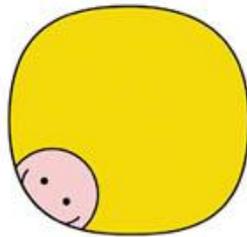


Australian Law Reform Commission

Copyright and the Digital Economy: Discussion Paper (DP 79)

Australian Children's Television Foundation Submission



**AUSTRALIAN CHILDREN'S
TELEVISION FOUNDATION**

The Australian Children's Television Foundation ('**ACTF**') is pleased to have the opportunity to respond to the Australian Law Reform Commission's ('**ALRC**'), *Copyright and the Digital Economy: Discussion Paper (DP 79)* ('**Discussion Paper**').

The ACTF is a national children's media production and policy hub and performs a wide range of functions in children's media: as a voice in policy matters; as a distributor of and investor in Australian children's television series; as an instigator of new, innovative and entertaining children's media and as a developer of valuable screen resources for the education sector.

1. Introduction

As a key organisation concerned with the creation and production of Australian children's content, and creating educational resources based on such content, we direct our submission specifically towards the following sections of the Discussion Paper:

- *Section 6. Statutory Licences*
- *Section 13. Educational Uses*

while also having regard generally to the following section:

- *Section 4. The Case for Fair Use in Australia*

We express concern over the following proposals:

- the repeal of the statutory licensing schemes under the Copyright Act (Proposal 6-1); and
- the introduction of a broad educational exemption under a proposed fair use regime (Proposal 13-1), or alternatively, the introduction of an education exception under the existing fair dealing exception (Proposal 13-2).

We express broad support for retaining the existing statutory licence scheme on the basis that it has for many years struck a balance between granting users reasonable access to reproduce and use copyright works and providing copyright holders with a valuable source of revenue arising from that use, in an otherwise imperfect marketplace.

Notwithstanding our support for the existing scheme, we welcome the review and further consideration of ways in which the existing system could be improved.

The proposals for a broad education exception to copyright, either under a fair use regime or a new exception under the existing fair dealing exception, would grant users broad and extensive rights to reproduce copyright material within certain educational contexts. However, we oppose these proposals as the rights they grant users would be at the sole expense of copyright holders, and would unacceptably undermine the legitimate expectation of copyright holders to obtain remuneration for use of their works.

2. Australian screen content creation

Our opposition to a broad based fair use exemption to copyright for educational use, and our support for the retention for a statutory licence scheme, must be appreciated in the context of the Australian marketplace for screen content creation.

The ALRC review is predicated on a narrow market analysis of content creation, that does not fully take into account the challenges faced by Australian content creators in a globalised marketplace. This is not surprising given that the terms of reference provided for the Discussion Paper are focused primarily on opportunities for legislative reform, the ALRC's natural area of expertise, without necessarily taking into account broader cultural and economic concerns that are relevant to the creation of screen content in Australia.

The Terms of Reference does require the Review to have regard to the economic impacts of the digital economy:

'the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies'.

However, the creation of screen content in Australia, in the context of a globalised marketplace, operates in a framework of market failure. The unique challenges faced by screen content creators should be considered in evaluating proposed legislative reform that may impact on their ability to continue the creation of locally produced content.

We therefore take this opportunity to present a brief analysis of the challenges faced by Australian screen content creators.

Government intervention and funding the production of Australian content

Due to the globalised nature of the screen content environment, the continued creation of high quality Australian content would not exist without targeted support from the government. Recognising this, successive Australian governments have provided continued support for the production of Australian film and television through a range of strategies:

- direct funding for the development and production through Screen Australia, state development agencies, and the ACTF;
- indirect funding through tax rebates such as the Producer Offset, or production investment through the ABC and SBS;
- maintaining minimum content quotas for Australian content on commercial Free-to-Air broadcasting; and
- maintaining expenditure requirements for drama on subscription television.

Notwithstanding the assistance provided by government, funding for the creation of Australian content remains scarce, competitive, and difficult to secure.

Australian content creators operate in a globalised marketplace, competing with foreign imports made on significantly larger budgets for larger domestic (predominantly US) audiences. The economies of scale of US and UK production allow the costs of production to be recouped from domestic markets – which then allows content to be licensed internationally for licence fees lower than are lower than their budgets would reflect. A key challenge facing producers of Australian content is it remains expensive to produce compared with foreign production.

