Association of American Publishers, Inc.
www.publishers.org

455 Massachusetts Ave., NW Suite 700
Washington, D.C. 20001
Telephone: (202) 347-3375
Fax: (202) 347-3690

M. Luisa Simpson
Executive Director
International Enforcement & Trade Policy
lsimpson@publishers.org

Via Electronic Mail: copyright@alrc.gov.au

July 30, 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Sir:

The Association of American Publishers (AAP) appreciates this opportunity to submit comments on the Discussion Paper (DP) on "Copyright and the Digital Economy" issued by the Australian Law Reform Commission (ALRC).

The Association of American Publishers is the national trade association of the U.S. book and journal publishing industry. AAP's some 300 members include major commercial publishers, smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services.

AAP's membership includes a diverse range of publishers of different nationalities. Most of our member companies participate actively in the global marketplace, including in Australia. Accordingly, publishers are accustomed to the need to accommodate a diversity of approaches under national copyright law to issues such as the scope of exclusive rights; limitations and exceptions to those rights; direct and collective licensing; and statutory or compulsory licenses. The following comments, while reflecting the perspective of U.S.-based publishers, are also informed by this long history of active participation in markets that function under a variety of copyright regimes.

The Discussion Paper addresses a host of issues of vital concern to AAP member companies, to all publishers, and indeed to all companies and individuals that depend upon copyright law for protection of their investments, operations and livelihoods. In these brief

comments, we focus on a handful of specific issues of particular importance to publishers of books, journals, and periodicals.

1. Educational uses

Many types of publishers sell and license copies of their works for a broad range of educational purposes. Of course, textbooks and related materials are created, developed and marketed with formal educational uses in mind. But many other kinds of books, journals, periodicals, and other copyright materials can productively be employed to carry out an educational function. Published materials are used, both within formal, not-for-profit educational institutions at all levels (primary to post-tertiary), and in a host of other settings, including for-profit trade schools; continuing education of professionals and skilled workers; and all manner of training and current awareness environments.

Accordingly, in order to provide strong incentives for investment in the development and distribution of copyright works that can be used for educational purposes, it is critical that any copyright reform proposal for Australia assure that publishers can control, through the exercise of exclusive rights, the terms and conditions under which their works may be exploited for such purposes, or at a minimum provide consistent, predictable and adequate compensation for such uses. AAP strongly believes that the best route for achieving this result is to foster a robust and competitive marketplace in the sale and licensing of copyright works for educational uses.

The above notwithstanding, AAP has strong reservations regarding the proposal in the Discussion Paper that the existing statutory licenses in parts VA and VB of the Copyright Act should be phased out or repealed. Though the ALRC notes that "rights holders, collecting societies, and educational institutions should be able to negotiate more flexible and efficient licensing arrangements voluntarily" (DP at 13.5.), the Discussion Paper offers no evidence that such voluntary licensing arrangements will be more effective than Australia's current system.

However, the critical question is whether what succeeds the current statutory licensing environment will be fully conducive to the voluntary licensing regime that is needed. AAP is seriously concerned that the adoption of other recommendations in the Discussion Paper risk undermining the goal of encouraging voluntary licensing. In particular, if the recommendation for dramatic expansion of free-use exceptions for educational uses of works is adopted, the viability of the desired voluntary licensing regime may be threatened.

The Discussion Paper proposes that a "fair use exception should be applied when determining whether an educational use infringes copyright." DP at 13.3. If Australian legislators are not persuaded to take the dramatic step of switching copyright law to a fair use regime, then the ALRC recommends that "a new 'fair dealing for education' exception be introduced." *Id.* at 13.4. While, as discussed below, the choice between fair use and fair dealing as the basic rubric for copyright exceptions is a significant one for Australia, for the purposes of predicting its impact on development of a voluntary educational licensing market it probably makes little difference which label is employed. Whether as an "illustrative" fair use, or as a specified use subject to fair dealing analysis under essentially identical criteria, either proposal would replace educational statutory licensing with broadly phrased and highly uncertain new exceptions for educational uses.

