



**COPYRIGHT AND THE DIGITAL ECONOMY**

**THOMSON REUTERS RESPONSE TO ISSUES PAPER 42**

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The Executive Director  
Australian Law Reform Commission  
Email: [copyright@alrc.gov.au](mailto:copyright@alrc.gov.au)

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**Introduction**

Thomson Reuters has been engaged in the publication of information for the academic, professional, government and corporate sectors for more than 100 years in Australia.

By providing materials for course work and research, it contributes to the education and professional development of lawyers, academics, accountants, tax specialists, financial planners, those involved in human resources and government, amongst others. Through its publications it has helped to foster debate and free speech in areas of key legal significance in Australia. It has helped to order and develop jurisprudence and legal thought and commentary which in turn contribute to ensuring certainty and accessibility of the law. By presenting the law in a structured and cohesive way, it saves professionals, academics, students and government employees significant time and in this way contributes to the overall efficiency and productivity in the relevant sectors.

Through its very long-standing participation in the information sector, Thomson Reuters has displayed an ability to adapt to changing conditions and the needs of its user base. Its move to online publication, its massive investment in creating indexed and readily searchable databases of information and more recently the development of its ProView e-reader are all illustrative of Thomson Reuters' responsiveness to changing market conditions and technological developments.

It is against this background that Thomson Reuters responds to the Issues Paper and the proposal for copyright reform. Thomson Reuters is of the view that content providers have in fact demonstrated an ongoing ability to adapt to changes in technology. The liberalisation of access to content is therefore not required to achieve this. It is more likely to undermine the fundamental rights of copyright owners. Thomson Reuters would prefer to see the law reformed to ensure that the rights of copyright owners are protected in the face of an increasing onslaught of copyright infringement. Publishers are incentivised to and do provide very wide ranging access on commercially reasonable terms to users. Competition law ensures that pricing and licensing terms are held in check.

Thomson Reuters believes that the Issues Paper does not address questions that are of very real concern to the maintenance and protection of copyright in the digital age. How can the law best ensure that copyright is protected in an age of technological advancement which facilitates ease of reproduction and communication?

The move from print to online has extensively reshaped the publishing industry. Decline in demand for legacy print formats, fuelled by the ongoing effect of the Global Financial Crisis has, and will



continue, to put severe pressure on publisher revenues. Despite the introduction of improved systems and processes, publishing remains an employee intensive industry because of the intellectual effort required in the publishing process. For example, Thomson Reuters employs more than 500 staff in Australia, a substantial number of these being engaged in publishing operations and the editorial process. Therefore, the viability of the industry hinges on the ability of publishers to effectively target the only areas of growth available - the reproduction and communication of content in digital media, data and text mining. Thomson Reuters submits that the recommendations for reform will inevitably have a further negative economic effect on the health of publishing and in turn on research and employment in this sector.

### **Response to Questions**

The focus of this Response is to those questions that are of particular relevance to the issues and concerns outlined above:

#### **Question 1: The Inquiry**

Thomson Reuters does not believe that copyright law inhibits the growth of the digital economy. Creators and publishers have been quick to respond to the digital revolution and publishers such as Thomson Reuters have made a substantial investment in developing content to be accessible in a stable and secure digital environment.

Thomson Reuters has also worked with other organisations and developed new business models to make its content more widely available and accessible at different price points. For example, it publishes and re-publishes content on behalf of individual writers (including barristers, judges, academics, private practitioners and civil servants) as well as not for profit organisations, academic and government institutions that do not have the funds or capability to invest in high functioning online platforms with sophisticated searching and linking of content. Thomson Reuters is able to use its economies of scale, access to targeted contact lists and different formats to disseminate materials beyond the capabilities of the individual and organisational creators of that content. It should be noted that a substantial component of Thomson Reuters' cost of publication is associated with remuneration paid to authors and third party licensors. If the statutory protections afforded to existing publishers and creators are eroded, publishers will no longer be able to afford to compensate or support third party contributors, who would in turn be affected.

