THE COPYRIGHT ADVISORY GROUP - SCHOOLS

OF THE

STANDING COUNCIL ON SCHOOL EDUCATION AND EARLY CHILDHOOD

SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO COPYRIGHT AND THE DIGITAL ECONOMY

PREPARED BY THE NATIONAL COPYRIGHT UNIT

APRIL 2013

The Copyright Advisory Group - Schools (**the Schools**) appreciates this opportunity to provide the Australian Law Reform Commission (**ALRC**) with a brief supplementary submission dealing with some of the issues raised by submissions to the Issues Paper. We may provide a more detailed response in due course in our submission in response to the Discussion Paper.

In this supplementary submission, we address three matters:

- Confusion that appears to have arisen regarding the basis for the Schools' decision to seek repeal of the statutory licences
- The inefficiencies that flow from monitoring and measuring uses that do not or should not attract remuneration
- The suggestion by Copyright Agency that any new exception should not apply to uses that are permitted under a licence.

Why the Schools seek repeal of the statutory licences

Some rights holder interests - including Copyright Agency - have suggested that the Schools' decision to seek repeal of the educational statutory licences is motivated solely by a desire to avoid paying for copying and communication that is currently covered by those licences. We wish to correct this misconception.

While the Schools' preferred position is that the statutory licences be repealed and a new flexible exception be introduced, our request for the repeal of the statutory licences is not contingent upon the introduction of a new exception. The Schools fully acknowledge that if the licences are repealed, regardless of whether or not a new exception is introduced, there will be a continuing need for collective licensing for educational use of content. Contrary to the suggestion by Copyright Agency in its supplementary submission dated April 2013, the Schools' do not suggest that a new exception would apply to all uses that are currently covered by the statutory licences.[1] We are not saying all copying and communication by schools should be free.

This position was made clear in the Schools' submission to the ALRC’s Issues Paper:

> *Introducing a flexible exception does not mean that all educational uses of copyright materials would be free. Many uses that are currently paid for under the statutory licence would continue to be paid for under voluntary licensing arrangements (similar to those currently in place with music collecting societies).*[2]

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[1] Copyright Agency says in its supplementary submission that it has sought but not yet received an indication from the education sector about likely reduction in licensing fees from the proposal to repeal the statutory licences. No such request has been made by Copyright Agency to the Schools.

[2] See p6 of the Schools' main submission.

The reforms that the Schools seek with respect to licensing of content are policy-based, not cost-based. They are intended to ensure that future dealings between schools and collecting societies can occur in a fair and efficient manner. This will not be possible unless the statutory licences are repealed. We have set out detailed reasons why the statutory licences should be repealed. These include that they are inherently unsuitable to the digital environment (see Submission pages 46 to 56) and that, they are economically inefficient, creating a false market for works (see Submission pages 71 to 76).

The repeal of the statutory licences may result in some reduction in the amount currently paid by schools for copying and communication. This would be a natural consequence of correcting the current effects of Australia's out-dated statutory licences, which require remuneration for uses that would elsewhere in the world be considered to be 'fair'. The main benefit flowing from this reform however would be to replace an inefficient and out-dated licensing regime with a regime that is better suited to a digital environment and more in step with the educational copying regimes operating in comparable jurisdictions. In the Schools' submission, this benefit will flow whether or not the repeal of the statutory licences is accompanied by the introduction of a new flexible exception.

Finally, we note that Copyright Agency appears to suggest that it should be a goal of the statutory licence to prop up a local educational publishing industry. [3] The Schools strongly disagree with this. While it is clearly a goal of copyright to incentivise the continued creation of content, the Schools submit that there is absolutely no policy justification for continuing with a highly inefficient licensing regime - that imposes significant unnecessary costs on the education sector - merely because there is perceived to be some advantage to local educational publishers. A far more efficient means of supporting local publishers – in the event that the government does consider this to be warranted - would be by means of direct government support or establishing a voluntary licensing system which can more flexibly respond to the needs of both publishers and schools in the digital environment.

Copyright Agency's "zero rate" submission: an illustration of the inefficiencies of statutory licensing

In its supplementary submission, Copyright Agency suggests that the statutory licences do not require payment for each and every licensed copy and communication, and that even if they were to do so, it is open to the Copyright Tribunal to determine that equitable remuneration for a particular use is zero.

