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The Executive Director  
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(by email)

### **RESPONSE TO ALRC 'ISSUES PAPER': Copyright And The Digital Economy**

We thank the government for the opportunity to respond to the 'Issues Paper' prepared on these subjects by the Australian Law Reform Commission (ALRC).

The Australian Society of Authors Ltd (ASA) is the peak organisation representing the professional rights and interests of Australia's literary creators. The ASA was formed in 1963 and operates under Australian corporation law, with a total membership of over 3, 000 nation-wide. The ASA has a vital role and interest in maintaining the integrity of the intellectual property of Australia's authors and illustrators, past, present and future.

### **Context**

#### **Exceptions:**

We take the view that all forms of Copyright Act 'exception' have the capacity to impact negatively on the rights and interests of the creator, especially in the matter of remuneration of literary creators. Not that they *will* in all instances but that they may, unless the form of exception is heavily qualified and seriously policed. An 'exception' valorises the interests of someone *other than* the copyright creator/owner. And for that fact alone, the creator/owner's interests must be protected as a priority.

The ASA supports copyright licensing rules that apply to commercial entities (these could be as small as an individual author/publisher) ,and that defend intellectual property as a first priority. We are also prepared to support only those exceptions that are tied to particular, non-commercial uses as described later.

### **Economic considerations:**

The ASA takes the view that the term digital economy is used in the Issues Paper and Terms of Reference in confusing ways that are unhelpful to the interests of literary copyright holders. There are in fact 'digital economies' and 'digital economies'...

Rather than speak of the digital economy, it is more useful when addressing copyright to identify and define the 'money trail' as this exists online.

The trade of goods and services online may overall be described as 'e-commerce'. What is traded online across national borders, and what is traded within national borders, includes – as a distinct component - 'digitised products' – that is, materials in specific digital formats such as music and book files.

Professionally-created literary products have, over the past few years, dropped as a percentage of the estimated 6.6% that the core copyright industries contribute annually to Australia's GDP ('The Economic Contribution of Australia's Copyright Industries', PricewaterhouseCoopers, 2012, p. 17). The increased piracy of material digitally – that is, the theft of copyrighted products – must be considered one of the causes of this decline, while allowing also for the expansion in other industries such as mining.

The digital-only component of this contribution is small and growing slowly rather than rapidly, representing perhaps 10% of the total trade. The bulk of economic activity in the book industry, for instance, remains with print, where estimates suggest total print format sales are unlikely to fall below 50% of total book sales inside 25 years.

There is at the same time an increased amount of 'casual creation' online, including music, visual and text material. Small operator, casual literary creation online proceeds ad hoc, and is a minor activity in dollar terms.

In proposing that copyright should be loosened to accommodate such creation – distribution of which is largely in the hands of overseas tech giants and/or e-tailers such as Amazon – we may arrive at rules that are potentially disadvantageous to those serious creators and copyright license holders who make a financially meaningful contribution to GDP and Australia's economy, as well as undermine a still vibrant and important print sector.

### **The Questions:**

#### **Question 1:**

The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law: (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services; (b) affects the introduction of new or innovative business models; (c) imposes unnecessary costs or inefficiencies on creators or those wanting

to access or make use of copyright material; or (d) places Australia at a competitive disadvantage internationally.

One of the problems that individual authors face when attempting to benefit from their copyright digitally is not copyright law itself, but a diminution of opportunities for income sources. An example: a book reviewer for a newspaper or magazine once produced a review for one print publication for one fee and was free to offer the review to interstate publications for further fees. The only rights request made by the commissioning newspaper was for first publication. The reviewer held all other rights. Now, a reviewer is asked to sign over under contract all rights to the review for use by the commissioning entity in all print and digital forms – all for what is generally a lesser fee than in the past. In other words, the freedom of digital distribution is taken as a reason for wholesale rights grabs.

An additional problem lies in the diminution of income sources as a consequence of failures to update and police the protective and sanctions aspects of the Act. Digital piracy is a growing phenomenon for literary creators that must be addressed on their behalf.

