

ALRC Submission

Copyright and the Digital Economy

Submitted by

R.I.C. Publications Pty Ltd

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ALRC report

We refer to our submission to the ALRC of 15 November 2012. We have had an opportunity to review and discuss the ALRC's Discussion Paper – 'Copyright and the Digital economy' and now take this opportunity to provide further material:

- to expand our previous submission;
- identify what we believe are wrong assumptions on the part of the ALRC; and
- identify how the proposals in the report, if enacted, would adversely affect R.I.C. Publications, our authors/creators, other publishers and the end users of our publications – students and teachers.

Some general misconceptions underlying the ALRC's recommendations

The weakness of the comparison between countries in education; i.e. different methods/systems

Several times in the ALRC Discussion Paper, comparisons are made with systems/copyright laws/statutory licences in other countries. These comparisons, however – and especially in the area of education – are generalisations that show little understanding of how education is undertaken either in Australian schools or in schools overseas.

For example, in UK primary schools, there is a predominant trend to programs of work; i.e. schools 'take on' a mathematics program from a large publisher. This program provides day-to-day direction and resources to allow for a very prescriptive pedagogy and little room for teachers to move away from that prescription.

Australia, however, has a very different approach. We have a national curriculum that schools are asked to use as a guide to educating their students. Lesson structures and resource use are then very eclectic processes where teachers match the curriculum requirements against the group and against the individual standards and needs of their students. This approach is pedagogically stronger than a prescribed approach but requires a varied and creative resource collection from which teachers can choose to meet the needs of their students. This process is very, very different from that used in the UK. It necessitates an involvement in and management of copyright from multiple and varied sources while, in the UK, the teacher only has to manage the copyright and intellectual property of one publisher/product.

For Australian teachers to move from the current statutory licence will mean that education sectors will need to implement processes to manage both the acquisition and the management of their resource collections. R.I.C. deals a lot with individual teachers in individual schools, and knows that having to implement such processes will be a burden on the individual and the school and have an unwanted consequence of diluting the time the teacher has to do what they are fundamentally employed to do – that is, teach.

Another weakness in the argument put which compares the Australian system with the UK, Canada and USA is the size of the countries. How can we compare the provision of resources from Australian publishers servicing a population of 22 million people with countries that have 80 million and 300 million people?

The size of these markets creates an economy of scale for publishers that greatly reduces their need for effective copyright laws and provides an environment that allows an independent educational publishing industry to flourish. They would prefer more aggressive protection of their copyright, but have managed to survive purely due to the size of their market.

Canada with a population of 30 million is more comparable and if we look closely here we see an educational publishing system that is serviced by:

- (i) multinational, foreign-owned publishers; and
- (ii) USA publishers treating Canada as an additional state of the USA and providing resources created for another country's curriculum – using US English rather than the native English of Canada

If we want a true comparison, Canada may indeed be the most effective, but is it what we want for Australian students? We will lose our independent, Australian-owned publishing industry as a result and be serviced by large multinationals who will not create product for Australia as the market is too small, but instead adapt product created

for another country's curriculums. At a time when we are introducing and embracing an Australian education curriculum for the first time and have government recognising the need to resource schools, the move to a weak system of copyright and intellectual property protection is baffling at the very least.

Generalisations across the 'education' spectrum; print is very much alive

The Discussion Paper too often talks of the use of copyright and/or digital materials in "education", without showing any understanding of how differently copyright materials are used from a Grade 1 classroom through to a tertiary lecture hall. Our experience is that digital education has a far greater opportunity of becoming reality as the grades progress. This is largely due to the changing pedagogy that occurs in that movement from early years to tertiary.

The misconception is that everything is digital. But print is alive and strong in the current environment.

We need to be very careful before we bury the book in case we bury something alive. It is our experience that books are very much alive in the areas we publish to, and that the statutory licences have supported the growth in the choices that teachers have, and that these choices support the National Curriculum.

Yes, the use of digital textbooks and the associated hardware is becoming very commonplace in tertiary and at higher secondary levels, as the nature of the education delivery and related student behaviour are a good match.

However, our experience is that print material is still a very important part of the learning process in early years and primary schools. Again, the pedagogy virtually demands it; and this is without considering the capacity of lower socioeconomic demographics to fund the hardware required for digital learning resources.

