# the Australian Publishers Association Response to the ALRC Discussion Paper:*Copyright and the Digital Economy*

# 30 July 2013

On the basis of the ALRC's Discussion Paper, its analysis and recommendations, it would be reasonable for copyright owners to doubt whether the Commission had been able to approach its terms of reference with balance.

In our earlier submission, the Australian Publishers Association expressed concern that some parts of the Issues Paper suggested the ALRC viewed copyright as 'a stumbling block to innovation' and assumed that copyright owners imposed 'unnecessary costs or inefficiencies on people who want to access or make use of copyright materials'. The Discussion Paper suggests those concerns were well-founded.

The Commission’s suggested principles are sound, but its recommendations are not consistent with them.

The ALRC appears to have encompassed the chief principles for an examination of copyright laws, addressing both creation and access. However the APA endorses the views expressed by other stakeholders, including the Copyright Agency Ltd, that the Commission’s recommendations do not adequately reflect all the principles. In our view the Commission’s proposals are addressed only to a subset of its principles. The Commission’s first two principles were:
1. Acknowledging and respecting authorship and creation, and
2. Maintaining incentives for creation of works and other subject matter.
Australian copyright law will achieve less for either if its recommendations are followed and a vague and wide provision for fair use is introduced or if Australia’s effective statutory licences for education are abolished.

In addition, in its approach to contracting out, while the Commission’s proposal that certain types of agreement should have no effect suggests that the Commission considers the promotion of access wide dissemination of content outweigh any damage to the acknowledgement of authorship or the incentives for creation of works. It is also contrary to the objective of providing rules that are flexible and adaptive to new technologies.

# Fair use

The Report lists both the arguments of those seeking further opportunities to use copyright material in favour, and the extensive concerns of copyright owners about the introduction of a fair use provision. However, it appears to have discounted the interests of copyright owners and to have accepted relatively uncritically the views of those seeking further opportunities to use copyright material at no cost.

We will not repeat again the arguments and evidence already presented against the proposal in the first round of submissions by copyright owners, but we endorse the submissions of the Australian Copyright Council, the International Publishers Association and the Copyright Agency regarding the practical difficulties of introducing a fair use provision into the Australian jurisdiction.

The Commission appears to have accepted the view that entrepreneurialism is better served by diminishing rather than protecting opportunities for the owners of copyright material to benefit from its value. At 4.30, for example, the Paper suggests that ‘opportunities made possible by the digital economy provide further evidence in favour of fair use.’ At 3.25, the Commission cites with approval a suggestion that ‘valuable research could build upon initial attempts to quantify the benefits of exceptions and limitations in terms of the economic outputs and welfare effects of those individuals, businesses, educational institutions and other entities that rely on them’. In the context of the discussion, the Commission seems to be implying the conclusion that further exemptions would result in further growth. It does not consider here or elsewhere the alternative conclusion that the very substantial businesses that have been able to develop under existing copyright rules show the enormous extent of economic value supported by the products of the copyright industries, including publishing.

The Commission relies heavily on an argument about an alleged trend towards the use of ‘standards’ rather than ‘rules’ and an optimistic evaluation of the idea of ‘principles-based’ regulation. The Commission’s proposal for a broad fair use provision mistakes simplicity of legislation for straightforward operation. The examples the Commission uses to illustrate this trend are consumer protection, privacy and media regulation. However, there is an important difference between each of these areas of regulation and copyright. Legislation in each of these areas is administered by a statutory regulator, and consumer and privacy laws involve both Commonwealth and state agencies. Large, well-funded authorities play a significant role in promoting public awareness, exerting moral pressure, encouraging a culture of compliance, enforcing and litigating egregious breaches, and continuously developing and adapting standards, often with the implicit threat that recalcitrance may lead to legislative action. Without this support, the main difference between ‘principles-based’ standards and more specific rules may be that standards are less observed and more difficult to enforce.

The Commission suggests that a fair use provision will lead to an ‘entrepreneurial culture’. It does not explain whether this involves anything more than more people using more copyright material for their own commercial purposes without seeking permission and without any benefit to the copyright owner. On the basis of the Discussion Paper, it would be reasonable for copyright owners to conclude that the Commission has mistaken fair use for free use.

