AUSTRALIANPUBLISHERSASSOCIATION

30 November 2012

Submission to the ALRC in response to Issues Paper 42: *Copyright and the Digital Economy*

Dear Professor McKeough,

The Australian Publishers Association ("**APA**") thanks the Australian Law Reform Commission ("**ALRC**") for the opportunity to make a submission in response to the issues raised in *Copyright and the Digital Economy* (Issues Paper 42) ("**the Issues Paper**").

The APA is the peak industry body for Australian book, journal and electronic publishers.[1] Established in 1948, the Association is an advocate for all Australian publishers – large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has over 200 members and, based on turnover, represents 94% of the industry. The APA's membership includes publishers from all sectors including consumer, school and academic who publish in all formats and across various platforms.

We understand that a number of the publisher members of the APA are making separate submissions.

Also, as an affiliate of the Australian Copyright Council ("**the ACC**"), the APA has seen the ACC's submission in draft form, and supports that submission. The APA has also seen the submission of Copyright Agency in draft form, and supports that submission. The APA is nonetheless making a separate submission to draw the ALRC's attention to particular issues of concern to APA members.

In summary, the APA draws the ALRC's attention to the following:

- the APA's members are very active in the digital economy;
- in publishing, the digital market is highly competitive (particularly in the educational publishing sector);
- access to copyright material has never been easier;
- business models for delivering access to copyright material (both to individuals directly and through organisations) are still developing; and
- digital material is highly vulnerable to being infringed.

It is against this background that the APA submits that:

- exceptions available under the *Copyright Act 1968* (Cth) ("**the Act**") are already very broad – particularly in comparison with the United Kingdom and even the United States;
- free exceptions in the Act already eat into the legitimate business of Australian publishers;
- the international "three-step test" is the appropriate test that the ALRC should apply in considering both existing and any new exceptions, and the ALRC should ensure that any new exceptions it proposes do not conflict with publishers' markets or unfairly affect their rights;
- "legacy" exceptions – introduced into the Act when Australia was subject to the tyranny of distance and in a pre-digital age – should be repealed;

[1] See http://www.publishers.asn.au.

- new, uncertain and unclear exceptions (and particularly any generic "transformative use" provision, and any US-style "fair use" provision) should not be introduced into the Act;
- security concerns arising from the storage and distribution of copyright material in digital form should be properly addressed both in relation to existing exceptions and in relation to any new exceptions that the ALRC may be minded to recommend; and
- parties should be left free to negotiate or accept contractual arrangements that will suit them and (in particular) there is neither need nor reason for the ALRC to recommend that the ability to rely on exceptions in the Act may not be excluded by contract.

In particular, the APA submits that, when considering any difficulties raised in relation to accessing or using copyright material, the ALRC should:

- clearly examine the policy basis for recommending any new or expanded exception;
- in recommending any new or expanded exception, consider the important policy objectives served by copyright, and only recommend an exception where a clear policy objective such as free speech or the fundamental needs of the State should, on balance, over-ride those objectives;
- consider the extent to which any difficulties in accessing copyright material may be addressed by the government encouraging more secure, effective and efficient licensing of copyright material and efficient markets for those materials; and
- consider also that certainty is more likely to encourage investment and engagement in the digital economy than new or expanded exceptions – particularly if those exceptions are unclear in scope.

The APA understands that the ALRC will be publishing a Discussion Paper next year, and that further submissions and consultations will be sought. In the meantime, however, please let me know if the APA can provide any further assistance or information.

Yours faithfully

Maree McCaskill
Chief Executive Officer

Australian Law Reform Commission: *Copyright and the Digital Economy (Issues Paper 42)*

Submission from the Australian Publishers Association

The participation of APA members in the digital economy (Question 1)

Introductory comments

The APA's members are active participants in the digital economy. Further, publishers and other creators are at the forefront of new and innovative digital business models.

In relation to sales of books and ebooks, such models include not just sales through bookstores (including online stores) but also direct licensing of ebooks. Whatever their source licences offered include (but are not limited to):

- licences specifically designed for individuals and organisations including site licences, licences that allow off-site access and licences developed for sales to and lending by libraries;[2]
- bundling and subscription models;[3]
- payments based on actual use rather than flat fees;[4]
- delivery systems that allow a certain number of backups or the unlimited transfer of the relevant title to devices owned by the customer;[5]
- licences for customers (such as educational institutions) to provide their own clients with access to copyright material through Learning Management Systems ("LMS"); and
- access via cloud storage services.

In addition, the needs and expectations of clients with print disabilities, for example, are increasingly being met through:

- technology itself (clients requiring large print are usually able to choose their own font size when accessing an ebook);
- market mechanisms (audio, large print and even braille and DAISY versions are increasingly available through commercial, rather than charitable channels, and within increasingly short time-frames); and
- voluntary initiatives such as the TIGAR Project, which involves co-operation between WIPO, publishers, collecting agencies, and organisations providing specialised library services for people with print disabilities.[6]

[2] See services such as www.myilibrary.com, www.overdrive.com and www.wheelersbooks.com.au/info/ebooks for examples of relatively recent ebook suppliers who model their business on meeting the needs of institutional purchasers.

[3] For example, in educational publishing, it is common to sell a hardcopy along with an electronic copy and for the sale of a book (whether in print or digital) to also include access to dedicated online resources, via an access code. Similarly, journal and technical publishers will often sell subscriptions to a range of titles at a price that works out cheaper than if the customer had bought each title separately.

[4] Some of the business models supplying into libraries and educational institutions may only impose payments if and when a title is "borrowed" or "accessed".

[5] In many cases, these models are managed by technological protection measures.

[6] For more information, see www.visionip.org/tigar/en. The APA also notes that, where the needs of people with a print disability are not met by the market or by voluntary mechanisms, both Part VB and section 200AB of the Copyright Act already provide mechanisms to ensure that accessible copies can be made.

In light of the enormous threat of digital piracy, publishers also have to decide whether to apply technological protection measures and, if so, what sort. At issue is the balance between giving customers what they want, while at the same time ensuring that the publisher maintains profitability in a highly competitive market.

It is also important to note that – particularly in the children's book and educational markets – there are increasing demands for "add ons" to basic textual material, such as apps and dedicated websites with interactive content. These can be very expensive to design and publish,[7] yet the demand for lower prices and free support makes it challenging for publishers to get an adequate return on such investments.

Further, in educational markets, there is now demand on publishers to provide material in each of the formats required by the devices and systems used by educational institutions. These formats vary widely, and for a publisher to cover each one can be an expensive process.

For example, in most cases, a print book is produced first and then converted to the required formats. Educational publishers report that converting print books into an Apple iBooks Textbook can cost between $30,000 and $60,000 alone – as much as the cost of designing and laying out the print version. The iBooks Textbook, however, works only on iPads, which are not used in all schools. iBooks Textbook prices are capped at $19.99 in the Australian market, and this applies downward price pressure to other available and competing formats.

Under these circumstances, to produce an educational text in print and then in all available digital formats will cost a publisher more than double what it cost before educational institutions began using digital reading devices.

In other words, while it is a business imperative to cater for all formats, this reduces profits and makes educational publishing even more challenging than it has ever been.

In order to understand the publishing industry in Australia, the APA submits that it is also important for the ALRC to note the process required to get a book to a stage where it is ready to be published – either in print or digital form. Non-fiction publishers will identify a need or potential for a publication and then identify the relevant author or authors who might be commissioned to write that publication. A healthy Australian publishing industry requires that titles of local interest and relevance (and ones that may have limited overseas appeal) be commissioned.

During the development phase for a title, a publisher will provide editorial assistance and feedback to the author and, once a manuscript is accepted, will edit and proofread the text. Publication of a title will then require investment of time and talent in commissioning and/or sourcing relevant illustrative material, expertise in layout and in cover design,[8] as well as expertise in marketing and distribution.

The APA understands that, generally speaking, of any 10 Australian books published, only 2 will make a profit; 3 will break even; and 5 will never recover their investment. In other words, publishing is a highly speculative industry, with publishers essentially hoping that roughly 20% of their publications make a sufficient profit to cover their losses on other titles. It is also a highly competitive industry, with thousands of new titles every year vying for the public's attention.

It is also important to note that the business of publishers is not restricted to selling books or copies of journals (whether in print or digital form). It is also core business for a publisher to license rights in publications, both in Australia and into other markets, and including for transformative uses such as translations, anthologies and stage and film adaptations (all of which we discuss in more detail in our response to Question 14).

However, to enable publishers to participate fully in the digital economy – and to encourage innovation – the efforts and business models of publishers and other copyright owners must be backed by strong copyright law. In this context, we mean law that is not subject to exceptions that may:

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[7] The APA understands, for example, that the costs of developing an app to go with a school textbook can range from $70,000 to $100,000.

[8] See, for example, information about the awards for book design presented by the APA, at www.publishers.asn.au/awards.cfm?doc_id=24.

- encourage third parties to free-ride on the investment of time, talent and resources made by copyright owners;
- discourage third parties from engaging with copyright owners to explore new ways of extracting value from their material to their mutual advantage; or
- enable third-parties to use copyright material in ways that conflict with a copyright owner's own markets, or in ways that prejudice a copyright owner's interests.

Rather, where third parties see digital opportunities to use copyright material, copyright law should work to encourage those parties to engage with the relevant copyright owners to enter into licence arrangements to their mutual benefit.

> ***Question 1****: The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:*
>
> - *affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;*
> - *affects the introduction of new or innovative business models;*
> - *imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*
> - *places Australia at a competitive disadvantage internationally.*

The core business of publishers is built on copyright, and it is only as a result of copyright law that publishers are able to provide services both to individual authors and to the wider public. Publishers do this by investing time and resources into assessing, refining, packaging and promoting books, journals and other publications across a wide range of subject areas, including for personal, professional and educational use.

The investment of time and resources by publishers creates both cultural and economic value for Australia. A strong publishing industry in Australia is, the APA submits, fundamental to Australia's growth in the wired, global, knowledge economies of the future.

The contribution that a strong publishing industry can make to Australia's digital economy is even more fundamentally underpinned by copyright than in relation to Australia's "hardcopy" economy, and strong copyright law enables publishers to explore new and innovative business models that will grow that economy. As the 1995 United States White Paper Report of the Working Group on Intellectual Property Rights and the National Information Infrastructure (NII) noted:

> *[c]opyright protection is not an obstacle in the way of the success of the NII; it is an essential component. Effective copyright protection is a fundamental way to promote the availability of works to the public.*[9]

The APA is, therefore, concerned that Question 1 of the Issues Paper is phrased in a way that suggests that copyright is a stumbling block to innovation, rather than the primary means of enabling and encouraging innovation in a way that is fair to both rights owners and to people wanting to use copyright material. The APA is also concerned that the phrasing of Question 1 seems to be based on an underlying assumption that copyright owners impose "unnecessary" costs or inefficiencies on people who want "to access or make use of copyright material".

[9] White Paper Report of the Working Group on Intellectual Property Rights and the National Information Infrastructure, *The Report of the Working Group on Intellectual Property Rights* (1995) at 16. The APA also draws the Inquiry's attention to the findings of the 2011-2012 World Economic Forum's *Global Competitiveness Report*, which demonstrates a clear correlation between countries that rank high on "Intellectual Property Protection" and countries that rank high on "Innovation": see *Global Competitiveness Report* at 22 and 391. See also Department of Innovation, Industry, Science and Research, *Australian Innovation System Report*, (2011) at 67 (available at www.innovation.gov.au/Innovation/Policy/Pages/AustralianInnovationSystemReport.aspx).

