



Agricultural Machinery Project
Australian Competition and Consumer Commission
GPO Box 3131
Canberra, ACT 2601

29 May 2020

To whom it may concern

Impact of copyright law on access to independent agricultural machinery repairs

The Australian Digital Alliance (ADA) welcomes the opportunity to provide comment to the Australian Competition and Consumer Commission (ACCC) in relation to its inquiry *Agricultural machinery: After-sales markets*.

The ADA is a non-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. It was founded following a meeting of interested parties in Canberra in July 1998, with its first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. Its members include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

We provide this short submission to draw the inquiry's attention to the potential for Australian copyright law to restrict the ability of farmers to access independent agricultural machinery repairs.

In its discussion paper, the ACCC highlights the computerisation of farm machinery as a factor in the reduced ability of farmers to access after-sales repairs. It also notes that restrictions on access to diagnostic and repair programs, including licensing terms, may limit the ability of independent repairers to compete in the provision of after-sales services.



However, the paper does not specifically mention that one of the ways that access to such programs may be restricted is through the application of technological protection measures (TPMs); nor does it mention the potential for copyright law to prevent independent repairers from circumventing these measures to undertake repairs.

Also referred to as digital rights management (DRM), TPMs are the digital locks that manufacturers use to protect content, such as the technology that prevents copying of commercial DVDs. They are commonly used to prevent access to software built into machinery of all types, from computer games to tractors.

Under ss116AK-116AQ of the Copyright Act 1968 it is a criminal offence to circumvent a TPM to access copyright content without permission, even if the use you wish to make of the protected content is legal. Regulation 40 of the Copyright Regulations 2017 sets out exemptions to this ban, which include a number of permitted uses by disability groups and educational and cultural institutions, as well as the making of interoperable products. However, it does not currently include circumvention for the purpose of repair.

It is common for TPMs to be used globally to prevent the use of generic replacement parts and/or to restrict independent repairers' access to software essential to diagnose or run machinery - even where the machinery itself has nothing to do with copyright or creative content. For example, legal action has been brought under the US anti-circumvention provisions seeking to prevent the manufacture and sale of universal garage door openers and generic printer cartridges, purely because they have recognition software built into them.¹ The problems this causes have been widely discussed in academic articles² and the call to address it through legislative change has been taken up by advocacy groups.³

This issue has, in fact, become so prominent that in 2016 the US Copyright Office held an inquiry on the matter.⁴ In 2018, US law was amended to permit individuals and third-party experts to circumvent TPMs to fix and maintain lawfully acquired consumer electronics, although the amendments only apply to certain categories of devices, and must be renewed in three years.⁵

¹ See *The Chamberlain Group, Inc v Skylink Technologies, Inc. (Skylink)* (Unreported, United States Court of Appeals for the Federal Circuit, Pallmeyer J, 31 August 2004) and *Lexmark* (Unreported, United States Court of Appeals for the 6th Cir, Sutton and Merrit JJ, 26 October 2004).

² See for example Leah Chan Grinvald and Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 Fordham L. Rev. 63 (2019). Available at: <https://ir.lawnet.fordham.edu/flr/vol88/iss1/3>; Aaron Perzanowski, *Consumer Perceptions of the Right to Repair* (April 24, 2020). Indiana Law Journal, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=3584377>; Brian T. Yeh *Repair, Modification, or Resale of Software-Enabled Consumer Electronic Devices: Copyright Law Issues* (August 11, 2016) Congressional Research Service

³ See <https://repair.org/copyright>

⁴ United State Copyright Office, *Software-Enabled Consumer Products: a report of the Register of Copyrights* (December 2016) <https://www.copyright.gov/policy/software/>

⁵ See Library of Congress, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (26 October 2018) available at

Australia's TPM laws were introduced as part of our 2005 ratification of the Australia-United States Free Trade Agreement, and hence align closely with those of the US. In our implementation of the treaty requirements, Australia sought to avoid the problems caused by US laws by defining TPM to exclude technologies that restrict your ability to use "goods and services" in relation to "machines and devices".⁶ However, local academics have questioned the effectiveness of this strategy, which has never been tested in court.⁷

The current inquiry provides an excellent opportunity for the Australian government to clarify the current uncertainty as to the effect of our TPM laws on the right to repair in Australia. The ADA therefore urges the ACCC to include TPMs in its consideration during the inquiry, and to:

- Seek evidence from farmers, independent repairers and other stakeholders as to whether TPMs are currently being used to restrict their ability to access software necessary to repair agricultural machinery; and
- Work with the government's copyright team in the Department of Infrastructure to determine whether amendments are needed to Australian law to ensure our TPM laws do not have this unintended effect.

The ADA would welcome the opportunity to discuss the matter further with the ACCC. Our principal contact for inquiries related to this submission is Jessica Coates, who can be contacted at jessica@digital.org.au or on 02 6262 1118.

Yours sincerely



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Chair
Australian Digital Alliance

<https://www.federalregister.gov/documents/2018/10/26/2018-23241/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control>

⁶ Copyright Act 1968 s10

⁷ Leanne Wiseman, *Do Australian Farmers need a Right to Repair?* (23 November 2018) Griffith News, available at <https://news.griffith.edu.au/2018/11/23/do-australian-farmers-need-a-right-to-repair/>. See similarly Matthew Rimmer, *The right to repair: Mandatory scheme for the sharing of motor vehicle service and repair information* ((2019) The Treasury, Australian Government available at <https://eprints.gut.edu.au/127446/1/Treasury%2BSubmission%2BRimmer.pdf>