It is very unlikely that such a change will encourage voluntary licensing. It is far more likely to have the opposite effect. Entities that wish to use copyright material for educational purposes, and that are no longer required to pay for statutory licenses, will have strong incentives to eschew the licensing market entirely and take refuge in the broad new free-use "educational" exception.[1] Rather than negotiate with publishers, these users will force publishers into costly and protracted litigation in order to obtain any compensation whatever. Courts, not the marketplace, will be deciding how much users need to pay -- if anything – in order to make educational uses of copyright material. Such an outcome will be highly disruptive of settled expectations, and inimical to the steady, consistent investment needed to develop and bring to market the highest quality educational materials.

This scenario is far from merely theoretical. Recent developments in Canada should sound a cautionary note for Australian policymakers. In June 2012, Canada enacted a new Copyright Modernization Act that added "education" to the list of uses qualifying for the fair dealing exception.[2] A fortnight later, Canada's Supreme Court announced a sweeping new interpretation of the then-current Copyright Act, ruling that classroom uses of photocopied materials qualified for the fair dealing exception as "research and private study."[3] The combined impact of these two events quickly wrought havoc on well-established collective licensing regimes, administered by the Access Copyright organization, for photocopying copyright materials for use in Canadian schools, colleges, and universities.

In 2011, Access Copyright distributed over C$23.5 million to publishers and authors for photocopying of materials for use in K-12 and post-secondary schools across Canada. It seems now as though nearly all of that revenue is threatened and could largely disappear in the very near future. Most of the K-12 school systems across the country, and a growing number of college/university systems, are declining to take a license from Access Copyright going forward, relying on the advice of their lawyers that they no longer need to pay for this copying because it all falls within the expanded definition of "fair dealing." Unless and until the scope of this new exception is limited more appropriately --- an outcome that probably can only be achieved through protracted litigation – the situation in Canada might well be described as a massive new subsidy to the Canadian education system, involuntarily paid for by authors and publishers. Since the Discussion Paper clearly indicates that such subsidization is inappropriate, *see* DP at 13.45, AAP urges the ALRC to consider the risks that its recommendations regarding educational exceptions will result in just such a scenario occurring in Australia.

It should also be considered that a scenario as above described will likely have a greater adverse impact on the domestic educational publishing industry of Australia. Local educational publishing is typically targeted to the specific needs of the market. At the primary and secondary levels, educational materials developed by Australian publishers provide students with an important introduction to their country's history, culture and traditions, creating the necessary engagement between the materials and the student. A system that encourages a "right to copy"

[1] It should be re-emphasized that these entities are by no means limited to formally recognized schools, colleges and universities, or to current statutory licensees. A wide range of businesses, institutions and individuals could plausibly characterize as "educational" the uses they wish to make of copyright works, and thus could claim the shelter of a broad "educational use" exception.

[2] This new provision came into force in November 2012. Copyright Act (Canada), section 29.

[3] *Alberta (Education) v Canadian Copyright Licensing (Access Copyright), 2012 SCC 37, [2012] 2 SCR 345 http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do.*

regime will likely put greater economic pressures on the viability of local publishers which may have less opportunity to offset their domestic losses with gains in other more-market oriented markets overseas, thus, diminishing the strengthen of the domestic educational publishing industry.

In order to encourage voluntary licensing of as broad a range of educational uses as possible, AAP would in principle support the "license it or lose it" approach described in paragraph 6.102 et seq. of the Discussion Paper. As noted there, free-use exceptions are provided in the law of New Zealand and the UK for certain educational uses of works, but only if collective licensing schemes are not available for such uses. Id. at 6.106-108. A similar approach in Australia would provide a strong incentive for rights holders to offer a license – either directly or through a collective administration scheme -- for the use in question. But the far broader and less predictable free-use exceptions advocated in the Discussion Paper are likely to have the opposite effect of providing incentives to users to spurn whatever licenses are offered. AAP urges the ALRC to reconsider this recommendation and to embrace a more calibrated approach.

2. Fair use and fair dealing

The Discussion Paper's recommendation that Australia replace most of the Copyright Act's existing exceptions to exclusive rights with a "broad, flexible exception for fair use" is hardly a novel proposal. As the Discussion Paper recounts, it has been considered several times in Australia, as well as in other common law jurisdictions such as the United Kingdom and Canada. In almost every instance, these inquiries, many of them quite detailed, have concluded that fair use should not be enacted. The ALRC reaches a contrary conclusion this time because it "considers that the potential benefits of introducing fair use now outweigh the transaction costs." AAP is skeptical of this conclusion.

