International
Publishers
Association

To:
The Commissioner and
The Executive Director
Australian Law Reform Commission (ALRC)
GPO Box 3708
Sydney NSW 2001
AUSTRALIA

Sent by email: copyright@alrc.gov.au **30 November 2012**

Dear Professor McKeough and Ms Wynn,

Consultation on Copyright and the Digital Economy: Comments of the International Publishers Association on Issues Paper 42

The International Publishers Association appreciates this opportunity to comment on Issues Paper 42 looking at "Copyright and the Digital Economy" (the "Issues Paper") and is grateful for the deadline extension granted.

The International Publishers Association (IPA) is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, IPA counts some 60 national, regional and specialised publishers associations from 55 countries – including the Association of Australian Publishers - among its members, and therefore the great majority of publishers together generating world-wide sales of AUD 164 billion. IPA is an accredited non-governmental organisation enjoying observer status to United Nations organisations, including the World Intellectual Property Organisation (WIPO) and the UNESCO. IPA's main goals are the promotion of literacy and reading, freedom to publish and the development and protection of copyright.

In our submission, we offer some general comments before focussing on those aspects in the Issues Paper potentially touching upon Australia's obligations under international treaties. We note that other organisations representing creators, including the Australian Publishers, Association and the Association of Scientific, Technical and Medical Publishers (STM) are submitting comprehensive comments addressing publisher concerns, and we commend those comments to your attention.

General comments
IPA supports initiatives aimed at aligning existing intellectual property (IP) laws to the challenges of the digital environment. Any review of IP laws should not be limited to looking at the suitability of exceptions for the digital era; it should, at the same time, also review whether the rights conferred by the laws adequately protect rightsholders, including through effective enforcement mechanisms, and overall contribute to a fair and balanced framework. We therefore hope that the ALRC will also be looking at whether the current rights conferred on

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creators and publishers offer adequate protection and incentive to creators in the digital world, and whether current laws enable creators and other rightsholders to effectively enforce their rights. IPA would be very happy to offer its expertise were the Commission to launch any related Issues Paper.

With this in mind, IPA offers its comments on the following sections or questions of the Issues Paper:

Guiding principles for reform

The ALRC should appreciate the role of intellectual property as incentive to creation, and as the only means to ensure the sustainability of innovation. As Google Inc put it: "Our intellectual property rights are valuable, and any inability to protect them could reduce the value of our products, services, and brand. Our […] intellectual property rights are important assets for us. Various events outside of our control pose a threat to our intellectual property rights, as well as to our products, services and technologies. For example, effective intellectual property protection may not be available in every country in which our products and services are distributed or made available through the internet. "Any significant impairment of our intellectual property rights could harm our business and our ability to compete."[i] The same concerns guide the publishing industry whose core assets are the content we invest in.

IPA acknowledges the need for a balanced approach to copyright, and the need for flexibility as provided for by the framework established by international treaties – in particular the "three-step-test". Here a thorough understanding of publisher/rightsholder business models is required, in particular when it comes to judging how "normal exploitation" and "legitimate interests" should be interpreted. The ALRC should ensure that it investigates the complexity of doing business in the digital economy and that it makes any recommendations in relation to Australia's legal framework with full respect to Australia's international treaty obligations.

Another major need for rightsholders and users alike is legal certainty. The ALRC should therefore avoid pursuing any option that exposes users to an increased danger of infringement actions just because a given exception is not clearly defined, and that puts rightsholders under the obligation to defend their rights in costly and time-consuming litigation. As Google put it: "[…P]rotecting our intellectual property rights is costly and time consuming. Any increase in the unauthorized use of our intellectual property could make it more expensive to do business and harm our operating results."[ii] This concern is even greater for the book industry which as a whole has far fewer resources to create legal certainty through expensive and time consuming litigation.

Copying for private use; Online use for social, private or domestic purposes; Transformative use; Other free use exceptions

IPA acknowledges the need for a balanced approach to copyright, and the need for flexibility as provided for by the framework established by international treaties When assessing the limits of the framework, though, a thorough understanding of publisher/rightsholder business models is required, in particular when it comes to judging how the different steps of the "three-step-test", in particular the notion of "normal exploitation" and "legitimate interests" should be interpreted prudently with an understanding of the economics and particular circumstances of the different publishing industry sectors in mind. As noted above, the ALRC should ensure that it fully investigates the complexity of doing business in the digital economy and that any recommendations it makes in relation to changes to Australia's legal framework fully respects Australia's international treaty obligations.