Put simply, a Grade 2 teacher needs to know whether his or her students understand what is being taught before moving to the next stage of the learning pathway. Print material is still the best method of achieving this, notwithstanding the capacity of digital resources to support some elements of this process.

In this respect, we particularly note that the ALRC was asked to report on whether exceptions are "adequate and appropriate" in the digital economy, yet its proposed recommendations would have far reaching and adverse effects into the non-digital economy as well.

Currently, resources used in classrooms are protected by a statutory licence system that is familiar to all users and participants, flexible and cheap — and it works.

Cost of creation/digital dilution of quality

The concept that digital must be cheaper is something that needs to be corrected.

If recommendations for law reform are introduced based on this argument, we will see a gradual dilution in the quality of educational resources in schools. The argument both totally devalues intellectual property and does not take into account the considerable costs of maintaining a digital business while investing in the creation of new materials and new markets.

The vulnerability of digital data

Statutory licences serve a very strong purpose within the education systems: they allow for a strong, quality education by providing and protecting a broad and varied resource collection for schools. As some of these resources become available in digital format, that protection becomes weaker. The fragile level of protection that is available to digital content is a concern to many publishers and authors. The concern is all about how easy it is to infringe copyright on a digital product. To copy a book takes some time and physical effort. To not only copy but also to transmit to many sources a digital product takes seconds and a flick of a computer mouse.

To suggest that statutory licences – a system that is transparent, and supervised by both Parliament and the Copyright Tribunal – be abandoned and left open to 'fair use' interpretation or 'voluntary licensing' is a system that is abrogating its responsibility to the creative minds within its community.

Compensating copyright owners for use of copyright material in schools

Put simply, statutory licence provides creators and publishers with appropriate compensation for use of their copyright within education institutions that would otherwise be unauthorised and infringing. That compensation allows publishers the opportunity to proceed with what they do best: providing for the needs of their clients – that is, teachers and students.

Remove that compensation and you remove that capacity to create. Remove new creative product and publishers would have to dilute the quality of resource available to educators. A diluted resource pool means a diluted quality of education. Already the current federal Government through its Better Schools program has identified that schools are poorly resourced and has put in place a new funding arrangement to rectify this. The value of this money will be diluted if the available resource pool is reduced by removing statutory licence protection and compensation.

Most of the submissions from those speaking on behalf of the education sectors seem to have one over-riding complaint: that they're paying too much for copyright materials. It's difficult to see how paying less than \$17 per student per year can be too much to pay for giving teachers access to the widest possible range of copyright material without teachers having to stop to consider whether or not material is covered by a voluntary licence or whether or not using it without permission might be 'fair'.

The \$17 per student equates in the 'digital world' to one-twenty ninth of the cost of one i-Pad; one-third of the cost of a protective rubber cover for that i-Pad and one-three-hundredth of the cost of an interactive whiteboard. The cost of giving teachers the freedom to do what they need to do for their students without undue interference is apparently not significant to the bureaucrats who have made submissions on behalf of the school sectors!

The suggestions that publishers should take their own legal action against schools who contravene copyright under a voluntary licence or fair dealing or fair use environment would only serve to foster an environment of aggression to replace the existing one of provider and consumer working together to create quality education.

The effects on R.I.C. Publications, other publishers and creators

R.I.C. Publications is one of the leading supplemental educational resource publishers in Australia. The company also operates in Ireland, the United Kingdom, United States of America, South Africa, New Zealand and Malaysia. The widespread use and acceptance of our resources – which are in many cases comprised of “blackline masters” (that is, materials specifically created to be photocopied for student use) – is testament to the quality of intellectual property and the high level of publishing associated with them. For R.I.C. Publications to continue to develop new product ideas and to meet new curriculum challenges as are being faced in Australian schools today relies heavily on funds made available through the system of statutory licence.

Monies from statutory licences effectively finance our product development processes. We would expect to be forced to reduce our workforce of 35 staff by between 30 and 40 per cent if there was any significant reduction in statutory licence payments.

We have no doubt whatsoever that, as a small company, we would have enormous difficulty trying to get education sectors to negotiate with us, or trying to get them to pay anything for our blackline master materials. Their attitude to blackline masters is made very clear in the Copyright Advisory Group's submission to the ALRC's *Issues Paper*:

Copies made from blackline masters in Australia are treated as remunerable copies under the Part VB statutory licence. CAG understands that these copies are recognised as a fair use in the United States, and specifically excluded from remuneration as a fair dealing in Canada.