AAP's comments on this topic are informed by the perspective of U.S.-based international publishers that operate both in the main jurisdiction that recognizes the fair use doctrine – the United States -- and in a wide range of other countries that do not. The latter group encompasses both common law legal systems, most of which (like Australia) include fair dealing exceptions in their copyright laws, and civil law systems in which only relatively specific statutory exceptions to exclusive rights are recognized. From this perspective, AAP is concerned that the Discussion Paper may have overstated the benefits of fair use, and in particular that it may have understated the "transaction costs" that would flow from the dramatic shift in copyright jurisprudence that the ALRC calls for.

The most troubling "transaction cost" is uncertainty. A high level of uncertainty is an inherent feature of the fair use model. Fair use applies to a wide range of uses of virtually all works, and constitutes an exception to all of the exclusive rights. Perhaps more significantly, no one can read the fair use statute in the United States, 17 U.S.C. 107, or in any other country which has enacted the same law, and determine whether a particular contemplated use that involves the exercise of an exclusive right, and that has not been authorized by the right holder, will or will not be an infringement. As the Discussion Paper notes, a fair use statute announces a non-exhaustive list of principles that courts are directed to apply to make such a determination; it does not spell out rules that would allow a right holder or user to anticipate (by reading the statute) what the answer will be to the question of whether a particular use is infringing. AAP

agrees that this flexibility provides some advantages, but it also imposes costs. In particular, the radical uncertainty of the scope or applicability of the fair use exception to any particular set of facts can be a debilitating cost. Indeed, unless this uncertainty can be mitigated or managed by other features of the fair use system, it would be very difficult to maintain an orderly marketplace in which works of authorship are created, published, disseminated, and used in a predictable fashion.

In the United States, these costs are mitigated, principally by the existence of a deep and rich body of case law and precedent.[4] Counsel to a publisher in the United States reads the statute only as a starting point in analyzing whether a particular use of a copyright work is or is not likely to be considered fair. It is far more important to consult the case law. These precedents were compiled over the course of nearly two centuries, during most of which there was no fair use statute whatever. Only the case law gives meaningful content to the broad principles stated in the statute.

In the U.S., the precedents provide answers, for example, to how the illustrative uses listed in the chapeau to 17 USC 107 should be interpreted (to determine whether or not a particular use falls within the list), and what weight should be given to the determination of whether the use is within or outside the list. *See, e.g., Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 203 (4th Cir. 1998) (a "scholarly appraisal" of another's work fit within *several* of the illustrative uses, which causes factor one, i.e. the "purpose and character of the work," to weigh heavily towards fair use); *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) (book printing previously unpublished letters of well-known author "fits comfortably within several of the statutory categories" as it could be considered "criticism," "scholarship," and "research."). They also provide guidance on what the four non-exhaustive factors listed in the statute encompass, how they should be applied, and how they should be weighed against one another. *See, e.g. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (first factor, "purpose and character of the work" asks "whether the new work merely supersedes the objects of the original creation . . .or instead adds something new"; "it asks, in other words, whether and to what extent the new work is 'transformative.'"); *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (when evaluating factor four, market effect, "a court must consider not only the primary market for the copyrighted work, but the current and potential market for derivative works"). Case law also illuminates what additional factors should be considered in the fair use calculus, since the factors listed in the statute are explicitly a non-exclusive list. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985) (considering whether the use was made in "good faith").

Armed with this case law, counsel in the U.S. are able to provide meaningful guidance on whether specific uses are likely to be treated as "fair." Publishers rely on this guidance every day to make critical decisions, not only about whether to object to particular unauthorized uses that are being made of their works, but, importantly, about whether a use that the publisher itself may wish to make – for example, incorporating an excerpt of another work without permission – is fair. In other words, both as right holders and as users, publishers in the U.S. can mitigate the inherent uncertainty of fair use by reliance upon the case law precedents. Since the same case

[4] The Discussion Paper correctly notes that a handful of other countries have recently enacted fair use provisions. Some of these countries have legal systems that are at least partially based on the common law. However, AAP is not aware of any significant case law that has been developed under the fair use statutes in any of these countries. Their adoption of fair use should carry little if any weight in resolving the issue of whether Australia should do so.

law resources are equally available to entities whose interests fall far more on the user end of the spectrum, all market participants can have a reasonable level of confidence in the legal boundaries. This confidence can be, and generally is, further buttressed by voluntary licensing arrangements, under which the parties to a license make their own agreements about what conduct is and is not permissible with respect to the works in question.[5]

While this system works well in the United States, AAP urges the ALRC to take a more skeptical approach as to whether it can be successfully transplanted to Australia, simply by repealing fair dealing and a number of other existing statutory exceptions and replacing them with fair use. The fair use doctrine is by no means identical with the fair use statute. Statutory changes can bring the latter to Australia; but without importing U.S. case law as well, the doctrine, or at least its constructive role in encouraging a robust marketplace in works of authorship, will not make the same journey.

