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7th October, 2005

The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

**Submission to Review of Technological Protection Measures (TPM)
Exceptions by the House of Representatives Standing Committee on Legal
And Constitutional Affairs (LACA)**

Viscopy Operations

1. Viscopy is a copyright collecting society for the visual arts in Australia, owned by 5307 creators. Viscopy is a non profit company that represents rights for fine artists, illustrators, cartoonists, textile designers, photographers, crafts workers, sculptors and architects. Over 40% of Viscopy members are Aboriginal and Torres Strait Islander artists.
2. In addition, Viscopy is a member of the International Confederation of Societies of Authors and Composers (CISAC) and represents 250,000 international visual artists through our 43 affiliates, with which we enjoy reciprocal distribution collection arrangements. Like many of our visual arts collecting society peers, Viscopy has also elected to be an associate member of the International Reprographic Rights Organisation (IFRRO), the global body for reprographic rights linked with publications.
3. Both CISAC and IFRRO are closely linked to the World Intellectual Property Organisation (WIPO).
4. Viscopy represents two different sets of rights for members. Primary rights are represented for 60% of Viscopy membership, which includes the direct licensing of images. Statutory income from Government and Educational use is received on behalf of 96% Viscopy members. The remaining 4% are represented by other collecting societies for statutory rights only. While Viscopy members can receive statutory income, it is collected by the two collecting societies declared for these rights under the *Copyright Act 1968*, the Copyright Agency Limited and Screenrights. Viscopy members receive income from both these collecting societies.

5. In addition to managing the rights of our members, Viscopy provides services for them including educational services, information and non legal advice, infringement services and moral rights services. Where legal advice is required for members, we work with Arts Law, the Copyright Council and pro bono lawyers to ensure members have representation.

6. Viscopy provides licensing services for our Licensees which include auction houses, cultural institutions, commercial galleries, film makers, public art galleries, libraries, manufacturers, publishers and other users of direct licensing image services, such as retail.

Accountability

7. Viscopy is a not for profit company, that operates under the Australian Corporations Law. In addition we are covered by accountability mechanisms provided through a voluntary Code of Conduct, carried out annually by Justice Burchett QC.

Role of Copyright in International Trade Agreements

8. Viscopy understands that the copyright provisions negotiated in the *Australia-United States Free Trade Agreement (AUSFTA)* cover matters of copyright and intellectual property for the economic benefit of creators and rights holders in Australia and the United States. The circumvention of TPMs should be considered in this context.

9. Viscopy notes that Australia is a signatory to the *Berne Convention for the Protection of Literary and Artistic Works* and other agreements such as TRIPS and WIPO Internet Treaties. Copyright compliance is of global importance at the hard copy and digital level.

10. Without these agreements, many copyright creators such as visual artists, composers, writers and audio-visual creators would be worse off financially. It is not accurate to view copyright owners as corporations.

Australian Copyright Council Submission to LACA

11. The Australian Copyright Council (ACC) has made a submission to the Standing Committee on Legal and Constitutional Affairs which Viscopy supports. This submission makes the point on page two that "there are already sanctions in the *Australian Copyright Act 1968* against the manufacture, importation and distribution of TPMs designed to prevent or inhibit infringement of copyright (copy-control TPMs). The amendments required by the AUSFTA relate to measures intended to control access to a copyright work (access-control TPMs)."

12. Having said this, the ACC recognises that the provisions relating to TPMs in the AUSFTA are intended to more closely align the systems in operation in Australia and the United States. The ACC argues for this alignment to extend to the review of applications for those who seek exemption from liability, for circumventing access control measures.
13. Viscopy would encourage LACA to consider an appropriate vehicle for a triennial review process, to be considered in a similar context to the American process carried out by the US Copyright Office.
14. This US review process considers applications in the context of the potential detriment to groups of copyright creators and owners, and a detailed set of criteria which applications must meet. In the Australian context such a review process might be considered by the Attorney-General's Department, the Copyright Tribunal, or a panel of set up by LACA that represented copyright creators, owners and Licensees.
15. Like the ACC, Viscopy would appreciate the opportunity to comment further, once we are aware of the nature of submissions received by LACA. Until this time will not be aware of the numbers of current Viscopy Licensees who consider the subject of Review to be relevant to their activities and seek indirectly to be exempt from current licensing arrangements.