To the contrary, the whole business of publishers is to enable access and use of copyright material – either directly through sales or direct licences, or indirectly through licensing by collecting societies.

The APA notes that there are generally three sectors that are likely to be arguing for copyright exceptions to be expanded:

- the library and archives sectors;
- the education sectors; and
- entrepreneurial internet companies (including social media behemoths and start-ups based, for example, on text and data mining).

While each of the first two sectors are important parts of the cultural, social and economic infrastructure of Australia, neither the library and archives sectors nor the education sectors are directly part of the digital economy. Indeed, publishers have expressed to the APA their concerns that the library and education sectors' attitude to copyright may sometimes appear to be that copyright owners should provide their material either *gratis* or for very little in order that they (the library and education sectors) may continue to provide services to their own clients – even if this is potentially in direct competition with commercial services provided by publishers.

On the other hand, the attitude of the internet-based companies appears to be that other people's copyright material is merely a raw resource on which to build their own businesses, and that they should have no obligation to co-operate with copyright owners to create mutual benefit.

The APA submits that the Inquiry should reject the premise that more and/or broader exceptions in the Act would inevitably lead to growth in the Australian digital economy. As noted in the *Hargreaves Report*:

> *We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk & investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.*[10]

Bernard Girard, for example, has identified the four factors critical to Google's success as being:

- investment in world-leading mathematicians and ICT engineers;
- the vision, leadership and management techniques of its founders;
- high R&D intensity and collaborative research efforts, continuously seeking new innovations; and
- responding to users' needs and influencing their preferences.[11]

In this context, we note also that Facebook, in its submission to the current Irish enquiry, stated:

> *… Facebook's investments, operations & ability to innovate in Ireland have not been materially inhibited by Irish copyright law to-date …*[12]

The APA further notes that copyright law in the UK (which provide for narrower exceptions than under Australian law) has not stopped Google from recently establishing a start-up base in the UK.[13]

The APA nonetheless submits that (as discussed later in this submission) there are indeed aspects of Australian copyright law that place Australia at a competitive disadvantage internationally. In particular, the broad library and archive provisions available under the Australian Act are having a detrimental effect on the ability of publishers to participate in the digital economy to the same extent as many of their overseas counterparts.

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[10] Ian Hargreaves, *Digital Opportunity: a review of intellectual property and growth* (2011) at 5.16.

[11] Bernard Girard, *The Google Way: how one company is revolutionizing management as we know it* (No Starch Press, San Francisco, 2009).

[12] Available at www.djei.ie/science/ipr/Facebook.pdf. Note that the exceptions available under Irish copyright law are fewer and narrower than already available under Australian law.

[13] See http://www.stm-assoc.org/industry-news/google-to-open-startup-base-in-london/ and http://bit.ly/pSvySB.

Growing the digital economy

The APA submits that there are the two key factors in growing the digital economy:

- legal certainty; and
- creating an environment in which digital licensing transactions are efficient, secure and easily accessible (both for rights holders and for licensees).

The APA submits that each factor should figure highly in the ALRC's assessment of any new and/or expanded exceptions.

In respect of legal certainty, the APA particularly draws the attention of the ALRC to comments made by the UK government in its response to the Hargreaves Report:[14]

> *The Government recognises the potential benefits of greater clarity in the application of copyright law, in particular the application to new technologies & opportunities. Uncertainty can lead either to unintentional infringement, or to opportunities being lost because of fear of infringing.* [emphasis added]

To the extent, then, that copyright law (including exceptions) is clear and well defined, it can assist in driving the digital economy.[15]

In this respect, the APA notes that a clear contributor to legal certainty is that intellectual property rights (and indeed, exceptions) are "internally & externally coherent"[16] – hence our attempt below to articulate for the Inquiry different bases for exceptions that can then assist when it comes to assessing whether or not a specific exception is necessary at all and, if so, whether it should be a free exception or subject to statutory licensing.

The APA notes that the second factor – creating an environment in which digital licensing transactions are efficient, secure and easily accessible – is not directly a part of the reference to the ALRC. The APA nonetheless submits that, in recommending any new or expanded exception, the ALRC should not reach first for a "legal" solution – that is, that the government introduce a new or expanded exception. Instead, the Inquiry should first consider the extent to which any particular difficulty in either accessing or using copyright material may be alleviated by licensing solutions and/or support for business in developing licensing solutions (including voluntary licensing by relevant copyright owners themselves and through collecting societies, including digital and online licensing).

The APA submits that this should particularly be the case where the policy basis for the exception (whether an existing or a new one) relates to market failure, to high transaction costs and/or to a high volume of material that needs to be accessed.

In this respect, the APA particularly draws the ALRC's attention to the *Hooper Report* into the streamlining of copyright licensing in the United Kingdom[17] and to the Report's findings that licensing solutions will be a key element in strengthening "*the UK's no.1 position in the e-world of the internet ahead of South Korea, China, Japan and the USA as measured by the Boston Consulting Group*",[18] and that such solutions will work not only for larger companies, but also for "*the small digital start-up company wanting to use music and images and text creatively for its customers, the teacher in the classroom, a user posting a video on YouTube*".[19]

The APA submits that creating both legal certainty and support for business development of licensing solutions is especially important while digital licensing models are still developing. In particular, the APA is concerned that any over-eagerness on the ALRC's part to recommend new or expanded exceptions (and particularly any that are uncertain or untried in the Australian context) may prematurely stifle emerging digital markets.

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14 Government response at 13.

15 We comment further on this later in this submission, particularly in our comments on "fair use" and "transformative use".

16 Gowers Review at 35.

17 Richard Hooper and Ros Lynch, *Copyright Works: streamlining copyright licensing for the digital age*, (Intellectual Property Office, London, 2012), (*Hooper Report)* available at http://www.ipo.gov.uk/hargreaves-copyright-dce.htm.

18 *Hooper Report* at 1.

19 *Hooper Report* at 2.

By way of further general comment, the APA also submits that the ALRC should not rush to recommend that any large-scale or potentially far-reaching exceptions need to be introduced into the Act in order to enable Australia to benefit from the digital economy, and the APA particularly draws the Inquiry's attention to the answer by Gowers in his Report in relation to the question of whether "*the system"* – one very similar to the intellectual property system applying in Australia – *"was fit for purpose in an era of globalisation, digitisation & increasing economic specialisation*": *"The answer is a qualified 'yes'. I do not think the system is in need of radical overhaul".*[20]

Guiding principles for reform (Question 2)

> ***Question 2:*** *What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?*

The APA generally refers to and supports the submissions of the Copyright Agency and the ACC in relation to this question.

In addition, however, the APA submits that the ALRC's approach to the Inquiry should be informed by an examination of both the purposes of copyright law as it applies in Australia, and on how exceptions function within those broader purposes. The APA submits that it is only within such a framework that the ALRC can articulate whether or not exceptions (including any new exceptions that may be proposed to it) are either necessary or desirable.

The Spicer Committee's report at para [13] stated that:

> *The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.*

The two purposes here – reward and incentive – may be contrasted with the approach in the United States, where the purpose of copyright is "to promote the progress of science and useful arts". Rewards and incentives to individual creators and to other people and organisations involved in creating value in copyright material (including publishers) may, under the US approach, be means to that end, but are not, in US jurisprudence, ends in themselves.[21]

By way of contrast, in Canada, the purposes of copyright have been stated as embodying a position more closely aligned with "natural rights" theories, and have been stated as being distinguished from the US approach:

> *The Canadian Act is based on very different principles: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors.*[22]

Relevant to exceptions, the APA notes that the Spicer Committee stated at para [13] – immediately after its statement as to the purposes of copyright law – that:

> *as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.*

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[20] Gowers Review at 1. Note also that the Gowers recommendations, if implemented by the UK government, would not have provided for any more exceptions under the UK Copyright Act than already are available under the Australian Act.

[21] See also the comments of Terry Hart at http://www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/ in relation to how, properly understood, US copyright law (operating within the constitutional copyright clause) achieves its public aims by granting private rights.

[22] Copyright Sub-Committee of the Information Highway Advisory Council, *Final Report* (1995), unpaginated, under the heading "Chapter 9(c) Fair dealing on the Information Highway", available at strategis.ic.gc.ca/SSG/ih01092e.html. To the extent that the Australian Copyright Act now includes important provisions relating to the moral rights of authors – provisions that are largely absent from US copyright law – the purposes of Australian copyright law now also may be characterised as protecting the inherent interests of creators as creators, and ensuring they receive both recognition and respect.

Two points to note here: the concerns are that rights not be abused and that, in relation to study, research and education, the concern was not that these pursuits not be hampered at all, but that they not be unduly hampered. As noted below, the APA submits that similar approaches should be adopted by the ALRC in its Inquiry.

In this respect, it is necessary to examine how exceptions in the Act might be broadly characterised. The APA submits that, apart from provisions in the Act that shape the scope of a copyright owner's rights (such as section 28), most of the exceptions in the Act may be characterised by reference, for example, to whether they:

- place the fundamental needs of the State above the rights of individuals within the State (provisions such as the exceptions for judicial proceedings and for parliamentary librarians are examples);
- underpin free speech (the parody and satire, news reporting, and criticism and review exceptions come to mind here);[23]
- operate to preserve irreplaceable cultural materials (the provisions for libraries and archives to make preservation copies of manuscripts and other original materials and the broadcasting provisions relating to the deposit of recordings of exceptional documentary broadcasts with the Australian Archives are examples);
- address market failure (that is, where copyright owners do not exploit their copyright in a particular "market" – such as the provisions for people with print disabilities, where there were no commercial markets for Braille formats, for example);
- reduce transaction costs where the cost of obtaining a licence would outweigh the value of the licence (examples might include the provision for public recitation of copyright material);
- promote otherwise desirable competition (examples include the design/copyright overlap provisions and the provisions relating to the importation of labels and "accessories"); or
- facilitate high volume access to copyright material (Parts VA and VB for educational institutions and section 183 for governments would be examples).[24]

The APA submits that how an existing or proposed exception is categorised must play a determinative role in both:

- whether the exception is needed in the Act at all; and, if it is,
- whether it should be a free exception or subject to statutory licensing and payment (either as agreed with the copyright owner or as determined by the Copyright Tribunal).

The APA further submits that:

- the value in some of the identified categories of exceptions is intrinsic (such as exceptions for fundamental State needs, free speech and preservation);
- the value of exceptions that fall within the other categories (and particularly those relating to reducing transaction costs and facilitating high volume access to copyright material) are essentially extrinsic, because they are based on pragmatic considerations rather than on a value judgement of the worth of competing rights;
- while the Copyright Act might be amended to produce a certain socially desirable result:
  (i) that does not mean that the Copyright Act should provide an exception if the market is capable of achieving the same result; or

[23] By this, we mean the freedom to use copyright material to the extent necessary to participate in public discourse and political life; we do not mean the ability to be free with other people's speech for creative or entertainment purposes. Important as such purposes may be.

[24] To the extent that these exceptions are remunerable by way of statutory licence, they are clearly framed in a way that also reduces transaction costs both for the beneficiary of the licence and the copyright owners.

