WILEY

30 November 2012

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Via mail and email to copyright@alrc.gov.au

Australian Law Reform Commission: Copyright & the Digital Economy
Submission from John Wiley & Sons Inc

John Wiley & Sons (Wiley) is pleased to respond to the Australian Law Reform Commission's Issues Paper regarding *Copyright and the Digital Economy* in relation to changes proposed to the copyright system in Australia.

Founded in 1807, Wiley is North America's oldest independent publisher, and has a distinguished history as a literary, scientific, technical, medical, and scholarly publisher, serving researchers and practitioners in the United States and around the world. Wiley's Australian operations include offices in Melbourne and Brisbane, with an Australian Distribution Centre in Stafford, Brisbane, and we are a significant local employer in these locations. Today, we employ approximately 270 staff in Australia and 5300 globally.

We are one of the world's foremost academic and professional publishers. We publish over 1,500 scholarly peer-reviewed journals, and our online service Wiley Online Library (http://onlinelibrary.wiley.com/) provides electronic access to more than 5.5 million articles across these journals. Wiley-Blackwell, Wiley's scientific, technical, medical and scholarly publishing division (STMS), is also the world's largest society publisher, working in partnership with over 800 learned and scholarly and professional societies and organisations which represent millions of members globally. Partners in Australia include the Royal Australasian College of Surgeons, the Australian Psychological Society and the Economic Society of Australia. Many of the societies we and other publishers partner with depend to a significant extent on the revenues generated by publishers to support activities which benefit the communities those societies serve and the general societal good.

Wiley-Blackwell is one of Wiley's three core businesses. Our Professional Development business serves professionals and consumers, producing books, subscription content, and information services in all media in subject areas including business, technology, architecture, psychology, education, health and consumer interest. Our Global Education business (GE) serves undergraduate, graduate and advanced placement students and lifelong learners, publishing educational materials in all media,

155 Cremorne Street, Richmond, Victoria 3121, Australia
T +61 (0)3 9274 3100
F +61 (0)3 9274 3101
melbourne@wiley.com
www.wiley.com

John Wiley & Sons Australia, Ltd
ABN 67 009 673 081
Registered Office: 42 McDougall Street, Milton, Queensland 4064, Australia

notably through WileyPLUS, our integrated online suite of teaching and learning resources. In Australia, we also service the secondary educational market through the Jacaranda imprint, which produces high quality textbooks and sophisticated digital offerings for secondary students tailored to the Australian curriculum through the JacPLUS online portal.

Please find our responses to some of the specific questions canvassed in the Issues Paper in the attached.

Yours sincerely,

Mark Robertson
Vice President
Publishing Director Asia-Pacific, Science, Technology, Medical and Scholarly
Executive Director Wiley Australia and Wiley Japan

The Enquiry

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.*

As a general remark, Wiley has concerns that this question is phrased in a way that assumes or implies that copyright is a "fetter" on innovation in the digital economy. Instead, it is clear that copyright is an essential component of the digital economy - as without the ability to protect the outcomes of the time and labour invested by authors, publishers and other rightsholders, the incentive for undertaking such new and innovative activities vanishes. Wiley's new digital business models all rely on being able to quickly and appropriately licence and provide our content to users. We also do not believe that appropriate remuneration to authors, publishers and other rightsholders should be classified as an 'unnecessary cost' and we note that the advent of digital methods of licensing in fact reduce some of the inefficiencies that may have previously existed in the non-digital era.

Social, Domestic and Private Use

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

The term 'social, private or domestic purposes' is very wide and open to interpretation and dispute. Such purposes could equally apply to students sharing accommodation in a University Residence and to a social media group or 'facebook page' formed online of students in a particular course. To permit copying of legally owned content in this way would create a serious risk, especially for textbooks, of unregulated sharing and dissemination and loss of income to the rights holder. Current practice controls sharing through licensing while allowing use on multiple devices and pricing accordingly.

Increasingly social media is monetised through direct or indirect advertising and is part of a successful marketing strategy for many businesses, so distinguishing commercial use from "private" or "social" use would be impossible to apply in practice. Wiley supports the view that muddying the waters in this manner would lead to increased issues in protecting rightsholders against online piracy - in that Internet Service Providers would have reduced incentives to comply with notices regarding piracy in these contexts.

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-

commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Determining whether a social, private or domestic use is 'non-commercial', does not 'conflict with normal exploitation of copyright material' or 'unreasonably prejudices the legitimate interests of the owner of the copyright' is fraught with difficulties in the online environment.