This position is at odds with the position previously adopted by Copyright Agency, which has previously sought to have each and every act of copying and communication - including caching - measured for the purpose of having this activity included when determining equitable remuneration to be paid by schools.[4]

[3] See page 11 of Copyright Agency's supplementary submission where it suggests that one reason why schools in some countries pay less than Australian schools for educational copying is that these countries have "alternative means of supporting a local educational publishing industry".
[4] See pp 54-55 of the Schools' main submission.

More importantly, however, the "zero rate" position outlined in Copyright Agency's supplementary submission is a clear example of the inefficiencies of the statutory licence that have led to the Schools seeking its repeal. Under a voluntary licence regime, the parties to the licence reach agreement as to what uses are covered by the licence and therefore remunerable. There is no need for either party to direct resources to monitoring and measuring uses that do not attract remuneration.

Compare this with the statutory licences. By Copyright Agency's own admission, each and every copy and communication made in sampled schools is required to be reported regardless of whether or not Copyright Agency intends to seek remuneration.[5] Even if Copyright Agency were in the future to adopt a position whereby some copies and communications attracted a zero rate, it makes absolutely no sense from an efficiency point of view to impose substantial compliance costs on schools (and Copyright Agency itself) for the purpose of collecting data on copying and communication that Copyright Agency now says is not necessarily even remunerable.

Copyright Agency appears to suggest that this "record everything whether it is remunerable or not" approach to licensing is a virtue of the statutory licence, based on the fact that it is convenient for schools to be relieved of any responsibility for deciding whether a use falls within the scope of the licence. The Schools strongly reject this argument. The unnecessary costs associated with collecting and processing data on uses that either fall outside of the scope of the licence, or for which Copyright Agency does not otherwise intend to seek remuneration, represents a significant waste of public resources. The National Copyright Unit (formed in 2005 partly in response to the Schools' concerns that the costs associated with the statutory licences were increasing exponentially) directs a very large proportion of its resources to developing and implementing the smart copying practices that are only necessary due to the inefficient operation of the statutory licence.

Copyright Agency itself also engages in unnecessary expenditure as a result of the inefficient operation of the statutory licence. This includes the cost of processing data relating to copying of freely available internet content, *even where Copyright Agency accepts that no remuneration is payable due to the copying falling outside of the scope of the statutory licence.* See, for example, Copyright Agency's supplementary submission, where it states that schools are required to report copying and communication from all websites notwithstanding that Copyright Agency excludes from remuneration more than 50 per cent of uses of content sourced from the internet. The costs incurred by all parties would be significantly reduced if this copying and communication were not required to be reported in the first place. A voluntary licensing arrangement would free both parties from the statutory constraints and inefficiencies created by the statutory licences.

Copyright Agency's "fairness" submission

In its supplementary submission, Copyright Agency says that any new exception should not apply if the use is allowed under a licence that is available on reasonable terms.

5 In the print survey, teachers are not in fact required to record unpublished materials (eg administrative or school owned materials). .

The Schools submit that such a "market failure" approach to determining the scope of exceptions is to misunderstand the nature of exceptions as a central aspect of copyright law, and has been rejected by local law reform bodies as well as by courts in the US and Canada. It has also been implicitly rejected by the UK Government.

The Schools refer the ALRC to the following:

- In Australia, the Copyright Law Committee on Reprographic Reproduction (***Franki Committee***) considered and rejected an argument by the Australian Copyright Council that rights holder willingness to licence library copying by university students should defeat any claim that such copying could be done in reliance on fair dealing. The Franki Committee found that as a *matter of principle* a measure of photocopying should be permitted without remuneration in reliance on the research and study fair dealing exception.[6] In other words, the Committee's understanding of exceptions such as fair dealing was that they were a carve out of the grant of copyright that operated as a matter of principle, and were not subject to elimination merely because the rights holder was willing to grant a licence.

