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The Executive Director
Australian Law Reform Commission
Submitted electronically to email account: copyright@alrc.gov.au

Pearson Australia Response to Australian Law Reform Commission (ALRC) Inquiry into Copyright and the Digital Economy Discussion Paper dated May 2013

Introduction

Pearson Australia Group, is a subsidiary of Pearson plc, the world's leading learning company, with 41,000 people across 70 countries. We provide educational materials, technologies, assessments, consumer publishing and related services to teachers, learners and readers of all ages. Our goal is simple: to help people progress in their lives through learning. The two core divisions of Pearson plc are Pearson and the Financial Times Group.

Over the years, Pearson Australia has invested significantly in developing products and services for Australian students and readers across all sectors, and we continue to do so. Our recent multi-million dollar investment in building new digital and print products for the Australian Curriculum is just the latest example.

Overview

Today Pearson is a technology company as much as we are an education, newspaper or book publishing company (though these don't diminish in the digital age – they are simply more flexible). Our strategy is to add services to our content, usually enabled by technology, to make the content more useful, more personal and more valuable. We have also invested heavily in digital platforms to enable faster product development and more efficient creation and re-use of content. This represents a fundamental shift in our business, our culture and our growth opportunities and we play a leading role in the digital economy.

This investment carries over into our educational businesses. Our education services are about enhancing employability and efficacy for the learner. We therefore invest in educational products and digital infrastructure to consistently improve results and to offer a broad range of educational tools and programmes online. Globally, Pearson offers digital homework and assessment programmes, electronic testing facilities and digital teaching solutions. Our services cover new, data-driven initiatives helping teachers to assess their students' individual progress; premium content allowing students to learn through gaming, imagery and tailored tests; and learning platforms allowing schools to share data and course-content.

This data evidences business growth despite a difficult economic climate and challenging external market conditions. Much of this growth has come from digital and content divisions of our businesses, and that in turn has come from innovation in business models and in new services and publications.

A common theme across Pearson is the absolute requirement for confidence in the security of our intellectual property and the return on investment that enables. Although there have been plenty of challenges in that regard we have been able to develop methods, systems and business models to respond to those challenges. We have developed our business models with a view to openness and engagement with other service providers and innovators.

As the digital world has developed, we have recognised the need for and benefits of striking a balance between rights ownership and opening up to the digital ecosystem – from readers to commercial partners. We actively partner with the tech start-up community and other external partners to find new and better ways to innovate, making our content and data easily available for new products and services, because we recognise that we're not going to have all of the best ideas.

Our successes across the group in digital, and the jobs predicated on them, have been achieved not as a result of any changes to copyright law, but by a reliance on the existing legislative framework coupled with the creative use of licensing, in turn allowing for sustained investment in quality content and innovation. Copyright law has enabled and supported the innovations we have produced, buttressing the case for investment and enabling us to grow in terms of revenue, profit and jobs.

Proposals and Questions

We have only responded to those proposals and/or questions that seem to us most relevant to our experience of copyright, production and digital policy. We would be very happy to provide such further information as would be helpful, or practical experience of working with different copyright regimes around the world.

4. The Case for Fair Use in Australia

Response to Proposals 4-1 to 4-4 and Questions 4-1 & 4-2: Put simply – none. As a global publisher we operate under Fair Use in other territories and as such have the benefit of comparison. On this basis, we state that any broadening of the exceptions for Fair Use in Australia would have an immediate and longstanding impact of diluting author and copyright owners' rights. This would not only be a retrograde step in Australia in terms of copyright law but it would be inherently unfair on the principle of equity.

To illustrate the above point, consideration should be given to the fact that copyright, whilst intangible, is a proprietary right in exactly the same way as a chattel or freehold real estate is. Both can be dispensed with entirely via an assignment and sale respectively, and both are divisible in the sense that electronic and hardcopy rights are distinguishable as are territorial rights, or in the case of a property, subdivided in many portions.