Literary creators are losing the right to negotiate use of their material in digital terms. One means to halt the diminution of rights is to ensure that there is a degree of inalienability in these rights, so that creators are not obliged to sign over all digital rights to the owners of digital information silos without clear sight of a remunerative return controlled via copyright law (in addition to commercial contract law).

Among the benefits of the copyright system as it exists at present is that creators have the ability and choice to give their creations away for free, or to seek remuneration. A writer of a blog, for instance, may first offer material free to a digital audience. That same material might be repurposed for publication in print form, say as a book or an article in a magazine or journal for which the writer receives payment.

## **Question 2:**

What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

### **Guiding Principles for Reform**

The ASA agrees that before determining any form of exceptions or other changes to the Copyright Act, we are obliged to refer to foundational values and guiding principles. Guiding principles are statements that follow and articulate values - such as the values of equity, access and protection - from which subsequent ideas, policies, practices, actions, ought to follow.

The first principles asserted by literary creators sit considerably above the 'principles' enunciated as part of this review. As a means of guiding the review we believe these eight principles are inadequate, for reasons as follow.

The principles as described in the issues paper are not sufficiently differentiated, but seem to imply one principle is as significant as another. There is no evident effort at establishing a hierarchy of value. This is a serious flaw.

1. A first principle for literary creator/owners is that the production of copyrightable material – intellectual property - is a matter of human agency. (See previous ASA submission on the original Draft Terms of Reference.) A book is called a ‘work’ for the fact that time and labour are involved. We see copyright as primarily a system of law covering human interests.
2. A first principle for literary creators is that copyright law is fundamentally a private right. It is ‘for the author first and the national interest (including any ‘digital economy’ interests) second’.
3. A first principle for literary creators is that copyright law is also a property right, with moral as well as economic dimensions. This property may be dealt with, exploited only according to the wishes of the owner.
3. A first principle for literary creators is that copyright exists to afford the possibility of remuneration. And that the protection of this possibility is the best way to encourage creators to provide their ‘social good’. ‘Society benefits when creators get paid. The private right that copyright secures is what advances the public’s interest in new expressive rights’ ([www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/](http://www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/)).
4. A first principle for a framework of law in copyright is that the drafting of new or revising of current provisions should focus on the protective aspects of copyright. We do not see copyright primarily as a facilitator of better distribution machinery, production methods, technology, or ‘the economy’. While technology may bring benefits to both creators and users, copyright law must also be cognisant of the potentially serious negative effects of digital technologies for copyright creators.
5. A further guiding principle is to work from the success of the current formulation of the Act. The task of identifying if/where there might be shortcomings needs to be undertaken in the context of the overall quality and efficacy of the Act. Furthermore, literary creators would wish to see any suggested shortcomings need to be assessed according to the foregoing principles - not on sectoral claims which amount to wanting ‘more copyright material at less cost’. Among the successes of the Act is the current statutory licences regime, which has achieved a balance between users’ and creators’ interests that is mutually beneficial.

On this basis, we believe that an ‘exceptions’-focused review approach is a flawed approach, and even more so if it does not take evidence or information from creators. Before change, facts need to be put forward, not assertions. Without facts it is not possible to establish ‘any urgent need for legislative change across areas of copyright, or that private or commercial activity is being impeded by existing copyright laws.’ (Michael Williams, Gilbert+Tobin, reported in *AFR* 8 Oct. 2012)

### **Question 3:**

What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia’s copyright law?

We are not aware of any kinds of ‘internet-related functions’ being ‘impeded’ by Australia's copyright law.

On the other hand, internet caching and indexing functions are not sufficiently understood or regulated. Creators in most cases give only *de facto* permission for Google and other bots to crawl across material online to find, sort and aggregate. Creators, authors included, are generally not actively or clearly asked permission for these functions to proceed. These activities need greater scrutiny and formalisation, including within the Copyright Act, before we concern ourselves with how much we might be impeding them.