Whilst the digital era has provided opportunities for Thomson Reuters to establish new offerings and provide greater access to readers, it has also seen an increase in its cost base because of the ongoing need to invest in rapidly changing technologies and secure and stable platforms. At the same time, there has been an erosion of traditional sources of revenue from print products as readers switch to online. Publishing in an electronic age therefore brings new economic risks. To remain viable, publishers such as Thomson Reuters, must be able to generate revenue from use of proprietary published content in a digital environment to replace loss of revenue from print and to recoup the cost of investment in technology.

Thomson Reuters also does not agree with the argument, at least in the legal, tax and regulatory publishing space, that copyright law has placed Australia at a competitive disadvantage



internationally. On the contrary, in contrast to many other countries, there are actually a number of free sources of *primary* legal and tax information. For example such as those provided by organisations like AUSTLII and the ACCC. Access to primary information is in fact freely accessible and traditional publishers (like Thomson Reuters and CCH) have historically contributed to these resources which have in turn been used by new entrants to create other offerings.

## **Question 2: Guiding Principles for Reform**

For the reasons outlined in greater detail below, Thomson Reuters does not believe that the solution to the evolution of the digital economy is to broaden the range of exceptions available. Rather, it should be recognised that the revenue generated from commercial exploitation of content in a digital sphere is largely a replacement for the erosion of revenue from print sources. Market reports show that there has been a marked contraction in the rate of growth of the content publishing businesses in the professional space<sup>1</sup>.

The proposed expansion of exceptions to copyright law would severely impact the generation and distribution of new intellectual property by diluting and potentially removing the commercial incentive to write, publish and disseminate new works. This would fundamentally undermine the ability of existing content creators and publishers to survive in an increasingly challenging environment and have profound consequences for a variety of sectors including law, accounting and academia.

## **Questions 3 -18: Caching, Indexing, Cloud Computing, Private and Transformative Use**

To the extent relevant to Thomson Reuters' response, these issues are dealt with in response to other questions in this paper.

## **Questions 19-22: Libraries, Archives and Digitisation**

- Thomson Reuters supports the concept of a national archive, but is concerned that an archive should not be seen as having an extended use beyond holding works for archival purposes. Thomson Reuters holds extensive digital collections of works covering virtually its entire publishing history, which means that users can easily approach it for licensed access and there is therefore no need for the use of public archives to be extended in this way.
- As a publisher of content primarily used for research purposes, Thomson Reuters depends on the libraries as a significant component of its customer base. Extending the rights of libraries beyond the scope of the existing exceptions would deprive digital publishers in the research space of a significant source of revenue which would in turn impact the ability of publishers to invest in the publication of new content for research and have a debilitating effect on research rather than a positive one.
- It should also be noted that Thomson Reuters already provides libraries and academic institutions with access to its content at a significant discount.
- Public libraries should therefore be constrained in their ability to digitise and communicate works where the publisher has or is capable of making those works available in digital format on commercial terms and such use should be limited to providing viewing access to visitors who are physically in the library. Thomson Reuters does not agree with the provision of

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<sup>1</sup> Outsell Inc. *Legal Tax and Regulatory 2012 Market Size Report* pp11, 24.



remote access where online access is already available from the publisher on commercial terms.

- Thomson Reuters would also prefer that the library exception is limited to libraries that are purely public service institutions and not those that are part of a commercial organisation, even where the latter provide public access, because in Thomson Reuters' experience, public access is a very nominal part of a private or commercial library's overall activity and should not skew the exception in favour of commercial organisations that would otherwise be required to pay a licence fee.

#### **Questions 23 and 24: Orphan Works**

N/A

#### **Questions 25 – 27: Data and Text Mining**

Thomson Reuters does not think that data and text mining is impeded by the Act. Subject to the qualifications below, data mining should be a right limited to the copyright owner to exploit at an appropriately set licence fee rather than an entitlement enabled by exception.

Publishers have in fact invested considerably in enabling data and text mining to meet customer demand. Much of the value-add contributed by publishers such as Thomson Reuters is in providing content within a cohesive, structured framework that facilitates ease of search and *enables* research.