It is noteworthy that, while there have been dramatic changes in the content of the fair use doctrine in the U.S. in the 35 years since the fair use statute came into force, there has been only one relatively small change in the wording of the statute itself.[6] This helps to underscore the fact that, even if the scope of the benefits of the fair use doctrine are as significant as the ALRC believes them to be, the solution it proposes -- adopting the U.S. statute without necessarily taking on its case law and precedent -- is unlikely to deliver them. We urge ALRC to consider whether at least some of the anticipated benefits could be realized, with far less uncertainty, in other ways. In particular, simplifying and rationalizing the current fair dealing provisions, including by making the statutory factors that currently apply only to fair dealing for research and study more broadly applicable in the fair dealing context, may be a more prudent approach. (See generally chapter 7 of DP).

While AAP will not in this submission analyze in detail the ALRC's fair use proposal, we will offer comments on two of the uses which it recommends be codified, either (as ALRC prefers) as "illustrative uses" in the fair use provision, or as new "fair dealing" exceptions.[7]

The first such use is "education."[8] As discussed above, and as exemplified by the Canadian example, introducing a broad fair use or fair dealing exception for "educational " uses risks destabilizing established markets for published materials, including but by no means limited to textbooks and similar products. In the Australian case, in which some (though far from all) of these potential markets are now covered by statutory licenses, a broad free-use exception is likely to divert potential uses from the marketplace, where reasonable and balanced

[5] AAP discusses the importance of contractual agreements further below. See discussion under "Contracting Out."
[6] That change, which added the final sentence of the current version of Section 107, was itself a reaction to court decisions that were read as creating a strong presumption against fair use of unpublished works. *See, e.g., Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987). In other words, the statute was amended only to make it clearer that the statute did not set down a presumptive rule.
[7] AAP does not provide extensive comment as to the inclusion of "transformative use" as a stand-alone exception. AAP does, however, support ALRC's conclusion in DP 10-1that there is no need for Australia to enact a stand-alone exception for "transformative use" of copyrighted materials.
[8] As a matter of statutory fair use, this goes beyond the U.S. law, under which the illustrative use is limited to "teaching (including multiple copies for classroom use), scholarship or research." 17 U.S.C. 107 (chapeau). As discussed above, these three uses fall far short of exhausting the range of uses that could plausibly be characterized as "educational." Nor is the ALRC proposal limited (as is the example given in the U.S. statute under the first factor) to "nonprofit educational purposes." 17 U.S.C. 107(1). Thus, the implication that the ALRC proposal is identical to U.S. law on this point is incorrect. DP at 13.60.

licensing arrangements could be negotiated, to the courts. This risk is especially high when advocates for fair use (or for expanded fair dealing) are clearly expecting that its adoption will expand the scope of free-use exceptions and will thus be encouraged to test the extent of that expansion by embarking on extensive unlicensed uses.

Second, AAP counsels against adopting a "private and domestic use" exception, either as an illustrative example of fair use, or as a specific fair dealing exception. Regarding the first option in particular, this would be a big step beyond the fair use doctrine (and statute) in the U.S.: the U.S. Copyright Act contains no private use provision, and no U.S. court has ever ruled that private uses constitute fair use per se.[9] Enactment of a blanket private use exception in either form could create a significant impediment to enforcement against online infringement, since even massive and unquestionably unauthorized downloading of copyright works could plausibly be characterized as "private and domestic" from the standpoint of the infringing end-user.

The fact is that high volume, commercially harmful infringements are now frequently carried out using personal devices located in people's homes or carried on their persons. To categorically exclude these uses from all liability for infringement would significantly truncate exclusive rights in the digital age.[10] Additionally, the expanding access to copyright works that end-users increasingly enjoy through licensed streaming and downloading arrangements would be jeopardized if a private use exception were enacted. Such a step could cast doubt on the enforceability of these licenses, and encourage many end-users to walk away from them and take refuge in a claimed free-use exception.