If we were to hypothesise for one moment that the Fair Use proposals were being considered in respect to tangible property, there would be public outcry and any such proposals would be swiftly struck out for being immensely draconian well before any forum was granted for the purposes of mooting them. Logic would dictate that such rationale should be applied to copyright as well and we urge that any review should be undertaken along the lines of measured evolution and erring on the side of caution as demonstrated in 2006 with the introduction of the new exception of 'parody and satire' as per the 2006 amendments of the *Copyright Act 1968 (Cth)*. Adherence to the Three Step Test is also advised.

To act contrary to the above and overhaul the exceptions would in our view be impetuous and riddled with unresolved issues including untested definitions such as what is, and what constitutes 'transformative use' and 'market effect' in this context and how should they be defined? There would be an increase in piracy due to complexity of compliance and uncertainty of parameters which is elaborated on further down in this submission.

Lastly on this section, it should be kept in mind that since its inception here in Australia, copyright law has been founded on the fundamental underpinnings of recognition, equity and protection for originality and creativity and any step towards a Fair Use doctrine would be a deviation from these notions.

6. Statutory Licences

Response to Proposal 6-1 Question 6-1: We do not support changes to the statutory licensing schemes for educational institutions and state this on the basis that the education statutory licence was established in an attempt to balance the needs of creators and consumers which has for the most part succeeded. Despite its imperfections, for consumers it has created an efficient and cost effective way for instructors and institutions to legally access and reproduce very significant amounts of print and digital content. At an average cost of \$16 per student per year, in the context of the total education cost per annum (roughly \$10k - \$13k per student based on the Gonski Report), this is a very small price.

For creators, both authors and publishers, the statutory licence provides an important financial foundation and with it the certainty and confidence to continue to invest and create new products and services. Such a foundation has never been as critical as it is today, with both the promise and the threat of technology looming large. The introduction of the Australian Curriculum has presented content creators like Pearson with an opportunity to develop new, innovative digital and print products, and business models, although this comes with a great deal of risk. It stands to reason that any new curriculum needs fresh, relevant digital and print products to help it come to life: that is, to support teachers and to engage students. We cannot over emphasise that Pearson's appetite for risk-taking in this climate would certainly be reduced if the certainty over gaining a fair return on past and future investments were diminished.

Further ramifications of a repeal of the statutory licensing scheme would be that there would be a higher administrative burden for schools and their teachers (who are already under immense stress from their daily workload) who currently do not have to check whether what they are copying and sharing requires copyright permission or payments. Following from this, there would be an increased compliance burden for creators and publishers across the board and we feel certain that this would bring about an increase in piracy due to the complexity of compliance.

Educational exceptions were proposed in the Hargreaves Review of Intellectual Property in the UK, and a study was subsequently undertaken by PriceWaterhouseCoopers into the economic impact of these exceptions. They demonstrated the potential for significant losses to educational authors and publishers, serving as a disincentive to invest in new educational works. These conclusions, as above, clearly carry over to the Australian case.

7. Fair Dealing

Response to Proposals 7-1 to 7-4: We would emphasise that copyright is vital to encourage innovation and creativity: creators invest their time and we invest our money at risk and copyright is what allows a return if that risk pays off. Put differently, copyright is what gives Australian authors and businesses confidence to create high-value content and invest in the infrastructure needed to deliver it on tomorrow's platforms, as well as today's. Australian copyright law currently upholds these values and must continue to do so.

We would caution against over-prescriptive legislation and the introduction of broad copyright exceptions that could harm the creative industries. Broad exceptions to copyright can bring unintended and undesirable consequences; licensing is a far more practical and effective way of ensuring access to content. Exceptions should be just that – exceptional – and targeted at specific market failures. They should always be subject to the three step test.

The UK government recently concluded a similar exercise to the present consultation, resulting in proposals for "housekeeping" style updates to the UK exceptions regime combined with practical recommendations for innovative platforms, products and services such as a cross-media copyright hub. The kinds of recommendations for practical, voluntary and flexible

initiatives in Richard Hooper's UK 2012 report "Copyright Works" ensure that stakeholders collaborate more easily and readily, giving the consumer a better offering. A similar approach may be worth consideration in Australia.