In order to mine data, access is required to the content. If "miners" are allowed to wholesale download content for prospective mining purposes, this would enable back door access to whole libraries of material without compensation for the owner which could then be used for all sorts of purposes beyond mining and would be difficult to police. Publishers, between them, are capable of reaching agreement on commercial terms to achieve federated access across databases.

If Thomson Reuters is unable to derive revenue from those who wish to mine its data, it will be restricted in its ability to invest in ensuring that its content is updated and enhanced. That will inevitably lead to a reduction in newly published output which is exactly counter to the stated aims of this Enquiry. Moreover, in areas such as legal publishing, this will inevitably have a detrimental effect on confidence in the development of legal jurisprudence, which is dependent on appropriate editorial and quality control from suitably qualified sources. Allowing mining use on an exceptions basis is really just allowing free-loading that would unfairly disadvantage established publishers in favour of new entrants or participants in ancillary enterprises. Such organisations are unlikely to have the resources or feel the obligation to engage in costly creation of new content and will simply recycle that which already exists.

It should also be taken into account that unmanaged or unchecked mining can affect the performance of the publisher's website and deter publishers from investing in the infrastructure to allow mining if additionally there is no return on investment.

Thomson Reuters publishes content expressly for the purpose of research and its indexation tools facilitate ease of searching to enable subscribers to extract clear answers to questions across a number of different sources including primary source material such as legislation and cases as well as



commentary authored by Thomson Reuters' authors and staff. If third parties were able to conduct duplicate searches without the obligation of paying a licence fee, this would enable users to "cherry pick" Thomson Reuters' content without any compensation. Also, the perceived benefit of permitting data mining in the context of Thomson Reuters' type content is a fiction, given that Thomson Reuters' provides that ability as part of access to the content itself.

Thomson Reuters is not averse to its *subscribers* utilising indexation and federated search tools across a number of different research databases including those published by Thomson Reuters. Nor does it believe that its position would preclude reproduction of bibliographic and abstract content in third party databases. In fact, in its legal business, it routinely grants such use to academic institutions and academic databases on the basis that such indexation is appropriately attributed, so that users can be directed to Thomson Reuters' publications.

All of these offerings help to drive research and development. Thomson Reuters does however object to the creation of substitute competing content sets which undermine the viability of its business.

#### **Questions 28-31: Educational Institutions**

Our response is in relation to the issues raised at questions 29-31.

- As indicated in response to previous questions, a significant component of Thomson Reuters' publications are published for the benefit of students and the academic community. For example, Thomson Reuters' is a major publisher of legal journals in Australia. Some of these journals have been published in response to requests from academics to provide a forum for debate and discussion in the relevant subject areas.
- If educational institutions were able to make use of this content exclusively under a free use exception or an extended statutory licensing scheme, this would bring an end to any commercial incentive for Thomson Reuters (and presumably other academic publishers) to continue to support publication in this sector. Inevitably there would therefore be a reduction in the exchange of information and ideas from appropriately qualified sources that are critical to education and the development of academic thought; ostensibly a primary goal of this Enquiry.
- It is Thomson Reuters' understanding that many academics in fact favour publishing that is able to support a quality assured body of knowledge and learning which is what publishers, such as Thomson Reuters, invest in by way of the editorial review process.
- There does not appear to be any economic benefit or other justification for the proposed grant of extended access by way of exception to educational institutions. The negative effect that access on an exceptions basis is likely to have on the future viability of existing publishers is however clear. Publishers, such as Thomson Reuters, also take on all the financial risk of supporting academic publishing. Circulation levels in many subject areas are often very low, but Thomson Reuters understands the overall benefit for the academic community and students of ensuring a broad level of quality controlled subject coverage and assumes this burden in the interests of servicing its broad customer base.
- The danger in expropriating the right of publishers to receive any kind of return on copyright exploitation is that, whilst there may still be a level of publication, there will be no or limited



quality assurance and publication is likely to be skewed to those subjects that are of interest to the majority. Critical minority interest subject areas are unlikely to be serviced. In a field, such as the law, this is a high price to pay and counter to the stated aims and objectives of this Enquiry.

