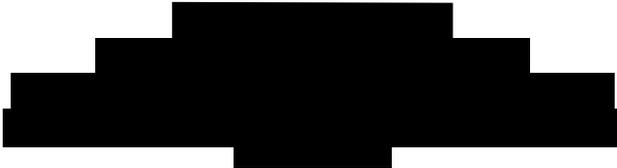


Michael Green
Barrister



31 July 2013

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

By email and post (3 pages)
copyright@alrc.gov.au

Dear Director,

Copyright and the Digital Economy: ALRC Discussion Paper 79 – Statutory licences

I refer to the Commission's Discussion Paper, *Copyright and the Digital Economy*, DP 79 (May 2013). I note the Commission called for submissions and comments.

While there is much else worthy of comment, time limitations dictate that this submission merely deals with the issues addressed in Chapter 6 of the Discussion Paper in which the Commission recommends the repeal of the various statutory licences.

The views expressed in this communication are personal to the writer.

I have had experience of working in a senior role in a collective rights management organisation (Screenrights), as well as acting for and against other collecting societies. I have acted for educational institutions. I have also had extensive experience of the ways in which copyright owners seek to obtain value from copyright material in the 'digital age'. I am aware of the problems of obtaining licences. I am also aware of the trade disparity between Australia and the rest of the world in relation to intellectual property, particularly in the educational sector.

Statutory Licences

1. The discussion paper recommends the repeal of the statutory licensing schemes in the *Copyright Act 1968* (Cth) ("**the Act**"). For the reasons which follow, I submit that such a recommendation should not be maintained.
2. The framework provided by the statutory licensing schemes over the last almost quarter-century has provided opportunities for small and medium niche creators and owners to enter and participate in the emerging digital economy.
3. The Commission must bear in mind that copyright creators (and owners) are like any other participant in our complex post-industrial economy: they seek to define and develop structures which facilitate economic returns. They need nurturing through the maintenance of a creator-friendly environment.

4. The statutory licensing framework in the Act provides for:
 - (a) the negotiation of voluntary licences;
 - (b) the regular review by the Copyright Tribunal of the administration of these schemes and the setting of rates of equitable remuneration; and
 - (c) the general departmental and parliamentary oversight of the behaviour and performance of the administration of statutory licensing schemes.
5. The Copyright Tribunal has developed a 'jurisprudence' in relation to the practical task of rate setting which takes into account changing circumstances and the need for balance. It is instructive to read determinations made by the Copyright Tribunal. The Tribunal's determinations have brought into the rate setting calculus many of the concerns expressed by the education sector as recorded in the discussion paper. See for example *Copyright Agency Limited v Queensland Department of Education* [2002] ACopyT 1 (Finkelstein DP) and the considerations referred to in that decision.
6. It is understandable that the Commission appears to have been swayed by the superficial attractiveness of the assertion by the education sector that "statutory licensing is economically inefficient". The premise of that assertion is that there is a better way. The licensing of music is cited. However, as any experienced participant in rights management would immediately note, the way in which rights are managed in the music sector is fundamentally different from the way in which it occurs in book publishing or in the film and audio-visual sectors.
7. The relatively long term of copyright protection means that changes in licensing practices in an industry may take up to a century before becoming universal. Thus, users of copyright material taking from exclusive licensees will still need to fit within licensing practices long since abandoned. An example is the changing practice in the licensing of cinematograph films.
8. The statutory schemes help to provide lawful access and realise returns in a practical way. Copyright licensing is *complex*, and has evolved having regard to the multiplicity of works and settings, and the possibility of reuse. Freedom of contract has led to a diverse universe of licensing practices. That the statutory licensing schemes are themselves 'complex' is no surprise having regard to the legislature's intent to strike a balance in relation to facilitating lawful use by educational institutions of otherwise foreclosed copyright works.
9. The cost to the educational sector of legitimate access to copyright material needed for educational purposes needs to be put in context. The cost spent by the sector represents a tiny fraction of the overall costs of providing education at all levels. While the discussion paper flirts with 'price discrimination', it does not descend into any discussion of relativities. The question which ought to be considered is: if the educational sector was able to 'save', say, 10% on licensing, would that have any material effect on the viability of the sector? Based upon figures from 2002, these costs are so insignificant in the overall cost structures that they are not even detectable in financial statements. It is surprising that the education sector has seen fit to raise such a concern on an issue which is not even on the financial radar.
10. Given that voluntary schemes have always been possible side-by-side with the statutory schemes, the Commission does not appear to have addressed the reason why they have not flourished, if there is a need, desire, or any economic incentive for them. The fact that this has not occurred indicates that the work of the Copyright Tribunal in setting levels of equitable remuneration has been effective and efficient.

11. If the aim is to improve compliance outcomes and enhance students' understanding of the need to respect others' rights, then providing an easy and low cost way in which educators can comply with their copyright obligations ought to be encouraged. The difficulty of doing that where access to repertoire is restricted unnecessarily impedes curriculum innovation.
12. Sweeping away the statutory licence schemes would not make the Act "more flexible and adaptive to new and efficient digital technologies". Why? Because, as the discussion paper seems to overlook, most of the uses in the education sector are no different to those existing before the emergence of 'digital technologies'. While the works may not now be 'consumed' on paper, the analogues to the non-digital world are still pervasive. This is because teaching modes are really no different, albeit intermediated digitally.
13. The removal of the statutory licence schemes would likely skew availability of repertoire to those well-resourced providers of material and exclude small and medium niche creators. It would also interrupt valuable revenue streams which have led to the creation of Australian and international content of unique value to Australian educators.
14. The Australian statutory collecting societies (Screenrights and Copyright Agency) have demonstrated their ability to facilitate access to works and to generally improve educators' awareness of appropriate repertoire beyond that which might appear in set text books or traditional educational programming. It is hard to imagine how the repeal of the statutory schemes would ensure the continuation of this important work.
15. The 'alternatives' cited in the discussion paper at [6.102] to [6.112] do not rebalance the undesirable consequences of repeal.
16. I submit that none of the reasons given in the Discussion Paper demonstrate any need for repeal. **Proposal 6-1 should not be maintained.**

Thank you for the opportunity to make this submission. I am happy to provide further information or commentary if desired.

Yours sincerely,



Michael Green

Liability limited by a scheme approved under the Professional Standards Legislation.