# Statutory licences

For twenty-five years, Australia's copyright law has included a unique system that gives educators easy, uncomplicated access to a wide range of copyright material and copyright owners a fair remuneration for its use.

The then Attorney-General, Lionel Bowen, explained the scheme to the Parliament in 1988:

'While copyright owners should not be called upon to subsidise the educational needs of the public, there should be as few obstacles as possible to access to educational materials.' The statutory licensing scheme in Part VB of the Copyright Act provided a mechanism 'whereby the interests of copyright owners will be balanced against the interests of educators in the most efficient manner possible.' (Hansard, 3 Nov 1988)

Australia's statutory licenses for education have operated successfully for twenty-five years. They have been efficient, keeping transaction costs to a minimum, making life easier and administration more straightforward for both the owners and the users of copyright material. They have been fair, providing equitable payments to copyright owners based ultimately on the impartial assessments of independent arbitrators.

However, the ALRC now proposes to dismantle the scheme and make radical changes to Australia's copyright system to reduce the amount paid to copyright owners for the use of their material.

At 6.87 the Commission says that it ‘would prefer not to ground reform in this area by referring to the comparative cost of licensing these uses’, however it is impossible to make sense of its recommendation to abolish the existing scheme in any other light.

The Commission considers the possibility that under its proposed change to use only voluntary licences educators might find some material inaccessible because it had not been licensed. Its solution is to recommend the adoption of a ‘license it or lose it’ provision.

Ultimately, it appears that the only part of the current scheme that the Commission finds objectionable is ‘equitable remuneration’.

The Commission has uncritically adopted and regarded as evidence submissions from educational authorities or their agents, in particular from the schools copyright advisory group, despite a number of inaccuracies.

First, the Commission does not make clear that the full flexibility of voluntary licences is available under the existing scheme. The statutory scheme imposes a compulsory licence on the publisher, not on an educator. Educational institutions do not have to use the statutory licence. It is open to them to license material separately. The only duty imposed on a school is to pay ‘equitable remuneration’ for what it uses. Although they have chosen to create a monopsonist agent through which to negotiate, schools are also at liberty to make their own, individual arrangements.

For the benefit of copied copyright material for a year, each student is charged less than $17. The price per student is small, at less than 0.1% of the total cost per student, and it is based on impartial assessments by an independent arbitrator of the value of the material actually used.

Suggestions about the scheme’s compatibility with the ‘digital age’ do not bear scrutiny and would be better understood as proxies for objections about the cost. It is revealing, at 6.58, that the Commission describes as an 'observation' a pejorative complaint from Universities Australia that the ‘existence of the statutory licence provides an opportunity for CAL [Copyright Agency/Viscopy] to seek a price hike for every technological advance that results in digital “copies” being made’.

The Commission has accepted without adequate scrutiny inaccurate claims about the way in which remuneration has been set at an ‘equitable’ level.

It is worth noting here material that is also presented in the The Copyright Agency’s submission addresses a number of specific misrepresentations by educational institutions, and they are reproduced below.

All the flexibility of voluntary licensing is available under the existing scheme. The statutory licence makes it compulsory for the copyright owner not for the educational institution. However, educational institutions have opted instead to invest in a centralised negotiating authority, to pursue strategies to reduce their overall payment for the use of copyright materials and to seek the removal of the whole scheme.

The context that led to the introduction of the scheme is as relevant today as it was then. The statutory licensing schemes for education were introduced as a response to widespread photocopying in educational institutions. It took a High Court case, *University of New South Wales v Moorhouse* [1975] HCA 26, to establish their potential liability for authorizing infringements of copyright on copying machines on their premises and to produce an awareness of the need to comply with copyright laws. As the Commission notes, much has changed with the arrival of the digital economy, but the ease with which copies of copyright material can be made has not. The statutory licence balanced the interests of copyright owners and those of educators in the most efficient manner possible. It has the flexibility to adapt to a new environment, and wholesale change is unnecessary. The Commission has been misled by mistaken claims about the way the scheme operates and the way it has adapted to new technology, and its proposed solution is to replacing equitable remuneration with free use. It is also unclear why the opportunity for coping with modern technology should substantially discount the value of old-fashioned physical photocopies.

Educators’ agents have also made claims about the costs of administration.