- In 2004, the Canadian Supreme Court considered this question. In *CCH Canadian Limited v. Law Society of Upper Canada,*[7] the Court said:

  > *Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. ...In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.*

  This led the Court to find that the availability of a licence was not itself determinative of whether or not a use was fair:

  > *The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner*

[6] Copyright Law Committee on Reprographic Reproduction, October 1976 (Franki Report) para 6.24 http://www.ag.gov.au/Copyright/CopyrightLawReviewCommittee/Reports/Pages/CopyrightLawCommitteeonReprographicReproduction.aspx

[7] *CCH Canadian Limited v. Law Society of Upper Canada* 2004 SCC 13

that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.

- In a series of decisions earlier this year, the Canadian Supreme Court reaffirmed this principle. In *Council of Ministers for Education v Access Copyright,*[8] the Court held that schools could rely on fair dealing despite the fact that the collecting society, Access Copyright, was prepared to grant a licence for the relevant uses. And in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, the Court held that an online music publisher could rely on the research and study exception to allow potential purchasers to stream short, low quality previews of musical works for free notwithstanding that the rights holders were prepared to grant a licence for this use.

- US courts have also rejected a pure market-failure approach to fair use. In *Cambridge University Press v Georgia State University,*[9] the US District Court for the Northern District of Georgia was required to determine whether Georgia State University could rely on the fair use exception for excerpts of works that had been uploaded onto a password protected e-reserve system. The publishers asserted that where a commercial licence was available, unpaid uses could never be fair. GSU argued that fair use would become a meaningless exception if publishers could seek to override it by developing a licensing scheme that can charge users for a single page, paragraph etc. The Court agreed, finding that it would involve "circular reasoning" to determine the fair use question merely on the basis of whether a licence was or was not available for the use in question.

- See also *Bill Graham Archives v. Dorling Kindersley Ltd*.[10] In this case, which involved a dispute over whether the publisher of a history of the Grateful Dead could rely on fair use to reprint thumbnail-size reproductions of copyrighted concert posters despite the fact that the publisher was willing to grant a licence for this use, the US Court of Appeals for the Second Circuit said:

  [A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.

- In the UK, the Intellectual Property Office is considering whether to recommend new copyright exceptions, including new education exceptions. Two such exceptions being considered are an expanded exception permitting educational institutions to copy and communicate print and graphic works and an exception permitting educational institutions to time shift broadcasts.[11] This is notwithstanding that these uses are currently subject to licence. The IPO Consultation on Copyright document that canvasses these proposals makes no reference to any principle to the

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[8] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37

[9] *Cambridge University Press v Georgia State University* Civ. Action No 1:o8-CV-1425-ODE

[10] *Bill Graham Archives v. Dorling Kindersley Ltd* 448 F 3d 605 (2d Cir 2006)

[11] See Consultation on Copyright, December 2011, UK IPO

effect that educational (or other) exceptions should not be available for any use that a rights holder is prepared to licence. On the contrary, the IPO clearly contemplates that new exceptions could be introduced for uses that are currently the subject of a licence.

Copyright Agency also considers that the availability of a Creative Commons licence should also exclude the operation of an exception. With respect, this position is contrary to the intention and terms of the Creative Commons licences. See for example a 'frequently asked question' on the Creative Commons website:

> *Do Creative Commons licenses affect exceptions and limitations to copyright, such as fair dealing and fair use?*
> *No. All of CC's licenses include language that accounts for exceptions and limitations, similar to the following: "Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws."*
>
> *The laws of all jurisdictions allow at least some uses of copyrighted material without permission of the creator, and may include uses such as quotation, current-affairs reporting, or parody in some jurisdictions. These exceptions vary depending on the jurisdiction. Fair use and fair dealing are two exceptions to copyright that may be relevant to your use of a CC licensed work depending on your jurisdiction.*[12]

The Schools accept that the availability of a licence on reasonable terms may be relevant to an assessment of whether a particular use may be considered 'fair'. However it cannot be the case that the 'mere availability' of a licence operates to prevent the reliance on an exception in a copyright statute in all cases. The Schools submit that Copyright Agency's position is wholly inconsistent with recognised principles of law and policy – in Australia and internationally.

We would be pleased to discuss any of the issues raised in this supplementary submission with the ALRC if this would be of assistance.

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[12] http://wiki.creativecommons.org/Frequently_Asked_Questions#Do_Creative_Commons_licenses_affect_exceptions_and_limitations_to_copyright.2C_such_as_fair_dealing_and_fair_use.3F