

Copyright and the Digital Economy

Submission by Thomson Reuters to the ALRC

1. Introduction

1.1 The proposals set out in the *Discussion Paper* are far-reaching in nature and Thomson Reuters believes they not justified on the evidence.

1.2 Thomson Reuters identified four main “areas of concern” in its submission on the *Issues Paper* (**Core Issues**):

- (a) data and text mining;
- (b) educational use;
- (c) libraries and archives; and
- (d) “fair use”.

1.3 Thomson Reuters does not support the ALRC’s proposals in so far as they relate to the Core Issues.

1.4 As Thomson Reuters stated in its submission on the *Issues Paper*:

“The reality is that Thomson Reuters has invested significantly in ensuring that its content is readily available in a variety of formats at a reasonable commercial price and there are therefore very few circumstances in which a user would need to look at an exception to gain access to Thomson Reuters’ content for use in a digital environment. For example, in addition to licensing the content that it updates on a regular basis in digital form, Thomson Reuters has rapidly responded to market interest and has also released many of its older print publications in pdf format at a nominal charge to ensure that such publications are easily accessible for research.”

1.5 The *Discussion Paper* ignores this submission. The ALRC has not dealt with the Core Issues in a practical context.

1.6 Thomson Reuters is dealing with the challenge of the digital economy by making significant changes to its publishing and licensing activities. Other publishers and copyright owners are doing the same. These changes are demonstrably responding to the legitimate needs of users of copyright material.

1.7 Thomson Reuters has invested heavily in developing its content and product delivery capabilities. Over the past decade, Thomson Reuters has undertaken five major online platform releases: *Westlaw Australia*, *Legal Online*, *Tax and Accounting Online*, *Westlaw AU* and *Checkpoint*. Thomson Reuters has supported these releases with investment in:

- (a) online platform development, involving a large team of analysts, software engineers, testers and content experts;
- (b) development of content management and publishing systems, to ensure content currency, accuracy and functionality requirements. These involve large scale projects with third party systems and developers, local developers, editorial consultants and testers; and

- (c) content development, involving content classification and large scale XML mark-up and testing.
- 1.8 Such investments commonly require expert teams of 20 or more staff to work on a project for periods of up to several years.
- 1.9 In addition to major online releases such as those mentioned above, Thomson Reuters typically invests many millions of dollars each year in Australia in ongoing platform and content enhancements (and also globally on investments that have been leveraged for use in the Australian market), constantly upgrading and improving the online experience offered to customers.
- 1.10 These investments have had the following impacts:
- (a) XML conversion:
 - (i) this huge project was undertaken to enable the subscriber base to more effectively have access to Thomson Reuters' content sets in a variety of different ways, including online and via email;
 - (ii) the XML conversion enabled better linkage between discrete content sets (both public and proprietary). This in turn helps subscribers to more efficiently find answers which in turn drives savings and better output by subscribers; and
 - (iii) in addition, the XML conversion enables meta level data to be captured which improves information about the content sets published and the ways in which it can intelligently be used.
 - (b) The massive investments in Thomson Reuters' legal and tax and accounting online platforms that provide tools to enable the customer to have easier and more effective access to content.
- 1.11 Advances in Thomson Reuters' technology are not restricted to online delivery. Thomson Reuters has invested millions of dollars in recent years in delivering sophisticated tablet solutions and in preparing its content for optimal consumption on iPads and similar devices.
- 1.12 The ALRC ignores the evidence to this effect in many submissions in favour of hypothetical considerations. It is difficult to escape the conclusion that its proposals have been influenced primarily by academic considerations.
- 1.13 There is little evidence in the *Discussion Paper* that the problems it identifies actually exist in practice. The ALRC does not appear to have conducted its own research. Rather, and notwithstanding the submissions of copyright owners, the ALRC appears to have accepted the assertions of users as to the existence of the types of "problems" the proposals seek to remedy. The ALRC could have sought to test what copyright owners put to it, but it has not done so.
- 1.14 In summary, the ALRC proposals are a system of users' rights, not a balanced regime. The proposals:
- (a) completely ignore the concerns of Thomson Reuters expressed in response to the *Issues Paper*;

