



31 July 2013

Ms Sabina Wynn
The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
E-mail: info@alrc.gov.au

Dear Ms Wynn

Submission: ALRC Discussion Paper *Copyright and the Digital Economy* (ALRC DP 79)

Allen & Unwin is Australia's largest independent book publisher, and is Australian owned and operated. We publish 250 new titles every year, including fiction, general non-fiction, children's books and books for the university market. The majority of our books are written by Australian authors and our primary market is Australia. We publish in both print and digital formats.

The ALRC is proposing radical changes to the Copyright Act. In this submission we will focus on the proposed **abolition of the statutory licence** for educational copying, and its proposed replacement by **voluntary licencing**, and the proposal to replace fair dealing with **fair use**.

In these areas it seems to us that the ALRC's proposals would benefit users of both print and digital books, as well as lawyers, at the expense of authors and publishers. We do not see how these changes would contribute to the general development of the digital economy in Australia, which we understand to be the brief of this review of the Copyright Act. If anything, the likely increase in our costs and the reduction in revenue from both digital and print publishing would reduce the value of works published digitally. It would certainly hamper Allen & Unwin's investment in Australian-authored digital content.

Australian book publishers are currently under considerable commercial pressure, partly as a result of the shift to digital formats and distribution channels, and partly because of the general retail downturn in Australia over the past couple of years. The steady decline in sales of print books in Australia has not been fully offset by the rise in ebook sales, and these trends are ongoing. Of course the book industry has to adapt to commercial realities, but it

83 Alexander Street
Crows Nest, Sydney
NSW 2065
Unwin PTY LTD
Australia
003 994 278

PO Box 8500
St Leonards
NSW 1590
Australia

ph: (61 2) 8425 0100
fax: (61 2) 9906 2218

info@allenandunwin.com
www.allenandunwin.com

Allen &
ABN 79

would be a serious blow if at this very challenging time the Australian government were to introduce the radical changes to copyright law proposed by the ALRC.

PROPOSED ABOLITION OF THE STATUTORY LICENCE AND REPLACEMENT WITH VOLUNTARY LICENSING

For book publishers and authors, the statutory licence for educational copying is a practical mechanism for obtaining modest recompense for the high levels of copying of our publications in schools and universities. It requires very minimal input from copyright holders, and it enables the interests of individual authors and publishers of all sizes to be represented by one body—Copyright Agency—with the staff, skills and systems to do the job. The payments from Copyright Agency are important and valuable income for Allen & Unwin and our authors.

1. *Disruptive transition*

We are seriously concerned that the transition to voluntary licensing could be slow and involve protracted negotiations between educational institutions and Copyright Agency and possibly sustained litigation, or protracted individual negotiations. During this time, payments for copying may be withheld, which would be damaging for Allen & Unwin, and for our authors too.

2. *Reduction in costs to schools and universities*

Some educational groups are seeking to reduce the amount paid for copying in schools and universities under the statutory licence. This is despite the fact that at \$16 per school student and \$21 per university student, annual fees currently paid for copying are low in relation to the voluminous copying of published works in educational institutions. If some educational institutions seek to reduce these amounts, and if they insisted on pursuing this in lengthy negotiations with Copyright Agency, we are concerned that this could lead to publishers being pressured to enter individual negotiations with individual schools or universities, or maybe state departments of education (we were approached along these lines by a major educational body for a voluntary licence a couple of years ago, so the ALRC can't assume all licensing would be handled by Copyright Agency).

Allen & Unwin does not have in-house legal staff and we simply cannot afford the cost to employ a lawyer or the time for senior staff to undertake multiple complex negotiations under which we are likely to fare poorly against well-resourced and powerful educational and other institutions. We also have no capacity to monitor levels of copying in a school or university, and would have to rely entirely on their internal interpretation of fair use and monitoring, which is likely to tend to favour the user.

3. *Implications of varied voluntary licenses in educational institutions*

Under the statutory licence and educational fair dealing, we have a standardised national system for copying in educational institutions. It is well understood by publishing staff, senior education staff and librarians in educational institutions, and some understanding among teachers and university lecturers has been developed over the years.

