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By email to: copyright@alrc.gov.au

Pearson Australia/Penguin Response to ALRC Inquiry into Copyright and the Digital Economy**1. Introduction**

- 1.1** Pearson Australia Group, incorporating Pearson and Penguin, is a subsidiary of Pearson plc, the world's leading learning company, with 41,000 people across 70 countries. We provide educational materials, technologies, assessments, consumer publishing and related services to teachers, learners and readers of all ages. Our goal is simple: to help people progress in their lives through learning. The three core divisions of Pearson plc are Pearson, Penguin and the Financial Times Group.
- 1.2** Over the years, Pearson and Penguin Australia have invested significantly in developing products and services for Australian students and readers across all sectors, and we continue to do so. Our recent multi-million dollar investment in building new digital and print products for the Australian Curriculum is just the latest example.
- 1.3** Penguin is the leading English-language publisher in many parts of the world, including Australia, where we publish an unrivalled range of fiction and non-fiction, bestsellers and classics, children's books and illustrated reference books. Around 50% of the content sold by Penguin in Australia is locally generated. In many cases we are now publishing in digital formats as well as physical.
- 1.4** Two important considerations underpin any investment Pearson Australia Group makes. Firstly, like any commercial organisation, can we achieve a reasonable return. In the case of publishing, commercial returns are predicated on copyright. And secondly, do we think these products or services will help in achieving better results or experiences for those using them.
- 1.5** The latter consideration is partly driven by the realities of a healthy, competitive marketplace, and partly driven by Pearson's mission. Either way, the beneficiaries are the students, teachers and readers of Australia. We would submit that fostering a healthy, competitive marketplace for educational products and services is essential if Australia is to achieve the objectives of education initiatives like the Bradley Higher Education reforms, the Melbourne Declaration and the National Plan for School Improvement. Despite their protestations to the contrary, publicly-funded content creators, who are not subject to commercial pressures (thanks to the Australian taxpayer) have historically been unsuccessful in developing efficacious or widely-used materials.

- 1.6** We believe that Australian students and consumers should learn primarily from Australian sources – but this is only possible when the Australian legislative regime allows a commercial return on high-value content developed in Australia. The alternative is learning primarily from northern hemisphere resources. Copyright has always evolved to keep up with new technology and it is right that that evolution continue. However, any changes need to be coherent with the needs of Australian learners and Australian culture generally as well as the internet.
- 1.7** Pearson welcomes the opportunity to respond to this consultation. In summary, we argue that:
- Businesses within the digital, publishing, education and creative sectors are successfully providing competitive, diverse and innovative products and services through the digital economy;
 - A robust and stable framework for copyright is crucial to ensure that industry continues to compete effectively. Copyright law must remain relevant and adaptable to new digital developments, and some updating of exceptions and limitations may be appropriate in some circumstances;
 - We do not support a change to the current statutory licensing schemes relating to educational institutions because this will harm Australian students;
 - We generally support licensing schemes where appropriate. They act as viable and in many cases preferable alternatives to broad copyright exceptions which often serve to undermine industry;
 - The Australian exceptions regime is unusually broad compared to other major English-language markets. We would question the extent to which broadening it yet further would yield positive results, though this is not to say that some updating would not be of benefit;
 - A fundamental prerequisite that any alteration to the exceptions regime needs to meet is the Berne Three Step Test, encapsulated in international instruments to which Australia is a signatory.

The present consultation is intended as the start of a process and we will engage fully as that process plays out. We are very happy to offer such information as would be helpful either formally or informally, within the normal constraints of commercial confidentiality, and look forward to discussing these important matters further. As a global player we can offer a comparative perspective on the operation of copyright here in Australia which may be of benefit.

2. Overview

- 2.1** Today Pearson is a technology company as much as we are an education, newspaper or book publishing company (though these don't diminish in the digital age – they are simply more flexible). Our strategy is to add services to our content, usually enabled by technology, to make the content more useful,

more personal and more valuable. These digital products and services give us access to new, bigger and faster growing markets. Digital revenues last year contributed about one-third of our global sales, or over AU\$3bn in total. Five years ago, they were 20%, about AU\$1bn. We have invested about AU\$6bn in content over this period, AU\$1.3bn of which was invested in 2010. We have also invested very heavily in digital platforms to enable faster product development and more efficient creation and re-use of content. This represents a fundamental shift in our business, our culture and our growth opportunities and we play a leading role in the digital economy.