(ii) that any exception that is introduced should be a free exception;[25]

- as a general rule, exceptions should:

  (i) clearly articulate scope and purpose (so parliament does not abdicate its role to the courts);

  (ii) impose obligations in relation to citation as well as attribution;

  (iii) place limits on the amount that may be used;

  (iv) only be available where copies are not commercially available, including under licence (including from a collecting society); and

  (v) be subject to payment unless there are very clear policy reasons for copyright owners not to be paid for the use of their material;

- many exceptions are contingent on particular historical circumstances that no longer apply (for example, a number of the current library provisions were introduced because of time and distance problems in Australia during the analogue age);

- exceptions introduced in one age as necessary should therefore not be regarded as immutable, and should certainly not be regarded as articulating any sort of inviolable "balance" of interests;

- exceptions should periodically be re-assessed in light of changing circumstances;[26]

- some exceptions address market failures that, over time, the market may or may not address (this may, for example, lead to the conclusion that such provisions need to be reviewed more frequently, or that they should be framed in terms that limit reliance on the exception to situations where licences are available – either from relevant copyright owners or from collecting societies);[27]

- where a collecting society may be in a position to offer suitable voluntary licences, statutory licences may not be necessary (statutory licences have in many cases introduced detailed provisions into the legislation to regulate each and every aspect of the operation of the licence; under voluntary licences, this would usually not be necessary, and supervision may instead be done through the Copyright Tribunal);[28]

- whether the purpose of an exception is to permit access and use of material, or to minimise transaction costs, payment to relevant copyright owners through statutory licensing should always be considered the default position, as this approach balances the policy objectives of both copyright ownership and of exceptions (only in some cases – such as the "free speech" exceptions – should the values inherent in the exception be preferred to the values inherent in the copyright owner's rights);

- in other cases, statutory licences provide potential means for addressing both access and fairness issues (that copyright owners are paid for uses of their material that society finds valuable).

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[25] In other words, copyright exceptions should not be a vehicle for the allocation or re-allocation of social goods or for social welfare purposes.

[26] Although the APA notes that the need for some exceptions – such as those necessary for free speech – are less likely to require periodic review, in that they promote fundamental aspects of the sort of society in which we live.

[27] See also the Canadian report, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* in relation to the goal of reform processes: "to strike an appropriate balance between creators' rights and users' needs, especially where market forces had not responded adequately to such rights and needs" (emphasis added): available at http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00870.html. The APA also refers the ALRC to the work of Richard Hooper in the UK: his report is available at http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20120731.htm.

[28] For example, in the UK and NZ a number of exceptions are framed on the basis that the exception only applies in the absence of licences. Rather than building complexity into the Act, this approach provides sufficient incentives for copyright owners to organise through collecting societies to license particular uses of their material, while ensuring that, to the extent that some material may not be within the scope of a society's repertoire, people needing to use the relevant material may still do so. Extended statutory licences (that is, statutory licences extending a relevant collecting society's voluntary mandate) may similarly balance the policy objectives served by copyright.

Libraries, archives and digitisation (Questions 19 to 22)

Introductory comments

The APA's members strongly support libraries, and have a long history of contributing to libraries and the community generally to support literacy and access to books. In particular, the industry donates to major projects around Australia involving reading and literacy, distributes books into disadvantaged communities, and makes generous donations to schools, childcare centres and charities.[29]

Nonetheless, the APA is concerned about the scope of the exceptions available to libraries and archives under the current Act, and is very concerned that the ALRC may recommend that libraries and archives have yet more freedom under the Act to deal with copyright material without permission and without payment. The nub of the issue is captured in the following comment from the US government representative in relation to the proposed new international instrument being discussed at WIPO:

> *… the making and supplying of copies brings libraries directly into the activities we normally associate with authors and publishers. For that reason, we must craft very carefully the relationship between the two and recognize proper limits to exceptions and limitations that address this topic.*[30]

In this context, it is instructive also to consider the history of many of the Australian library provisions (including the history of their UK antecedents), and particularly the provisions relating to client copying and to inter-library supply of published material.

For example:

- in the UK, library and archive exceptions (later mirrored in the Australian 1968 Act) were introduced against a context of post-World War II paper shortages, with the consequence that many publications were out of print;[31]

- in the UK, the Gregory Committee recommended that provisions in relation to library copying of periodicals for clients could be included in the revised Act provided that (among other things) a charge was made for the copy (including a contribution to overheads) – the Committee noting that such a measure:

  > *should safeguard the sales of the publisher, since a person who would normally buy the periodical would not be tempted to secure it by copying rather than by purchase in the ordinary course; copying would be restricted to organisations which have no commercial interest to serve and the student would be saved much time and unnecessary labour*;[32]

- the reasoning of the Franki Committee in relation to why it was making particular recommendations in relation to a number of the library provisions included:

  i. the length of time it took for learned journals to arrive from overseas (up to five months by surface mail: para 3.31);

  ii. that not all libraries could afford to bring in journals by air (para 3.31);

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29 For example, publishers frequently respond to bush fire appeals by replacing lost textbooks and school books, replacing library collections of school libraries lost in bushfires, donating emergency stocks of books to child care centres and emergency centres for victims and replacing childcare books for outreach services in baby health centres. Further information on particular projects is available from the APA, but some of the projects include strong support of the Benjamin Andrew Footpath Library (which delivers a regular supply of books to homeless and disadvantaged people living in hostels and on the streets) and programs run by the Smith Family, the Centre for Community Child Health, the Indigenous Literary Project (in conjunction with The Fred Hollows Foundation), the Fogarty Foundation and the Children's Book Council of Victoria.

30 From Standing Committee on Copyright and Related Rights, Twenty-third Session, Geneva, November 21 to 25, 28, 29 and December 2, 2011, *Provisional Working Document Containing Comments on and Textual Suggestions Towards an Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitation for Libraries and Archives,* (document SCCR/23/8.PROV) at 11.

31 See the discussion of this in the Gregory Report at 17.

32 Gregory Report of 1952 at 19.

iii. that "*the most profound problems arise when attempts are made to find practical, fair, and economic means of collecting and distributing royalty payments*" (para 1.20 – this was well before publishers were easily locatable online and before the establishment of Copyright Agency);

iv. that the Committee had "*taken into account the relatively limited resources in Australia for subscribing to and maintaining large numbers of scientific and technical publications from overseas"* (at 1.37); and

v. that "*the combination of geographical isolation and low population density puts Australia at an industrial disadvantage and requires a greater effort to ensure good communication with the rest of the world than is needed in most other industrialised countries*" (para 4.05);

- the 1956 UK Copyright Act (on which the current Australian Act is based) inter-library and client copying provisions only applied if the librarian did not know "*the name and address of any person entitled to authorise the making of the copy and could not by reasonable inquiry ascertain the name and address of such person"* – but the Library Association in Australia submitted to the Spicer Committee that such a limitation should not be included in Australian copyright law "*on the grounds that the geographical isolation of Australian libraries from the main centres of book production made the proviso unduly onerous*";[33]

- the Spicer committee based its recommendations on library copying on, among other things, "*the facts that Australia is geographically isolated from the major centres of scientific and industrial research and that the vast area of the Australian continent raises special problems in relation to the dissemination of information, particularly in the remoter parts*" [para 1.37]; and

- in 1980, a proviso in the 1968 Act that a librarian could not copy more than a "reasonable portion" unless he or she did not know the name and address of a person entitled to authorise the making of the copy was removed on the recommendation of the Franki Committee, which had stated that it was "*satisfied that there is very often great difficulty in communicating with the person entitled to authorise the making of a copy and that frequently communications are not answered*".

Such considerations are no longer relevant given:

- immediate digital access to authorised copies; and

- digital technology that assists in both identifying and communicating with publishers and/or collecting societies able to license the use of copyright material on behalf of publishers.

Nonetheless, throughout the library and archives provisions, the Copyright Act contains the legacy of the pre-digital age, and a time in which Australia was ruled by the "tyranny of distance". Such provisions should have no place in copyright legislation that supports a digital economy.

***Question 19**: What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?*

In summary, the APA submits that the current libraries and archives exceptions are impeding the development of proper digital licensing markets for publishers.

[33] Spicer Report at 140. The UK Act included this proviso as a result of a recommendation made by the Gregory Committee of 1952 (Gregory Report at 19 and 21). Interestingly, the Committee rejected the approach suggested by the Australian Libraries, stating that it was "*unable to see that they are in a much different position from an English librarian in regard to, say, an American publisher*". The Australian Book Publishers Association (as the APA then was) suggested a compromise of notifying publishers "after the event", so that publishers could monitor demand for their books. In the event, however, this suggestion was not taken up by the Parliament in the Copyright Bill 1967.

As early as 1952, the Spicer Committee recognised that overly broad exceptions for libraries would impact on the commercial markets of publishers. For example, in relation to copying for other libraries, the Committee noted that:

> *it seems to us reasonable that in the case of copying for other libraries the consent of the copyright owner should be obtained where his name and address are known or can reasonably be ascertained.*[34]

Similarly, in response to a submission from the Library Association that a library be able to supply a copy of an unavailable book to another library, the Committee stated:

> *… we consider that this is a field where there is considerable risk to the copyright owner, involving as it does the copying of the whole of his work. The mere fact that a work is "out of print" is not, in our view, sufficient justification for the copying of the work as it may prevent the building up of a demand for the work sufficient to justify commercially the bringing out of a new edition.*[35]

If such reasoning applied in the pre-digital age, how much more so does that reasoning apply now. With digital technology, publishers are developing print-on-demand facilities and are increasingly moving to make their back-catalogue material available on a round-the-clock basis. The APA therefore submits that, as further outlined below, the need for the existing library provisions should be reviewed, and that exceptions that require a librarian to check whether or not a copy is commercially available before making or supplying a copy should be clarified to provide that, in all cases, commercial availability includes whether or not the relevant work is available under licence from the publisher or a collecting society.[36]

Exceptions permitting client and inter-library supply

The practices impeded by the current libraries and archives exceptions in Australia may be clearly contrasted with the practices that apply to the supply of material by libraries in the United Kingdom.

For example, the British Library applies the provisions in the *Copyright, Designs and Patents Act 1988* (UK) as follows in relation to supply to clients:

- the copy may only be supplied for private study and for non-commercial research;[37]
- the client makes his or her request, and must make a payment;[38]
- the copy is not emailed to the client, but made available over a secure server;
- the client is only able to access that copy for 14 days, and if he or she fails to download the requested material within that time, he or she must put in a further request, and make a further payment;
- the client may only access the copy once, and is permitted to make only a single paper copy from the electronic version;
- once received and printed, the electronic file may not be stored, but becomes unusable, and the client is locked out from accessing the copy held on the British Library's server;

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[34] Spicer Report at para 145.

[35] Spicer Report at para 146.

[36] In this context, the APA particularly draws the attention of the ALRC to the *Out of Commerce Memorandum of Understanding* (MoU) that was signed in Brussels in September 2011 by representatives of libraries, publishers, authors, creators and representatives of authors, publishers and collective management organisations for text and image based works. The MoU was enabled through a dialogue with libraries facilitated by the European Commission (EC) and recognises that the right to authorise the use of an Out of Commerce work is vested in the copyright holder (authors and publishers) and that voluntary solutions involving collective management are the way forward: see generally http://www.stm-assoc.org/industry-news/stm-association-signs-out-of-commerce-memorandum-of-understanding-mou.