Wiley utilises copyright held by it or its licensors in a number of ways that involve online activities and we do not limit the way in which we would consider licensing content online. Therefore, all such uses could potentially conflict with the normal exploitation of copyright material owned or licensed by Wiley. Rightsholders are still in the process of discovering and creating systems to enable fast and effective licensing of their content from online and social uses, including monetisation from videos or webpages through advertising. Social media platforms cannot be accurately described as commercial free zones, with the plethora of advertising and monetisation options available. To create such an exception would prejudice copyright holders by withholding their ability to participate in this new area of the digital economy; whilst still allowing online social platforms, software companies and commercial users to benefit without restrictions. There is no compelling argument as to why the rightsholders and the creators of content should be the parties to lose out in this new arena of digital commerce.

It should be the decision of the rightsholders as to whether to allow such uses, which are easily managed through a variety of licensing options (for example by utilising Creative Commons licenses) or through fast and effective online licensing systems such as the one utilised by Wiley - the Rightslink service operated by the Copyright Clearance Center.[1]

Libraries, archives and digitisation

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

Question 20. Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

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?

Wiley submits that the current libraries and archives exceptions in the Copyright Act should not be extended.

Wiley makes almost the entirety of its holdings of journal articles available in a digital form, available for pay per view on an article by article basis to any user in Australia through Wiley Online Library (http://onlinelibrary.wiley.com). Increasingly Wiley's full length works are being made available in ebook or other digital format. Print on Demand systems are also being introduced. Publishers are providing the resources, systems and means for this increased, globalised and instant access to works, including archival works, by users and we submit that any issues around availability that may have been a concern for legislators when these exceptions were introduced, certainly no longer apply in this digital age.

[1] http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/rightslink.html

Wiley supports the submission of the Australian Publisher's Association on this point. Wiley further notes that we have been concerned regarding reports of commercial libraries and commercial research organisations both within and outside of Australia which appear on the face of their activities to be utilising the section 49 and 50 exceptions as a way of securing cheaper 'document delivery' services and access to works, rather than purchasing or licensing these works and fairly remunerating publishers, authors and rightsholders. An amendment which expressly limits user requests and inter-library loans for the purposes of private study and non-commercial research is sorely needed. In addition, clarification of this provision to ensure that it is clear that it applies only to benefit end users within the Australian territory is also required.

Orphan works

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Wiley supports efforts to resolve issues in relation to orphan works, which impose difficulties for publishers as much as for other users. We believe that it is necessary to distinguish orphan works (works for which no rights holder can be traced) from works which are out of commerce but for which rights holder information is available.

Wiley is not responsible for any collections other than its own archive of works published since 1807, for which rights information is maintained and updated. However, as a publisher we license in third party content for use in our publications across all business units – including photographs, illustrations, text, data, reference material including figures and tables, and, increasingly, video clips, podcasts and sound recordings. There are occasions when we have been forced to exclude such content, although selected by authors, and pertinent to the text, due to difficulties in tracing ownership and concern about punitive measures if such material is used without consent. Such works would be easier to use if the law provided for an 'innocent dissemination' defence if users could produce evidence of a diligent search. In principle, we would not oppose a two stage process of diligent search and then either a licensing model or a 'safe harbour' provision if precise and narrow definitions of what constitutes an orphan work could be agreed.

Question 24. Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

As set out above, a two stage process, involving diligent search and then either a licensing model or a 'safe harbour' provision would in principle be supported by Wiley.

Diligent search

A diligent search should include attempts to contact the named copyright holder or publisher if that information is available, as well as a search of all publicly available information including public databases, copyright registries, library catalogues, internet searches, publisher's catalogues, and evolving rights management databases such as ARROW and the Digital Copyright Exchange. The search itself should be mandatory rather than any particular element. It is unlikely that a search of any one source could be classified as diligent.

In principle, Wiley would be in favour of an authorised licensing body offering a service to conduct a diligent search on behalf of the applicant and believes that this would facilitate generally understood industry norms in relation to diligent search. Users of such a service should be protected from legal action by a suitable indemnity from the authorised licensing body. To be useful, the search would need to be carried out efficiently within agreed timeframes.

Licensing/Safe harbour provision

The ALRC discusses a possible exception proposed by Brennan and Fraser for 'non-commercial' purposes, however Wiley would be of the view that any orphan works solution should also extend to a solution for licensing for commercial works. This could either be through a 'safe harbour' scheme or a licence obtained from an authorised licensing organisation for an agreed market rate fee.