The basis for this statement in relation to Australia is, however, completely wrong, and shows that the Copyright Advisory Group is completely out of touch with the way publications from companies such as ours are actually used.

For example:

- when we publish blackline masters, we grant very limited licences to the individual teacher who purchases the item to make copies for his or her class only;
- our licence statements are very clear that the licence cannot be relied upon by an organisation as a whole;

- when we talk to schools and teachers, it is obvious that our blackline materials are used other than under the direct licence from us to the individual purchaser in his or her class only;
- the statutory licence in Part VB of the Copyright Act entitles people other than the individual purchaser to use those materials in these ways, but we are remunerated for that additional use under Part VB;
- in recognition that some use of our materials is done under a direct licence from us, and some is done under Part VB, a two-thirds discount is applied when it comes to the Copyright Agency remunerating us for use of our blackline materials (a discount applied as a result of the decision by the Copyright Tribunal in the 'Second Schools Case' in 2002).

However, if the ALRC's proposals ever became law, we wouldn't expect the Copyright Advisory Group to change its attitude that copying any of our material is a fair use or a fair dealing, and we would therefore have to consider either taking legal action against our customers, or putting up with the knowledge that our materials were being used beyond the scope of direct licences but without any compensation.

And the ALRC should note that its proposals are already having an effect on businesses. At R.I.C. Publications we need to plan up to two or three years ahead, so we are already having to consider adjusting budgets, curtailing expenses and thinking twice about product development investments, just in case the relevant government accepts proposals such as those in the Discussion Paper. The ALRC's Discussion Paper is therefore extremely destabilising and irresponsible: while it focuses on a nice abstract view of what might work as an academic idea, and what might bring about a nice tidy Act, it appears that the ALRC has no idea that its proposals have already begun to trigger adverse commercial consequences, possibly due to its failure to comprehend or properly consider the commercial ramifications of its proposed recommendations.

Just in the period taken to write this submission, we have been contacted by three of our authors, each stating that without the protection of statutory license, there is little point them making the effort to create intellectual property that isn't valued in the forum for which it is written.

The undervaluation of intellectual property at the expense of the 'users' needs.

The ALRC's proposals, if adopted, only take a short-term view – a view that would see a gradual dilution of the high quality of intellectual property emanating from Australian authors and publishers.

The ALRC's Discussion Paper is very biased towards the end-user of the intellectual property. While the end-user is an essential part of the equation, they are at the 'end' of the process. Again, the ALRC seems to have forgotten it is supposed to be looking at how the digital economy works, and not focusing on whether or not the end user wants to pay for material.

If, as the ALRC seems to suggest, the end user indicates they do not wish to pay for the use of intellectual property, or only at a reduced rate, then it is natural that the quality of the resource will reduce accordingly. The ALRC must resist the temptation to believe uncritically that digital means free or cheap, just as we reject the assumption that has been put to the ALRC by education groups that everything on the internet is (or should be) free.

R.I.C. and other publishers are trying to establish and maintain businesses in both the fast-changing digital and print economies: the ALRC's proposals ignore this, with the ALRC putting forward proposals that might, in the short-term, benefit users if immediate cost is the only consideration, but that in the longer term would operate to limit Australian content for Australian education without any corresponding long-term cost benefits.

In relation to this, we see that the ALRC provides next to nothing by way of economic analysis as to how its proposals would operate in practice to benefit the digital economy.

Increased administrative burden for teachers

Currently, teachers are protected in their use of copyright by statutory licence, provided they stick to the easily understood general limits of 1 chapter or 10%. As explained earlier in this submission, Australian teachers

(especially in primary and early years) have an eclectic approach to applying the curriculum and as such have a broad and varied resource collection and are always looking to acquire new resources (not always respecting the resource copyright!).

To move from this current system to the suggested system (albeit without detail), teachers would be faced with an administrative burden that would greatly reduce the time they have available to teach. Australian teachers are already stretched - do we stretch them further - and in the process dilute the quality of what we provide our children?