[37] The APA understands that copying for any commercial purpose will only be done under a licence from Copyright Licensing Agency, and that a copyright fee is paid for such copying.

[38] The UK legislation provides that a payment must be made, which must not be less than cost (including a contribution to the general expenses of the library): sections 38(2)(c) and 39(2)(c) CDPA.

- the file accessed by the client is unable to be converted into any other format; and
- the client may not cut or paste from the file, and is unable to alter the text.[39]

In addition, the Library may only rely on a declaration made by a client (and supply a copy of the requested material) where the relevant librarian is satisfied that the person wants them for a non-commercial purpose or for private study.[40]

By way of contrast, under the Australian provisions:

- research in a commercial context or for professional purposes is not clearly excluded;[41]
- a librarian may make copies in reliance on a client's declaration, provided the declaration does not contain "a statement that to [the librarian's] knowledge is untrue in a material particular";[42]
- there is no obligation to impose a payment (leaving this to the discretion of the library);[43]
- copies may be emailed;
- a notice about copyright accompanies the email, but there are no technical or technological protections accompanying the supply of the document; and
- in practice, a client may do as he or she wishes with the material supplied by the library, including converting it into any format he or she wants and cutting and pasting and altering the text as he or she wishes.

Similarly, in relation to interlibrary supply, the British Library obliges recipient libraries that want copies to supply to clients for their private study and non-commercial research to:

- pay relevant royalties; and
- ensure that neither the library nor the library's client "will copy, scan, store electronically or further sell" a copy unless there is "a separate licence or agreement with the rights holder or an appropriate licensing body that specifically permits" this.[44]

Again, the client of the library to which the British Library supplies the copy is only permitted to make a single paper copy, and not manipulate the text.

The APA submits that the way the British Library has implemented the library exceptions is a reasonable model for Australia: it meets the needs of the Library and researchers without unduly prejudicing the interests of relevant copyright owners.

The APA further submits that the Inquiry should recommend that the Australian Act relating to client and inter-library supply, should (in the absence of an agreement with the relevant copyright owner to the contrary):

- require payment of licence fees;
- specifically require copies to be supplied with relevant technological protection measures in place (either as provided with the publication by the publisher or as may reasonably limit the uses to which the copy may be put in light of the purposes of the supply);

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[39] See the British Library website at http://www.bl.uk/reshelp/atyourdesk/docsupply/help/terms/index.html.

[40] Sections 38(2)(a) and 39(2)(a).

[41] In this context, the application by Australian libraries of developments in Canadian law, as interpreted by the Canadian Supreme Court, may mean that research for commercial and professional purposes is (on their interpretation) specifically included.

[42] Section 49(2). Contrast this provision with section 49(2C), where the Australian position more closely resembles the situation in the United Kingdom. Note, however, that the section 49(2C) procedure only applies where the relevant researcher or student – as a result of his or her remoteness from the library – "cannot conveniently furnish" the written request and declaration generally required. With the near-ubiquity of email and internet access, the remote client provisions in section 49 would appear to have diminishing relevance.

[43] Under section 49(3), any such charge may not exceed "the cost of making and supplying the reproduction".

[44] See http://www.bl.uk/reshelp/atyourdesk/docsupply/help/terms/index.html.

- specifically require copies to be supplied with all relevant Electronic Rights Management Information in place (as provided with the publication by the publisher);[45] and
- be expressly limited to private study and non-commercial research.

Preservation provisions

The APA has fewer issues with the current provisions that relate to preservation of materials within libraries in relation to manuscripts and other original materials (in particular, current section 51A).

The APA does, however, submit that the Inquiry should recommend that section 51A should:

- state clearly that the purposes for which copies of original materials for researchers may be made must be either private study or non-commercial research;
- continue to limit use for research to the premises of the library in which the item is held or the premises of another library; and
- state that researchers should not be able to make or communicate digital copies of the material on or from the library premises.[46]

Online access within the premises of libraries

Where a library has a copy of a work in digital form in its collection, section 49(5A) entitles it to make that copy available online within the premises.

One of the normal ways in which publishers now license their material, however, is by licensing a site for multiple users, or by licensing by reference to a set upper number of users at a time. To the extent that a library gets additional value from being able to provide access to the one item to multiple clients at the same time, the publisher should share in that value.

It is difficult to see that the existing provision fits any of the reasons for exceptions we articulated earlier in this submission, and it is therefore difficult to see that this exception should be retained at all. At the very least, the APA submits, this provision is too broadly worded and, unless otherwise licensed by the copyright owner, the ALRC should recommend that this provision be amended so that copies of digital material acquired by a library should only be made available online within the premises to one user at a time.

Concluding comments

The APA anticipates that Australian libraries will strongly argue that they should continue to be able to supply materials freely both to individuals and between themselves, as per the current Act.

As one noted US copyright commentator has noted in relation to the attitude of American libraries to copyright:

> *Because librarians' core values are altruistic in nature, they often believe that their hearts are good and true: what librarians do, they do for the public good. Therefore, any use made of a copyrighted work for a user should be a fair use. The primary goal librarians seek is to help people and provide them with*

[45] The APA notes the current provisions relating to Electronic Rights Management Information (ERMI) in sections 116B to 116CA and 132AQ to 132AS of the Act but submits that the obligations implicitly imposed on people under these provisions may either be overlooked by librarians, or may not apply if the supply of the material without the ERMI is in situations where the librarian did not know reasonably ought to have known that the removal or alteration would "induce, enable, facilitate or conceal an infringement of the copyright" in the material.

[46] The APA draws the Inquiry's attention to the fact that a similar restriction is already set out in section 49(5A) in relation to published material acquired in digital form.

> *appropriate information they need and want, not make money. Librarians also want to provide quality service to users.*
>
> *This makes it hard for librarians to accept that some of their activities may infringe when it comes to using copyrighted works to further these noble purposes. There simply is a disconnect between the public-spirited goals of librarians and the private ownership notions of copyright. The owners of copyrighted works understandably want to market their works in ways to maximize profits. The public good that publishers and producers of copyrighted works produce is economic growth, which many librarians view as overt commercialism.*[47]

The APA's submission is that the Australian library and archive provisions are outdated and are impeding publishers from participating fully in legitimate commercial opportunities in the digital economy. The APA submits that provisions such as those currently in the UK meet the needs of libraries, clients and customers, and should be used as a basis for reforming the Australian provisions.

The APA further notes that, in relation to published materials, fundamental access rights are not at stake here.

As noted earlier, never before have either individuals or organisations had such ready access to copyright material. As was noted in a third reading speech in the Canadian Senate, before Canada's 1997 copyright amendment legislation was passed:

> *… Libraries and institutions such as universities also feel that they should be entitled to the liberal use of a writer's property. They speak highly of the importance of having a "free flow of information," as if writers are somehow arguing for censorship. Writers are not asking for censorship. They insist only that they be included in the profits that are being made …*[48]

The APA does note that, in many cases, libraries are the only means by which people may be able to access certain types of copyright material and that therefore arguments may be put to the ALRC that free exceptions for libraries are an essential component of a healthy and vibrant democracy. The APA submits, however, that such arguments are misplaced.

While the APA is acutely aware of the vital functions performed by libraries, the APA submits that exceptions in the Act should not be the means by which issues of social equity are addressed. Rather, where access to copyright material through libraries is seen as socially beneficial, the cost of that access should be borne by society generally – for example, through public subsidising of the costs of licence subscriptions and purchases – and not by publishers through providing exceptions to copyright.

Exceptions in relation to the use of published material by libraries originated as responses to market failure, and there do not appear to be any good reasons why such exceptions should not be wound back, and no good reason why such exceptions should be free exceptions where copyright owners may be contacted and where licences are available.

The APA also notes that, to the extent that specific provisions in the Act (including those amended in line with the APA's submission) do not address the needs of libraries, the Act is already sufficiently flexible because libraries and other collecting institutions are able to rely on section 200AB – a section that also takes into account the interests of copyright owners.

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[47] Laura Gasaway, "Values Conflict in the Digital Environment: Librarians Versus Copyright Holders", available at http://www.unc.edu/~unclng/Columbia-article3.htm. Gasaway is a past president of the American Association of Law Libraries and is a Fellow of the Special Libraries Association.

[48] Hon. Janis Johnson, Canadian Senate, Hansard, 23 April 1997, available at http://www.parl.gc.ca/english/senate/deb-e/94db-e.html#0.2.W54BJ2.50HS0G.0WZ49E.H1.

***Question 21**: Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?*

The APA submits that the Act should not be amended to allow greater digitisation or communication of material, particularly where that material is commercially available, including under licence from the publisher or from a collecting society.

The APA does, however, submit that the Act should be amended as follows:

- section 201 of the Act should be amended to state that, where a library acquires material under a legal deposit obligation, it may not rely on any library exceptions except the preservation provisions;
- where a library or archives may only rely on an exception where material is not commercially available, it should be clarified that commercial availability includes availability under a licence (including from a collecting society); and
- so as not to compete with site licences available from publishers, the exception in section 49(5A) should be amended to provide that the on-site communication of materials in digital form is limited to one viewer at a time.

In this respect, the APA particularly notes comments made by a House of Commons sub-committee in Canada:

> *It is common knowledge that a significant amount of photocopying takes place in libraries and it has been suggested that an exception for library photocopying should be introduced. The sub-Committee has sympathy with the difficulties experienced by libraries in this area, but does not feel that such an exception is appropriate. Instead, the sub-Committee considers that reproduction by libraries should be the subject of blanket licences issued by collectives following negotiation.*[49]

The APA also notes the framework licence agreement between the International Association of Scientific, Technical & Medical Publishers (STM) and the British Library of 8 September 2011 in relation to the supply of articles to overseas clients of the Library, which the UK Publishers Association has also recommended to its members.[50]

Under this framework:

- the British Library caps the number of articles it supplies from its holdings to any authorised overseas library in any one calendar year (currently set at nine items from each volume of a journal or serial or from the same book);
- the system allows the library to carry out its functions, researchers get access, and publishers to share in a licence fee; and
- end-users and not-for-profit libraries have to ensure that "the differentiation between commercial and non-commercial use is actively monitored and differentiated".[51]

The agreement enables publishers to retain their contractual control over the international cross-border delivery of copies of their material – an important e-commerce consideration – while the British Library has been able to improve its service to authorised users (and particularly in relation to delivery times).

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[49] Sub-Committee on the revision of copyright of the Canadian House of Commons Standing Committee on Communications and Culture, *A Charter of Rights for Creators* (Minister of Supply and Services, Canada 1985) at 21. Interestingly, the sub-Committee went on to note how things stood in 1985: "*The library community by and large accepts this approach as only fair and the sub-Committee applauds its responsible and reasonable attitude on this issue*".

[50] See http://www.bl.uk/reshelp/atyourdesk/docsupply/industryspecificinfo/publisher/INCD/index.html.

[51] See http://www.stm-assoc.org/industry-news/stm-pa-and-british-library-agree-framework-licence-agreement-for-document-delivery-to-non-commercial-research-publishers-outside-the-uk.

Educational institutions (Questions 28 to 31)

General comments

The APA submits that the interests of both educational institutions and publishers are well-served by the existing exceptions – and particularly by the exceptions in Part VB of the Act.[52]

The APA suspects, however, that organisations making submissions on behalf of schools and other educational institutions may well make representations as to the supposedly enormous costs of copyright under the statutory licences, and particularly under Part VB of the Act.