**Question 4:**

Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

No, it should not.

**Question 5:**

Is Australian copyright law impeding the development or delivery of cloud computing services?

Not as far as we are aware. The more popular of these services are in any case majority-owned and driven by overseas interests. We see no meaningful local competitors to Google, Amazon, Microsoft or Apple.

**Question 6:**

Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

No.

**Question 7:**

Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Copying of legally acquired copyright material, including broadcast material, for private and domestic use should only be more freely permitted if this provides some form of recompense to creators. For example, recording of materials on video or digital recorders could be more freely permitted if a levy was placed on the sales of these devices as part of a compensation system for the income lost to creators.

**Question 8:**

The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic

use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

There will be further developments in technology that will challenge the format shifting exceptions in the *Copyright Act 1968* (Cth). The Act may eventually be amended in such a way that maintains the principles that already operate, but permits reasonable interpretation and application of the technologies that may come to appear. A single, simplistic format-shifting exception is not appropriate.

### **Question 9:**

The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example: (a) should it matter who makes the recording, if the recording is only for private or domestic use; and (b) should the exception apply to content made available using the internet or internet protocol television?

It should matter who makes the recording. That should not be someone who makes a copy for commercial gain. The exception should apply to content made available using the internet or internet protocol television, but this should be accompanied by a remuneration scheme for creators and producers.

### **Question 10:**

Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

There should not be a blanket exception, but some users should have this right, for example, the National, State, educational and public libraries (not corporate or commercial libraries).

### **Question 11:**

How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Copyright materials are being used indiscriminately in social networking contexts. However, we need to gain some perspective on social networking. It is a phenomenon that has arisen in the past decade. Will it still be a phenomenon in another decade? The digital environment has changed rapidly in the past two decades. There is some advantage in the fact that changes to law are slower. This allows a more nuanced response.

### **Question 12:**

Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968 (Cth)* be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

No.

### **Question 13:**

How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

There shouldn't be any such exception. The fact that technology may permit something to occur is no reason for creators to lose rights. The rights have already been established in law. Creators are losing income and control over their works because technology permits users to use creators' works in ways that creators may not have ever intended or which devalue the works.

Creators should not be penalised further by having their right eroded through the creation of more exceptions. Rather, social media networks and ISPs might instead be levied fees for the amount of third party material they carry, including book material, and these levies would form the basis for payments to those creators whose works have been communicated without their permission.

### **Question 14:**

How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

‘Transformative use’ obviously raises questions as to the ability of owners to control how their work is used. For literary creators, this is a moral and a property right matter. We support a ‘copyright owner should give permission’ approach, difficulties acknowledged.

One of the authors of this submission once wrote a short story quoting the song line ‘You make me feel like dancing’, by Leo Sayer. In order for it to be used, he paid Festival Records a small amount, covering future reprints of the story collection in which it appeared. This may be taken as the purchase of a license to ‘quote’ the material. But it may also be seen as a form of ‘creative borrowing’, or in today’s language a ‘transformative use’.

The story was improved or ‘made’ by the inclusion of that line from a song that was widely played for years, and which added irony and other effects to the narrative. It could also be said that the author had taken the original context and use of the phrase and ‘transformed’ it, too - giving Sayer's words new life in another medium, and his work some (small) further cache. But the point is, whether this occurred or not, the author also paid for the privilege.

Current ideas and practices of 'transformative' use of material (sampling, mash-ups etc) have been enabled by internet technology certainly, but there is increasingly a strong scent of cultural fad about such use (e.g., not as prevalent in US music as it was, say, five years ago). Why then should copyright law valorise what may only be intellectual and cultural ephemera?

Creators have been collaborating and using material in transformative ways since time immemorial. Such practices are the basis of Indigenous art in Australia. There is also the matter of referential use of materials, which may be an acknowledgement of cultural status or an act of homage. Where such practices are for commercial purposes, that is, when money is made, all the creators whose works are involved should be remunerated. At the very least, the moral rights of creators, which are inalienable, should be observed. Many creators would be flattered to be asked to be included in a collaborative and/or transformative use, so long as their rights were respected and any potential remuneration was taken into account.