 First, many of the costs complained of are the costs of what they call ‘smart copying’ or avoiding use that attracts any charge under the statutory licence. This is not an argument about the administrative efficiency of the existing scheme; it is an argument about the price. The Commission proposes to accommodate this concern over the amount paid to avoid use by abolishing an efficient and equitable scheme and allowing use without payment.

Secondly, even if the costs of administration might be reduced for the schools centralised buyer under the Commission’s alternative scheme, they will be substantially greater when considered for the country as a whole.

A March 2011 report by Pricewaterhouse Coopers, ‘An economic analysis of copyright, secondary copyright and collective licensing’, notes that prospective users face identification, search and transaction costs, and that rights owners face equivalent transaction time costs and the costs of detecting unauthorised use, and noted that if the same uses were to have been negotiated under an atomised model, the costs would have been between £130M-710M higher per year.

The existing scheme uses efficient methods for measuring the amount of use. It is in the interests of both the licensor and licensee to minimise these costs, and the system is negotiated and agreed between their agents. Substantial reductions in measurement will result in more uncertainty about use, or increases in unauthorised use. It is a proposal to reduce the capacity of copyright owners to measure the amount of use made of their material.

At 13.45 the Commission notes: ‘the importance of education does not mean creators should subsidise education in Australia. Although this Inquiry is about exceptions to copyright, the ALRC appreciates the need for copyright laws to help ensure authors, publishers, film makers and other creators have an incentive to create. Unfortunately, its proposal is to repeal what remains of a scheme that balances ‘the interests of copyright owners ... against the interests of educators in the most efficient manner possible’ with an arrangement the only real difference of which is that it will force copyright owners to choose between higher transaction costs or higher unauthorized use, and to remove equitable remuneration.

At 3.22, the Commission writes: ‘It is clear that the economic contribution of Australia's copyright industries is significant. What is contentious is how to increase that contribution to the benefit of copyright owners, users and the community, and what reform, if any, would effect this.’

However, its proposals would not have been out of place if the terms of reference had been to limit the reward to copyright owners for the value their material provides to the economy overall and to other businesses. What it proposes are schemes to allow more value to be extracted from the material produced by copyright owners, while minimising the reward they obtain for their entreprise.

MISUNDERSTANDINGS ABOUT THE EXISTING STATUTORY LICENSE SCHEME.

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| Misunderstanding | Fact |
| Schools pay up to four times more in copyright fees to deliver education using digital technologies than using paper copies | 'technical copies' are not 'remunerable'';compensation to creators is based on 'consumption';the value of a copy displayed to many students through a learning management system to an electronic whiteboard or individual tablets is greater than the value of a photocopy used by one student. |
| Schools have to record technical copies in surveys of usage | Copyright Agency has never sought this;The survey design, and the processing of usage data, is agreed between Copyright Agency and the educators’ Copyright Advisory Group. |
| Schools pay millions of dollars to use content freely available on the Internet | Only content used in reliance on the statutory licence taken into account for compensation to creators;Content available under 'open' licences like Creative Commons is excluded;The proportion of overall compensation relevant to internet content is 6%. |
| Writing a quote from a book on an interactive whiteboard must be paid for out of education budgets | Copyright Agency has never sought payment for this, even if there were a way to measure it. |
| Equitable remuneration is determined according to how much material is available rather than how much is consumed | Flat fees negotiated for agreed periods are based on estimates of consumption; |

# Libraries, Archives and Digitisation

The APA supports the Commission’s Proposal 11-7 in relation to the procedural steps libraries should be obliged to follow in providing copies of material under section 49 of the Act. However, the provision of copies to clients should be subject to licence where a licence is available.

The APA has no in-principle objections to Proposals 11-4 to 11-6, particularly as Proposal 11-6 would impose a limitation on preservation copying where the copyright material is commercially available within a reasonable time at an ordinary commercial price. Proposal 11-6 would be clearer and it would ensure its continued application in a digital environment if it also stated that the availability of a licence to access or make a preservation copy constitutes ‘commercial availability’ and that access to preservation copies is limited to private and non-commercial researchers on the relevant organisation’s premises only.

The APA opposes the Commission’s Proposals 11-1 to 11-3.