Income from educational copying and use

Maximising the sources of income for producers of Australian content is therefore critical to ensuring the continued creation of Australian content, not to mention the growth of Australian businesses creating such content.

For producers of children's screen content in particular, revenue from educational use is an extremely valuable source of income. This is particularly the case for documentary producers.

Recoupment by producers allows further investment in content creation, while a failure to recoup across all potential distribution channels makes it harder for future production to be made.

3. Response to 'Section 6. Statutory Licences'

The Discussion Paper proposes the repeal of the statutory licensing scheme set out in the Copyright Act.

Proposal 6–1 The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

We express our support for the retention of the statutory licensing scheme.

It is a fundamental principle that copyright owners should be entitled to remuneration for the reproduction and use of their work. It is critical that a system exists that efficiently tracks copying and usage of copyright works, and is also able to collect and distribute payments relating to that use.

As the Discussion Paper has outlined, there are a range of reasons why a statutory licence scheme has advantages over a voluntary licensing scheme, as well as the converse. Although Australia is unique in the world in having a statutory licence scheme, this alone should not be taken as a reason to discredit its achievements.

Practical hurdles – historical context

The statutory licence scheme was originally established to address the unauthorised copying by educational institutions of works protected by copyright. The scheme legitimised such copying, but also introduced a mechanism for securing payment for copyright owners for the reproduction of their material within an educational context.

The scheme has worked well for many years. This is particularly the case when one takes into account the variety of works, the number of users, and the scale and complexity of the licensing regime required to record and administer the copying that is subject to the scheme.

The statutory licensing scheme does involve a range of compromises, as highlighted in the Discussion Paper. However, for many years it has represented a workable compromise that has benefited both users and copyright holders.

Despite the emergence of digital technology that has revolutionised the distribution and consumption of content, the key reason behind the introduction of the scheme remains valid today; balancing the ability of users to reproduce copyright work for educational purposes against the rights of copyright owners to secure a reasonable level of payment for that use.

Improvements on scheme

This is not to say that the scheme could not be improved from its current form.

The current existing system of surveys and data collection administered by Screenrights for tracking reproduction of broadcasts can only arrive at an approximation of usage. It is possible that certain users may pay more than their use of material warrants. However, it is also likely that copyright holders are not paid for every copy made of their material. The averaging out of usage and payments has been an acceptable compromise given the scale of the task of tracking every reproduction across the educational community.

The transition from an analog to a digital content distribution environment may present an opportunity to develop cost effective new tools or processes for more accurately measuring copying of content and payment. We would welcome consideration by both the educational sector as well as copyright holders of viable and workable alternatives to the current scheme that take into account technological developments that have emerged since the scheme's introduction.

If it ain't broke...

Our main objection with repealing the statutory licensing scheme is that the scheme has been operating successfully for over two decades, and given the period of uncertainty and the additional cost involved in establishing a voluntary scheme or range of voluntary schemes, the case has not been made that repealing the scheme will result in clear benefits for users and copyright holders

If the repeal of a statutory scheme was accompanied by the introduction of a fair use regime, it is likely that parties will have little choice but to revert to litigation to determine their rights in relation to the exploitation of material where the status of that exploitation is uncertain.

We would anticipate that voluntary schemes would attempt to forestall any litigation by negotiating agreed limits and exceptions. However, it is unlikely that any arrangement would anticipate every use, so in some circumstances parties may look to the courts to establish certainty over their entitlements. As is currently the case, the exact definitions of the existing fair dealing exceptions have occasionally required the courts to determine their interpretation.

In a media environment that continues to evolve, there is some value in defining such exceptions broadly, requiring the nature of each exception to be determined through litigation. But this will likely be the case only after delays, additional cost and uncertainty.

Given the existence of a functioning scheme, the case has not been made that dismantling the existing scheme and leaving content creators and users to organise voluntary schemes to take its place would deliver benefits that would justify this period of uncertainty. Particularly when the statutory licence scheme does, by and large, serve the interests of copyright owners, and those who wish to use the material, well.

Existing scheme is voluntary

Furthermore, as Screenrights has pointed out in its submission, while the statutory licensing scheme is mandatory for copyright holders, for users of the scheme it is voluntary and users are free to negotiate their own arrangements for use of material. The potential exists, therefore, for users to negotiate their own licensing arrangements if they are inclined to.