For example, in its submission to the Federal government's discussion Cyber White Paper, *Connecting with Confidence: Optimising Australia's Digital Future*, the National Copyright Unit of the Copyright Advisory Group to the Ministerial Council for Education, Early Childhood Development and Youth Affairs noted that "*In 2010 Australian schools (government and non-government) and TAFEs (excluding Victorian TAFEs) paid over $80 million in licensing fees to copyright collecting societies for statutory and voluntary copyright licences for the use of copyright materials in schools and TAFEs*".[53] The APA suspects that the educational sector will also try to emphasise to the Inquiry that the statutory licences are inordinately expensive.

The APA, however, notes that:

- the amount paid to copyright owners by the education sector under the statutory licences is miniscule in relation to overall education budgets;[54] and
- the APA understand that, for the 2010-2012 period, school sectors have been paying a flat, capped rate per student of only $16 plus CPI, covering all hardcopy and digital use of content.

The APA understands that the flat rate paid per student in the school sectors does not vary – either up or down – according to actual usage. The flat rate therefore provides certainty to the school sectors and enables them to budget accordingly. In return, the sector is given a broad ability to copy chapters of books, articles in periodicals, and so on, without the additional transaction costs involved in getting permissions, and without any delays that would accompany the need to get such permissions.

The APA also notes that Part VB does not preclude copyright owners and educational institutions from entering into direct licences for the use of copyright material,[55] and the APA particularly draws the ALRC's attention to the fact that the APA has developed template licences that its members may choose to use if they are entering into direct licences with educational institutions for the use of digital material. These licences were specifically developed to assist in ensuring that both publishers and educational institutions are clear as to whether particular uses of material are made under Part VB or under the licence (with a view to ensuring that educational institutions do not pay twice – once through the statutory licence and once through the direct licence – for that use).[56]

The Australian Part VB provisions may be contrasted with the much more limited educational copying (for "purposes of instruction" rather than, under Part VB, "educational purposes") under section 36 of UK Act:[57]

> *36 (1) Reprographic copies of passages from published literary, dramatic or musical works may, to the extent permitted by this section, be made by or on behalf of an educational establishment for the purposes*

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52 We comment further below, however, on some areas of Part VB that, the APA submits, should be amended.

53 Available at cyberwhitepaper.dpmc.gov.au.

54 For example, based on data published in 2010, the amount paid by government schools is only some 0.14% of annual recurrent income, based on the information provided in *Review of Funding for Schooling: Final Report* (December 2011), available at www. schoolfunding.gov.au, at 14.

55 See section 135ZZF.

56 The APA understands that Copyright Agency also has systems in place to differentiate uses of copyright material under Part VB from uses made under direct licences.

57 Note also that the "1%" permitted under the UK legislation is not necessarily free – an available licence may charge for that 1%.

of instruction … provided that they are accompanied by a sufficient acknowledgement and the instruction is for a non-commercial purpose].

…

(2) Not more than one per cent. of any work may be copied by or on behalf of an establishment by virtue of this section in any quarter...

(3) Copying is not authorised by this section if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.

***Question 29**: Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt. VB of the* Copyright Act 1968 *(Cth) adequate and appropriate in the digital environment? If not, how should it be changed?*

Members of the APA have informed it that the Part VB schemes – and particularly the "10% / 1 chapter" rules of thumb as to what constitutes a "reasonable portion" – are generally well understood in the education sectors, and are generally operating efficiently.[58]

The APA submits, however, that in light of the dangers of digital piracy,[59] Part VB should be amended to ensure that educational institutions are required to take reasonable technological steps to ensure that:

- where online access to material is provided to students, that access does not permit the making of an electronic reproduction of the material or the ability to communicate the material;[60] and
- where digital copies of material are provided, those copies may be used only by the relevant student for educational purposes.

The APA otherwise refers to and supports the submission of Copyright Agency in response to this question and particularly notes Copyright Agency's comments in relation to protocols Copyright Agency has agreed with the education sectors in relation to content on the internet that is excluded from being taken into account in relation to either licence fees or distributions.

***Question 30**: Should any uses of copyright material now covered by the statutory licensing schemes in pts. VA and VB of the* Copyright Act 1968 *(Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?*

The APA submits that:

- a wider range of uses of internet material by educational institutions should not be covered by a free-use exception; and
- there is no reason for a wider range of uses of copyright material to be covered by Part VB.

As noted above, Part VB permits the reproduction and communication of relevant copyright material for "educational purposes" – a term that is already broader than used in the comparable provision in the UK, where the

[58] See, however, our comments in response to Question 31.

[59] By "digital piracy", we mean the distribution of infringing copies of copyright material on a commercial scale, whether or not for commercial gain.

[60] This wording reflects the wording currently in section 49(5A). We also refer the Inquiry to our earlier comments in response to Question 19 as to the technical means adopted by the British Library to give clients access to what they need for research and study, while still protecting the interests of copyright owners.

phrase "purposes of instruction" is used.[61] The APA understands that "educational purposes" under the Australian Act is likely to cover uses of copyright material for social, physical, religious and moral education, as well as in relation to coursework.

The APA particularly draws the Inquiry's attention to the fact that the basis on which statutory licensing was initially introduced for the educational sector was a matter of pragmatics, and not high principle. For example, in recommending that the Act be amended to permit educational institutions to make multiple copies using the then reasonably new photocopying technology, the Franki Report stated (at 6.29 and 6.30):

> *6.29 We consider that it is not practicable at the present time in most cases to obtain specific permission in advance from individual copyright owners to make copies. Even if the name and address of the person who could give permission were known, the delay in obtaining permission, often from overseas, would be likely to be so great that the material would be no longer needed by the time permission was received. Very often the administrative costs involved in seeking permission would be out of all proportion to the royalties reasonably payable in respect of the reproduction of the work. So far as we are aware publishers of books and journals have not made any significant efforts in Australia to provide copies of articles or parts of works for purchase by educational establishments.*
>
> *6.30 Accordingly we are of the view that some special arrangements are desirable …*

The APA submits that, except in relation to the existing free *de minimus* uses such as copying material onto whiteboards and so on (section 200) or uses that fall within section 200AB, there are no compelling grounds on which educational sectors should be entitled to use copyright material without payment.

The APA does note that, as a result of the recent case in the United States involving Georgia State University (a decision which is highly controversial and under appeal), copyright material may in some cases be used for free in that country, while those uses are paid for in Australia (including under Part VB).[62]

The APA submits, however, that there are no compelling reasons for attempting to duplicate those outcomes in Australia. In this regard, the APA particularly notes that:

- educators are one of the sectors that publishers expect will use their material (whether published in books or journals or online, and whether or not that material is specifically aimed at the education sector);
- to the extent that Australian society finds it valuable that educational institutions should have wide access to copyright material created and made available by publishers, it is fair that publishers should share in that value, and not subsidise it through any new free exception or any free extension to existing exceptions (including where publishers make that material available via the internet);
- it is a well-accepted principle that "value" in this context should take into account both the value to the copyright owner and the value to the user of having access to the material;[63] and
- to the extent that some material may be more or less valuable, that is a matter that may be taken into account either when equitable remuneration is being negotiated between the relevant education sector and Copyright Agency, or when equitable remuneration is determined by the Copyright Tribunal.[64]

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[61] Section 36 *Copyright, Designs and Patents Act 1988* (UK).

[62] *Cambridge University Press v Paton*. For background information on the interests affected by the decision, see also: Kevin L Smith, "What's at stake in the Georgia State copyright case", *The Chronicle Review*, 30 May 2011 (chronicle.com/article/Whats-at-Stake-in-the-Georgia/127718); and Tom Allen, "Common goals: AAP on the GSU e-reserve lawsuit", 258 *Publishers Weekly* 8 July 2011 (www.publishersweekly.com/pw/print/20110711/47931-common-goals-aap-on-the-gsu-e-reserve-lawsuit.html).

[63] See, for example, *Copyright Agency Limited v Queensland Department of Education* [2002] ACopyT 1 ("the Second Schools Case"), where different values were accorded to different types of copies, largely based on the different value of the relevant formats to the schools.

[64] See in particular the wide range of considerations that the Tribunal must take into account when setting "equitable remuneration": Regulation 25B of the Copyright Tribunal (Procedure) Regulations 1969.

The APA also notes that, to the extent that Part VB or any other specific provision in the Act does not currently address the needs of an educational institution, that educational institution may – without any remuneration to copyright owners – rely on the flexibility already provided by section 200AB.

In this respect, the APA also notes that income received by Australian publishers under the Part VB schemes has been vital in enabling publishers to develop Australian content and material tailored to Australian curricula. The APA estimates that Australian educational publishers have already invested some $40-50 million into producing new resources and platforms during the first phase of the Australian Curriculum, which relates to mathematics, science, English and history for years 7 to 10 alone. (Further investment for other subjects and for kindergarten to Year 6 is also underway.) The APA understands that:

- a significant part of this investment comes from income received by Australian publishers under Part VB;
- even with the Part VB income, profits in the industry are under threat due to the changing nature of the marketplace; and
- without Part VB this level of investment would not have been possible.

In other words, Part VB as currently structured plays an important role in the digital economy that should not be diluted.

The APA otherwise refers to and supports the submissions of Copyright Agency and the ACC in response to this question.

> ***Question 31****: Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?*

The APA refers to and supports the submission of Copyright Agency in response to this question, including in relation to:

- the repeal of current section 135ZG, and the consequent application of the Part VB statutory licences to any part of a work which is a "substantial part" (as Copyright Agency submits, section 135ZG appears to have been introduced for pragmatic reasons and not as the result of any principle that the interests of society are better served by a free exception rather than relevant copyright owners being paid for the use of their material); and
- the repeal of section 28(7) to the extent that it currently operates other than in relation to the communication of artistic works included in broadcasts.

The APA adds that Part VB should also be amended so as to impose positive obligations on educational institutions to:

- distribute and make available copies with all relevant Electronic Rights Management Information in place (as provided with the publication by the publisher);[65] and
- ensure that they use technological protection measures when distributing or giving access to material (either as provided with the publication by the publisher or as may otherwise be reasonable in light of the purposes for which the material is distributed or accessed).

[65] The APA notes the current provisions relating to Electronic Rights Management Information (ERMI) in sections 116B to 116CA and 132AQ to 132AS of the Act but submits that the obligations implicitly imposed on people under these provisions may either be overlooked by educational institution staff, or may not apply unless the person supplying the material without ERMI knows or ought reasonably to know that the removal or alteration would "induce, enable, facilitate or conceal an infringement of the copyright" in the material.

"Transformative use" and "fair use" (Questions 14 to 18 and 52 to 53)

The APA is unclear as to why the Issues Paper has not dealt with the "transformative use" and "fair use" together, as the APA understands that the former is a subset of the latter under US law. The APA therefore has grouped its answers to these questions together.

> ***Question 14:*** *How are copyright materials being used in transformative and collaborative ways – for example, in 'sampling', 'remixes' and 'mashups'. For what purposes – for example, commercial purposes, in creating cultural works or as individual self-expression?*

A publisher's normal exploitation of material includes uses that may generally be referred to as "transformative" and "collaborative". For example:

- translations;
- film and stage adaptations;
- dramatic and non-dramatic readings;
- making versions in different formats (including in digital and audio formats, and including for purposes such as making copies accessible for people with a print disability);[66]
- making cartoon versions;
- licensing the online distribution of material, including by way of site licences and licences to individual organisations;
- licensing the use of text as lyrics;
- licensing the use of material for anthologies;
- licensing sequels, prequels and spin-off versions (including computer game versions of works); and
- licensing extracts.