In a licensing model it would be essential that an established licensing body or bodies be appointed to operate any orphan works scheme. The licensing body would need to operate according to generally accepted practices and in the interests of all parties. The costs of the scheme would be covered by a reasonable subvention from licence fees, with the balance held in a secure escrow account. In granting the licence, the licensing body should grant the publisher or author an indemnity against future action by a revenant rights holder. If later, a rights holder did come forward, they should not have the right to terminate this licence as this would impose potentially unrecoverable costs on the licensee.

For a 'safe harbour' scheme, following a diligent search, such a 'safe harbour' provision should provide that, if the copyright owner of the orphan work comes forward after the post diligent search use of the work has been commenced, the revenant rightsholder should be able to claim payment for the use but should be entitled only to a limited remedy that is based upon a reasonable commercial rate licence fee and they should not be entitled to injunctive relief ordinarily available for copyright infringement. Any new uses of the work by that user would require authorisation by the rightsholder, however ongoing uses previously commenced would be able to continue without such authorisation.

Both systems have their advantages and disadvantages with one model favouring flexibility for users over the bureaucracy of a licensing scheme. Wiley would prefer the flexibility of a 'safe harbour' scheme which also extended to commercial use, provided that there were definitive requirements for diligent search.

However, either way, a properly implemented orphan works scheme would have the benefit of certainty from a legal perspective and would revive dissemination of valuable copyright works which might otherwise be left unused. Licensing systems or safe harbour schemes that allow inclusion of orphan work content in other publications should not be limited in terms of duration for the same reason that it is not practical to limit distribution by territory due to the globalisation of publishing markets. Any licence or scheme would therefore need these rights to be granted, on a non-exclusive basis, for all media, languages and territories in which the publication itself will or may be available, for as long as it is available in any media.

Data and text mining

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?

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, how should this exception be framed?

We recognise that use of research articles, text and data have always been central to the scholarly enterprise and that technology creates exciting possibilities for automated search and discovery. Wiley is actively engaged in developing text and data mining (TDM) solutions to enhance the value of our content for researchers and welcomes approaches from researchers and customers. However, we do not believe that an exception would deliver any real benefits.

There is currently little or no uniform understanding of what TDM actually is, nor how best it can be enabled and supported. From our experience, there is little consistency across TDM projects as far as activities, processes and results are concerned, let alone definitions and agreement around content access methods and protocols or standard licensing terms. In addition, it can be difficult to adequately define the boundaries of 'commercial' or 'non-commercial' uses, particularly with regard to the application of the results of scientific research.

However, the relative immaturity of the TDM market at this point in time should not be considered as indicative of market failure demanding legislative intervention. There are on-going industry initiatives to develop best practice in this area around content access protocols, licensing terms and the redistribution of the outputs of TDM. For example STM publishers have recently developed a model licence clause in order to facilitate mining of subscribed content by pharmaceutical companies and other licensees.[2]

We believe that any current TDM issues surrounding access can be appropriately resolved within the existing licensing and access frameworks; any demand for an exception appears to be driven more by a wish for convenience than a willingness to engage with the legitimate interests of publishers and copyright holders, including the scholarly and professional societies and other non-profit organisations on whose behalf Wiley publishes.

Further, we are concerned that the unrestricted content access envisaged by a non-commercial exception could potentially lead to copyright infringement, and the creation of commercial derivative or substitute works. It could also have significant impact on the security, efficiency and performance of publishers' and others' online platforms. We believe that customised licensing solutions for TDM enable review and verification of requests on a project-by-project basis, as well as enabling management of content access and delivery to ensure optimum user experience by minimising any impact on online platforms and other content systems.

There are significant cost implications for publishers in supporting TDM of content on any large-scale or unrestricted basis, which can include increased technology costs in order to minimise the impact of crawling on platform performance and response times. To ensure adequate performance and access for all users, whether licensed content users or unlicensed TDM users, publishers would be faced with significant increase in technology costs. Such increase in costs could act as a significant disincentive to publishers to continue to invest in programmes to enrich and enhance published content, which in turn facilitates greater usage and engagement.

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

Wiley remains keen to enhance the use of our journal content through TDM, and we are currently engaging in industry and customer discussions on how this can best be achieved, as well as developing what we can offer ourselves. We are already participating in various industry initiatives around TDM and are working with some academic research groups to understand more about their TDM needs and whether there are opportunities for future collaboration and use of TDM output in

[2] See: http://www.stm-assoc.org/text-and-data-mining-stm-statement-sample-licence/

future Wiley products and services. Wiley is working on a number of pilot projects in collaboration with research partners - one such example is our collaboration with the Human Genome Project at the University of California, Santa Cruz. The UCSC Genocoding project is mining our content in order to index the biomedical results in our journals using the reference sequence of the human genome.

