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**Australian Law Reform Commission (ALRC)
Discussion Paper 79: Copyright and the Digital Economy
Comments by the International Publishers Association**

The International Publishers Association (IPA) is grateful for this opportunity to respond to the ALRC's discussion paper 'Copyright and the Digital Economy.'

Summary

- The IPA advises against the introduction of 'fair use' into Australian copyright law
- The IPA believes the current statutory licence regime in Australian copyright law follows international best practice
- The IPA advises against the broadening of education exceptions
- The IPA endorses the submission from the Australian Publishers Association
- The IPA also commends the submissions from the following organisations:
 - Copyright Agency|Viscopy
 - Australian Copyright Council
 - Association of Scientific Technical and Medical Publishers (STM)
 - International Federation of Reproduction Rights Organizations

The IPA is the international federation of national publishers associations, representing all aspects of book and journal publishing from around the world. Established in 1896, IPA's mission is to promote and protect publishing and to raise awareness for publishing as a force for economic, cultural and political development. Around the world, IPA actively fights against censorship and promotes copyright, literacy and freedom to publish. IPA is an industry association with a human rights mandate. Our member in Australia is the Australian Publishers Association.

Copyright Law and the public interest

At the outset, the IPA would like to state categorically that copyright protection and the public interest in more and better access to content in education, research and for cultural participation and advancement are not opposites. On the contrary: a society that wants better educational material and high quality content in schools, universities and research facilities must embrace the notion of making use of market forces to create that content. Education, freedom of expression and cultural advancement all require successful creators and viable publishers and their investment in time, resources, career choice and development. Researchers value powerful research tools and well maintained databases. Teachers value

great textbooks, and the choice, diversity and innovative approaches that come out of the entrepreneurial spirit of publishers seeking to serve them better. Copyright (and the authors creators and publishers) who rely on it serve education, culture and research. A world with weaker copyright would be a place with less investment, less choice and fewer incentives to grow and develop curated quality content.

Terms of Reference/Framing Principles for Reform

The IPA strongly supports the framing of this inquiry's terms of reference around the 'importance of the digital economy'. Publishers and other content creators are among the primary investment engines and drivers of the evolving digital economy. For publishers around the world, copyright is not a theoretical or ideological debating point, it is a practical tool that underpins our relationships with authors and illustrators and with consumers (including educational institutions). It is at the heart of many business models and enables investment in the development of outstanding books, journals and applications.

A successful business environment requires clarity, stability and certainty. This is especially true during this period in which the way content is created, curated, published, distributed and used is changing quickly and unpredictably.

This inquiry's terms of reference accurately link the digital economy to 'innovation leading to national economic and cultural development'. Innovation, investment and flexibility are central to the business models of the digital era. Publishers have embraced digital technology and are taking advantage of its new opportunities in their operations and their business development. Publishers have harnessed technological innovation and many have found success in developing new digital products, new ways of engaging with their customers, and new strategies for finding new customers.

However, legislative change requires clear and logical reasoning. To the IPA, the changes and amendments the ALRC recommends are not robustly evidence-based or practical, and are not rooted in an understanding of the way collective and voluntary licensing work in practice for publishers.

The IPA supports the five framing 'Principles for Reform' as set out in the discussion paper, but submits that a number of the ALRC's recommendations are inconsistent with (and counter to) those principles. Proposals that are not based on practical experience but appear solely based on academic thought or a desire for a tidier looking Copyright Act, require a particularly prudent approach, before they should be seriously considered for legislative reform.

The IPA's global remit allows it to provide the ALRC with an international perspective. Our comments will be confined to the following:

- Fair Use
- Statutory licenses
- Educational use

Fair Use

'Fair use' has been adopted by only five countries worldwide (USA, Israel, Philippines, Korea and Singapore). Only the US has extensive forensic experience with the concept. Fair use regulations have been rejected by many jurisdictions and for good reason — most recently, by the UK on advice from Professor Ian Hargreaves¹. The introduction of a fair use doctrine in Australia would:

- create legal uncertainty and hence an atmosphere hostile to creative innovation and collaborative solutions;

¹ Ian Hargreaves 'Digital Opportunity - A Review on Intellectual Property and Growth', May 2011, paragraphs 5.19 and 5.41

- create a serious risk that Australia may violate its obligations under international copyright treaties, in particular the three step test of the Berne Convention, WCT and TRIPS;
- require the development or importation into Australian jurisdiction of an entire body of legal precedents, adjudications and case law, carrying with it unpredictable legal consequences, uncertainty and therefore business risks.