Online Publication of Visual Artworks

16. With the visualisation of the internet, works of visual copyright as commodities are of increasing importance in the global economy. Recent surveys by Bild-Kunst the German visual arts collecting society suggest that up to 48% of copyright works on the internet are visual artworks.
17. However the gross royalty income to Viscopy for both domestic and international visual artists licensing in the Australian territory was greater than \$1 million for the first time last only last financial year. Of this, less than \$50,000 concerned digital licensing. There is clearly a discrepancy between the use of visual artworks, particularly the digital use in Australia, and the licensing income of visual artists.
18. Viscopy is concerned that visual artists receive a comparatively small proportion of copyright royalties to begin with, so that any change to copyright income could adversely impact visual artist members. There simply is such a narrow margin that there is no fat to cut.

Commercialisation of Public Entities and the Blurring of What is a Public Good Background for LACA's Consideration regarding particular activities (a) and (b)

19. In the past 15 years cultural institutions, educational institutions and libraries have been encouraged by State and Commonwealth Governments of both political persuasions to develop cost-centre functions and activities, designed to supplement public budgets paid from general revenue.
20. This has led to situations where the majority of these institutions now have a proportion of cost-recovery driven or profit-driven functions where the generation of income is a primary activity. Such activities are not public goods, nor are they activities "in the service of the Crown", regardless of the constitution of the entity. Such functions often co-exist with more traditional public good driven functions.
21. While Viscopy supports our direct licensing Licensees who are cultural institutions, libraries or educational institutions in their drive to generate income to supplement the public budgets of their organisations, we also support our member visual artists in their copyright, to receive income for any use of their artistic works. In our view a TPM exception would not help to facilitate the appropriate balance between author and Licensee.
22. Under the Viscopy tariff, cultural and educational institutions receive a 50% discount for direct licensing unless the activity is considered a commercial use, for instance direct licensing an artwork to be reproduced on coasters or scarves to sell in the shop of an institution.
23. In Viscopy's experience the public galleries have worked very hard to establish copyright process.
24. However, there have been some instances, particularly with libraries, where the works of visual artists have been archived as part of the public functions of an entity, and then commercially onsold to private companies for commercial use in calendars or publications without reference back to the artist or collecting society.
25. While a visual artist might choose to waive copyright for a specific public function, such as an archive, they most certainly would not expect onselling or commercial use to occur without further consultation. The moral rights implications of such practices are grave, and it is common that there is not sufficient copyright expertise at particularly smaller institutions, for their staff to determine the difference between policy and the law.

Conclusion – Particular Activities

Viscopy is concerned that any blanket TPM exemptions to institutions in the (a) or (b) of the categories referred to by LACA might result in a further blurring of their public functions and cost-recovery/ fund-generating functions.

In our view this would not be in the interests of visual artist members, nor would it be in the long term interests of institutional Licensees, whose best foot forward is to develop strong copyright process, for the benefit of their entity and copyright creators alike.

Viscopy does not feel able to comment on (c) (e) or (f) categories. With regard to category (d), people with disabilities, Viscopy considers that there may be other means to facilitate equitable access to materials than those under discussion in the terms of the Review. It should not be necessary for visual artists to subsidise the use of people with disabilities, through the use of a TPM exception.

Where LACA deems there is a genuine case for greater access to copyright materials, then it should consider whether the TPM exception process would be as effective as a new statutory license, or similar mechanism, to cover the cost of licensing use.

Yours sincerely,

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