- 2.2** This investment carries over into our educational businesses. Our education services are about enhancing employability and efficacy for the learner. We therefore invest heavily in educational products and digital infrastructure to consistently improve results and to offer a broad range of educational tools and programmes online. Globally, Pearson offers digital homework and assessment programmes, electronic testing facilities and digital teaching solutions, all of which have seen strong growth. Our services cover new, data-driven initiatives helping teachers to assess their students' individual progress; premium content allowing students to learn through gaming, imagery and tailored tests; and learning platforms allowing schools to share data and course-content. In 2011 student registrations on our digital learning platforms increased by 23% to 43 million globally.
- 2.3** These data evidence business growth despite a difficult economic climate and challenging external market conditions. Much of this growth has come from digital and content divisions of our businesses, and that in turn has come from innovation in business models and in new services and publications.
- 2.4** A common theme across Pearson is the absolute requirement for confidence in the security of our intellectual property and the return on investment that enables. Although there have been plenty of challenges in that regard we have been able to develop methods, systems and business models to respond to those challenges. We have developed our business models with a view to openness and engagement with other service providers and innovators.
- 2.5** As the digital world has developed, we have recognised the need for and benefits of striking a balance between rights ownership and opening up to the digital ecosystem – from readers to commercial partners. We actively partner with the tech start-up community and other external partners to find new and better ways to innovate, making our content and data easily available for new products and services, because we recognise that we're not going to have all of the best ideas.
- 2.6** Our successes across the group in digital, and the jobs predicated on them, have been achieved not as a result of any changes to copyright law, but by a reliance on the existing legislative framework coupled with the creative use of licensing, in turn allowing for sustained investment in quality content and

innovation. Copyright law has enabled and supported the innovations we have produced, buttressing the case for investment and enabling us to grow in terms of revenue, profit and jobs.

3. **Answers to specific questions**

3.1 We have only answered those questions that seem to us most relevant to our experience of copyright, production and digital policy. As in the preamble we would be very happy to provide such further information as would be helpful, or practical experience of working with different copyright regimes around the world.

4. **Guiding principles for reform – Question 2:** We would emphasise that copyright is vital to encourage innovation and creativity: creators invest their time and we invest our money at risk and copyright is what allows a return if that risk pays off. Put differently, copyright is what gives Australian authors and businesses confidence to create high-value content and invest in the infrastructure needed to deliver it on tomorrow's platforms, as well as today's. Australian copyright law currently upholds these values and must continue to do so.

4.1 We would caution against over-prescriptive legislation and the introduction of broad copyright exceptions that could harm the creative industries. Broad exceptions to copyright can bring unintended consequences; licensing is a far more practical and effective way of ensuring access to content. Exceptions should be just that – exceptional – and targeted at specific market failures. They should always be subject to the three step test.

4.2 The UK government recently concluded a similar exercise to the present consultation, resulting in proposals for “housekeeping” style updates to the UK exceptions regime combined with practical recommendations for innovative platforms, products and services such as a cross-media copyright hub. The kinds of recommendations for practical, voluntary and flexible initiatives in Richard Hooper's UK 2012 report “Copyright Works” ensure that stakeholders collaborate more easily and readily, giving the consumer a better offering. A similar approach may be worth consideration in Australia.

5. **Cloud computing – Question 5:** Cloud computing is an exciting development, and we are implementing cloud services across our internal structure and external offering. Cloud computing is still in its very early stages, so strong legislation in this area would be inappropriate – which is not to say that will always be the case. However while the technology remains nascent and different models continue to evolve, regulation should be technology neutral and light-touch.

5.1 One potential area of concern surrounding cloud computing is the gap between commercially available guarantees on data protection and security

from cloud providers, and standards in these areas rightly sought by regulators and consumers for downstream services. Certification standards may need to be developed in future.