As we note in our responses to Questions 25 to 27, text and data mining also fall increasingly within the normal scope of a journal publisher's business.

The APA notes that all of the exploitations listed above will generally be for commercial purposes, although publishers do also regularly grant permissions for non-commercial, religious and charitable uses of their material. The APA also notes that all of the exploitations listed above will only be truly "collaborative" where the user obtains a licence from the copyright owner.

The APA is aware that, in some cases, people will – without permission, and outside the scope of existing fair dealing provisions – use published material such as text and images to create what is sometimes referred to as "fan fiction", and which may also include (as in the US case involving a "Lexicon" to the *Harry Potter* series)[67] companion works which reproduce a "substantial part" of copyright material.

In many cases, such works may have a cultural value, and in many cases these works may be forms of "individual self-expression". However, as discussed below, the APA submits that there is no basis for concluding that such a characterisation should lead to the conclusion that any new exception is necessary or that any new exception would be "fair" to the relevant publishers and authors whose work – without permission and outside the scope of

[66] In this respect, the APA particularly refers the Inquiry to commercial organisations such as Read How You Want (www.readhowyouwant.com) and Bolinda (www.bolinda.com/aus/about/aboutwelcome.aspx?/1), which are licensed by publishers to make accessible versions of books – including in formats such as large print and (in the case of Read How You Want) Braille.

[67] See *Warner Bros Entertainment Inc and JK Rowling v RDR Books* (575 F.Supp.2d 513); note that the use of the material by RDR Books was found not to be "fair use".

the current Act – is "transformed" (including in ways that may be inimical to the copyright and/or moral rights interests of the publishers and authors).

The APA also notes that the commercial purposes to which unauthorised transformations may be put would include distribution online on a commercial scale, including through social media platforms that monetise content (including by attracting advertising revenue as a result of the number of users or visitors to their platform and that may also generate payments back to the poster of the material, based on views or hits of their "transformed material").[68]

> ***Question 15****: Should the use of copyright materials in transformative uses be more freely permitted? Should the* Copyright Act 1968 *(Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?*

The APA submits that the Inquiry should be very wary of recommending the introduction of any new or additional exception relating to "transformative use" or "collaborative use", without:

- carefully delineating what it means by terms such as "transformative" and "collaborative" in this context (particularly in light of the fact that words such as "transformative" carry with them both vernacular meanings and legal connotations from US case law);
- carefully considering in which contexts or for what purposes such an exception may apply; and
- being able to articulate the exact social objectives such an exception would promote and why that objective should take precedence over the rights of copyright owners to negotiate such uses.

As noted in our response to Question 14, making and licensing transformative uses of material is core business for publishers. Therefore, an exception that merely stated that a fair dealing with copyright material for transformative purposes does not infringe copyright would be extremely prejudicial to the interests of publishers, and would inevitably damage their ability to contribute economically to Australia. Such an exception would also permit a broad and uncertain range of people and organisations (including online social media platforms that benefit commercially from user-generated material, including third-party copyright material) to free ride on the investment of time and resources by publishers and creators alike.

In this context, the APA is particularly concerned that an un-delineated "transformative use" exception will be unclear, and is likely to lead to significant differences in opinion which will have to be played out in litigation. The APA refers the Inquiry to what it regards as the strange – even perverse – view held, for example, by the American Library Association in the United States that a professor choosing extracts of published material to include in an e-reserve is making a "transformative" use of that material – and that this should therefore weigh in favour of the use being a fair (and therefore free) use under US law.[69] The APA also refers the Inquiry to the recent statements in the US decision in *The Authors Guild Inc v Hathitrust Inc* that "the use of digital copies to facilitate access for print-disabled persons is also transformative".[70]

As noted in response to Question 14, in both cases, these uses of copyright material are squarely within the scope of the normal exploitation of material published by Australian publishers.

The APA further submits that an exception to permit transformative and "collaborative" uses of copyright material is not needed to protect any fundamental societal interests – particularly as the Act:

- does not prevent the use of ideas or information;

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[68] See for example, Jason Kincaid, "YouTube extends revenue sharing program to anyone with a viral video" (25 August 209) in relation to YouTube's sharing of advertising revenues with people who upload material to its site: techcrunch.com/2009/08/25/youtube-extends-revenue-sharing-program-to-anyone-with-a-viral-video/

[69] US case law, for example, contains statements that "a transformative use can also be one that serves an entirely different purpose" than the purpose served by the original work: see *Bill Graham Archives v. Dorling Kindersley Ltd* 448F 3d 605 (2d Cit 2006).

[70] Decision of the Hon Harold Baer Jr, District Judge, Southern District of New York, Case 1:11-cv06351-HB, document 156 of 10 October 2012.

- only applies for limited periods, leaving a wealth of material free to be used as people choose;
- already permits the use of any parts of works that are not "substantial"; and
- already contains exceptions for criticism and review, news reporting and parody and satire.

Rather, the APA submits that the Act should operate to encourage people and organisations wanting to make transformative uses of copyright material to collaborate with the relevant copyright owners, and to seek a licence to use the relevant material.

***Question 16**: How should transformative use be defined for the purposes of any exception: For example, should any use of a publicly available work in the creation of a new work be considered transformative?*

The APA refers to its answer to question 15 and, in particular, reiterates its view that:

- an exception for "transformative use" is not warranted;
- transformative uses constitute "core business" for publishers;
- an exception for "transformative use" would likely be extremely unclear, and potentially require extensive litigation before its scope would become clearer; and
- any such exception would undermine the core business of publishers.

Particularly in a smaller market such as Australia, the ability to grant licenses for transformative uses constitutes a key incentive to produce content tailored to the Australian market, as it heightens the likelihood of recouping investment costs.

***Question 17**: Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

As noted above, the APA submits that no new exception should be introduced to permit "transformative or collaborative uses" of copyright material.

If, however, the ALRC were minded to recommend the introduction of such an exception, then the ALRC should also recommend that the exception should apply only where the use does not conflict with a normal exploitation of the copyright material (including new and emerging exploitations) and does not unreasonably prejudice the legitimate interests of the owner of the copyright or the relevant creator/s of the material that is being used. Further, the ALRC should recommend that any such exception should only apply in a special case.

If, therefore, the ALRC rejects the APA's submission and recommends the introduction of such an exception, the Inquiry should also recommend:

- the specific purposes for which the exception should be available; and
- the exception should only be recommended if it genuinely promotes an objective that should clearly take precedence over the objectives of copyright (and not apply merely where it gives a right to be free with other people's speech for creative purposes and/or for solely entertainment purposes).

***Question 18**: The* Copyright Act 1968 *(Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?*

As noted above, the APA submits that no new exception should be introduced to permit "transformative or collaborative uses" of copyright material.

Consequently, the APA submits that there is no need to amend any of the moral rights provisions in the Act to respond to such an exception or exceptions.

In any case, the APA draws the Inquiry's attention to the following:

- the interests protected by copyright and the interests protected by moral rights are different, and the fact that a copyright exception might be perceived as necessary should not automatically lead to any conclusion that a matching moral rights exception is also required; and
- the moral rights exceptions relating to consent and (in the case of the attribution and integrity rights) "reasonableness" are already available on a case-by-case basis to address the interests protected by moral rights.

***Question 52:** Should the* Copyright Act 1968 *(Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?*

Under Australia's international treaty obligations, any exception must:

- be limited to "certain special case";
- apply only where the relevant activity or use does not conflict with a "normal exploitation" of the material; and
- not unreasonably prejudice the legitimate interests of either the creator or copyright owner.[71]

A broad flexible exception based on such vague concepts as "fairness" or "reasonableness" (or, indeed, "transformative use") would therefore not meet Australia's international obligations.

In any case, the APA submits that:

- the introduction of a broad exception based merely on concepts such as "fairness" or "reasonableness" would inevitably prejudice the ability of publishers to participate in the digital economy; and
- such a broad exception could not be justified in terms of any societal interest that should over-ride the societal interest in having strong copyright laws.

In particular, the APA submits that the ALRC should be very wary of recommending the introduction of any general, open-ended "fair use" exception such as applies in the United States, for reasons that include the following:

- any such provision would introduce a great deal of uncertainty into Australian copyright law;[72]

[71] See, for example, Article 9(2) of the Berne Convention; Article 13 of TRIPs; Article 10 of the WIPO Copyright Treaty; Article 16 of the WIPO Performances and Phonograms Treaty; and Article 17.4.10 of the Australia-United States Free Trade Agreement. Note that some of these treaties refer to the rights holder, and others to the "author" when it comes to prejudice to legitimate interests.

[72] As noted by Kenneth D Crews, "The law of fair use and the illusion of fair-use guidelines", (2001) 62 Ohio State Law Journal 601 at 700 – available at centerforsocialmedia.org/direct/crews.pdf: "The precise definition of fair use is akin to Heisenberg's "uncertainty principle" from physics: one cannot know both its empirical definition and its specific application simultaneously".

- it should not be presumed that what is "fair use" under United States law, for example, would be found to be "fair use" by an Australian court, given Australia's very different legislation and legislative history (including the absence of a constitutional framework stating the purpose of copyright, and including also the presence in Australia of statutory licensing schemes that operate as acknowledgement of the important principle that where society draws a benefit from copyright material, publishers and creators should generally share in that benefit);

- while people may obtain some comfort and guidance from previous cases on fair use as such case law develops in Australia, ultimately, each court decision on fair use is provisional and based on its own facts and circumstances, and may be subject to re-assessment as circumstances change;[73]

- any new "fair use" provision may not only introduce a great deal of uncertainty into the Act, but also a great deal of confusion – mitigating against the legal certainty that is a pre-requisite of economic growth;

- to the extent that "flexibility" is required in the Act, libraries, archives and collecting institutions, together with educational institutions and people with disabilities such as a print disability, are already able to rely on section 200AB;[74] and

- to the extent that flexibility is required to deal with other situations (and particularly ones where commercial interests are at stake), the APA submits that the proper forum for weighing whether the objectives served by copyright should be over-ridden by an objective served by an exception is parliament, and not the courts.[75]

The APA particularly directs the Inquiry's attention to the situation in the United States, where there even seems to be a high level of uncertainty as to how certain the application of the "fair use" exception may actually be. For example, while Pamela Samuelson has written about how the application of fair use is much more predictable than generally thought,[76] on the other hand:

- statements in relation to how difficult and uncertain fair use is to apply in practice regularly continue to appear in discussions of "fair use" in both practical and academic writing;[77]

- much time and effort over the years has been devoted in the United States to formulate practical guidelines to assist people apply fair use – "*as a means for simplifying application of an uncertain law … [and] to bring a desired level of certainty, reduce risks of infringement liability, and minimize transaction costs associated with statutory interpretation for common needs*";[78]

- the recent case involving Georgia State University – while overwhelmingly a "win" for the University – did not find "fair use" in every case, and is now on appeal, so cannot be said to represent the final word on the application of fair use to digital reserves.

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[73] The APA submits, for example, that cases such as the US Betamax case might not be decided the same way today, given the growth of online catch-up services and easier commercial access to broadcast material. See generally Wendy Gordon, "Fair use as market failure: a structural and economic analysis of the Betamax case and its predecessors", (1982) 82 Colum L Rev 1600.