Also, refer to response for The Case for Fair Use in Australia above.

8. Non-consumptive Use

Response to Proposals 8-1 to 8-3: Pearson is against the enactment of any fair use provision on the basis that the current provisions are sufficient for the purposes of an individual or entity avoiding inadvertently infringing copyright. To enact fair use provisions or to broaden the exceptions could contradict the very concept and intention of "non-consumption" although the latter option would be preferred from an evolutionary (technologically speaking) perspective and only with close consultation with industry stakeholders.

9. Private and domestic use

Response to Proposals 9-1 to 9-5: It is incontrovertible that with the advent of the photocopier, private infringement increased exponentially. To put it into perspective, the impact of private infringement in the digital age has inconceivably dwarfed such hardcopy infringement given the availability of (often cheap) devices at one's disposal which can be operated without interruption and in the convenience of one's household. If a user has paid to access one of our products or services, our view is that the user has acquired a licence to use that item and should be afforded some flexibility however we sometimes cannot deliver on this principle because different platforms, such as Kindle or iOS, use non-interoperable file formats and other technical measures to prevent easy transfer of files between different kinds of device.

Also, whilst *prima facie* we are not averse to the concept of private and domestic use, careful consideration needs to be given to prevent unjust enrichment and in that regard any additional reproduction of materials should not be concurrent so as to avoid multiple copies existing where only one is needed at any given time by one purchaser. It must be ensured that format-shifting does not introduce the scope for unlawful and uncontrolled distribution of publisher content but rather it would allow shifting of e-books from one format to another for example.

10. Transformative Use and Quotation

Response to Proposals 10-1 to 10-3: We are strongly supportive of many platforms and activities which allow the use of copyright materials in new, transformative ways, as long as the copyright holder is attributed and recompensed where that's appropriate (and we are clear that sometimes it isn't). Indeed, we have ourselves produced platforms like OpenClass, which allow educators to mash up our content with their own, and Pearson Plug & Play, which allows external developers to use our content on a developer platform through Application Programme Interfaces (APIs) designed and provided by us, to encourage just such behaviour. Developers are then able to create new offerings by using our content.

Pearson's approach is that consumers, customers and everybody who interacts with us should have choice, freedom and flexibility when utilising our products and services.

Other content providers are bringing different solutions to the table. We would argue that the plethora of such environments available demonstrate that the market is meeting this need – doubtless imperfectly, and we expect the scope and number of solutions to continue to grow; but there is no market failure here and no new exception to copyright is needed.

11. Libraries, Archives and Digitisation

Response to Proposals 11-1 to 11-7: We support efforts to improve archiving and digitisation of cultural works and in general we support a copyright exception for format-shifting expressly for the purpose of archiving and preservation, with particular reference to cultural institutions such as national libraries. There should be controls on subsequent access to material to ensure such access does not interfere with commercial exploitation of the works involved (as mandated by the Berne Three Step Test and other international instruments). More broadly we are aware and supportive of the helpful comments in the submission of the APA concerning the extant exceptions regime in favour of libraries.

12. Orphan Works

Response to Proposals 12-1 to 12-3: We support any amendment to the *Copyright Act 1968 (Cth)* which limits the remedies available in an action of "unintentional" infringement. This would especially be necessary in relation to opportunistic rights holders who may become aware of an infringement, yet elect to prolong enforcement until such time when the orphan work has been widely disseminated and for a longer period of time thus warranting much higher remuneration or increasing a claim for punitive damages. To that end it would also be prudent to limit the time frame of any such remedy via the confines of a statute of limitations specific to this purpose.

Additionally, and as previously canvassed, we would be supportive of solutions for orphan works along the lines that an entity wishing to use an alleged orphan work must complete a 'reasonably diligent search' after which it would then be granted a licence at low cost. The licence fees would be held in a trust by a collective management organisation (CMO) and paid to bona fide rights holders who subsequently re-emerge to lay claim to the work. The rights holder would then of course deal with future rights of such work. We have contributed to voluntary schemes in many jurisdictions to facilitate diligent search: we recognise that the onus is on industry to do this.

