



Technological Protection Measures Review
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Submission on the Further Review of Exceptions to the Technological Protection Measure Scheme

Monash University is a leading Australian educational institution. It has eight campuses including one in Malaysia and one in South Africa, and centres in London, UK and Prato, Italy. Monash is committed to quality education and research. It is a member of the Group of Eight Universities.

Monash University is writing in relation to the Further Review of Exceptions to the Technological Protection Measure Scheme. Monash appreciates the opportunity to comment on the proposed additional exceptions. The particular exception to be discussed is:

- An exception to allow circumvention of Technological Protection Measures ("TPMs") to gain access for making back-up copies of computer programs

Monash believe that this exception is vital for research and teaching, particularly within the Information Technology Faculty. Consultation with staff suggests that this exception is valuable in situations of system failure and malfunctioning software.

Exception to allow circumvention of TPMs to gain access for making back-up copies of computer programs

The following addresses the required criteria detailed in Attachment A of the Attorney General's Department e-News on Copyright, Issue 40 – September 2006 :

(A) Is the work, performance or phonogram for which an exception is being sought protected under the Copyright Act? If no, an exception is not required. If yes, proceed to (B).

The works are computer programs which are protected under the Copyright Act.

(B) Can the non-infringing use which is asserted be made of the work, performance or phonogram under the Copyright Act?

a Is the use an infringement under the Copyright Act?

i the answer is no, proceed to (C).

ii If yes, proceed to b.

The use is exercising one of the exclusive rights of the copyright owner in making a copy of the work. It is not infringement as making back-up copies of computer programs are permitted under section 47C of the Copyright Act.

b Does an exception exist?

i If the answer is yes, proceed to (C).

ii If no, proceed to c.

An exception exists under section 47C of the Copyright Act.

(C) Is the person or body seeking the exception able to make the non-infringing use of the work, performance or phonogram in question under the Copyright Act?

a Does the Copyright Act limit the non-infringing use to a certain type of user? (eg. Educational institutions)

i If the answer is yes, proceed to b.

ii If the answer is no, any person may seek the exception. Proceed to (D).

The Copyright Act limits the exception to the owner or licensee of the copy. In the examples that were provided, Monash staff were the licensees and needed to make back-up copies in case of systems failure.

b Has the specific user or representative of the user sought an exception?

i If the answer is yes, proceed to (D).

ii If the answer is no, an exception cannot be granted.

Yes.

(D) Has an access control TPM been applied to the work, performance or phonogram? (The person or body seeking an exception must show evidence that TPMs are currently being applied to the work, performance or phonogram that would be subject to the exception.)

i If the answer is yes, proceed to (E).

ii If the answer is no, an exception cannot be granted.

The access control TPMs that are applied to the computer programs are a unique password or verification process that need to be typed in to access the programs. Staff receive one password only, or are limited to a fixed number of passwords. These passwords are used whenever staff need to install the software on their machines. If access to the copy of the computer program is lost due to system error or if the software is erased due to malfunction, staff would have to contact the vendor to obtain another password.

(E) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact? (Reasonably believable evidence of such an impact needs to be shown to justify an exception.)

i If the answer is yes, proceed to (F).

ii If the answer is no, an exception cannot be granted.

Each time there is system failure or a particular terminal breaks down, the software needs to be re-installed on another computer. This requires either a new password or use of one of the install codes given when the software is licensed to staff. In these situations, vendors can be unsympathetic and ignore requests for assistance. Without the ability to circumvent the access control TPM, no backup could be made. Staff must purchase another copy of the program or pay for new access codes, with the risk that the same problem would occur again. Many programs are now downloaded from the internet, so there is no original purchase copy stored on a CD or DVD that can be used as a back-up. This is wasteful of staff time and valuable public resources.

(F) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?

i If the answer is yes, an exception cannot be granted.

ii If the answer is no, an exception could be granted.

No as the only people circumventing the TPM to access the programs to make back-up copies are the licensees, who have already paid for access to the program. The software does not have wide application. It is related to the specific research interests of the Faculty staff who purchase a licence to use the programs. One example was game space learning education development software, relating to studies in educational multimedia. Another example was advanced training for graphics programs.

The Information Technology Faculty at Monash, is involved in a wide range of research projects using advanced and obscure software that is not easy to obtain. The software comes from small vendors, usually located overseas, who supply a niche market. Access to this software is necessary to enable staff to keep pace with the latest scholarship and to contribute to the development of new software and technology.

The granting of an exception in these situations would not impair the adequacy or effectiveness of legal protection or remedies against circumvention.

If further information on this submission is required, please contact

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