[74] The APA understands that many such institutions are already reluctant to rely on section 200AB as a result of its uncertainty, and are uncomfortable in making the judgment calls and risk analysis required under that section. The APA notes that industry co-operation to devise practical guidelines may provide some assistance here, and notes that the guidelines that do exist (such as those set out in Ian McDonald, *Special case exception: education, libraries, collections* (Australian Copyright Council, Sydney, 2007), and in *Section 200AB Flexible Dealing Handbook* (Australian Digital Alliance, Canberra 2008) were created with co-operation and input from a range of interests and sectors, and show a great deal of uniformity in approach.

[75] See generally the discussion of these and other issues in Ian McDonald, *Fair use: issues and perspectives* (Australian Copyright Council, Sydney, 2006).

[76] Pamela Samuelson, "Unbundling fair uses", (2009) 77 *Fordham L Rev* 2537.

[77] See, generally, the quotations listed in Ian McDonald, *Fair Use: Issues & Perspectives* (Australian Copyright Council, Sydney, 2006) at 14. See also the decision in Georgia State University (*Cambridge University Press v Beck*er, 08-01425, U.S. District Court, *Northern District of Georgia* (Atlanta), Document 423: while "fair use" was found in relation to the use of 69 of the excerpts in issue, fair use was denied in relation to 5 – so the University was working with a margin of error of almost 7% in applying fair use. Note also that the judge indicated that fair use would not apply if "the heart" of the relevant work were used or if a licence were readily available at a reasonable price. Further, it should be noted that the case is on appeal, and may be reversed (including if the matter then goes to the US Supreme Court).

[78] Kenneth D Crews, "The law of fair use and the illusion of fair-use guidelines", (2001) 62 *Ohio State Law Journa*l 601 at 639.

The APA further notes that (as outlined in the Issues Paper at 75 to 78) several Australian enquiries have already rejected the introduction of a "fair use" exception, and that the APA is not aware of anything that has occurred since the dates of those reviews that would support a compelling case for the introduction of such an exception now. As the Hargreaves Review noted:

> *The approach advocated here stops short of advocating the big once & for all fix of the UK promoting a Fair Use copyright exception to the EU, as recommended by Google & under examination by the Irish Government. We do so because we believe that the economic benefits of a more adaptive copyright regime are more likely to be attained in practice by the approach recommended above & because there are genuine legal doubts about the viability of a US case law based legal mechanism in a European context.*[79]

The APA also notes comments in academic literature from the US in relation to fair use, including that:

- "*the high costs associated with interpreting standards and the financial risks associated with relying on fair use greatly limit the degree to which those who produce works for public consumption are willing to rely on fair use*";[80]
- "*fair use, if too broadly interpreted, might sap the incentive to develop innovative market mechanisms that reduce transaction costs and make economic exchanges between copyright holders and users feasible*";[81] and
- that "categorical" or specific exceptions would be preferable to fair use for anyone other than those who can afford the lawyers.[82]

The APA also refers to and supports the submission of Copyright Agency in response to this question.

> ***Question 53**: Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

As indicated in response to Question 52, the APA submits that there are no compelling grounds for the ALRC to recommend the introduction of a new and broad flexible exception. Indeed, the APA submits that there are compelling grounds to reject suggestions that such an exception should be introduced.

If, however, the ALRC were minded to recommend the introduction of a "fair use" exception, the APA submits that the ALRC should recommend that it not apply where:

- a statutory licence applies; or
- where licences are available from publishers (including through collecting societies).[83]

Further, the ALRC should recommend that the exception only apply where the use does not conflict with a normal exploitation of the material and where the use does not unreasonably prejudice the legitimate interests of the relevant rights holders and creators.

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79 Hargreaves, at 5.41.

80 Michael Carroll, "Fixing fair use", (2007) 85 *North Carolina L Rev* 1087 at 1122, and see also, infra, the citations at footnote 38 in relation to the "chilling effects of copyright law's vague scope".

81 Landes and Posner, "An Economic Analysis of Copyright Law", (1989) 18 *Journal of Legal Studies* 325 at 358.

82 See, for example, Richard Posner, "*Eldred* and fair use", (2004) 1 *The Economists' Voice* Article 3; see also the comments of Larry Lessig in *Remix: making art and commerce thrive in the hybrid economy* (Bloomsbury Academic, London, 2008) at 267 in relation how "for everyone else", the US Copyright Act should contain specific provisions stating what is permitted as exceptions to a copyright owner's rights.

83 Such limitations would then reflect in part the first instance decision in the Georgia State University case (*Cambridge University Press v Beck*er, 08-01425, U.S. District Court, *Northern District of Georgia* (Atlanta), Document 423.

Data and text mining (Questions 25 to 27)

***Question 25**: Are uses of data and text mining tools being impeded by the* Copyright Act 1968 *(Cth)? What evidence, if any, is there of the value of data mining to the digital economy?*

The APA is not aware that the use of data and text mining tools is being impeded as a result of copyright.

In this context, it is important to note that:

- information, as such, is not protected by copyright;
- recent cases have diminished the scope for copyright to protect compilations of information;[84]
- Australia does not recognise any rights in databases;
- to the extent that data and text mining occurs within government or educational institutions, copyright issues may already be covered by the relevant statutory licences; and
- to the extent that data and text mining occurs for non-commercial and scholarly purposes, any copyright issues may already be covered by the "fair" dealing exception for research and study.

That said, as noted further in our response to Question 26, to the extent that people and organisations make contrary submissions to the ALRC, the APA draws the Inquiry's attention to the following:

- the use of text and data mining tools is reasonably new;
- the co-operation of relevant publishers will lead to more effective and efficient data and text mining (thereby enabling a greater contribution of these tools to the digital economy);
- there can be significant cost implications for publishers in supporting the text and data mining of content on any large-scale or unrestricted basis;[85] and
- business models are already emerging that facilitate data and text mining, and these are likely to be refined through negotiation as the value of this mining is better understood and exploited.

In other words, to the extent that using data and text mining tools raises copyright issues, copyright should work to:

- facilitate efficiencies by requiring relevant parties to negotiate and enter licence agreements; and
- ensure that all contributing parties (that is, both publishers and people and organisations exploiting published material) share in the benefits.

***Question 26**: Should the* Copyright Act 1968 *(Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, however should this exception be framed?*

The APA notes that the use of the word "mining" in this context may suggest that the individual copyright works and the compilations of such works that are mined are somehow just a passive or natural resource – raw materials – from which others (including large, privately owned for-profit corporations) may extract value without sharing that value.

The APA, however, draws the ALRC's attention to the important role that publishers perform in collating, commenting on, and organising the peer-review of material that is subject to text and data mining.[86]

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[84] In particular, see *Network Ten Pty Ltd v TCN Channel Nine* [2010] HCA 14; 218 CLR 273.

[85] These cost implications arise because crawling can affect platform performance and response times, and may require the development and maintenance of parallel content delivery systems; costs are then incurred to ensure that adequate performance and access (whether for licensed or unlicensed users) is maintained.

The APA also draws the ALRC's attention to the 2011 report from the Publishing Research Consortium which identified:

> *the variety of text and data mining methods and purposes in which journal publishers and other stakeholders are currently engaged … not all TDM requests come from the general public – many are from abstracting services, commercial entities and scientific and medical researchers. For researchers and other individuals with a scholarly or non-commercial purpose, it may be indicative that the Report found over 90% of publishing respondents stated that they grant research-focused mining requests. TDM for commercial purposes involves different evaluation criteria, but increasingly STM publishers are providing licensing options and arrangements for such ends …. Publishers and Collective Management Organizations are currently offering a variety of licensing options and permissions and such offers and solutions should be encouraged and supported. Changes to current copyright law that would mandate extraordinary "rights", particularly when proposed as copyright exceptions, might not be technically feasible or result in harmful unintended consequences such as reducing the incentives for innovation in TDM solutions.*[87]

Therefore, while the APA fully supports data and text mining and the potential added value that may be extracted from the material that is being mined, the APA submits that relevant copyright owners should share in the benefits of that value, and that the full value of that benefit should not be freely transferred to third parties under a copyright exception.

The APA also notes that licensing arrangements in relation to text and data mining are particularly subject to rapid change as new technologies come online, and the licensing landscape may significantly change between now and the time the ALRC reports. Given the changes in the landscape to date, those changes are more likely than not to support market-based responses to support text and data mining.

> ***Question 27:*** *Are there alternative solutions that could support the growth of text and data mining technologies and access to them?*

The APA submits that contractual and licensing arrangements are the primary means by which the growth of text and data mining technologies, and access to them, may be supported.

The APA makes this submission on two bases:

- on the basis of the principle that, to the extent that an activity based on copyright material contributes to Australia's economic benefit, relevant copyright owners should share in that benefit; and
- on the basis of practical considerations in that, as discussed in our response to Question 26, in many cases, co-operation with copyright owners will assist in the efficiency of data mining.

In relation to the second basis, the APA particularly draws the ALRC's attention to the report from JISC on the value and benefits of text mining[88] which indicates the extent to which co-operation with publishers may assist in removing technical barriers (for example, by providing documents in XML formats rather than in pdf formats).

The APA also draws the ALRC's attention to the work of the International Association of Scientific, Technical and Medical Publishers in relation to developing sample licences. As that Association notes:

> *… TDM [text and data mining] is rapidly becoming the norm for STM publishers using text and data mining to improve, add structure and enrich their content offerings. TDM involves a combination of resources*

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[86] See further our comments in response to Question 27.

[87] *Journal Article Mining*, available at www.publishingresearch.net/documents/PRCSmitJAMreport20June2011VersionofRecord.pdf.

[88] "JISC" formerly stood for "Joint Information Systems Committee": the report was authored by Dr Diane McDonald, and available at http://www.jisc.ac.uk/publications/reports/2012/value-and-benefits-of-text-mining.aspx#a33.

> *from various stakeholders and in an optimised environment brings together large series of corpuses of standardised or normalised text and data.*
>
> *… the complexity of stakeholder interests and commitments means that no one solution that is imposed externally can be effective, whether by way of national exceptions or otherwise: solutions must therefore be worked out by multi-stakeholder dialogues which respect stakeholders' interests, are conducted in a transparent manner and aim at models that are simple and scalable.*[89]

As is particularly clear from the first paragraph reproduced above, licensing of text and data mining is seen by publishers as an area of growth, and one where they can generate mutual benefit not only to the relevant copyright owners and authors, but also for licensees and society at large.

The APA therefore submits that the ALRC should recommend against the introduction of any exception to permit text and/or data mining.

Contracting out (Questions 54 and 55)

> ***Question 54:*** *Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?*

In summary, the APA submits that the ALRC should not recommend that agreements purporting to exclude or limit exceptions be unenforceable.

Much will doubtless be made in many submissions from other organisations and individuals in relation to how the Act presents a "balance" that must somehow be preserved whatever the contractual relationship of the parties.

Such submissions may be based on two related arguments:

- that the Act captures an optimal balance between users of copyright material and the owners of copyright in that material that is inviolable and must be preserved at all costs and in all situations; and
- that exceptions operate as limitations on copyright (that is, they define the scope of a copyright owner's rights) rather than as defences to situations where the copyright owner's rights would otherwise apply.

The APA submits that each of these arguments are wrong-headed.

