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31 July 2013

By email to: copyright@alrc.gov.au, web@alrc.gov.au

Penguin Australia Response to ALRC Discussion Paper: Copyright and the Digital Economy

This letter has been written specifically in response to the ALRC proposal to repeal the Statutory Licence provisions and introduce 'fair use' provisions into Australian copyright law as part of its review of Copyright and the Digital Economy. This is a follow up to the Pearson/Penguin joint response to the Issues Paper in November 2012.

Penguin Australia Pty Ltd is part of the recently formed Penguin Random House, a company ultimately owned by Pearson plc and Bertelsmann SE & Co. KGaA. Penguin is the leading English-language publisher in many parts of the world, including Australia, where we publish an unrivalled range of fiction and non-fiction, bestsellers and classics, children's books and illustrated reference books. Around 50% of the content sold by Penguin in Australia is locally generated. In most cases we are now publishing in digital formats as well as physical, and we have invested in new platforms and technology.

Like any commercial organisation, a significant factor in our decision-making is whether we have the potential to achieve a reasonable return for our investment. Our commercial returns are predicated on copyright. Therefore, we would emphasise that copyright is vital to encourage innovation and creativity: creators invest their time and we invest our expertise and resources in developing new content, at high risk. Copyright is what allows a return if that risk pays off. Copyright is also what gives Australian businesses confidence to invest in the infrastructure needed to deliver this content on tomorrow's platforms, as well as today's.

Australian copyright law currently upholds these values and must continue to do so.

We support appropriate licensing schemes rather than broad copyright exceptions. The education statutory licence system 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 \$17 per student per year (a very small price in the context of the total education cost of roughly \$10,000 per annum). For creators - both authors and publishers - the statutory licence system provides an important financial foundation for continuing to create and invest in new products and services. This development has never been as critical as it is today, with mechanisms of



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content delivery changing so quickly and profoundly, and with initiatives like the Australian Curriculum needing (and inspiring) fresh, relevant digital and print products to support teachers and to engage students.

In the UK Educational exceptions to copyright were proposed in the Hargreaves Review of Intellectual Property, and a study was subsequently undertaken by PriceWaterhouseCoopers into the economic impact of these exceptions.¹ The study demonstrated that the potential for significant losses to authors and publishers served as a disincentive to investment in new educational works. These conclusions, as above, clearly carry over to the Australian case.

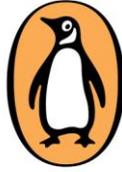
Therefore, we do not support a change to the current Statutory Licensing scheme relating to educational institutions. It will harm Australian students and be a burden (and therefore disincentive) to Australian teachers. The present system is fair and balanced enabling access to content at the same time as ensuring recompense for creativity.

A repeal of the Statutory Licence provisions:

- Will put development of new content and formats in jeopardy – *Authors and Publishers rely on income from Statutory Licence to invest time and resources in to creating new works and making them available in an increasing variety of formats. This will in particular threaten new Australian writing and research.*
- Will result in increased administrative burden for teachers, content creators and publishers – *currently, teachers are able to copy work to share with their students in the knowledge that authors will receive fair return for the work. The administration is simple and teachers are not concerned by the need for individual licences or consents.*
- Will create an unfair advantage to licensees with more bargaining power than content creators - *Content creators will need to directly negotiate licences and this may be with large companies and others who may have more bargaining*

¹ An economic analysis of education exceptions in copyright

http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf



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power than them. The current system ensures that content creators receive balanced and fair remuneration.

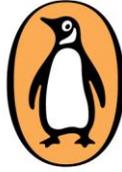
We believe that the current Copyright Agency system is working well – it is simple to administer and both authors and publishers are compensated for use of their intellectual property at a very small cost to each student. The Copyright Act does not preclude direct licences - copyright owners, educational institutions and other organisations are not precluded from entering into direct licences for the use of copyright material if they choose to license directly

Moreover, we believe that the present ‘fair dealing’ provisions under the Australian Copyright Act are appropriate to our market and we do not support the introduction of ‘fair use’ provisions:

The Australian exceptions regime is unusually broad compared to other major English-language markets. Broad exceptions to copyright can bring unintended consequences; licensing is a far more practical and effective way of ensuring access to content.

We submit that the proposed ‘fair use’ provisions:

- *Are too broad – even the existing ‘fair dealing’ provisions can sometimes create confusion and can be subject to misinterpretation. To introduce alternative, more wide-ranging exceptions will create even further confusion and open the door to unauthorised use.*
- *Will lead to uncertainty and litigation – with more wide-ranging exceptions, users are more likely to take a risk and assume ‘fair usage’ to avoid the need to seek consent.*
- *Will lead to excessive expense for content creators and publishers - The onus of proof as to what is fair use will fall to Publishers and/or the Copyright Owners, authors, and creators who can least afford to engage legal advice to prove fairness or not.*
- *Discourage legitimate use of content – The uncertainty surrounding ‘fair use’ may result in discouraging legitimate use of content.*



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- US fair use exceptions have led to a high degree of litigation – *‘fair use’ is always open to interpretation which requires legal expertise and possibly court proceedings to determine. These legal proceedings come at a very high cost which is likely to outweigh the value of the use.*
- Foster a misapprehension about the nature of copyright – *rather than encouraging the sense that Copyright material should be free to use, legislation ought to be encouraging the sense that content creators are entitled to fair compensation for use of their work.*

As the digital world has developed, Penguin has recognised the need for and benefits of striking a balance between rights ownership and opening up to the digital ecosystem – from individual 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. All of our innovation and development of new Australian writing – as well as the jobs associated with publishing – rest on our Copyright law. We strongly believe that law provides the best environment for the writing, production, dissemination, reading and study of Australian work, to the benefit of all participants.

Sincerely,

Ben Ball
Publishing Director, Penguin General
Penguin Australia Pty Ltd