13. Educational Use

Response to Proposals 13-1 to 13-3: We reiterate our responses as per Items 4, 6 and 7 above and further state that the exceptions in the context of 'educational use' in Australia are unusually broad when compared to other major English-language markets and question the extent to which broadening it yet further would yield positive results.

Two important considerations underpin any investment Pearson Australia makes. Firstly, like any commercial organisation, can we achieve a reasonable return. In the case of publishing, commercial returns are predicated on copyright. And secondly, do we think these products or services will help in achieving better results or experiences for those using them.

The latter consideration is partly driven by the realities of a healthy, competitive marketplace, and partly driven by Pearson's mission. Either way, the beneficiaries are the students, teachers and readers of Australia. We would submit that fostering a healthy, competitive marketplace for educational products and services is essential if Australia is to achieve the objectives of education initiatives like the Bradley Higher Education reforms, the Melbourne Declaration and the National Plan for School Improvement. Despite their protestations to the contrary, publicly-funded content creators, who are not subject to commercial pressures (thanks to the Australian taxpayer) have historically been unsuccessful in developing efficacious or widely-used materials.

We believe that Australian students and consumers should be able to learn from Australian sources – but this is only possible when the Australian legislative regime allows a commercial return on high-value content developed in Australia. The alternative is learning primarily from northern hemisphere resources. Copyright has always evolved to keep up with new technology and it is right that that evolution continue. However, any changes need to be coherent with the needs of Australian learners and Australian culture generally as well as the internet.

14. Government Use

Response to Proposals 14-1 to 14-3: Refer to our responses as per Items 4, 6, 7 and 13 above.

17. Contracting Out

Response to Proposal 17-1: Refer to response in Item 11 above.

In summary, we argue that:

1. Businesses within the digital, publishing, education and creative sectors are successfully providing competitive, diverse and innovative products and services through the digital economy;
2. A robust and stable framework for copyright is crucial to ensure that industry continues to compete effectively. Copyright law must remain relevant and adaptable to new digital developments, and some updating of exceptions and limitations may be appropriate in some circumstances;
3. We do not support a change to the current statutory licensing schemes relating to educational institutions because this will harm Australian students;
4. We generally support licensing schemes where appropriate. They act as viable and in many cases preferable alternatives to broad copyright exceptions which often serve to undermine industry;
5. The Australian exceptions regime is unusually broad compared to other major English-language markets. We would question the extent to which broadening it yet further would yield positive results; and
6. A fundamental prerequisite that any alteration to the exceptions regime needs to meet is the Berne Three Step Test, encapsulated in international instruments to which Australia is a signatory.

Conclusion

Sustainability in copyright terms is predicated on the ability to finely balance between the consumer, which includes the learner for educational purposes, creator and publisher, and by leveraging this balance away from the creator and publisher will undoubtedly disturb the balance to the extent of (paradoxically) affecting the very same people it was intended to advantage by diminishing the overall quality of published material developed due to a lack of confidence and hence investment.

Whilst technologies have changed and business models evolved, there has been one constant throughout the decades of Pearson's history – the learner; and improving the lives of learners has always been our core philosophy.

We believe that if Australia is to remain competitive and maintain its image as a centre of innovation, we need to ensure that our learners have uncompromisingly the best resources and materials at their disposal and in that light we strongly recommend that the 'Fair Use' provisions are not enacted in any way.

We would be pleased to offer such information as would be helpful either formally or informally, within the normal constraints of commercial confidentiality, and look forward to discussing these important matters further should you wish. As a global player, we can offer a comparative perspective on the operation of copyright here in Australia which may be of benefit.

A handwritten signature in black ink, appearing to read 'David Barnett', written in a cursive style.

David Barnett
Chief Executive Officer, Pearson Australia