- (b) appear to virtually ignore similar submissions of other copyright owners – for example, the submissions of the respected umbrella body, the Australian Copyright Council, and the senior Australian copyright collecting societies, Copyright Agency, APRA|AMCOS, Screenrights and ARIA; and
- (c) are internally inconsistent – suggesting an ideologically-driven approach. Why, for example, has the ALRC recommended the repeal of:
 - (i) the statutory licences in Parts VA and VB – but not the glaringly obviously anachronistic statutory licence in Division 6 of Part III of the Act;
 - (ii) section 45 (relating to reading or recitation in public for a broadcast) – but not sections 46 and 106 (relating to performances [that are like readings and recitations] at premises where persons reside or sleep);
 - (iii) section 47 (relating to broadcasting) – but not sections 47AA and 110C (relating to simulcasting);
 - (iv) sections 51A and 51B (relating to reproducing for the purpose of preservation) – but not section 51AA (relating to reproductions and communications in care of the National Archives of Australia), or most of the other library provisions;
 - (v) section 67 (relating to incidental filming or televising of artistic works) – but not section 65 (that relates to the filming of sculptures); and
 - (vi) section 70 (relating to reproduction for the purpose of including work in a television broadcast) – but not sections 72 or 73 (that relate to including work in imitations and reconstructing [protected] buildings).

2. “Problems”

2.1 The “problems” identified in the Discussion Paper are not actual problems, they are phantoms – at best they are almost exclusively hypothetical possibilities identified by academic commentators; such as:

- (a) the lack of appropriate access to copyright material – when, in practice, copyright material is made available by copyright owners on reasonable terms;
- (b) impliedly, the unreasonably high cost of copyright compliance – when, in practice, consumer protections are in place and there is no evidence of system failure;
- (c) a lack of creativity and freedom of expression – when, in practice, there is no evidence of any such thing;
- (d) the complexity of the law – when, in practice, legal regimes are necessarily complex and nuanced, and the users involved in copyright at a level of sophistication that requires professional advisors, have ready access to it; and
- (e) inflexibility in the copyright regime – when, in practice, copyright owners have been extremely successful in offering solutions to users’ reasonable needs.

- 2.2 The only way to properly identify practical concerns is to undertake an inquiry into the practice of copyright. The ALRC has not done this. The *Discussion Paper* does not provide a basis on which the government can:
- (a) assess the extent to which “problems” actually exist; or
 - (b) implement changes to the copyright law that would:
 - (i) develop the national digital economy;
 - (ii) harness the benefits of new technologies; or
 - (iii) advance our country’s education, research or culture.

3. Data and text mining

- 3.1 The ALRC recommends a fair use exception or, alternatively (if that is not enacted), a fair dealing exception for “non-consumptive” use. In other words, use “that does not directly trade on the underlying creative and expressive purpose of the material.”
- 3.2 This proposal is unworkable. The reference to a “creative and expressive purpose” assumes that the value of a protected work can only be measured by reference to a market for works of that kind. In other words, that copyright owners are not entitled to be compensated if a user of their work exploits their work in other markets.
- 3.3 The measure of copyright value is not limited to uses that compete with the original. Copyright owners must be rewarded according to the usefulness of their work generally.
- 3.4 This is illustrated by the fact that the digital environment enables users to access vast quantities of data, but the usefulness of mined data depends on users being able to verify the provenance of the information the data contains. Such provenance has a value, which must be recognised and its creator attributed and rewarded.
- 3.5 As Thomson Reuters stated in its submission on the *Issues Paper*:

“If Thomson Reuters is unable to derive revenue from those who wish to mine its data, it will be restricted in its ability to invest in ensuring that its content is updated and enhanced. That will inevitably lead to a reduction in newly published output which is exactly counter to the stated aims of this Enquiry. Moreover, in areas such as legal publishing, this will inevitably have a detrimental effect on confidence in the development of legal jurisprudence, which is dependent on appropriate editorial and quality control from suitably qualified sources.”

4. Educational use

- 4.1 The ALRC recommends preserving exceptions for educational users, either in the form of fair use (and repeal of the statutory licence) or the statutory licence plus a fair dealing exception. In short, the ALRC’s proposals would give educational users more scope for unremunerated uses of protected works.
- 4.2 Professional publishers, such as Thomson Reuters, pride themselves on their editorial and quality control. Those who use Thomson Reuters’ publications rely on this and expect Thomson Reuters to maintain its high standards – as Thomson Reuters stated in its submission on the *Issues Paper* “to support a quality assured body of knowledge.”

This is especially so in “critical minority interest subject areas” that depend on the investment of publishers with the specialist skills necessary to service publications in the field. There is ample evidence of the market regulating itself.