Reduction in content volume and quality available to teachers

The removal of statutory licences will undoubtedly reduce the volume and quality of educational resources available to schools in Australia. Currently, R.I.C. Publications publishes in excess of 60 new educational resources every year. Without the compensation provided by the statutory licence, or with the uncertainty created by a 'voluntary licence', we anticipate our output would be reduced by up to 40%, with the quality of intellectual property and publishing input to reduce equally. This does not mean that the void will not be filled, it will — but not by independent Australian publishers and creators. Instead, it will be filled by some or all of the following:

- (i) International publishers bringing product created for other education sectors and 'dumping' in Australia. Australia was forced into this level of resource provision in the 1970s before the emergence of the current education industry.
- (ii) Education departments/systems attempting to fill the resource void with internally-published product. This has been tried and abandoned as an expensive impost on education budgets, creating resources that provide schools with little or no choice and variety. The Learning Federation is the classic example of this. Hundreds of millions of dollars spent on a digital resource environment that no-one uses. Not to mention the beauracritic costs that tend to be associated with government.
- (iii) Teachers reverting to the old practices of creating their own resources - further adding to the existing time impost on teachers.

Increased administrative burden for content creators to manage licensing arrangements

The suggested 'voluntary licences' as a replacement for statutory licence provide no detail on how this process may be applied nor the willingness of parties to be involved. One can only assume that creators and publishers will now have to employ staff and legal representation to constantly be negotiating 'voluntary licences' from what could be as micro as a licence with individual teachers through to the state and federal education departments — a further dilution of funds available for resource creation.

6.5 /6.9The assumption that rights holders would not want to be protected or remunerated by statutory licenses

In several places in the report it is suggested that authors, creators and publishers are being forced into statutory licences they don't wish to be part of. From the experience of our company and our many authors, we know not one individual who shares this concern and can vouch for 100% support for the statutory licence system.

How is a voluntary licence better suited to a digital age?

The regular assertion that a voluntary licence system is better suited to a digital age is not substantiated anywhere in the report, yet is a pivotal argument by the ALRC in its push for removal of statutory licences. As mentioned several times already in this submission, the digital age is not something that is occurring universally across all sectors of the education system. We also suggest elsewhere that the nature of digital content and its propensity, by its nature, for copyright infringement suggests that instead it will require the protection and support of a statutory licence system even more than print material.

Also, voluntary licensing would mean that our administrative costs as a publisher will be higher, and we would have to either pass these administrative costs on to our customers, or reduce our investment — particularly for publications that might be exciting but riskier.

We also very much doubt that voluntary licensing will be cheaper for individual schools, particularly once their administrative costs and the costs of the time teachers take to make copyright decisions are taken into account. We note also that schools could not expect to be given the same types of 'administrative convenience' and 'bulk' discounts that are applied under the statutory payment schemes.

6.4 This reform should allow schools to take better advantage of digital technologies and services.

If we define 'taking advantage of' as meaning it will cost schools less then this statement is very true, at least in the short term and if the ALRC ignores the cost of the administrative burden on individual teachers. Without the protection of a statutory licence, individual teachers will need to make hard decisions about whether or not their use of particular material will infringe digital copyright.

As a small publisher, however, we fear that we will not be able to detect whether or not teachers are infringing copyright. Where we do detect what we think are infringements, it looks likely the relevant department or school system would automatically raise a 'fair use' defence, and then we would need to go to great cost to argue against this. However, given there is no body of case law in Australia on fair use, and given that it is likely to take years before people have sufficient idea about how courts will assess what might be and what might not be 'fair use' or an expanded 'fair dealing' for education, the reality is that a lot of the time, we might just need to let infringements go. The ALRC sees this system as providing 'flexibility', but we see this is just a way we will be placed at a great disadvantage in terms of our business.

More broadly, however, we want the ALRC to spell out what it is that Australian educational institutions can't currently do that would be assisted by a fair use regime without the statutory licences. In particular, R.I.C. doesn't see how addressing any 'technical copying' arguments (at 6.54 and following) would be addressed by abolishing the statutory licences, particularly as technical copying is either already free under the Copyright Act (see, for example, sections 43A and 43B) or educational institutions can ask the Copyright Tribunal for a valuation.

The ALRC's statements here all seem to be about cost, not access or use – and this against a background where the actual cost that educational institutions pay is extremely small (and even smaller if it's just digital use that is counted).

6.20 Education institutions want repeal to save money.

The sections of the education departments that have made submissions to the ALRC are not at the coalface of our schools; rather they are the bureaucratic and political sections of these institutions that drive this process but know little about what happens in a classroom. Education happens in the classroom. Those people in classrooms know of the current system and how it allows them to do their job well. A number of R.I.C.'s staff are ex-teachers; its authors are teachers or ex-teachers. As teachers, they would not want change. They do want clarity on digital material and we should be putting all our energies into creating a system where creators of intellectual property in digital format have protection of that property and a system that values their contribution to society.