### **Question 15:**

Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

This must be the choice of creators – they can choose whether or not they wish their works to have transformative uses under the current laws, and whether or not they want remuneration. The problem comes when creators are divorced from having control over their works by agreements they are forced to strike with publishers and producers. If authors had certain inalienable rights under the law, this matter would not be an issue. It should not be an exception. The current Act allows for such use, and licences such as Creative Commons help facilitate it.

### **Question 16:**

How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

See response to Question 14.

### **Question 17:**

Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

See response to Question 14.

### **Question 18:**

The *Copyright Act 1968* (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to



provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

None. However, the Act should be amended to ensure that many more rights than moral rights are made inalienable to the creator. For example, the right for creators to be able to claim from statutory licences should not be a right subject to contract. It should always be a right on which a creator can depend.

**Question 19:**

What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

No comment.

**Question 20:**

Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

**Question 21:**

Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Any digitisation exceptions for libraries and archives must be limited to archival purposes only.

**Question 22:**

What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

Because of the very sensitive nature of Indigenous cultural production and ownership, the opportunity of free, prior and informed consent must be offered by libraries and archives to Indigenous creators.

**Question 23:**

How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

The first question is to establish the size of the problem, if it is a problem at all in Australia. There should be some measurement of this before any further action involving copyright law.

Tracing rights holders may be an issue for some potential users, but it ought not be an issue that rights holders or the Act should be expected to resolve.

The ALRC should note that in 2012 the HathiTrust 'orphan works' program in the US was suspended by the University of Michigan and others, due to admitted failures to develop an adequate rights search mechanism. Orphan works definitions may have commercial implications for creators, in the case of out-of-print but still in copyright works. Commercial or other organisations should not have the authority to assert what counts as an 'orphan' work.

**Question 24:**

Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

See answer to Question 23.

**Question 25:**

Are uses of data and text mining tools being impeded by the *Copyright Act 1968* (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

The second sentence is very relevant. See answer to Question 27.

**Question 26:**

Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

No, it should not be amended for these purposes.

**Question 27:**

Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

Due to their copyright-breaching potential, there should be a review of the efficacy and purposes of these technologies and whether or not they are in the public and rights holders interests.

**Question 28:**

Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

The Act should not be changed in this regard.

**Question 29:**

Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Yes. It is a very effective balance. It works well for educational institutions and creators. There could be more transparency in the process – particularly how much money is paid to which publishers and authors – but all in all it operates quite well. Again, creators can suffer if their rights to statutory payments can be contracted away by publishers, and quite a few publishers use their negotiating strength to deprive creators of the right to receive payments from statutory licences. This right should be inalienable to creators. Some educational institutions protest the size of the licence fees they are charged under this scheme, but they would feel more comfortable about those fees if it was absolutely clear that they went back to creators and knew who was being paid what.

**Question 30:**

Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

The ASA rejects the proposition that educational statutory licences be replaced with free-use exception provisions.

**Question 30:**

Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

No. However, it may be that the owners of certain internet material do not seek any remuneration for its use in educational institutions. This needs investigation.

**Question 31:**

Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

No, exception provisions for educational institutions should not be amended for something as nebulous as ‘in response to the digital environment’.

**Question 32:**

Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

The Act should not be changed in this area.

**Question 33:**

How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

No comment.

**Question 34:**

Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

Yes.

**Question 35:**

Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

No comment.

**Question 36:**

Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

No comment.

**Question 37:**

Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

No comment.

**Question 38:**

Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

No comment.

**Question 39:**

What implications for copyright law reform arise from recommendations of the Convergence Review?

No comment.

**Question 40:**

What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Much better data collection and sorting methods. Also presents the ability to aggregate and use total data, rather than samples.

**Question 41:**

How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

An important area where this might be done is to ensure that certain rights remain inalienable to the original creator, so that other parties cannot acquire these rights and use them to lock material behind paywalls or exploit them with little or no return to the original creator.