'Fair use' works (more or less) in the USA because it is rooted in over 150 years of case law and judicial interpretation. The understanding of fair use is based on carefully developed criteria, differentiations and fine tunings that can only develop through the large number of court cases that have been decided over decades and have allowed a complex and finely balanced legal construction to evolve.

In Australia, introducing an entirely new legal concept into the Australian Copyright Act would be radically intrusive, unpredictable and of dubious utility. Given that there is no international mechanism to coordinate and resolve tensions between different applications of the fair use doctrine in different countries, there is no such thing as a single, homogenous, uniform notion of 'fair use'. Therefore, to what extent would Australian courts make use of the legal precedents of foreign jurisdictions, which have been set within a different legal framework and if they diverge from them in practice, or develop them, will this not lead to further confusion rather than legal certainty?

If 'fair use' were introduced, Australian courts may or may not agree with precedents set abroad. This will create confusion because the expectation of homogeneity and consistency cannot be borne out in practice. The importation of an entirely new legal concept as loosely formulated as 'fair use' would leave both rightsholders and users with a high degree of uncertainty as to whether a given use is legal or not, thus stifling both investment in innovation and restricting the freedom of speech of authors. The US Constitution provides a countervailing safeguard for the freedom of expression that is missing from the Australian legal context. In the end, 'fair use' can be described as being of most utility for lawyers and clients with the deepest pockets. As one of the most prominent academic copyright critics, Lawrence Lessig, puts it: 'Fair use in America simply means the right to hire a lawyer.'²

It should also be mentioned that it is arguable that 'fair use' is incompatible with the three step test enshrined in the Berne Convention and TRIPS, because, without the existing case law and legislative underpinning, it is not clear whether it limits a copyright owners' exclusive rights only in 'certain special cases'. The US can point to a highly developed set of precedents that have, over decades, calmed (though not silenced) critics with regard to the ambit of the 'fair use' doctrine. If Australia were to introduce a fair use doctrine, without fully adopting US precedents (a process which is difficult to envisage even conceptually), the question of compatibility with the three step test would have to be freshly examined.

Most importantly, the ALRC provides no evidence to show that the introduction of 'fair use' would stimulate Australia's digital economy.

Statutory licences

At the outset, the IPA wants to state that we support voluntary licences and believe that user demand and evolving technologies will enable such licensing mechanisms to thrive and develop in many creative sectors. But our fundamental support for what the ALRC discussion

² 'Fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad — in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.' Lawrence Lessig, *Free Culture*, p. 187 <http://www.freeculture.cc/freecontent/>

paper refers to as ‘copyright’s overall free market philosophy’³ needs to be complemented by practical solutions that ensure seamless, clear and risk-free access, where such licensing solutions cannot be found. Such complementary seamless access requires a collective licensing mechanism that is clear, simple, transparent and based on a sound legal footing which ensures that any disputes can be resolved quickly and fairly. The Australian statutory licence appears to fit these requirements very well. To reject such a complementary solution is to unfairly disregard the benefits that it has provided now and in the past and to be blind to the potential that such licences have to balance interests as technologies and user needs evolve. To reject such a complementary solution also ignores that, as currently drafted, educational institutions are not compelled to rely on the statutory licences, and are not precluded from reaching voluntary licences with publishers (as they already regularly do, for example, in relation to online subscription services and in relation to music and collections of photocopy masters, with consequent reductions in what they pay under the statutory schemes).