First, the APA submits that the ALRC only needs to consider the legislative history of any of the copyright exceptions (including the library and educational sector exceptions discussed earlier in this submission), to see the extent to which circumstances applying at a particular time have shaped the exceptions we now see in the Act.

This is not to say that exceptions are mere "historical accidents", but to emphasise that the necessity for a particular exception is in most cases shaped by circumstances applying at a particular point in time, and that such exceptions may well remain in the Act even though the circumstances that led to their introduction have changed.[90]

The APA therefore submits that it cannot be said that the Act represents or captures any sort of inviolable "balance" between interests, and that it cannot consequently be said that contracts should never be used to interfere with this supposedly inviolable allocation of "rights".

Second, the APA submits that the structure and language of the Act (and most of the exceptions) clearly indicate that exceptions are in almost all cases defences: they do not operate in the same way as, for example, "substantial part" or duration or territoriality to define the scope of a copyright owners' rights *per se*.

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89 See http://www.stm-assoc.org/2012_03_15_STM_Summary_Statement_Text_Data_Mining_final.pdf.

90 See further our introductory comments articulating the basis for most exceptions in the Act – very few of which are likely to be characterized as having such a fundamental character that they should be inviolable.

For example, the Act provides that "it is not an infringement" to do certain things, even though those things are within the scope of the copyright owner's exclusive rights. Also, whether or not the relevant activity is or is not an infringement is usually subject to a range of conditions being met – including, for example, conditions relating to:

- purpose (such as research or study, or educational purpose, or to supply a copy to a client);
- amount used (such as no more than a "reasonable amount");
- procedural steps being taken before the use takes place (such as checking whether or not the relevant material is available in a reasonable time at an ordinary commercial price, or ensuring that documentation is properly filled in and kept); and
- "sufficient acknowledgement" being given (such as in relation to use of material under some of the "fair dealing" exceptions).

Importantly, many exceptions are subject to more than one of these conditions, and it is only if all of these are met that the exception applies.

In other words, exceptions are in many cases highly conditional and highly fact-specific.

The APA also notes provisions such as section 43C(3) (in relation to personal copying of books and newspapers) and section 135ZZH in Part VB (the statutory licences for educational institutions) where an event occurring after reliance on an exception (such as selling a copy that was made under the personal copying provision or using material other than for an educational purpose) will result in that exception being taken never to have applied – even if the exception were available prior to that event.

That exceptions are defences also clearly reflects what happens when a copyright owner takes action for an infringement. While such a copyright owner will (and should) consider the extent to which someone allegedly infringing their rights may be able to rely on an exception before taking action, the onus to raise the exception is on the alleged infringer – the onus is not on the copyright owner to show that no exception is available.

In this respect, the APA notes (and disagrees with) the comment in the Issues Paper that "*Fair dealing limits the boundaries of copyright and, accordingly, the fair dealing exceptions are not simply defences to infringement*".[91] The APA also notes (and fundamentally disagrees with) a related position: that copyright exceptions should be regarded as user rights.[92]

Rather, the APA submits that the exceptions do not change or affect the nature of the copyright owners' rights as such. Rather, whether or not the conditions of the exceptions are met determine whether or not, in a particular case, a copyright owner can take action against someone for infringement. The ability to rely on an exception is just that – an ability – it is not a "right".

In other words, that exceptions operate as defences, are usually highly conditional and dependent on all the circumstances, and are historically contingent serve to underline the fact that the Act does not capture any inviolable "balance" that must be preserved at all costs in all situations by legislative prohibitions on contracting out.

[91] The APA notes that this comment is based on comments in Chapter 3 of the Copyright Law Review Committee's report, *Copyright and Contract* (CLRC, Canberra, 2002), available at www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Copyrightandcontract. The APA is also aware of the academic discussion on this topic, including the sources discussed and cited by the CLRC in that Report. As discussed below, however, the APA is not aware of any empirical evidence to support an argument that contractual terms in licensing agreements relating to copyright material are creating entrenched problems that need to be addressed by legislative intervention.

[92] See, for example, the PowerPoint of the paper presented by Anne Flahvin at the Australian Digital Alliance Copyright Forum 2012; available at digital.org.au; and Abraham Drassinower, "Taking User Rights Seriously", in *In the Public Interest: the Future of Canadian Copyright Law* ed M. Geist (Irwin Law, Toronto, 2010) at 462-479.

In any case, the APA submits that the ALRC should only recommend that any exceptions remain unable to be contracted away if considerable hard empirical data is presented to it that convincingly demonstrates that:

- a fundamental societal interest is in practice being eroded or removed through contract; and
- that this has become an entrenched problem.

The APA is not aware that this is currently the case, and submits that, in the absence of such evidence, the same normal contracting principles should apply to copyright material as to cement and biros and bread.

In other words, parties should be free to make their own arrangements and to negotiate their own interests under contract, and there is no demonstrable need for any legislative intervention.

Question 55: *Should the* Copyright Act 1968 *(Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?*

For the reasons set out both below and in its response to Question 54, the APA submits that the Act should not be amended to prevent contracting out of copyright exceptions.

In our response to Question 54, the APA discussed (and disputed) the notion of the so-called "copyright balance".

The APA notes another balance in play here: the contractual balance.

In this respect, the APA particularly draws the ALRC'S attention to the fact that, almost invariably, organisations such as libraries, governments, corporations and educational institutions are well placed to look after their own interests in contractual negotiations. In this respect, the APA notes the relative sizes of many of the players: the APA understands that many agreements in the local library sector are negotiated through State and Territory libraries; and agreements in the education sector may be brokered by departments or units within government. Many of the APA's members are extremely small by comparison.

As noted in our introductory comments, very few (if any) of the exceptions available in the Copyright Act are of such a nature that over-riding them by contract should be seen in all cases as so fundamentally repugnant or objectionable that the Act should contain provisions making such contracts *per se* unenforceable.

Instead, to the extent that an imbalance in negotiating power leads to undesirable outcomes, then competition and consumer laws are the appropriate means of redressing any contractual imbalance – not blanket prohibitions on such contracts under the Act.

In this respect, the APA further submits that the fact that some contracts may impose limitations on the uses that may be made of some copyright material is not, by itself, evidence of a problem that needs to be addressed, and that any analysis of such contracts must be viewed against current licensing practices more generally.[93]

By way of example, if a particular agreement prohibited use of material other than on the premises of an educational institution or library, or if a particular agreement prohibited someone from providing copies of the material to others, that is not, by itself, evidence that societal interests are being fundamentally damaged, given that publishers are developing business models for the distribution of copyright material into the library and educational sectors that are tailored to the needs of those sectors, and that address the needs of those sectors under agreements that may differ from the agreements offered to individual consumers.

Similarly, the fact that copyright material in digital form may not (as a result of conditions in a licence agreement) be used in the same way as something purchased in hardcopy form does not, by itself, indicate there is any systemic problem, given that the business models for digital material are so different from the business models for hardcopy materials. To submit otherwise would be to shackle digital businesses to the horse and buggy analogue era.

[93] In this context, the APA submits that the ALRC should be very wary of applying any of the conclusions reached by the CLRC in its 2002 report *Copyright and Contract*, given that over ten years have passed since the collection of data for that report, and given the enormous changes and develpments in digital licensing models that have since occurred.

In this context, however, it is important to bear the following in mind:

- copyright material has never been as accessible as it now is;
- Australian publishers are operating in a highly competitive market, and the terms of contracts are likely to be one of the factors that a purchaser such as a library or educational institution would take into account to determine whether or not (with their own shrinking budgets) they would purchase a particular item or a similar, competing item;
- publishers are working very hard to ensure that they meet the needs of their customers – including libraries and educational institutions;
- licences enable parties the opportunity to negotiate and clarify rights and responsibilities – including in relation to situations where the legal position may be unclear; and
- in many cases, licences will frequently expressly grant customers the ability to use material more broadly than they otherwise may be able to under the Act.[94]

The APA further submits that the introduction of a prohibition on contracting out of exceptions may well jeopardise continued experimentation with business models and with tailoring licensing solutions for individual customers (including organisations), as such licensing would always have to take into account uses of the relevant material that the customer may be able to make under the Act as well as uses that are negotiated with or offered to the particular customer.

In particular, the APA submits that flexibility of contract is an essential tool for publishers to do business in the digital environment and that, to the extent that there is any imbalance between copyright owners and people and organisations using copyright material under contract, unfair contracts legislation and consumer laws more generally (including competition laws) are the appropriate means of addressing any such imbalance.

Other questions raised in the Issues Paper

***Questions 3 and 4**: Caching, indexing and other internet functions*

The APA refers to and supports the response of the ACC to these questions.

***Questions 5 to 10**: Cloud computing and copying for private use*

The APA refers to and supports the responses of the ACC and of Copyright Agency to these questions.

***Questions 11 to 13**: Online use for social, private or domestic purposes*

The APA refers to and supports the responses of the ACC and of Copyright Agency to these questions.

***Questions 23 and 24**: Orphan works*

The APA refers to and supports the responses of the ACC and of Copyright Agency to these questions.

[94] Examples of such licences include site licences, other multi-user licences, and licences that permit access to material on multiple devices.

***Questions 32 to 34**: Crown use of copyright material*

The APA refers to and supports the responses of the ACC and of Copyright Agency to these questions.

***Questions 40 to 44**: Statutory licences in the digital environment*

The APA refers to and supports the responses of the ACC to these questions.

***Questions 45 to 47**: Fair dealing exceptions*

The APA refers to and supports the responses of the ACC and of Copyright Agency to these questions.

***Questions 48 to 51:** Other free-use exceptions*

The APA refers to and supports the responses of the ACC and of Copyright Agency to these questions.

The APA also refers to its responses to Questions 19 to 22 (relating to libraries, archives and digitisation) and Questions 28 to 31 (relating to educational institutions) in relation to existing exceptions that should be amended.

In particular, in response to Question 49:

The APA submits that, for the reasons set out in its responses to Questions 28 to 31 (relating to educational institutions):

- section 135ZG should be repealed (as Copyright Agency submits, section 135ZG appears to have been introduced for pragmatic reasons and not as the result of any principle that the interests of society are better served by a free exception rather than relevant copyright owners being paid for the use of their material); and
- section 28(7) should be repealed to the extent that it currently operates other than in relation to the communication of artistic works included in broadcasts.

In particular, in response to Question 50:

The APA submits that the Act already contains a very broad range of exceptions, including exceptions that enable the following to deal flexibly with copyright material within the international framework that should guide how exceptions are to be framed:[95]

- educational institutions,;
- libraries and archives;
- galleries, museums and other collecting institutions;
- people with disabilities that prevent them accessing copyright material; and
- people assisting such people.

The APA also notes that the public generally has never before had greater access to copyright material and that Australian publishers are currently working very hard to ensure that they meet the needs of consumers, including through developing new products, new business and licensing models and new ways of delivering material to consumers (including institutional consumers such as government, educational institutions and libraries).

[95] Section 200AB.

In other words, the APA does not currently see a need for other specific exceptions to be introduced into the Act, particularly if the basis for such an exception may be something that is being or is likely to be addressed by market mechanisms.

That said, the APA looks forward with interest to reviewing and responding to any submissions to the Inquiry that make out an evidence-based case for a new exception and that satisfies proper criteria for the basis for an exception – such as fundamental needs of the State or addressing market failure.[96]

[96] See further the analysis of the basis for exceptions set out in the APA's response to Question 1.