Voluntary schemes - case study

The ACTF recently received a request from a state based education department to license some of its materials under a National Education Access Licence for Schools. ('NEALS'). Not being party to NEALS has meant it has been difficult to establish exactly the nature of the scheme, however, we have established that NEALS appears to be an agreement between the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR), the state and territory education departments, and the Catholic and independent school sectors, to allow these parties to share materials without payment of fees.

While we do provide some material for use by schools and educators free of charge, we typically license use of our content for a fee (having paid an advance to the producer of the material for the educational distribution rights and invested in the creation of educational material). We requested information about the licence, but unfortunately our correspondent was not able to provide further information beyond the name of the licence.

We relied on our own internet enquiries to determine the nature of the terms and conditions attaching to the NEALS licence, and although we were unable to find a full description of its terms, we did discover that

The NEALS licence allows staff in schools to copy any material which is normally available to them and marked with a NEALS logo without incurring the usual copyright fees. Unlike other copyright material there are no restrictions on the volume of copying schools can make of NEALS material, provided the material is copied for an educational purpose.¹

There may be shortcomings in the administration of the NEALS licence whereby details of the terms of the licence are not readily available by those representatives requesting permission to use material on the terms of the licence. However, it is clear from this summary that the terms of use were entirely unacceptable to us, amounting to a free unrestricted licence to reproduce material without limitation.

This is not to suggest that all voluntary schemes would share the ambitious scope of NEALS. However, it is perhaps indicative of the ideal situation that the educational sector would like to achieve in respect of the conditions of use of third party material – free, and unlimited use of third party content for educational purposes.

While we can understand why the educational sector would prefer an arrangement whereby schools and educational organisations would be permitted to reproduce copyright material without requiring to pay for it, we hope that the ALRC will also appreciate that copyright holders have a strong interest in ensuring reasonable remuneration tied to the reproduction of their works, ostensibly to ensure their ongoing ability to continue in the creation of such works.

We are also concerned that due to the Government's funding of content creation, advocates for the introduction of a free use regime have argued that on the basis that some content is created through the assistance of government funding, then the community should receive the benefit of that content.

In relation to government assistance for Australian content production, the overriding benefit to the community from the Government's support is access to high quality, Australian content. Although government assistance is crucial to the creation of such content, it is created through the work of the independent production sector. And these businesses should

¹ This description has been taken from the website of the NSW Department of Education and Communities, <http://www.dec.nsw.gov.au/footer/neals>.

be entitled to extract a return from the creation of their intellectual property as any other business would.

4. Response to ‘Section 13. Educational Uses’

The Discussion Paper includes extensive discussion of an educational exception to copyright, based on a fair use model, or alternatively, amending the existing fair dealing arrangements to include an exception:

Proposal 13–1 The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

Proposal 13–2 If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

The fair dealing exception permitting the reproduction and use of copyright materials by individual students in the course of their research and study is an established and accepted exception that recognizes the limited resources individuals may have to access materials, contrasted with the greater resources of organisations or institutions.

The existing fair dealing exception arose when readily accessible forms of reproduction were restricted by the technical limitations and cost of analog technology. The emergence of inexpensive computing power, the internet and cheap storage hardware has transformed the ability of organisations to store and share vast amounts of material, across geographically disparate locations, at great speed, and at a fraction of the previous cost.

Taking into account these technological changes, it is simply not appropriate to establish a broad educational exception available to educational organisations. It is one thing for an individual student to reproduce parts of a work for their own research or study without payment. However, it is an entirely different case to grant a similar exception that would enable an educational institution to upload a television series onto a school wide or organisational wide intranet, accessible by all those within each organisation, without payment.

The existing fair dealing exemption for research and study strikes a balance between the right of students and educators to use work in the course of research and study, and content owners to receive a commercial return from exploitation of their work.

We oppose both proposals on the basis that a broad ranging educational exception unfairly disadvantages the ability of copyright holders to seek a reasonable return on the reproduction and use of their works within the educational sector. A broad fair dealing exception for educational use exemption goes too far to grant users unfettered rights to use educational material, at the expense of copyright owners.