Educational institutions

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?

The current Australian educational statutory licensing system under Pt VB of the Act is one that works effectively for both educational institutions, copyright holders and publishers. The system is well understood by educational institutions, teachers and lecturers and operates effectively to minimise transaction costs for seeking permissions within education and government and provides rightsholders with remuneration from copying in this context.

Wiley submits that the set amounts of 10% or one chapter of the work are already very generous in the educational context and do not need extending.

Copying in a digital environment has the potential to be more damaging to rightsholders than copying physical works, particularly because of the ability to reproduce 'lossless' copies instantly and their ease of transfer. In reviewing these licenses in a digital context, this should be taken into account.

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?

Wiley strongly disagrees with the proposition that any uses of copyright material now covered by the statutory exception should instead be covered by a 'free-use' exception.

Quality education materials, especially those tailored for a specific Australian curriculum, take significant time, resources and skill to develop and the efforts and rights of the creators and copyright holders should be recognised. In relation to the statutory educational licence, the primary market of many texts and resources are for their express use in schools and educational institutions, so to allow any extended right of free use (particularly in the digital arena) would significantly reduce the ability of, and incentives for, publishers to produce the kinds of innovative and educational materials which are relied on by teachers, lecturers and educators.

Increasingly publishers are expending significant resources on creating digital and interactive resources to accompany textbooks, so Wiley submits that this material should be included in the statutory licensing scheme in some manner. As per internet material, the current protocol undertaken by the Copyright Agency in relation to determining the usage rights of internet material is operating appropriately. The widespread misunderstanding that internet content is 'public domain' in some manner and therefore should be exempt from copying provisions should not be strengthened. Creators and rightsholders upload and publish their content on the internet and often set the terms on which this content may be further licensed or reused (for example through the use of Creative Commons licenses) and there is no compelling reason why rightsholders publishing in this medium should be unfairly prejudiced.

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?

Wiley submits that educational institutions should have a positive obligation to ensure that they use reasonable technological protection measures when distributing digital materials to students under these statutory licensing schemes. What is reasonable will depend on the circumstances and any such provision need not be onerous for institutions or schools.

Fair dealing exceptions

Questions 45. The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:(a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; and(e) a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice. What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

These exceptions are well defined and understood. There is an existing body of case law surrounding these exceptions which apply whether or not a work is being used in a digital or print environment. Wiley submits that these exceptions are sufficiently flexible to deal with uses in the digital context, whilst still retaining certainty for users of copyright.

Fair use

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?

The current Australian exception of fair dealing is well established in Australia and there exists a body of case law surrounding these exceptions. Wiley submits that introducing a new broad exception of 'fair use' would operate only to introduce further uncertainty into the use and exploitation of copyright in Australia. Specific exceptions are far preferable to a broad unwieldy exception. It cannot be assumed that US case law can be relied on in any interpretation of any new Australian exceptions and it would be many years before any certainty was achieved through the judicial process. We also submit that any such broad exception would run counter to the Berne three step test.

Contracting out

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

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

Wiley, like most publishers, uses bespoke contracts and licences to govern both the rights we obtain and the rights we license out, which govern how a work can be used – including rights administered on behalf of our publishing partners, such as the 800+ societies for which we publish. The market for our works is global and users' needs are constantly evolving. Licensing provides an essential and agile mechanism that enables us to respond to user needs and to document agreed uses, thus permitting certainty for all stakeholders, as well as the ongoing incentive to innovate and market new products.

Commercial licensing, by its nature, generally grants greater rights to users than those already granted under statute. In cases, fortunately rare, when parties may disagree on the scope and reach of a copyright exception, then agreeing the scope of a use under licence can provide a pragmatic business solution satisfactory to both parties and thus increase legal certainty and mitigate risk, both essential elements of a robust policy for innovation. Similarly, when the law is unclear on permitted exceptions and uses – particularly on whether these apply to digital uses – the parties can reach certainty between themselves when the legislative picture has yet to be resolved.

Consumer protection laws and unfair contracts legislation already act as a safeguard to protect consumers and users where there may be a significant power imbalance. Any other attempts to fundamentally restrict freedom of contract or to cast doubt about the enforceability of contracts in this arena would inevitably have an adverse effect on growth and innovation in Australia.