- 4.3 The proposals are more likely to put existing commercial arrangements at grave risk than to be of any long-term benefit to education.
- 4.4 As far as the statutory licence is concerned, if the existing regime is repealed and owners offer educational users voluntary licences to cover all their uses, history suggests that most educational users are unlikely to enter into such licences “voluntarily”. Copyright owners like Thomson Reuters will have to enforce their rights in circumstances where, as in the past – before the enactment of the statutory licence – it will be extremely difficult for owners to identify infringing activity. This has been the experience of Thomson Reuters in America.
- 4.5 It is noteworthy in this context that on 19 July 2013, Independent Schools Victoria circulated an information sheet to its principals, deputy principals, heads of curriculum and heads of library and information resources advising them, in short, not to oppose the ALRC’s recommendations. Those among the recipients who are authors will be forced to choose between their rights as creators and the wishes of (and pressure applied by) their employer.
- 4.6 The experience of Thomson Reuters in Canada – which has adopted a "user rights" regime similar to that proposed by the ALRC – is that the new regime leads to yet more litigation as many schools and ministries of education across Canada refuse to re-sign licences with Access Copyright (Canada’s English-language copyright collective).

5. Libraries and archives

- 5.1 The ALRC recommends retaining some of the existing library provisions – thereby preserving certain exceptions for libraries – but also giving libraries the added benefit of a fair use exception. In short, the ALRC’s proposals would give libraries more unremunerated uses of protected works.
- 5.2 Thomson Reuters has built extensive archives. It has commercialised these, as it is entitled to do. It is legitimately exploiting its copyright.
- 5.3 Public libraries compete with companies like Thomson Reuters and also build extensive archives.
- 5.4 Thomson Reuters believes that whilst public libraries are also entitled to commercialise, their libraries they should not be permitted to do so by exploiting the copyright belonging to others, such as Thomson Reuters, or on terms that enable them to undercut their commercial rivals. Special pleading for libraries can only be justified for copyright-related reasons if the subject works are:
 - (a) unavailable (as distinct from “orphaned”); or
 - (b) only available at unreasonable prices – in which case, the remedy should be access to a rate-setting tribunal, not compulsory acquisition.
- 5.5 There is no evidence that works published by Thomson Reuters are not available to libraries within a reasonable time at an ordinary commercial price.

6. Fair use

- 6.1 The ALRC recommends a broad-ranging fair use. In short, the ALRC's proposals would give all users more unremunerated uses of protected works.
- 6.2 Thomson Reuters has responded appropriately to the digital environment by moving online (with a substantial presence) and investing significant sums in building databases with sophisticated indexing that are readily searchable as evidenced elsewhere in this submission.
- 6.3 The ALRC proposals appear to accept the technological imperative: that users must be able to use the available technology to the extent of its technical capability. Thomson Reuters believes that this inevitably leads to uses that are uncontrolled and uncontrollable. Acceptable levels of "fair use" will inevitably be matched or exceeded in number by instances of "unfair use". The problem for copyright owners will be that unfair uses will be extremely difficult to identify and track, let alone control or moderate. Copyright infringements in the digital environment are notoriously difficult to prevent, particularly if the law is amended to widen exceptions to infringement.
- 6.4 The ALRC appears to have given no weight to:
- (a) the new digital business models developed by Thomson Reuters; or
 - (b) the risks involved in building secure and stable platforms that have the capacity to adapt to rapidly changing technology.
- 6.5 We draw the attention of the ALRC to *Maiden Civil (P&E) Pty Ltd v Queensland Excavation Services Pty Ltd & Ors* [2013] NSWSC 852. This case concerned the recently introduced personal property securities law. The Court looked to relevant foreign jurisdictions (in this case, New Zealand and Canada) for guidance, rather than crafting its own (possibly narrower) interpretation. If Australian Courts took that approach to fair use, and looked to American jurisprudence for guidance, the outcome could be most unfair to copyright owners. This is because American fair use cases are decided against the background of statutory damages.
- 6.6 The effect of statutory damages in American fair use cases has been to encourage Courts to give "fairness" a relatively wide meaning. It is only the more egregious conduct that is held not to be fair (and thus expose the user to punitive statutory damages).
- 6.7 Statutory damages are not available in Australia. It would therefore be most prejudicial to Australian copyright owners if Australian Courts were to interpret an Australian fair use by reference to American fair use cases with similar facts.
- 6.8 On a practical level, the proposals of the ALRC would radically shift the onus of enforcing copyright. The current provisions require users to find owners – in order to seek permission – whereas the ALRC proposals would require owners to find infringing users – a much more difficult task.
- 6.9 Thomson Reuters believes that such a reversal of the onus cannot be justified unless it has been shown that owners either don't give permission when they ought to do so, or insist on unreasonable terms. There is nothing in the *Discussion Paper* to support either contention.