



**Australian Law Reform Commission (ALRC)**

Antwerp, 30 July 2013

**Discussion Paper 79: Copyright and the Digital Economy**

**Comments by the Flemish Book Publishers Association (VUV)**

The VUV is grateful for the opportunity to respond to the ALRC's discussion paper 'Copyright and the Digital Economy.' The VUV is the Flemish Book Publishers Association, representing all aspects of book and journal publishing in the Flemish part of Belgium. The VUV is very much concerned by the plans for legislative reform in Australia that have been announced in the field of copyright, the thriving force for content creators to create and invest in original, qualitative content. The VUV therefore wishes to counter some of the main arguments raised in the ALRC's discussion paper and to expressly endorse the arguments as set out in the statement of the International Publishers' Association (IPA).

*Copyright Law and the public interest*

At the outset, the VUV would like to state expressly that copyright protection and the public interest in more and better access to content in education, research and for cultural participation and advancement are in our view not opposites. On the contrary: a society that wants better educational material and high quality content in schools, universities and research facilities must embrace the notion of making use of market forces to create that content. Education, freedom of expression and cultural advancement all require successful creators and viable publishers and their investment in time, resources, career choice and development. Researchers value powerful research tools and well maintained databases. Teachers value great textbooks, and the choice, diversity and innovative approaches that come out of the entrepreneurial spirit of publishers seeking to serve them better. Copyright (and the authors creators and publishers) who rely on it serve education, culture and research. A world with weaker copyright would be a place with less investment, less choice and fewer incentives to grow and develop curated quality content.

*Terms of Reference/Framing Principles for Reform*

The VUV strongly supports the framing of this inquiry's terms of reference around the 'importance of the digital economy'. Publishers are after all among the primary investment engines and drivers of the evolving digital economy. For us, copyright is not a theoretical or ideological debating point, it is a practical tool that underpins publishers' relationships with authors and illustrators and with consumers (including educational institutions). It is at the heart of business models and enables investment in the development of outstanding books, journals and applications. A successful

business environment requires clarity, stability and certainty. This is especially true during this period in which the way content is created, curated, published, distributed and used is changing quickly and unpredictably. Innovation, investment and flexibility are central to the business models of the digital era. Publishers have embraced digital technology and are taking advantage of its new opportunities in their operations and their business development. Publishers have harnessed technological innovation and many have found success in developing new digital products, new ways of engaging with their customers, and new strategies for finding new customers. The VUV supports the five framing 'Principles for Reform' as set out in the discussion paper, but submits that a number of the ALRC's recommendations are inconsistent with (and counter to) those principles. Proposals that are not based on practical experience but appear solely based on academic thought or a desire for a tidier looking Copyright Act, require a particularly prudent approach, before they should be seriously considered for legislative reform.

### *Fair Use*

'Fair use' has been adopted by only five countries worldwide. Only the US has extensive forensic experience with the concept. Fair use regulations have been rejected by many jurisdictions, amongst which the Belgian Council for Intellectual Property, and for good reasons. The introduction of a fair use doctrine in Australia would in our view:

- create legal uncertainty for both users and rightsholders and hence an atmosphere hostile to creative innovation and collaborative solutions;
- create a serious risk that Australia may violate its obligations under international copyright treaties, in particular the three step test;
- require the development or importation into Australian jurisdiction of an entire body of legal precedents, adjudications and case law, carrying with it unpredictable legal consequences, uncertainty and therefore business risks.

Introducing an entirely new legal concept into the Australian Copyright Act would be radically intrusive, unpredictable and of dubious utility. Given that there is no international mechanism to coordinate and resolve tensions between different applications of the fair use doctrine in different countries, there is no such thing as a single, homogenous, uniform notion of 'fair use'.

If 'fair use' were introduced, Australian courts may or may not agree with precedents set abroad. This will create confusion because the expectation of homogeneity and consistency cannot be borne out in practice. The importation of an entirely new legal concept as loosely formulated as 'fair use' would leave both rightsholders and users with a high degree of uncertainty as to whether a given use is legal or not, thus stifling both investment in innovation and restricting the freedom of speech of authors. The US Constitution provides a countervailing safeguard for the freedom of expression that is missing from the Australian legal context.

It should also be mentioned that 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 (how?) US precedents, the

question of compatibility with the three step test would have to be freshly examined. Most importantly, the ALRC provides no evidence to show that the introduction of 'fair use' would stimulate Australia's digital economy.

### *Statutory licences*

At the outset, the VUV wants to state that we support voluntary licences and believe that user demand and evolving technologies will enable such licensing mechanisms to thrive and develop in many creative sectors. But our fundamental support for what the ALRC discussion paper refers to as 'copyright's overall free market philosophy' needs to be complemented by practical solutions that ensure seamless, clear and risk-free access, where such licensing solutions cannot be found. Such access requires a collective licensing mechanism that is clear, simple, transparent and based on a sound legal footing which ensures that any disputes can be resolved quickly and fairly. The Australian statutory licence appears to fit these requirements very well. To reject such a complementary solution is to unfairly disregard the benefits that it has provided now and in the past and to be blind to the potential that such licences have to balance interests as technologies and user needs evolve. To reject such a complementary solution also ignores that, as currently drafted, educational institutions are not compelled to rely on the statutory licences, and are not precluded from reaching voluntary licences with publishers (as they already regularly do, for example, in relation to online subscription services).