- 6. Copying for private use – Questions 7 and 8:** Pearson’s view is that, in principle, a paying user should be able to access digital content on any platform or device they choose. If a user has paid to access one of our products or services, our view is that the user has acquired a licence to use that item and they should be free to exercise their rights under that licence across any digital device or platform as they see fit. In practice we sometimes cannot deliver on this principle because different platforms, such as Kindle or iOS, use non-interoperable file formats and other technical measures to prevent easy transfer of files between different kinds of device.
 - 6.1** Provided that format-shifting does not introduce the scope for unlawful and uncontrolled distribution of publisher content, we support a formalisation of the copyright legislation to permit users to format-shift a piece of digital intellectual property they have paid for, to produce another digital object of equivalent economic utility for their own private and non-commercial use. This would allow “ripping” of CDs but not scanning of books (because an e-book and a physical book have different economic utility). It would allow shifting of e-books from one format to another.
- 7. Transformative use – Question 14:** We are strongly supportive of many platforms and activities which allow the use of copyright materials in new, transformative ways, as long as the copyright holder is attributed and recompensed where that’s appropriate (and we are clear that sometimes it isn’t). Indeed, we have ourselves produced platforms like OpenClass, which allow educators to mash up our content with their own, and Pearson Plug & Play, which allows external developers to use our content on a developer platform through Application Programme Interfaces (APIs) designed and provided by us, to encourage just such behaviour. Developers are then able to create new offerings by using our content.
 - 7.1** This reflects the open philosophy we have at Pearson, meaning that we want consumers, customers and everybody who interacts with us to have choice, freedom and flexibility when utilising our products and services.
 - 7.2** Other content providers are bringing different solutions to the table. We would argue that the plethora of such environments available demonstrate that the market is meeting this need – doubtless imperfectly, and we expect the scope and number of solutions to continue to grow; but there is no market failure here and no new exception to copyright is needed.
- 8. Libraries, archives and digitisation – Question 19:** We support efforts to improve archiving and digitisation of cultural works and in general we support a copyright exception for format-shifting expressly for the purpose of archiving

and preservation, with particular reference to cultural institutions such as national libraries. There should be controls on subsequent access to material to ensure such access does not interfere with commercial exploitation of the works involved (as mandated by the Berne Three Step Test and other international instruments). More broadly we are aware and supportive of the helpful comments in the submission of the APA concerning the extant exceptions regime in favour of libraries.

- 9. Orphan works – Question 23 and 24:** In general we are supportive of solutions for orphan works along the lines that an entity wishing to use an alleged orphan must complete a duly diligent search, and is then granted a licence at low cost, with any rightsholder coming forward retaining the right to royalties and subsequent control over use of the work. The licence fees would be held in escrow by a collective management organisation (CMO) against rights holders subsequently re-emerging. We have contributed to voluntary schemes in many jurisdictions to facilitate diligent search: we recognise that the onus is on industry to do this.
- 10. Educational institutions – Question 28-31; Statutory licences in the digital environment - Question 40:** We would not support changes to the statutory licensing schemes for educational institutions.
 - 10.1** The education statutory licence was established in an attempt to balance the needs of creators and consumers. Despite its imperfections, for consumers it has created an efficient and cost effective way for instructors and institutions to legally access and reproduce very significant amounts of print and digital content. At an average cost of \$16 per student per year, in the context of the total education cost per annum (roughly \$10k per student), this is a very small price.
 - 10.2** For creators, both authors and publishers, the statutory licence provides an important financial foundation and with it the certainty and confidence to continue to invest and create new products and services. Such a foundation has never been as critical as it is today, with both the promise and the threat of technology looming large. The introduction of the Australian Curriculum has presented content creators like Pearson with an opportunity to develop new, innovative digital and print products, and business models, although this comes with a great deal of risk. It stands to reason that any new curriculum needs fresh, relevant digital and print products to help it come to life: that is, to support teachers and to engage students. Pearson's appetite for risk-taking in this climate would certainly be reduced if the certainty over gaining a fair return on past and future investments were diminished.
 - 10.3** Educational exceptions were proposed in the Hargreaves Review of Intellectual Property in the UK, and a study was subsequently undertaken by

PriceWaterhouseCoopers into the economic impact of these exceptions.¹ They demonstrated the potential for significant losses to educational authors and publishers, serving to disincentivise investment in new educational works. These conclusions, as above, clearly carry over to the Australian case.

11. **Fair use – Question 52:** As a global publisher we operate under Fair Use in the US and other regimes in other territories. As a user of rights, the cost to us of clearing a given right is roughly the same under the US version of Fair Use and comparator regimes in other places such as Fair Dealing in Australia. However, it would be a mistake to believe that an environment similar to the US environment could be created merely by aping their provisions: the US system rests on a canon of case law which has developed over 170 years and is still evolving today. That case law could not be lifted and dropped wholesale into Australian jurisprudence. Fair use has produced a much higher volume of litigation than comparator regimes; in the US the average cost for each side for such a case is USD 1m, rendering such recourse inaccessible in practice to all but the richest entities. Indeed in one such case in which we were a plaintiff alongside other international publishers our legal fees alone exceeded USD 30m. There is no perfect system, but US-style Fair Use would represent a retrograde step in Australia, although it works well in the US, because of the difference in legal systems and the lack of supporting case law. To the extent that Fair Dealing needs to evolve such evolution needs to be well defined and subject to the Three Step Test.

¹ *An economic analysis of education exceptions in copyright*
http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf