RESPONSE TO THE ALRC discussion paper "Copyright & the Digital Economy" BY THE AUSTRALIAN DIRECTORS GUILD
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ABOUT THE AUSTRALIAN DIRECTORS GUILD

This submission is made by the Australian Directors Guild (ADG), the industry association representing the interests of film and television directors, writer/directors, documentary filmmakers, animators and independent producers throughout Australia. Formed in 1980, the ADG has over 600 full members nationally. These members include directors in feature film, television drama, documentary, animation and new media. They include some of the highest profile directors in the world including BAZ LUHRMANN, PETER WEIR, GILLIAN ARMSTRONG, FRED SCHEPISI and PHILLIP NOYCE to name a few.

The ADG works to promote excellence in screen direction, to encourage communication and collaboration between directors and others in the industry, and to provide professional support for its members. It maintains a high profile and leading cultural and policy role through its efforts to address issues affecting the industry from a broad perspective.

The ADG is affiliated through the International Association of English-Speaking Directors Organisations (IAESDO) with the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU), the Directors Guild of America (DGA), the Directors Guild of Canada (DGC), Directors UK, the Screen Directors Guild of Ireland (SDGI) and the Screen Directors Guild of New Zealand (SDGNZ).

The ADG is also a member of the Australian Copyright Council.

EXECUTIVE SUMMARY

The ADG cannot support the proposals contained within the ALRC discussion paper on "Copyright and the Digital Economy – Discussion Paper". The main proposal to replace the current system of Fair Dealing and statutory licenses with Fair Use would do nothing but damage the many thousands of content creators in this country and as one colleague said "make a lot of money for lawyers". It is not surprising to discover that there were no content creators involved in the framing of this paper.

It is interesting to note that all the supporters of a Fair Use position in the discussion paper are not creators but companies who profit from using other people's work for nothing.[1]

All the examples that the ALRC has used in its support of Fair Use have come from large institutional bodies that have a vested interest in reducing the ability of content creators to control their work. There is a decided lack of commentary from content creators who oppose the Fair Use in this discussion paper.

The ALRC has been tasked by the government to look at copyright and see how it can be improved to aid in the development of the digital economy. Nowhere in this discussion paper does the ALRC prove their case that a change to a Fair Use system would assist in the development of better economic outcomes for Australia. In fact the lack of any "economic" analysis seems telling. It seems that the word "economy" has forgotten in the discussion. The discussion paper is also using the US system as their model with examples from that jurisdiction but fails to recognise the vast differences in our copyright and legal systems.

If this paper is to provide a case for change to improve economic development in the digital domain then there needs to be a more support for a business case. There has been no slow down in technological development, no restriction to people accessing content. The Optus Now case is a classic example of a large company exploiting someone else's content for their own gain. It is a testament to our copyright laws that they we held accountable and could not get away with this exploitation. Did any consumers lose out? No, they were able to access the content on devises legally. In fact no consumer would have been aware of the issue unless you were an Optus Now customer who suddenly didn't get what he or she had been promised by the company. They could then have opted for another provider who could legally provide the service.

Where is the evidence that Fair Use will enable more economic development and increase access by consumers?

In terms of statutory licenses, we do not object to the move to voluntary licenses as long as Fair Use is not introduced. The combination of Fair Use

[1] Copyright and the Digital Economy – Discussion Paper, May 2013. pp65-69.

and voluntary licensing will see a massive reduction in income for content creators as larger organisations use material claiming Fair Use. In many cases, the content creators will not pursue infringements of their copyright due to their lack of resources and the runaway train “free use” rather than “fair use” will begin. The ALRC also seems to think that the use of statutory licenses excludes voluntary licenses. It does not.

We believe that a move to Fair Use will:

- → reduce incentives for producers of creative content;
- → make it difficult for end-users to use third party copyright material with any confidence or certainty; and
- → exacerbate existing inequities for individual creators.
- → operates as a defence to allegation for infringement, therefore places onus on copyright owner to litigate;
- → offers little certainty for users. Without specific guidelines this is unlikely to be helpful to cultural institutions;
- → leave issues of fairness to the courts.

The following pages look in more detail at some of the specific issues that the ADG is concerned about. We will only be commenting on those issues that affect the screen sector.

We also support the submissions by Screenrights and the Australian Copyright Council.

1. RESPECT FOR AUTHORSHIP AND CREATION

The guiding principle of respect for authorship and creation, which is so eloquently enunciated in the discussion paper, is of paramount importance to all creators of content. It is upon this principle that all decisions about any change to the Copyright Act should be made. This not only includes economic rights of creators but moral rights as well. The ALRC acknowledges that any change to the Copyright Act should

"*operate in a way that acknowledges and respects the rights of authors, artists and other creators."*[2]

In 2006 a change to the Copyright Act recognising the rights of screen directors was enacted because of moral rights and the anomaly that this created in the Copyright Act. This recognition of the director also provided an economic benefit. This benefit was one to be negotiated with the screen industry and was always seen by the government as an industry issue. To this day we are still fighting to have this right widely recognised and in some cases directors have been told to "take us to court". This effectively means that if directors want to enforce their rights they will need to take legal action against producers. The cost of such an action is well beyond the resources of most directors. In fact, it is even beyond the resources of the directors' guild. So directors choose not to enforce this right.

This lack of respect is an indication of what will happen to creators if they do not have the protection of the Copyright Act as it stands. To force many of them to litigation which the Fair Use proposals will do is to doom many of them to lose control of their work and the remuneration that this brings.

The ALRC does not seem to be able to understand the reality of content creators when making recommendations in this discussion paper. This amounts to a fundamental disrespect for authorship and creation.

2. FAIR USE

The ADG rejects totally the proposal for the introduction of a Fair Use proposal into the Copyright Act. We believe it will:

- → reduce incentives for producers of creative content;
- → make it difficult for end-users to use third party copyright material with any confidence or certainty; and

[2] Copyright and the Digital Economy Discussion Paper, May 2013. 2.8, p.26.

→ exacerbate existing inequities for individual creators.

For content makers in the screen industry there has been a fight going on for some time with those who pirate the work they produce. This pirating of work is the single biggest cause of income reduction for content creators. It has been facilitated in many cases by the introduction of digital technology that makes the copying of audio-visual material simple. We believe the introduction of any "Fair Use" proposal will further undercut the ability of content creators to exploit their work and be a disincentive for content creation. This is counter to the ALRC review in its desire to support and develop the digital economy.

The ALRC has not shown in either the issues paper or discussion paper how the change to a Fair Use system will stimulate the creation of digital content. It certainly would stimulate the free use of content but this would not stimulate the creation of content or an economic return for Australian content creators.

Successive studies have pointed to the difficulty of earning a living as a content creator in Australia.[3] The introduction of Fair Use would further exacerbate this situation.

It was also one of the terms of reference of the ALRC review to look at the best way "*the general interest of Australians to access, use and interact with content in the advancement of education, research and culture."*[4] We firmly believe that Fair Use will only create uncertainty in the use and dissemination of content.

Any user of content will have to ask themselves is this Fair Use. In many cases the uncertainty that this creates will have a detrimental effect on the ability to use material for broadcast or in an educational institution. Using the work and hoping that the content creator will not sue them will only solve this uncertainty.

Finally, the biggest problem for content creators with the introduction of a Fair Use system will be their inability to exercise their rights due to a lack of resources to prosecute claims.

The argument of the ALRC is based on law and legal cases but has no regard for the reality that most content creators find themselves in. The US legal system has clearly shown that unless you have the resources to challenge unfair use of your copyright material you will lose control of it to large organisations and the majority of content creators will simply not challenge this use.[5]

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[3] D.Throsby & A Zednik, "Do you really expect to get paid? An Economic Study of Professional Artists in Australia, 2010.

[4] Copyright and the Digital Economy, Discussion Paper. 2.24, p.30.

[5] June M. Besek, Jane C. Ginsburg, Phillipa Loengard & Yafit Lev-Aretz, Copyright Exceptions in the United States for Educational Uses of Copyrighted Works, 2013. The Kernochan Center for Law, Media and the Arts. Columbia University School of Law.

Screenrights in their recent submission point out that a content creator would need to have considerable resources to resolve an issue with an organisation that may have infringed on its copyright under a fair use system. Quoting from their submission:

"*In Screenrights experience, litigation in the Copyright Tribunal costs between $500,000 to $2 million per case. This is a jurisdiction intended to be less adversarial, less formal and less expensive than the mainstream courts, which would be the venue or actions relating to fair use.*"[6]

We would concur with this view and have had legal advice that if we were to take any of the large stakeholders to court to challenge any Fair Use then the individual creators would need at least $250,000 to cover the cost of responding to any Fair Use claim. This is simply out of the reach of 90% of all content creators. It is also a process that favours the larger organisations that can afford to let such an action run while still infringing on the copyright of the content creator.

Again, we believe this demonstrates the lack of understanding of the ALRC to the realities of the content creators in the digital world. The interests of large companies and institutions seem to have garnered the major attention of the ALRC at the expense of the content creators.

The ALRC admits that it will be the courts that decide what is fair use:

"Precisely which educational uses would be held by a court to be fair use is an important question. Fair use should be considered on a case for case basis. The 'fact of a non-profit educational purpose does not automatically ensure fair use' as other factors are important. This flexibility is one of the main benefits of fair use, particularly in a changing digital environment. Although this Discussion Paper does not come to conclusions about exactly which educational uses are likely to be held by courts to be fair use, it is instructive to consider perspectives on which educational uses might be fair."[7]

The Optus Now case is a classic example of a large company exploiting someone else's content for their own gain. It is a testament to our copyright laws that they were held accountable and could not get away with this exploitation. In a Fair Use system as proposed by the ALRC they would be able to get away with it. Did any consumers lose out? No they were able I access the content on devises and legally, in fact no consumer would have been aware of the issue unless you were an Optus customer who suddenly did not get what they had been promised by the company. They could then have opted for another provider who could legally provide the service.

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[6] Response from Screenrights on "Copyright and the Digital Economy Discussion Paper. p.7.

[7] Copyright and the Digital Economy Discussion Paper. 2013.

In all the proposals outlining the Fair Use replacement of Fair Dealing, the ALRC recommends that if Fair Use is not taken up then exceptions should be put in place to support Fair Dealing. The way the arguments have been structured tries to portray Fair Dealing as cumbersome and restrictive and Fair Use as the simple answer to everything. This is not an impartial review and is clearly driven by an agenda to make everything appear simple so the legislators and the public are unencumbered in their access to copyright material. They don't want to pay for its use they want it for free when and where they like. But the reality of the business world is that content is created by someone who expects a fair return for their work.

"9.32 The ALRC agrees that social norms should not dictate the law. But the law should at least account for social norms. If a practice is very widespread, and commonly thought to be harmless, then this should, at least, be one consideration when determining whether the practice should be prohibited."[8]

The ALRC cannot seriously propose changes to law based on social behaviour. How do you measure that the majority are doing this. It may be common practice for people to smoke Marijuana but should we make it legal? It may be common practice for teenagers to drink underage but should it be made legal? The above statement is alarming.

This simplistic view of copyright law is quite astonishing and seems to disregard the functioning system we have in place that provides certainty. We are no arguing that it is perfect but do not believe the "one shoe fits all approach" will deliver any economic advancement in the digital economy.

3. STATUTORY LICENSES

The ALRC has called for the scrapping of statutory licenses in line with the introduction of Fair Use. In their place they recommend a system of voluntary licenses. Many of our members rely on the statutory licenses that are currently in place to provide income for the use of their material in educational institutions. First run documentary programs are highly regarded by the educational sector and many ADG members who produce this content earn a substantial part of their income from the education sector.

These documentary directors are usually single individuals who develop and producer their programs over many years. The making of these programs is costly and the amount of money they raise through sales, grants and investment does not usually cover the final cost of making the program. They rely on the long-term exploitation of their work through retransmission and educational use.

[8] Copyright and the Digital Economy Discussion Paper, 2013.

Most of these directors use the Screenrights system as well as the Australian Screen Directors Authorship Collecting Society (ASDACS) to collect royalties for them and to ensure that they get remunerated for the use of their work. The ALRC proposes to scrap these statutory licenses in favour of voluntary licenses.

6.3 The digital environment appears to call for a new way for these licences to be negotiated and settled. Like most other licences for use of copyright material in Australia and abroad, these licences should be negotiated voluntarily. Voluntary licences—whether direct or collective—are less prescriptive, more efficient and better suited to a digital age.[9]

This is not practical and again shows the ALRC lack of understanding of the practical reality of working content creators earning a living from their work. To license the myriad of programs that they produce to each individual institution and then to be able to track that their use is an undertaking that is beyond the resources of most content creators.

The introduction of the statutory licenses was to correct the infringement on their copyright that was occurring before a workable system was in place. The correction of this infringement by educational institutions was applauded by content creators and provided certainty for these institutions and access to the best Australian producer content.

In terms of statutory licenses, we do not object to the move to voluntary licenses as long as Fair Use is not introduced. The combination of Fair Use and the voluntary licensing will see a massive reduction in income for content creators as larger organisations use material claiming Fair Use and fight cases if they are brought by content creators. In many cases as stated above, the content creators will not pursue them and the runaway train "free use" rather than "fair use" will begin.

4. RETRANSMISSION

The ADG supports the second option put forward by the ALRC in the discussion paper, i.e. *the retention of the retransmission scheme.* We oppose any repeal of the remunerated exception. Like Screenrights we would also point out that no stakeholders called for the abolition of the statutory license scheme for retransmission.

There is a very good reason why they did not call for its abolition. It works.

Notwithstanding the anomaly when it comes to the Internet, which we will discuss later, the statutory license is an effective and efficient way to manage the various rights that would need to be secured for a television broadcast if

[9] Copyright and the Digital Economy Issues Paper, 2013.

we were to move to voluntary licenses. Currently the Screenrights model enables a simple "all rights" deal to be secured. Without this, the network seeking to retransmit the program would need to secure all the rights holders is a very short period of time from when the network announces the program to the actual broadcast. Not only is this impractical but highly unlikely. Voluntary licenses would not work.

The ALRC solution to this is to scrap the payment. Again, with no regard for the myriad of content creators – writers, composers, directors, and producers – who rely on those payments from Screenrights.

We also do not understand how this can fall into the remit of the ALRC review, as it does not constitute a new development in the digital economy. These rights have been in operation since retransmission started and all stakeholders agree it is a fair and well developed system.

In regards to retransmission over the Internet we also support the Screenrights submission. Although in principal we support a technology neutral approach when it comes to copyright, we are still in a transition stage where "over the internet" is not as clear as it seems. The advent of IPTV and various forms of transmission such as Apple TV has thrown up some challenges to the screen industry and these are currently being met under the existing copyright legislation. This is a case where we believe a "one size fits all" approach will not work and merely create more problems for all stakeholders.

We would therefore support the position that no change be made to the Internet exception in Part VC.

5. PROPOSALS

In regards to the proposals put forward by the ALRC in the discussion paper we would reject all those proposals that call for the introduction of Fair Use. In particular proposals:

4.1 Fair Use
The ADG does not support the ALRC's recommendation to introduce a broad Fair Use exception into Australian law.

6.1 Repeal Part VA, VB and VII Division 2 Statutory Licenses
The ADG does not support this recommendation and would oppose it in any form. We have an effective and unique statutory licensing system in place that works effectively for rights holders. We are surprised by this proposal, as it is not based on any economic modelling. Our understanding of the review was that is was about "Copyright and the Digital Economy. It seems the ALRC has lost sight of the "economy".

The introduction of a voluntary licensing scheme will in our view put the content creators at an immediate disadvantage especially if it is introduced in a Fair Use system. As our colleagues at Screenrights also point out in its

submission, "*voluntary licensing is likely to create significant difficulties for access to broadcast repertoire in Australia*."[10]

7.1 & 7.2 Fair Dealing
The ADG rejects the recommendation to repeal the existing fair dealing exceptions and replace them with a broad Fair Use exception.

13.1 to 13.3 Proposed Educational Use
The ADG opposes including educational use as either an illustrative purpose in a broad Fair Use exception or as a standalone for fair dealing exception.

The reduction of income for content creators in the educational sector will have a major impact on the development and production of Australian material. This "gap" will be filled with cheaper overseas material. The implications for our education sector are much wider than economic. They will be losing a valuable source of educational material that informs Australian students about their country and its view of the world.

15.1 to 15.3 Retransmission of Free-to-Air Broadcasts
The ADG opposes any abolition of the retransmission statutory license proposed in Option 1. We support the proposal in Option 2 and the submission by Screenrights on this issue.

We are also not in favour of changes to s 155ZZJA and we support the submission by Screenrights on this issue.

16.1 Broadcasting
The ALRC has highlighted issues between broadcast and copyright policy that needs to be addressed. We support the proposal by the Australian Copyright Council on this issue.

We also note the difference between broadcast and the Internet and therefore do not support exceptions that would apply to both.

6. IN CONCLUSION

The ADG's experience in the way Copyright law works when it is left to industry and courts to provide fairness dos not work. Ultimately, those with the ability to prosecute their cases in the courts successfully usually win the day. The majority of content creators do have access to the resources to prosecute their claims. To move to a system that would make it the norm to use the court system to settle copyright issues will in the long run reduce the amount of content created and have a detrimental effect on the Australian economy.

[10] Response from Screenrights on "Copyright and the Digital Economy Discussion Paper. 2013.