Under voluntary licensing, it's entirely possible that arrangements could vary from one group to another, and from one publisher to another. For example, rates for open ended copying may be agreed in one group of schools or universities (eg: multiple chapters from books, not just the amount currently permitted, commonly known as the '10% rule'). In others, the current formula may apply, with permission to be cleared if a teacher wants to copy more than 10% of a work. It is likely that staff in organisations covered by voluntary licences (such as teachers) will be unclear as to what is and isn't covered, and we believe they will struggle to work with the provisions of a voluntary licence (or, indeed, parallel voluntary licences from a range of organisations, as in the UK) alongside the quite vague principles of the fair use test.

Allen & Unwin's staff regularly field queries from teachers and organisations who need advice as to whether their use of works is covered under fair dealing, and we would expect the number of such queries to increase under voluntary licensing. It would be difficult and time-consuming for permissions staff in publishing houses to interpret various voluntary licence agreements on a day-to-day basis, alongside the fair use test. In-house permissions staff are usually relatively junior employees, and we think that, even with training, they will require much more support to do their jobs properly. All of this adds up to higher costs to publishers in handling permissions issues, yet most likely a reduced revenue stream.

While it might look like flexibility to legislators, in practice we believe voluntary licensing would be confusing, time consuming, and therefore more costly than the current system, for everyone involved, on an ongoing basis.

If educational institutions have complaints about the administration of the statutory licence by Copyright Agency, then repealing all the statutory licences—including the one for people with disabilities—is a strange way of addressing these complaints. Many of those complaints appear to be directed at cost, which is already supervised by an independent body (the Copyright Tribunal). Other complaints could surely be addressed by amending the statutory licence. We also think a standardised national system is in everyone's best interests: the needs of schools and universities don't in reality vary much from institution to institution, or from state to state.

PROPOSED ABOLITION OF FAIR DEALING AND REPLACEMENT WITH FAIR USE

A change from fair dealing to fair use seems to have the potential to generate much confusion for everyone on an ongoing basis, extra work for our staff, expensive litigation, and a likely significant long-term loss of revenue from uses of our works.

As a book publisher, Allen & Unwin is affected by fair use in both directions, ie: by reproduction of the works we publish by users, and by the inclusion of third party material by our authors in their works.

1. *Implications of fair use for use of Allen & Unwin works*

Working with the fair use checklist is challenging, and not everyone who needs to make decisions as to whether copyright clearance is needed for an item will have received specialised training. For example, 'non-consumptive' use could be readily misinterpreted by a user inexperienced in copyright. Also, many teachers understandably believe that any educational use of a work should be at no charge, because of the inherent public value of education and because copying may be undertaken in a not-for-profit context. We also seriously doubt teachers and trainers are in a position to reliably assess the market impact of their copying as fair use requires. Overall, we believe heavy users of works such as teachers and trainers will be inclined to interpret the fair use test to mean they don't need to pay for copying even large proportions of works.

Allen & Unwin is also concerned that under fair use, the onus will be on the copyright holder to establish whether or not a use is fair, rather than on the user to justify their use. It would be up to copyright owners to pursue legal action to clarify local frameworks for fair use. As noted, Allen & Unwin is in no position to monitor use of our works across the community, and we cannot afford to litigate against abusers in the manner which seems to have been required of copyright holders in the US under fair use.

2. *Implications of fair use for inclusion of third party material in Allen & Unwin publications*

We think our editorial staff and authors would find it more difficult to work out what they can and can't use from other literary works under fair use. We are also concerned that we may be vulnerable to litigation because of the vagueness of the fair use model as it has been proposed.

As a commercial publisher of ebooks and other digital content, Allen & Unwin is already active in the digital economy. However we will only be able to maintain our investment in high quality Australian authored works if we are supported by copyright law that acknowledges the rights of creators and the rights of companies such as ours that invest heavily in the highly risky field of publishing, as well as those of users such as individuals, educational institutions and libraries. The ALRC proposals for voluntary licensing and fair use seem to strongly favour the interests of users of print and digital works, and correspondingly reduce the opportunity for creators and publishers of both printed and digital content to receive fair recompense for their work.

We trust the ALRC will reconsider its proposals in preparing its final report.

Yours sincerely

Elizabeth Weiss
Academic and Digital Publishing Director
eweiss@allenandunwin.com
ph 02 8425 0107 (direct)