Instead, the ALRC is proposing an approach where we throw the baby out with the bath water, based on some assumption that the world will be digital when we wake up tomorrow morning.

The role of the publishing sector in education - we provide the resource. If it doesn't work, it fails; we fail. That system works and provides resources that 'work' too. The ALRC's paper, however, attempts to strike a divide between the creators/publishers and the education users. That divide is not being driven by any of these parties, but instead by the bureaucracy that exists between them. The educational publishing industry in Australia provides an invaluable resource to Australian schools. Schools are given the task of implementing and teaching a curriculum. To do so they need resources. Out of this need has developed a vibrant, local and enthusiastic educational publishing industry. That industry lives or dies by its own actions. Publishing is a business of risk taking. If we get it right, we survive and schools are happy. If we get it wrong, we die and schools look elsewhere. This is private enterprise and the right of choice working at its best.

Statutory licences do not remove this risk, but they reduce it slightly and allow breathing space for publishers and creators to develop even better resources. Without statutory licences there will be a significant reduction in the number of Australian educational publishers and all that is associated with that part of the publishing industry.

Parallel to this demise will be the dilution of quality educational resources available to Australian schools by Australian authors and Australian publishers. At a time when we have our government focused on the quality of schools and the level of resourcing, this report appears to be swimming strongly against the tide.

Willingness of parties to negotiate in good faith

Currently, the publishers and creators of Australia would have little faith that voluntary licences were capable of being negotiated in good faith. The bureaucracy that has made submissions on behalf of schools has shown no indication that this process is on its agenda and has done little except look for ways to reduce expenditure on the statutory licences, even though its own staff find these licences invaluable.

The government alternative

Over the past ten years, governments, both Federal and State, have embarked on projects that have aimed at providing a free resource collection to schools; two examples being the 'Learning Federation' and Queensland Government resource programs. The costs involved in the creation of these projects have been significant and the take up by teachers equally 'insignificant'.

This approach harks back to the mid-20th century when education departments created resources and even owned printing companies to complete the printing. That approach was abandoned due to the significant costs involved and the inability of those systems to remain relevant. It has been replaced by an educational publishing sector which is accountable by the simple nature of the commercial business model. This sector survives because it provides what teachers need. The approach of the Learning Federation is driven by the delivery model of online content and has paid little regard to the actual content quality, hence the poor acceptance in schools. The big question that needs to be raised here is the accountability processes for the large amounts of money expended over many years to create a white elephant. It could be suggested that with the money spent on the Learning Federation, the federal government could have purchased the entire Australian publishing industry and the collected expertise and skills that went with it.

This approach is effectively government attempting to remove publishers and their statutory licence payments by entering into competition with them in the provision of resources. How would other industry sectors such as agriculture or manufacturing react if government not only set up in opposition, but then provided their product for free!

In the past when R.I.C. Publications has approached these government initiatives (Learning Federation etc.) to suggest involvement and support from the private publishing sector, that involvement has been flatly refused. This attitude from government does not create an environment where any future negotiation of voluntary licences would be seen as a positive one.

Reduced income = Increased costs

The related reduction in publishers' and creators' income that would be brought about by the removal of statutory licences can only lead to those publishers increasing the prices of their resources. As identified earlier, R.I.C. Publications would have to look at a significant downsizing of its business infrastructure, and the other side of the equation would be an increase in prices. This model would be repeated throughout the industry, resulting in an overall increase in costs of resourcing schools.

Conclusion

We have a system in Australia of statutory licences in education that is accepted by publishers, creators, authors and teachers. This group comprises the creators, owners and users of copyright. There is one group opposed to statutory licenses: a small but vocal part of the bureaucracy in the education departments who are essentially quibbling about the minuscule costs of the current system and who have made submissions to the ALRC that represent a shortsighted approach that just looks at the money going out, and who have not produced any substantial or credible evidence to back up their sometimes outrageous claims.

We submit that the current system is not only effective but fair: it is valued by all its users and that any shortcomings in that system will not be solved by the wholesale dismantling of the current system for reasons that are not supported by commercial experience or hard economic evidence.