**ALRC ‘Copyright and the Digital Economy’ Discussion Paper**

**Submission from the Australian Society of Authors**

**FINAL**

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**About the Australian Society of Authors**

The Australian Society of Authors Ltd (ASA) is the peak organisation representing the professional rights and interests of Australia’s literary creators. The ASA was formed in 1963 and operates under Australian corporation law. Total membership in 2013 numbers 3,000+ nationwide.

The ASA works to establish minimum rates of pay and conditions for writers and illustrators; publishes books, contract templates, papers and information sheets for emerging and experienced authors; defends the legal rights of copyright holders. The ASA advocates to governments and cultural agencies at all levels on matters such as copyright and moral rights, contract law, literary funding, and business and taxation matters.

The ASA has formal Board representation on the Australian Copyright Council and on Australia’s principal collecting society for authors, the Copyright Agency. The ASA’s views on matters of authorship, libraries and copyright are regularly sought by federal and state governments and our Society is a key contributor to government enquiries and studies across the cultural and arts sectors (most recently the BISG and BICC).

The ASA is a member of PEN International, supporting that organisation to secure release of authors imprisoned in their work for free expression. The ASA is also a sponsor of the Indigenous Literacy Foundation.

The ASA administers annually the Barbara Jefferis Award and the Ray Koppe Young Writer’s Fellowship. The Society also delivers, on behalf of the Commonwealth Government’s Australia Council, various support initiatives such as emerging writers’ fellowships and children’s book development programs.

**Introduction**

The Australian Society of Author’s (ASA) general assessment of the ALRC’s Discussion Paper (DP) is that is does not take into consideration sufficient of the matters literary creators see as critical to any discussion of copyright in the context of their creative and economic circumstances – and that this reduces the efficacy and value of the proposed changes to the Australian *Copyright Act*. Overall, its angle of vision seems oddly to one side of our actual and chief concerns. Consequently, its proposals have been received as frustratingly disconnected from the needs of literary creators.

The DP does not convey the sense of an open and comprehensive representation of the main issues as understood by all the key copyright participants, with the intention of assessing and responding to those viewpoints in a fair-minded manner. It is primarily a ‘proposals paper’, marshalling evidence and mounting arguments on behalf of seemingly already determined recommendations to government.

The desire to improve user access, a theme throughout the DP, may be laudable in the abstract. And the kind of measures proposed may lead to even fewer copyright impediments for amateur and casual creation and distribution online than exist at present. This may seem an achievement, except that no evidence has been presented that online technology and retail companies are experiencing any difficulty in sourcing sufficient such content, or are unable to make it widely available to users.

At the same time, it has not been shown that Australia’s schools currently have insufficient, quality materials available to them for educational purposes under the present access regime. Or that literary creators are asking for changes to the *Act* on the basis of evidence that their works are somehow blocked. As for any further, currently unserviced ‘potential’ users, no research has been put forward that there is in fact a body of such users prevented from access by the *Act.*

Nowhere do we see in the DP how precisely the proposed reforms will facilitate the creation of more and better Australian cultural products, or how these will be more easily accessed by users, either within or outside Australia. The ASA argues that it is precisely these products that have the greatest real contribution to offer to GDP and economic activity within Australia. The encouragement of further creations for their cultural value and use is what, in large part, an *Australian* copyright act was always designed to do – and in our view should continue to do.

The kind of revised *Copyright Act* now proposed, however, will if legislated, mainly offer additional preferment to rent-seeking overseas corporations such Google and Amazon – who already ship the bulk of their revenues and profits overseas and pay minimal tax here, and who are likely be the greatest material beneficiaries of any changes designed to create more and more ‘exceptions’ under a ‘free use’ doctrine – would result in a negligible additional contribution to Australia’s economic well-being, if any at all. And, through the elimination of the statutory licensing rules and processes, dramatically reduce remuneration to our own literary creators, and also reduce the creation of further, culturally and educationally valuable – and potentially remunerable – works of intellectual property.

**The ALRC’s Terms of Reference**

The ASA was disappointed to see that, after asking for and being provided with numerous challenging responses to the draft terms, the ALRC’s terms of reference were not sufficiently amended to require a direct engagement by the Inquiry with real-world copyright creativity, and the actual work of creative practitioners. The Inquiry is missing the evidentiary heft that such an engagement would therefore have provided.

This continues an unhealthy tradition. Much of the effort and activity towards copyright ‘reform’ in the decade or two before the arrival of the revised *Act* of 2001 was driven by the Commonwealth Attorney-General’s Department. It has been noted that, ‘The decade from the mid-1980s for example saw more federal government studies of intellectual property than in the preceding eighty years and culminated in the major Digital Agenda copyright reforms’ (Bruce Arnold, 2008).

In other words, rather than practitioners – the makers of copyrightable material – various policy experts were put in charge of the shop. We use the word ‘shop’ advisedly. The right we deal with certainly covers tradeable goods. For this reason among others, it does not make sense that it should mainly be pronounced upon by those who see creative work or the associated trade in intellectual property primarily through administrative, intellectual or legal lenses.

In line with the disregard shown to creator concerns in the final terms of reference, the minimal references in the DP to important concerns noted by the ASA and included in our responses to the earlier ‘Questions’ document, suggests an inductive model of reasoning adopted to deliver pre-determined decisions.

The DP exhibits an inadequate appreciation of the nature of creative practice, and therefore cannot have an adequate ‘regard to: the objective of copyright law in providing an incentive to create and disseminate original copyright materials’. It cannot do so while the voices of cultural workers and artists – those most likely to act on the incentive of copyright and proceed to ‘create’ – have been so comprehensively missing, both from the process of consultation and the documents we have seen so far.

