



THE FEDERATION PRESS

The Executive Director
Australian Law Reform Commission
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Copyright and the Digital Economy

Submission on Questions 29 and 30

This submission is made on behalf of The Federation Press Pty Ltd, an Australian-owned publisher of legal, social and academic books. The Federation Press has over 400 books in print, and publishes around 40-50 new books and new editions per year. Most of those books are published without subsidy of any kind. Many are written for use in the education sector, principally at the tertiary level. The Federation Press and its authors receive remuneration from CAL.

Questions 29 and 30 of Issues Paper 42 are directed to the possibility of shrinking the operation of the schemes in Parts VA and VB of the Copyright Act. The Federation Press opposes any dilution of those schemes.

The short point is that the statutory schemes, which are inherently flexible, and which interpose an expert and independent umpire to determine a fair price for the exploitation by users of copyright works, were originally introduced to address technological change and have coped and will continue to cope with technological change. There is no rational connection between the premise that technology has changed once again (making it easier for infringing conduct to occur), and the conclusion that educational users of copyright works should be entitled to a free use exemption.

If indeed the value of the copyright works available online which users (such as schools) *choose* to exploit without licence (as opposed to reproducing “free for education” or “free for non-commercial use” works) has diminished, then the Copyright Tribunal is the expert forum designed to resolve that dispute. Alternatively, if the licence fee determined by the Tribunal is perceived to be too high, then steps could be taken to raise awareness amongst, say, school users, of how the CAL licence fee works, so as to alter behaviour (it might be as simple as requiring

a teacher to confirm that he or she has searched and is unaware of any “free for education” comparable material). If there is a perception that the mechanisms of an existing scheme have become outdated, or there are more efficient ways of determining use, then that too can and should be the subject of negotiation with CAL, and ultimately a determination by the Tribunal.

That is *precisely* what is happening in 2012 in relation to the tremendous technological change that has occurred in pay television in proceeding CT 1 of 2012 brought by the PPCA. Technology now permits Foxtel's subscription channels to be streamed to passengers in Virgin Australia planes (on “live2air”), and the proposed scheme itself expressly contemplates a licence for “New Media Rights” which include on demand and streaming rights.¹

And it is *precisely* what happened when, partly in response to the tremendous change in free-to-air broadcasting arising from the shift from analogue to digital broadcasting, PPCA applied for a new scheme to apply to free-to-air broadcasters of sound recordings; those proceedings were compromised without the need for extended hearing in July 2010.

A statutory scheme, such as that administered by CAL, empowers authors and copyright-owners through permitting a statutory licence to be administered by a not-for-profit collecting society. The Minister retains control to approve the collecting society, and to ensure that it is appropriately constituted and administered. CAL's total administrative costs are modest (in the order of 15%).

The centrepiece of the statutory licence is determination by an independent, and expert body, the Copyright Tribunal (whose members include judges of the Federal Court of Australia with incontrovertibly expertise in copyright, presently Emmett J; they have formerly included Sheppard J and Lindgren J). The Act authorises the Tribunal to resolve a licence fee dispute by a determination of “equitable remuneration”. That is to say, an independent and expert body can assess the competing claims as the licence fee being too high, or too low, and resolve them in a transparent and fair way. As Kevin Lindgren put it, in an article which conveniently describes the historical background to the various schemes and collecting societies:²

Under those formulas the Tribunal must determine an amount which provides equitable or reasonable or just or fair remuneration to the copyright owner, *but no more than that*. The amount must be fair to the user of copyright material as well as to the copyright owner.

Where then is the demonstrated need for change? It is no answer to say that new technology has made Part VB redundant. Schemes administered by collecting societies like CAL were introduced as a response to technological change (initially, the photocopier in the university library the subject of *University of NSW v Moorhouse* (1975) 133 CLR 1). As the examples above show, they are *designed* to accommodate technological change. They should be seen as signal examples of

¹ One of us (Leeming) appears for the PPCA in those proceedings.


² K Lindgren, “Market Power, Collecting Societies and the Role of the Copyright Tribunal” (2005) 79 ALJ 561 at 584 (emphasis in original); <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/2005/16.html>).

legislative success. In short, there is a long-standing legislative mechanism in place which has dealt with technological change and resolved the demands of users and creators of copyright works, which has not been shown to warrant replacing.

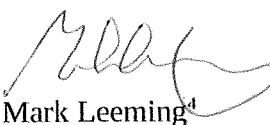
There are two final considerations. The first is the autonomy of authors. An author is free to make a work available online, without restriction. Many academic authors (including one of us) have done so, including through the SSRN network. That choice is respected by CAL, which does not collect revenue from use by schools categorised as “free for education”, “free for non-commercial use”, “free for use in your organisation” or “free copying”. But when a user such as a school or university chooses to exploit works available online which go beyond the licence granted by the author, it is perfectly plain that there would be an infringement of the author's copyright, and a benefit derived by the school (otherwise it would not do so). That does not support an expansion of a free-use exemption.

Secondly, a dilution of the statutory schemes will take revenue away from authors and publishers. The consequence will be fewer and more expensive books. In the short term, money “saved” on statutory licence fees will be spent on more expensive books. In the longer term, there will be even fewer incentives for educational works to be published in this country. It may be seen actually to be in the short and long term interests of educational institutions to keep in place the modest schemes that respect and protect the intellectual property rights of those who supply that important sector of the economy with one of its key raw materials.

We would be pleased to assist the Commission's inquiry on this or any other aspect, whether in writing or orally, if that would be of assistance to the Commission.



Chris Holt³



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3 Chris Holt is a founding director of The Federation Press, where he has been publisher for the last 25 years. He has previously participated in a delegation which met the former Attorney-General, in 2009, when similar issues arose.

4 Mark Leeming is a director of The Federation Press. He is also a barrister who has appeared in numerous copyright cases (including those the subject of the ALRC's Issues Paper such as the *iiNet* appeals, the Optus time-shifting appeal, and the *KaZaa* litigation), for both owners and alleged infringers. He is also an author of law books and journal articles (many of which are freely available from SSRN: see <http://ssrn.com/author=893987>), and he has taught at the University of Sydney since 1995, where he is Challis Lecturer in Equity.