In an environment in which the legitimate, licensed markets for copyright works increasingly involve dealings that take place in private and domestic settings, the enactment of such an exception could have much broader, even global, repercussions on right holders. AAP urges ALRC to exercise caution in this area, and to adjust its inquiry to focus on whether the specific statutory exceptions in current law that already apply to certain activities in "private and domestic" settings are adequate, or whether they need to supplemented with any other additional specific exceptions.

3. Orphan works

AAP and its member publishers have an interest in supporting the wide dissemination and use of copyrighted works under established principles of copyright law. As users of copyrighted works themselves, AAP member publishers are well aware of the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining the necessary permissions to use a specific work or works. AAP continues to support orphan works

[9] *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 465 (1984) (Blackmun, J., dissenting) (noting that when the fair use doctrine was codified in 1976, "Congress considered and rejected the very possibility of a special private use exemption.").

[10] We recognize that under the ALRC proposal, uses listed in the proposed fair use statute would not be conclusively, nor even presumptively, deemed fair. DP, at 4.160. Nonetheless, their inclusion in the statute would be intended to communicate the message that "a particular use that falls within the broader category of [one of the illustrative purposes] is more likely to be fair than a use which does not fall into [any] illustrative purpose category." DP at 13.60. This nuanced message is likely to be lost on the general public, which will instead hear that private uses are per se non-infringing. It is neither realistic nor fair to saddle right holders with the burden of correcting this entirely foreseeable misimpression.

legislation as "relevant where [permission is necessary and] all other exemptions [including fair use] have failed,"[11] and where it helps "to make it more likely that a user can find the relevant owner in the first instance, and negotiate a voluntary agreement over permission and payment…for the intended use of the work."[12]

AAP believes that the ALRC proposal reflects a similarly focused approach to the orphan works issue, which proposes to amend the Copyright Act to "limit the remedies available in an action for copyright infringement," where at the time of infringement, a 'reasonably diligent search' has been conducted and the rights holder has not been found." DP at 12.62. With respect to the question of what constitutes a "diligent search," AAP agrees that "the exact requirements of a diligent search should not therefore be set out in legislation," for as ALRC notes, given the advancements in technology, the availability of databases, and services, what may be considered "diligent" will necessarily change over time. DP at 12.73.

With respect to the question of how remedies for use of orphan works should be limited, where it can be established that a diligent search was conducted, AAP recommends that ALRC adopt the recommendation within the U.S. Copyright Office's 2006 report, to provide "reasonable compensation" as the exclusive monetary remedy should a rights holder assert a claim within a reasonable amount of time.[13] AAP likewise encourages ALRC to adopt limitations on injunctive relief that complement the limitations on monetary damages, *i.e.*, the reduction of monetary damages will be of no consequence if the good faith user can be completely prohibited from continued use of the work pursuant to an injunction.

4. Contracting Out

Publishers in all sectors (educational, professional, scholarly, as well as trade), like other users of copyright materials rely on licensing agreements to facilitate use of copyright works within their own works. Such agreements allow the parties to more clearly define the scope of rights and privileges between users and rights holders, i.e., to better delineate what can and cannot be done with respect to the works subject of the contract. A broad proposal providing that copyright exceptions trump contract terms, as enunciated in Proposal 17-1 of the Discussion Paper, will have the unfortunate effect of creating uncertainty in the market. A user and a rights holder may disagree as to the scope or applicability of an exception, and rather than this potential disagreement having been settled through the clear terms of a license, parties may be compelled to litigate to come to terms. Thus, rather than facilitating ease of use and access, this proposal may well do the opposite.

Because contractual arrangements play an important role in providing certainty in the marketplace, AAP urges ALRC to reconsider its recommendation to deny parties the freedom to contract with respect to provisions that may have "the effect of excluding or limiting the operation of certain copyright exceptions," including some aspects of fair use or fair dealing, as well as exceptions relating to libraries and archives. DP at 17-1.

[11] OFFICE OF THE REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS, 1 (2006).
[12] *Id.* at 95.
[13] *Id.* at 115-27.

AAP appreciates the ALRC's consideration of its views. If there are any questions or if additional information is needed, please do not hesitate to contact the undersigned.

Yours sincerely,

M. Luisa B. Simpson
Executive Director
International Enforcement & Trade Policy