The current collective licensing arrangements are designed to be inclusive, simple and effective, while maintaining maximum flexibility for educational institutions. They cover content from small to medium creators and rightsholders, who would usually have less market power because of their limited offering. For Australian society, statutory schemes administered by collecting societies offer not only an opportunity to minimize the administrative costs of copyright management and royalty distribution for both publishers and licensees. They also provide a simple mechanism to achieve balance. The free collective licences for persons with print disability are a great case in point. Here, all interests can be addressed without undue cost, flexibly managing and balancing all needs with the shared objective of best possible access.

In chapter 6, the ALRC’s discussion paper offers no evidence that repeal of the current statutory licence scheme would be more efficient. It merely asserts that moving to an environment that only encompasses voluntary licensing would be ‘more efficient and better suited to a digital age’⁴ and, that “the ‘digital environment *appears to* call for a new way for [statutory licenses for educational, government and other institutions] to be negotiated and settled’⁵ (emphasis added).

The words ‘appears to’ in the above sentence indicate the ALRC’s lack of practical evidence.

Quoting licensees’ submissions, the ALRC agrees with their arguments about the ‘inefficiency’ of the current statutory licensing apparatus, including surveys. After suggesting that voluntary licensing would be a better alternative to statutory licensing, the ALRC notes that new gaps would open up in this scenario, requiring further changes to the Copyright Act, and then suggests a series of such complementary measures including introduction of ‘fair use’, a kind of forced voluntary licensing, and extended collective licensing. Closer inspection reveals that reliance on such unexplored mechanisms would, at the very least, increase the complexity and the administrative costs confronting teachers (for example) wondering whether they can copy or use copyright material.

Currently, all Australian schools can copy a generous amount of virtually any text and pay a flat rate per student (currently, just under \$17 paid to Copyright Agency|Viscopy). It is unclear how the efficiency of such a system would be enhanced if each school, and possibly each teacher, had to determine the extent of their projected usage of various materials from a number of possible suppliers (only one of which might be Copyright Agency|Viscopy) and then negotiate a price for an individual licence from each.

³ ‘Copyright and the Digital Economy’, paragraph 6.41, p 116

⁴ ‘Copyright and the Digital Economy’, paragraph 6.38, p 115

⁵ ‘Copyright and the Digital Economy’, paragraph 6.3, p 109

The ALRC does quote some of the submissions that defend the current statutory licence scheme as 'efficient'. However, it discounts these arguments completely, without any apparent explanation.

Further, while the ALRC's inquiry is supposed to be aimed at assessing the adequacy and appropriateness of exceptions in the digital environment, most of the current \$17-per-student fee paid under the statutory licence relates to the physical photocopying undertaken in Australian schools. The IPA's understanding is that only one dollar of that amount relates to digital usage.

We understand that the Statutory Licence as it operates in Australia may indeed favour the smaller and medium-sized educational publishers which are predominantly Australian owned enterprises. A shift to voluntary licensing will increase administrative licensing costs to smaller publishers and creators, thereby diverting resources towards unproductive administrative functions and away from investing in and producing more high-quality educational resources for teachers and students.

The secondary market that operates through these licences is increasingly important to rightsholders and any diminution in the remuneration received by creators and publishers as a result would have significant consequences. According to a survey by PwC in the UK, almost 25% of the authors surveyed derived more than 60% of their income from secondary licensing.⁶ This PwC study also revealed that, for publishers, broadening exceptions and limitations would result in loss of income from secondary uses, and this in turn would impact severely on publishers' profit, potentially leading to job cuts and reduction of investments in new works and innovation. The study also found that there was a direct correlation between publishers' secondary income (which represented an average of 12% of their earnings) and the incentive to invest in developing new content⁷. This secondary income represents a significant proportion of the funds (almost 20%) that publishers in the UK use to invest in new works including digital learning resources.

Similarly, a study by the UK Authors' Licensing and Collecting Society (ALCS) showed that a 10% decline in income from secondary uses for creators would result in 20% less output, whilst a 20% decline would mean a drop of 29% in output, or the equivalent of 2,870 works per year⁸.

There is no reason to believe that these patterns are not fully replicable for Australian publishers and creators.

Educational use

The IPA reiterates its opposition to introducing 'fair use' into Australian law.