In particular, Proposals 11-1 to 11-3 extend beyond the digital economy that provided the Commission’s terms of reference. No evidence, and especially no economic data nor any economic analysis has been provided to show that these Proposals are in the best interests of the Australian digital economy.

At 11.5, the Commission has adopted the term ‘cultural institutions’ to refer to all ‘libraries, archives, museums, galleries …’. This conflates the library and archive sectors as a whole with the cultural sector, and overlooks the fact that the majority of libraries – each of which is currently entitled to rely on the library provisions in the Copyright Act – are not ‘cultural institutions’, but located in corporate, government and educational sectors. The Commission’s proposals will provide benefits to commercial operations based on the idea that they are operating as cultural institutions. A more appropriate economic analysis would have led the Commission to different conclusions.

There is another inconsistency in the Commission’s approach to the library provisions. Elsewhere the Commission proposes to simplify the Act by repealing statutory licences and relying instead on ‘fair use’ and voluntary licences. It has without explanation adopted the opposite approach in relation to the library and archive provisions.

As we noted in our earlier submission, most of the library provisions are artefacts from an earlier, decidedly pre-digital age. Many of the situations they were enacted to address can now be addressed by licensing solutions (including from Copyright Agency). The APA therefore re-iterates its submission that the majority of these provisions should be repealed. The Commission’s approach is open to the charge that it is only copyright owners that must accommodate the ‘digital economy’. Recent proposals in the United Kingdom to amend the UK library and archive provisions are very minimal, and retain features such as restrictions on supplying copies for non-commercial research and private study only. We also note that the retention of these provisions in the UK law does not appear to be supported by any economic analysis.

The Commission has undertaken an extensive analysis of section 200AB and how it works in practice. However, if libraries and archives find current section 200AB too complex, it is not obvious how either a ‘fair use’ exception or an expanded ‘fair dealing’ provision will be any simpler to apply in practice – particularly as section 200AB has a finite list of factors to be considered, while the ‘fairness factors’ proposed by the Commission are completely (and deliberately) open-ended.

The Commission should make a clear distinction in its final report as to how any exception permitting mass-digitisation would apply to published and to unpublished materials, particularly as mass-digitisation will generally relate to entire works and will generally include proposals to make the digitised materials available world-wide. In particular, any recommendations in relation to mass digitisation should exclude published books (or at least any published books that are commercially available), and should involve on-going payment, including through an extended voluntary licence scheme.

The APA and its members are strong supporters of the library sector, but issues relating to equity of access or to the flow of information through society and particularly through the digital economy should not be at the expense of publishers and their authors.

# Contracting out

The APA opposes Proposal 17-1.

The APA particularly notes that the Commission’s terms of reference focus on the adequacy and appropriateness of exceptions in the digital economy. Freedom of contracts is vital in the digital environment,. Digital business models including the rates at which customers are charged are often based on how a customer will use the relevant material. This clearly works to the advantage of both the customer and the copyright owner: in many cases, an individual with limited needs will not have to pay full price; in other cases, a customer wanting to make extensive use of a broad repertoire will be able to negotiate discount prices.

A number of submissions to the Inquiry on which the Commission appears to have relied stated that current contracting practice excludes, for example, supplying copies by way of inter-library loan or supplying copies for educational purposes. These examples are not relevant to the issue. Rather, the fact that the application of any particular copyright exception is excluded in any particular contract is meaningless unless and until the business context in which that contractual provision occurs is also examined. The Commission has not given sufficient attention to the economic context in making its recommendation, even though (at 17.119) it notes that ‘One reason policy makers have been reluctant to be prescriptive about limitations on contracting out is the difficulty of predicting future developments in emerging markets and technologies’. It would be better for the Commission to show similar reluctance.

* There has been no evidence provided to contradict the points we made in our first submission:
* parties should be free to make their own arrangements and to negotiate their own interests under contract;
* there is no demonstrable need for any legislative intervention;
* the exceptions and licences in the Copyright Act do not represent any sort of inviolable ‘balance’ that must be preserved at all costs; and,
* to the extent that any particular contract is unfair, then other methods of regulation (including under consumer and competition law) are available to address the problem on a case-by-case basis.

The Commission is very keen to import ‘fair use’ principles from the United States. It is worth noting in that context that United States law does not prohibit contracting out of copyright exceptions.