Educational exceptions – factors to consider

The Discussion Paper takes care not to attempt an exhaustive list of what instances of use, or factors to consider, that would constitute an educational use fair use exemption. This is consistent with the approach raised by several stakeholders in highlighting the uncertainty and cost involved in implementing a fair use regime.

The basis of our opposition to such a regime is set out above. The Discussion Paper, does however, survey a number of factors that could be considered in a fair use regime, which we have briefly responded to below.

Technical Copying

The tendency of existing legislation to pick up every single instance of copying necessitated by digital technology (copies made in temporary caches, for example) was not the original intention behind the legislation. Educational users should not be required to pay for reproductions that are created in the course of technical delivery, or 'non consumptive uses'.

We welcome consideration of reforms to the existing legislation to address this issue without doing away with the entire framework.

'Freely Available' material

We strenuously reject the submissions that the Discussion Paper characterises as follows:

'schools and universities should be able to use, without payment, some material that is otherwise 'free' – uses such as copying material on the internet and copying content broadcast on free-to-air television'.²

The ease with which content may be reproduced in this digital era should not be used as a justification to dismantle the nexus between the content creator creating work, and the content creator's entitlement to reasonable remuneration from the use of that work by third parties.

The suggestion by the Australian educational sector that 'educational institutions should be permitted to copy and communicate free and publically available material on the internet for non-commercial educational purposes'³, does not recognise that the initial broadcast or display on the internet is often facilitated by a licence fee from broadcaster or content site to the content creator, for consumption by viewers.

Furthermore, it does not appear to contemplate that much material that is freely available on the internet may be available without the permission of the content owner, or ignores the reliance content creators have on secondary markets to ensure a return on their content and facilitate further creation of work.

Commercial use and third parties

Referring to several cases of commercial copying in determining what is likely to constitute 'fair' copying, the Discussion Paper states that 'Copying and other uses by a non-profit educational institution are more likely to be fair, though the fairness factors would need to be considered'⁴. The Discussion Paper also refers to the submission by the Australian education sector that educational institutions be allowed to 'copy and communicate free and publically available material on the internet for *non-commercial educational purposes*' (emphasis added)⁵.

These statements suggest that the status of an organization as a non-profit organisation, or the purpose of a copy being non-commercial, should determine the treatment of that organisation's use of third party copyright material.

Non-profit organisations, including those in the educational sector, vary considerably. In respect of not-for-profit companies, the one defining characteristic is a restriction from returning any profits earned by the organization in the course of its activities to its members. However, not-for-profit companies may include as their members, commercial organisations.

² Discussion Paper, 13.22, p273

³ Discussion Paper, 13.23, p273

⁴ Discussion Paper, 13.43, p277

⁵ Discussion Paper, 13.23, p273

For example, a prominent well resourced not-for-profit company happens to be the Australian Football League, which administraters the AFL.

Ultimately it seems unusual that the status of an organisation should determine whether or not the content creator gets paid for the use of material by that organisation.

For example, if a commercial educational enterprise were to copy material to use in the course of educational activities, they would be liable for payment. However, if a non-profit organisation, ranging from a school to a non-profit organisation set up by member organisations of commercial enterprises, were to use the work they could be exempt from payment?

Liability for payment for use of material should be determined by the use enacted, and not the status of the organisation contemplating that use – unless clear exceptions are set out under legislation, as is the case for use by students or individuals in the course of study or research.

Market harm

We also express concern over the ALRC's contention that:

13.57 In the ALRC's view, the Copyright Act should not provide that free-use exceptions do not apply to copyright material that can be licensed. Instead, the availability of a licence should be an important consideration in determining whether a particular use is fair.

Our concern with this statement is that an analysis of fairness could be based on the resources of a particular user or user organisation to access or licence material. There are persuasive arguments that liberalising use of content may result in greater commercial exploitation, if managed properly.

However, the ALRC's contention appears to suggest that in certain circumstances it would be considered fair for users to reproduce material, without payment, despite that material being available to be licensed, but where the circumstances are such that the user is not in a position, whether those circumstances are financial or practical, to enter into a licence for that material.

An analysis of fairness that goes beyond whether or not material is able to be licensed goes too far into a subjective analysis of the circumstances of the material, and the circumstances of the use, when the key factor to be determined should be the nature of the use of that material.

**ACTF
July 2013**