- In the context of the periodicals and journals that Thomson Reuters publishes; there is a symbiotic relationship between the publisher and contributors which ensures that Thomson Reuters' ability to derive revenue from the publication of the journals and to be able to invest in their ongoing publication, is balanced with Thomson Reuters' obligations to provide access to that content. Those engaged in the academic sphere require a forum for publication that is vetted and approved by a peer group. The range of journals published by Thomson Reuters over many years has achieved that status and provide such a forum. Thomson Reuters generally grants to contributors the right to either publish an abstract or a copy of the published article in other non-subscription forums subject to certain conditions that ensure the viability of the journals. This clearly illustrates that the market is able to regulate itself without the need for intervention which is more likely to bring about the demise of such publications rather than to preserve the dissemination of such information.
- In response to the equivalent enquiry in the United Kingdom, the International Association of Scientific, Technical & Medical Publishers made the point that educational institutions are not exempt from paying for electricity and other utility services. It is incongruous to differentiate between these services and access to information<sup>2</sup>. We agree with that submission wholeheartedly.
- Thomson Reuters supports the concept of a collective licensing scheme and is a member of the Copyright Agency Limited (CAL). However, Thomson Reuters is of the view that there is confusion generally within the market about the extent of licensing permitted under the statutory licensing scheme. Thomson Reuters supports a collective licence for reprographic copying by educational institutions and government organisations of insubstantial extracts of material for the internal use of those organisations. It makes sense to centralise this function for both copyright owners and users. Thomson Reuters does not however support the notion of statutory bodies being empowered to grant licences for extensive use of content in a way that conflicts with the commercial expectations of the copyright owner. Such rights should be reserved to the copyright owner for the owner to decide whether licensing is appropriate and to determine an acceptable licence fee in those circumstances.

For the reasons already stated, Thomson Reuters does not support the concept of an extended licensing scheme. Further comments about the scope of the fair dealing exceptions are made below. However, Thomson Reuters would support a collective licensing scheme that is used to coordinate the existing fair dealing exceptions and rights clearance i.e. as a central exchange for collecting statutory license fees and administering rights clearance to overcome any perceived difficulties amongst users in locating the copyright owner to seek clearance. The statutory licensing body can also be instrumental in providing an educative role to ensure that users of content are aware of their rights and obligations in relation to the use of third party created material.

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<sup>2</sup> International Association of Scientific, Technical and Medical Publishers UK (STM) submission on the IPO's Consultation on Proposals to change the UK's copyright system (Ref. No 2011-004) page 7



### **Questions 32- 39: Crown Use of Copyright and Re-transmission of free-to-air broadcasts**

N/A

### **Questions 40-44: Statutory Licences in the Digital Environment**

Many of the comments made in relation to educational institutions, text and data mining and in the introductory paragraphs to this response, have general application here.

Publishers like Thomson Reuters have invested extensively in the transfer of its content to a digital environment. Thomson Reuters has also made use of each emerging technology to deliver its content in different formats and media to make it more accessible to users and at different price points. For example, for certain content, a "pay per view" option is available so that users do not have to subscribe to a full set of text, but can select smaller content sets at a significantly reduced price for a limited access period. Thomson Reuters' ProView e-reader is an example of the use of digital technology to enable tablet access to content which can be annotated by the user.

For this reason, the optimal mode of provision of access to content in digital format should be via the publisher on commercial terms. Ceding this area of exploitation to a collective licensing scheme would deprive a publisher of the ability to control and maximise revenue from its content in an age where digital delivery is becoming the dominant/preferred means of delivery by users and other sources of revenue in content publishing are drying up.

Other factors are also relevant here. Publishers, familiar with their content, are better placed to assess whether a proposed use would constitute a breach of moral rights. For example, images published from Reuters News sources have on occasion been licensed by third parties in ways that were inappropriate and degrading to the subject matter and would not have been permitted by the photographer or Reuters. There is a greater risk of such use occurring where it is not vetted by the publisher.