There is no convincing evidence provided by the ALRC to show that broadening the free-use education exceptions available in the Copyright Act would somehow stimulate or strengthen the digital economy. In fact, if such a broadening merely led to users paying less for use of copyright material, then such a diminution in payment to creators and publishers would lead directly to a diminution of output and innovation (see our reference above to the PwC and ALCS studies).

The ALRC states that education is a clear example of an area with 'a strong public interest.'⁹ This is unarguably true. There is therefore a public interest in variety, quality and innovation in the provision of educational content. This content should come from Australia, as Australia has

⁶ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf

⁷ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf

⁸ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf pages 5 and 87

⁹ 'Copyright and the Digital Economy', paragraph 13.6, p 270

unique needs in terms of its curriculum, cultural identities, history and world perspective. The only practical question, therefore, is how to encourage and facilitate a strengthening of education systems. The IPA submits that the best way of doing so is to strengthen the educational content market, and continue to encourage and facilitate the development, production and distribution of the highest quality education resources. Broadening exceptions that would lead to diminishing remuneration for creators and rightsholders, can only be deleterious to the overall quality, variety and number of high-quality educational resources in circulation.

There are times in the discussion paper where the ALRC seems to be wilfully ignorant of the contribution of publishers to the education 'value chain'. As a small measure of balance, allow us to make a number of basic statements along the lines of 'education is a strong public interest' which are often ignored in the public discourse on this issue:

- education publishers are committed and passionate about educational outcomes. Ultimately they can only sell products that work;
- education publishers are very knowledgeable about curricula — understanding them in extreme detail. They expend great effort pointing out curriculum changes to teachers, thus providing an important tool to ensure rapid curriculum change;
- at the core of what education publishers do is quality control and a sensitive yet robust feedback loop – their books will fail if teachers don't like them or they are sub-standard;
- education publishers consistently and constantly reach out to and listen to teachers; this is both part of their market research and their customer service;
- education publishers have both broad and deep expertise that cannot easily be replicated by individual teachers or by expecting teachers to rely on either open educational resources. They understand how design supports teaching, how different kinds of exercises tap into different learning styles, class dynamics, teaching rhythms, work flows, etc.;
- education publishers create not just one book or one digital product, they create series, based on different teaching styles and student needs. Books in such series often build upon each other, referencing back or requiring knowledge and skills based on previous books in the series.

Concluding Remarks

The development and ongoing support of a healthy national publishing sector is in the Australian national interest. There is not only a national interest in continuing this as part of the national digital knowledge economy, but there is also a direct interest in harnessing the innovative capacity and the improvement through competitiveness that a free, competitive and entrepreneurial market for copyright protected content brings. If Australia wants to stimulate the digital economy, then publishing is a strategically important industry. From this perspective, cultural expression, information and educational content are not ordinary commodities. Rather, they become indispensable for ongoing national development.

Beyond the pragmatic and economic argument for strengthening copyright and the local publishing industry, there are also broader policy implications: authors are a society's moral conscience. They are the way we tell ourselves who we are, where we've come from and what we could be. They chronicle, inspire and admonish us. As the American literary journalist Joan Didion once said: 'We tell ourselves stories in order to live.'

Copyright is the mechanism our society has invented to ensure that authors are rewarded for their creativity and are encouraged to continue creating. In an increasingly globalised, digitised and mediated world, authors are the people who create an intelligible conversation out of the anarchy, the dissonance and the babble. Publishers are the engines who drive that conversation and ensure that it reaches its maximum audience.

International Publishers Association

In education, publishers are also the creative drivers behind education resources. They devise, commission, modify, oversee, produce and update on a virtuous circle of improvement and adaptation.

Australian creators deserve the opportunity to be confident and productive participants in the global dialogue that is modern publishing. The IPA urges the ALRC not to risk the continued development and success of the creative copyright industries in Australia by proposing unnecessary and unpredictable changes to the Copyright Act.

IPA looks forward to supporting and advising the ALRC in its ongoing process of reflection and policy development and would be happy to engage wherever we can provide further information and insight.

IPA hereby agrees that this submission be made publicly available in compliance with ALRC's policies and practices.

Yours sincerely



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Secretary General