

The Executive Director
Australian Law Reform Commission
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31 July 2013

Dear Sir

I write regarding the ALRC's discussion paper 70: 'Copyright and the Digital Economy.'

The Publishers Association ('The PA') is the representative voice of the UK publishing industry. Amongst our 110 member companies are those from the consumer, education and academic & professional sectors. The PA is a member of the International Publishers Association (IPA) and endorses the submissions made by the IPA, and by the Australian Publishers Association.

We offer the following observations in response to the ALRC discussion paper:

Copyright and innovation

The importance of copyright to the global publishing sector cannot be overestimated. It is the legal and economic foundation for everything the sector does, driving investment, facilitating innovation, generating revenue and stimulating growth. Copyright underpins publishers' relationships with authors and illustrators and with consumers (including educational institutions). It is at the heart of many business models and enables investment in the development of outstanding books, journals and applications.

Copyright rewards creativity, generates investment, and drives innovation. Contrary to how the debate on copyright is often mistakenly framed, copyright and digital innovation are not mutually exclusive. In fact they are mutually dependent. A stable foundation for investment provided by copyright enables publishers to innovate with new products, services and means of delivery. The rapid development of ebook formats, advanced scientific research databases and online interactive content has come about precisely because copyright has provided the confidence to innovate. By contrast, the claim that copyright hinders innovation is neither grounded in evidence nor reflective of reality.

Any proposed changes to the copyright system should be approached with extreme care, given the knock on effect such changes are likely to have on investment decisions. Any proposed changes should also be underpinned by robust economic analysis. Failure to do this, as was the case in the UK, will lead to either a reversal of course when a climate of business uncertainty has already been created, or lead to the pursuit of proposals that will have no economic benefit at the expense of established business who support jobs and growth.

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Fair Use

The PA strongly cautions against the introduction of the concept of Fair Use into the Australian copyright system. 'Fair use' has been adopted by only five countries worldwide (USA, Israel, Philippines, Korea and Singapore) and only the US has extensive experience with the concept. A recent review of the UK's copyright system and the potential introduction of Fair Use led to the conclusion that Fair Use was not a suitable concept to introduce into the legal framework.¹ Many of the reasons for this conclusion have parallels with Australia:

1. **Legal Uncertainty:** Whilst the concept of Fair Use and the jurisprudence to support it has been built up over many decades of use and interpretation in the US, the prospect of developing such a test in Australian law would raise a number of highly significant challenges which, in our view, render it unworkable and potentially damaging to the creative economy. Fair Use has four criteria, applied by US courts over the years (1: purpose and character of use, 2: nature of the work used, 3: amount or substantiality of the portion used, relative to the work as a whole, and 4: the effect of the use on the market for the work). These interpretation criteria, honed over generations, still produce widely variable results in the USA, and would not be easily transferable or easily absorbed by the Australian courts. This would inevitably run the risk of creating confusion and uncertainty for litigants, with two equally dangerous (if unintended) consequences: (1) a bonanza for media lawyers, at unnecessary cost for the creative industries, and (2) a severe "chilling effect" on innovative publishing, where publishers may not be able to run the risk of it being deemed fair use or not.
2. **"A troublesome doctrine":** The evidence from the USA itself seems to suggest strongly that, even with their relative familiarity with Fair Use (the earliest case was 1841), it has proved to be very far from a settled, widely accepted doctrine. Even in a relatively early case (*Dellar v Samuel Goldwyn* 1939) judges are on record as describing Fair Use as "one of the most troublesome doctrines in the whole law of copyright".
3. **Highly litigious:** Unlike Fair Dealing, with its comparatively low level of litigation, there have been more than 300 reported Fair Use decisions since the 1976 Act, and it continues to attract controversy, even in its home country. To suggest importing it, or even aspects of it, from the USA into the very different jurisprudence in Australia would seem to risk even higher levels of dispute and litigation, which the publishing industry could ill afford, especially in an uncertain economic climate and with a nascent digital market. As one of the most prominent academic copyright critics, Lawrence Lessig, puts it: 'Fair use in America simply means the right to hire a lawyer.'²

¹ Ian Hargreaves 'Digital Opportunity - A Review on Intellectual Property and Growth', May 2011, paragraphs 5.19 and 5.41

² 'Fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad — in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.' Lawrence Lessig, *Free Culture*, p. 187 <http://www.freeculture.cc/freecontent/>

4. **Disproportionate cost:** Fair Use litigation is far from straightforward or cheap, even in the USA. A 2007 report by the American Intellectual Property Law Association estimated the average cost of a Fair Use action at just below \$1 million. The costs element in the recent Google Settlement, in which US authors and publishers had to combine forces to sue the world's largest search engine for wholesale scanning of 18 million books without consent, was even higher, with \$30 million set aside as a contribution towards the plaintiffs' costs (in other words, the costs of only one side).
5. **Berne Convention obligations:** It is arguable that 'fair use' is incompatible with the three step test enshrined in the Berne Convention and TRIPS, because, without the existing case law and legislative underpinning, it is not clear whether it limits a copyright owners' exclusive rights only in 'certain special cases'. The US can point to a highly developed set of precedents that have, over decades, calmed (though not silenced) critics with regard to the ambit of the 'fair use' doctrine. If Australia were to introduce a fair use doctrine, without fully taking on board US precedents, the question of compatibility with the three step test would have to be freshly examined.

Licensing

The PA strongly opposes the repeal of the current statutory licence scheme and supports the arguments made in the IPA submission.

A well functioning, transparent licensing system is a complement to a robust copyright framework and is intrinsic to growth and innovation. As the UK experience has demonstrated, the licensing process can and should be made more efficient. Such efficiency need not – and should not – include the dismantling of existing licensing structures that support the digital and creative economy. Instead, industry-led initiatives such as the Copyright Hub, can be used to improve the functioning of the licensing system to the benefit of businesses and consumers.³

Specifically in the context of education, experience from the UK – including in the recent review of copyright – shows the importance of licensing to the education sector, providing clarity and certainty for all users. And the secondary income generated from such licences, reinvested in new content, jobs and growth, cannot be underestimated. For example, a PwC study, commissioned in the UK during the Copyright Review, found a direct correlation between publishers' secondary income (which represented an average of 12% of their earnings) and the incentive to invest in developing new content⁴. Similarly, a study by the UK Authors' Licensing and Collecting Society (ALCS) showed that a 10% decline in income from secondary uses for creators would result in 20% less output, whilst a 20% decline would mean a drop of 29% in output, or the equivalent of 2,870 works per year⁵. It is reasonable to anticipate a similar knock-on effect in Australia if proposed reforms are pursued.

³ <http://www.copyrighthub.co.uk/>

⁴ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf

⁵ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf
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Concluding remarks

Publishing companies operate in highly diverse and extremely competitive markets. However, there is one factor around which all companies have complete unity: intellectual property and the edifice of law supporting it, is of fundamental importance to their success. This axiomatic belief does not lead to the view that there are no aspects of copyright law which should be changed but any changes must be made with extreme care and backed up by sound economic evidence. The very prospect of radical reform may in itself be detrimental if it fosters an air of uncertainty, or ambiguity over where rights lie, and therefore where negotiation and deals may take place.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R Mollet', enclosed in a thin black rectangular border.

Richard Mollet
Chief Executive