The current collective licensing arrangements are designed to be inclusive, simple and effective, while maintaining maximum flexibility for educational institutions. They cover content from small to medium creators and rightsholders, who would usually have less market power because of their limited offering. For Australian society, statutory schemes administered by collecting societies offer not only an opportunity to minimize the administrative costs of copyright management and royalty distribution for both publishers and licensees. They also provide a simple mechanism to achieve balance. The free collective licences for persons with print disability are a great case in point. Here, all interests can be addressed without undue cost, flexibly managing and balancing all needs with the shared objective of best possible access.

The ALRC's discussion paper offers no evidence that repeal of the current statutory licence scheme would be more efficient. After suggesting that voluntary licensing would be a better alternative to statutory licensing, the ALRC notes that new gaps would open up in this scenario, requiring further changes to the Copyright Act, and then suggests a series of such complementary measures including introduction of 'fair use', a kind of forced voluntary licensing, and extended collective licensing. Closer inspection reveals that reliance on such mechanisms would, at the very least, increase the complexity and the administrative costs confronting teachers (for example) wondering whether they can copy or use copyright material. A shift to voluntary licensing would also increase administrative licensing costs to smaller publishers and creators, thereby diverting resources towards unproductive administrative functions and away from investing in and producing more high-quality educational resources for teachers and students.

Further, while the ALRC's inquiry is supposed to be aimed at assessing the adequacy and appropriateness of exceptions in the digital environment, most of the current \$17-per-student fee paid under the statutory licence relates to the physical photocopying undertaken in Australian schools. The VUV's understanding is that only a dollar of that amount relates to digital usage.

The secondary market that operates through these licences is increasingly important to rightsholders and any diminution in the remuneration received by creators and publishers as a result would have significant consequences. Broadening exceptions and limitations would result in loss of income from secondary uses, and this in turn would impact severely on publishers' profit, potentially leading to job cuts and reduction of investments in new works and innovation.

### *Educational use*

The VUV reiterates its opposition to introducing 'fair use' into Australian law. There is no convincing evidence provided by the ALRC to show that broadening the free-use education exceptions available in the Copyright Act would somehow stimulate or strengthen the digital economy. In fact, if such a broadening merely led to users paying less for use of copyright material, then such a diminution in payment to creators and publishers would lead directly to a diminution of output and innovation as pointed out before. The ALRC states that education is a clear example of an area with 'a strong public interest.' This is unarguably true. There is therefore a public interest in variety, quality and innovation in the provision of educational content. The only practical question, therefore, is how to encourage and facilitate a strengthening of education systems. The VUV submits that the best way of doing so is to strengthen the educational content market, and continue to encourage and facilitate the development, production and distribution of the highest quality education resources. Broadening exceptions that would lead to diminishing remuneration for creators and rightsholders, can only be deleterious to the overall quality, variety and number of high-quality educational resources in circulation. There are times in the discussion paper where the ALRC seems to be ignorant of the contribution of publishers to the education 'value chain'. As a small measure of balance, allow us to make a number of basic statements along the lines of 'education is a strong public interest' which are often ignored in the public discourse on this issue:

- Education publishers are committed and passionate about educational outcomes. Ultimately they can only sell products that work;
- Education publishers are very knowledgeable about curricula, understanding them in extreme detail. They expend great effort pointing out curriculum changes to teachers, thus providing an important tool to ensure rapid curriculum change;
- At the core of what education publishers do is quality control and a sensitive yet robust feedback loop – their books will fail if teachers don't like them or they are sub-standard;
- Education publishers consistently and constantly reach out to and listen to teachers; this is both part of their market research and their customer service;
- Education publishers have both broad and deep expertise that cannot easily be replicated by individual teachers or by expecting teachers to rely on either open educational resources. They understand how design supports teaching, how different kinds of exercises tap into different learning styles, class dynamics, teaching rhythms, work flows, etc.;
- Education publishers create not just one book or one digital product, they create series, based on different teaching styles and student needs. Books in such series often build upon each other, referencing back or requiring knowledge and skills based on previous books in the series.

### *Concluding Remarks*

The development and ongoing support of a healthy national publishing sector is in the Australian national interest. There is not only a national interest in continuing this as part of the national digital knowledge economy, but there is also a direct interest in harnessing the innovative capacity and the improvement through competitiveness that a free, competitive and entrepreneurial market for copyright protected content brings. If Australia wants to stimulate the digital economy, then publishing is a strategically important industry. From this perspective, cultural expression, information and educational content are not ordinary commodities. Rather, they become indispensable for ongoing national development.

Beyond the pragmatic and economic argument for strengthening copyright and the local publishing industry, there are also broader policy implications: authors are a society's moral conscience. They are the way we tell ourselves who we are, where we've come from and what we could be. They chronicle, inspire and admonish us.

Copyright is the mechanism our society has invented to ensure that authors are rewarded for their creativity and are encouraged to continue creating. In an increasingly globalised, digitised and mediated world, authors are the people who create an intelligible conversation out of the anarchy, the dissonance and the babble. Publishers are the engines who drive that conversation and ensure that it reaches its maximum audience.

In education, publishers are also the creative drivers behind education resources. They devise, commission, modify, oversee, produce and update on a virtuous circle of improvement and adaptation.

Australian creators deserve the opportunity to be confident and productive participants in the global dialogue that is modern publishing. The VUV urges the ALRC not to risk the continued development and success of the creative copyright industries in Australia by proposing unnecessary and unpredictable changes to the Copyright Act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Geert Van den Bossche', with a stylized flourish at the end.

Geert Van den Bossche

Executive Director VUV vzw