To the extent that there is scope for collecting societies to operate as "clearing houses", that role should be very clearly defined with parameters that are easily comprehended and accessible to owners and users alike and publishers should have the option to opt in to the scheme rather than the scheme operating on a mandatory basis. [paya.com](http://paya.com) is an example of an organisation that has developed capability for users to license images directly from rights holders and illustrates the fact that alternative options are viable that do not cut the copyright owner out of the licensing process.

In particular, Thomson Reuters does not support collective licensing that permits electronic copying and distribution of content because this is significantly harder to police and quantify. Until appropriate controls to restrict and quantify the nature of this use are developed, this is not an appropriate activity for collective licensing.

### **Questions 45 – 53: Fair Dealing and Fair Use**

Thomson Reuters believes that any exceptions under the Copyright Act need to be consistent with the provisions of the Berne Convention and should only operate in the narrowest of ways so as not to





conflict with the reasonable expectations of the copyright owner. Relying on exceptions as a basis for enabling use of copyright material is in any event likely to result in increased costs and substantial inefficiencies i.e. there is more likely to be a difference of opinion between owner and user where an exception is the basis for use and therefore the risk of litigation or uncertainty. The market where a user pays an owner a fair price for use of content in a way that is clearly agreed is the best mechanism of control because it is based on certainty around use and payment.

The reality is that Thomson Reuters has invested significantly in ensuring that its content is readily available in a variety of formats at a reasonable commercial price and there are therefore very few circumstances in which a user would need to look to an exception to gain access to Thomson Reuters' content for use in a digital environment. For example, in addition to licensing the content that it updates on a regular basis in digital form, Thomson Reuters has rapidly responded to market interest and has also released many of its older print publications in pdf format at a nominal charge to ensure that such publications are easily accessible for research. Discrete journal articles are also available in PDF format at a nominal charge that saves researchers the cost of subscribing to the full service and facilitates research as does the pay per view option mentioned elsewhere in this paper. For the reasons already stated, Thomson Reuters therefore similarly does not favour a broad based Fair Use exception.

#### **Question 54-55: Contracting Out**

Thomson Reuters' licence terms recognise the provisions of Copyright law and Thomson Reuters does not currently seek to contract out of the exceptions, although for the reasons noted above, it believes that the exceptions should have very narrow application and therefore limited impact on commercial terms between Thomson Reuters and its customers. Thomson Reuters agrees with the observations in the Issues Paper that competition law is a more appropriate check on the terms agreed in the publishing context. Adding another layer of regulation will simply increase the complexity around the contracting process.

Having said that, if the exceptions were broadened in the ways proposed, then that could have a very serious negative impact on publishers engaged in providing content expressly for use in education and research, such as Thomson Reuters. In those circumstances, Thomson Reuters believes that it would be equitable to permit such providers to contract out of exceptions that would preclude providers from operating a viable business.

Elsewhere the point has been made that the inability to contract out of onerous terms will deter the use of local law as the contracting forum and potentially impede investment and trade where there is a disconnect between local law and other jurisdictions that might otherwise be trading partners<sup>3</sup>. Thomson Reuters agrees with those submissions.

#### **Concluding Remarks**

The putative economic benefits of liberalising access to content have to be weighed against the inevitable economic impact on existing providers in the industry, if the proposed reforms are introduced. We believe that this is a serious flaw in this Enquiry, in that it fails to raise questions

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<sup>3</sup> STM Submission page 36





directed at strengthening the remedies available to copyright owners who are being squeezed on every side as a result of convergence and the ease of piracy as a result of the move to digital. The answer to stopping widespread abuse is not to open the floodgates. Thomson Reuters' own experience of adapting its offering to the digital market is indicative of the fact that providers respond to the demands of technological change without the need for legislative reform. However, those technological changes have had a serious financial impact on publishers because of the absence of effective enforcement powers and Thomson Reuters seeks the support of the Commission to address this concern.

Thomson Reuters would be happy to provide further information if required by the Commission.

A handwritten signature in black ink, appearing to read 'JR', written over a horizontal line.

Jackie Rhodes  
CEO  
Thomson Reuters, ANZ