**Question 42:**

Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

This should be done on the basis of proper review and assessment of past experience. The fact that there is a digital economy should not mean that history is ignored. If new statutory licensing schemes seem viable they should be adopted and the Act appropriately amended. No such scheme is currently proposed.

**Question 43:**

Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer

necessary because, for example, new technology enables rights holders to contract directly with users?

Rights holders have always been able to contract directly with users. New technology assists with the better delivery of copyright material, not with the contracts that lie behind that. That said, the central reasons for some statutory licence schemes should be revisited and reassessed. The scheme governing educational institutions was originally intended to simplify the processes by which Australia educational institutions used copyright material while providing remuneration for the creators. The cases from which these schemes developed used Australian-created materials as examples. Now, these schemes are paying massive amounts of money to foreign publishers of educational materials, with only a small amount trickling to Australian creators. This goes against the original intent.

The Copyright Act should be amended so that the statutory right at issue here remains inalienable from the original Australian creator. Whether or not foreign rights holders are remunerated, or remunerated at the same rate as Australian rights holder, could be the subject of an inquiry. Also, the question of whether or not publishers should receive the same proportion of remuneration as creators must be asked. Who is the payment meant to compensate? Publishers argue they should be compensated for lost sales, but this is not the same as the copyright in a work being violated.

The original intent of the Statute of Anne, to *protect authors* (“Booksellers and other persons have of late frequently taken the liberty of printing reprinting and publishing or causing to be printed reprinted and published Books and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment and too often to the Ruin of them and their families”), should be remembered and reinforced. This again is a reason why the Copyright Act should make certain rights inalienable to the original creator, as much as it does with moral rights.

#### **Question 44:**

Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

No.

#### **Question 45:**

The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

1. research or study;
2. criticism or review;
3. parody or satire;
4. reporting news; and
5. a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

These are broad exceptions that in theory cover the needs of partial, user access in the current and foreseeable environments.

However, in practice consumers now infringe creators' rights more broadly than 'fair dealing' allows, because digital technology provides the capacity to do this, and the capacity is utilised. The failure to respect authors' and creators' rights has many causes. Stealing has become much more widespread also for the reasons that copyright law is not publicly explained, disseminated, defended by government – these are the government's laws as much as they are society's laws – or policed adequately enough.

Government has provided no rights management mechanisms, such as a central clearing-house or repository, that would allow readers and other copyright users to engage more effectively with rights holders.

**Question 46:**

How could the fair dealing exceptions be usefully simplified?

There is no necessity for this.

**Question 47:**

Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

The current fair dealing exceptions allow for quotation in research or study, criticism and review, parody or satire, news reporting and in legal practice. To extend these exceptions would be to disadvantage creators further – creators such as poets, for example, who may request a very modest remuneration for quotation of a few lines of a poem. Such creators are already underpaid, and should not be denied the right to benefit.

**Question 48:**

What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

No problems are seen.

**Question 49:**

Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

The current balance is adequate.

**Question 50:**

Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

No. There is a good balance between the demands of users and the rights of rights holders.

**Question 51:**

How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

There seems to be no need for this. They currently work well, offering a balance between users and rights holders' interests.

**Question 52:**

Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

No. If such an exception were to be agreed, it would be simpler to repeal the entire Copyright Act. The ASA does not support any US-style 'fair use' exception regime. This would inevitably require much court-based interpretation, involving authors and rights holders in expensive proceedings to assert and defend rights. Legal action in defence of copyright is already mostly beyond the resources of literary creators.

A general exception of this kind would also likely conflict with Australia's international responsibilities per the 'three step test' for copyright limitation.

**Question 53:**

Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

See answer to Question 52.

**Question 54:**

Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

No. Agreements that purport to negate a creator's moral or other rights, or allow for new copyright exceptions, should not be enforceable.

**Question 55:**



Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

It should not be possible to contract out of copyright exceptions.

**Jeremy Fisher (Board Member)**

**Angelo Loukakis (Executive Director)**

***The Australian Society of Authors***