Any proposal creating an exception for unremunerated copying activities within a broader, difficult to define group fails to meet already the first step of the three step test, as the exception no longer constitutes a special case.

Libraries, archives and digitisation
When considering any revision of the current provisions, care should be taken not to impede the growing document delivery and other online services, provided by commercial entities, including publishers themselves. This includes digital lending which is becoming a part of the commercial services publishers can offer themselves. Libraries are major clients of publishers, in particular of academic publishers. In the digital environment their digital services compete to a certain extent with publishers in serving readers. Any revised provision should not interfere with the sustainability of developing new delivery and business models, and therefore the viability of the publishing industry as a whole.

Orphan works
Publishers welcome any initiative clarifying, and facilitating the use of orphan works. At international stakeholder level, there is consensus on the basic principles (definition of "orphan work", "diligent search" etc), and IPA urges the ALRC to take relevant position papers into account. Also, the ALRC may wish to refer to the recent Orphan Works Directive at EU level.[iii]

Data and text mining
With regard to data and text mining, IPA questions the need for a new exception for this particular purpose. Such an exception would allow users to retain great quantities of copyright protected works under the pretext that data mining exercises have been executed, or are being executed or will be executed shortly. In effect this would grant rights to hold unlicensed works for indefinite time. Such a vague exception would touch the core of copyright, i.e. the ability of content owners to licence the storing, copying and adaptation of copyright protected works. Publishers heavily invest in the development of data and text mining tools, and are able and willing to collaborate with users to help with the use of technology to explore large data quantities.

Fair use/Fair dealing
Any attempt to introduce a broad and flexible exception risks creating an environment of legal uncertainty – and therefore an obstacle both to use and creation. Users should be able to easily assess whether or not the intended use is lawful and covered by an exception and, equally rightsholders should be aware of how their works can legally be exploited without remuneration, and in what circumstances legal infringement actions can be brought.

If the aim is indeed to avoid or abolish barriers to innovation, then the introduction of "fair use" provisions would be a highly unusual path to take, a path that has been adopted by only four countries worldwide, but rejected by many. The introduction of a fair use doctrine would:

- create legal uncertainty and hence an atmosphere hostile to creative innovation and freedom of speech;
- violate Australia's obligations under international copyright treaties, in particular the "three step test" of the Berne Convention, WCT and TRIPS;
- require the introduction or importation of an entire body of legal precedents, adjudications and case law into Australian jurisdiction, the introduction and interpretation of which would carry with it unpredictable legal risks.

A "fair use" doctrine works (more or less) well in a US context because of its roots in more than 150 years of case law, and significant - 35 years - experience with interpreting its codified version. It is exactly this long history that alleviates (but not silences) concerns regarding legal certainty, freedom of speech and violation of international treaty, but many commentators remain concerned also with regard to the US context. In recent times, many countries have considered the introduction of fair use, including Ireland and the UK.
Australia itself has also considered the introduction of fair use in 1988 and 2000 and has chosen tools that are less intrusive than the introduction of an entirely new legal concept. We submit that the legal arguments have not changed.

Contracting out
Licensing models are based on contracts, and therefore any impediment on rightsholders and users negotiating terms of use is an impediment on the development of new licensing models. As set out in the submissions of other publisher representatives, to the extent that Australian law reduces the ability of users and rightsholders to agree on permitted uses or create doubt over the enforceability of contractually agreed terms and conditions, Australian law becomes less attractive to both users and rightsholders. This means that Australia may become less attractive as a hub for (international) business.

IPA would be happy to provide any additional information supporting our arguments. We remain at your disposal for any further questions you may have.

Yours sincerely,

Jens Bammel
Secretary General

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[i] Google Annual Report 2011, downloadable here : http://www.sec.gov/Archives/edgar/data/1288776/000119312512025336/d260164d10k.htm

[ii] Google Annual Report 2011

[iii] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works