We now wish to offer some general commentary on themes, ideas and subjects canvassed in the DP, before responding under the particular headings as set out in the DP.

Online business models

The ALRC needs to appreciate that those online businesses which have co-opted, taken over or interposed themselves into book publishing and distribution operate primarily on a ‘click-bait’ business model. They seek to place ads in front of eyeballs. They are not in the business of seeking significant revenue and profit from the margins available to them via the sale of formal, remunerable intellectual property.

The DP places much emphasis – as the terms of reference place emphasis – on ‘freeing up’ digital distribution via copyright change, with an aim to facilitate broader economic benefit among other ends. But there is far more to the problems and potentials of digitised economic activity than issues with copyright law, and we argue that the ALRC has an insufficient understanding of the market and economic environment in which our literary creators currently and actually operate.

For one, in the matter of getting their works in front of potential purchasers or readers, literary creators do not operate in a diverse and level digital environment with equal opportunities for all, but a limited and highly constrained one. Bookselling has increasingly become a monopolistic or oligopolistic activity. One or two multinational online retailers have sewn up 80% of the distribution channels (for print and eBooks) and bricks and mortar booksellers become less and less viable and continue to close down – here and overseas – and publishers have fewer seller options.

The problem is not that local sellers or producers fail to make the most of current online opportunities, and that the copyright rules are compounding matters. It is that the book ecosystem has been disrupted and made dysfunctional by non-book, non-creativity focused players, Amazon most notably. Amazon’s main book business is in ‘front list’ selling of mass market genres, particularly those with ‘international’ potential. It has grown to dominate bookselling activity, undermining smaller players by adopting loss-leader price policies whose effect is to drive others out of business.

It should be understood that in reducing the depth and breadth of Australia’s bookselling sector, Amazon has compromised the effective, profitable, and wide circulation of works of ‘Australian content’. Having a lower number of book retail outlets means, ultimately, fewer outlets through which Australian content creators may have their works purchased. Publishers, booksellers and authors have been reporting these damaging developments to industry inquiries and their own associations for at least the past two years. Our authors do not see an Australian-supportive online business model in operation, or even possible, under the prevailing and primarily overseas-owned arrangements.

Current economic situation for authors in Australia:

Authors traditionally ‘build’ an income from a variety of sources, including compensatory source such as PLR/ELR payments and reprographic payments. But because of its domination by monopoly enterprises, the online environment is proving less than useful in supplying any new meaningful revenue stream for authors to add to their income.

The early promise held out by the distributive capacities of the giant online and tech retailers to individual authors who wish to offer serious work to potential consumers, and who may be looking for new means of enhancing their careers and prospects, is unrealised. Creative individuals are in the main competing for space and attention – whether as sole author/publishers, or through their publisher’s business– against mountains of digitised ephemera.

The DP ignores these real issues and instead does creators a disservice by substituting a selective use of market theory for research-based analysis. The application of market concepts relating to non-cultural consumer goods doesn’t make sense when the realities and complexities of commercial intellectual property exploitation are not also provided as context. Because the inferences regarding how our actual markets function are contestable (to say the least), what are understood as 'impediments' to market functioning also appear partial and tacked on rather than integral to an argument for changing the *Act*.

There are so many other more useful questions that might be asked. To list a few: Are authors engaged in a 'market' or ‘markets’? If so, which markets, which authors and how many? If some are consciously pursuing market success, how is that defined or how should it be treated from a copyright law perspective? Are originating authors competing with each other?

The latter might have been a particularly revealing one to have had answered. If literary creators are competing with each other for attention, readers and remuneration, doesn’t the proposal to enable more transformative use at the very least dilute the special character and identity of their work and person, so necessary to the purpose of achieving market success, and therefore compromise their chances? Had the Inquiry posed such questions, recommendations on copyright change would have been all the more grounded and convincing.

Protection of the economic *potential* of our work is often vouched for by writers themselves as being the greatest ‘incentive’ they have to create, and to go on creating. Not protection as in tariff walls, but the protection of intellectual works as private property. We invest time and effort to create personal – and cultural – capital, and we need protection so as to be able to exploit that capital for private benefit *and* deliver its creative outputs in socially beneficial ways.

The internet

It is perhaps only dimly understood that, as part of the English-speaking online environment, Australia’s version of the internet is largely a function the Unites States’ current version of the internet. That is, our online environment is directed by corporations with essentially dominant power over the basic conditions of Australians’ internet use – Apple, Microsoft, Google, Amazon.

Although these firms operate in other countries and languages, they do not seek nearly the degree of copyright minimisation in those places as they pursue among the satellite English-speaking nations. Cultural differences make it too difficult, or the potential markets are comparatively underdeveloped or simply too small for them to bother.

It is no coincidence that they have their strongest commercial and proprietorial interests in the copyright law and practice frameworks of countries like the UK and Australia and Canada. Interestingly, it is in precisely these places where the strongest pressures have been exerted on the laws and rules of copyright so as to introduce more exceptions.

We cannot stress too strongly that the rights of individual copyright owners, and the fact of individual copyright, are generally taken by these organisations as being obstructive to their interests. Indeed, many authors groups and individual authors have legally challenged their operations and their claims over and use of creator property. (See HathiTrust, under ‘Orphan Works’ section.)

Economics

While the ALRC is not tasked with the same questions or undertakings as the Productivity Commission, the ASA argues it should avoid considering or attempting to factor in macro or micro economic measures or other ends with some view to engineer material outcomes – for either producers, distributors or consumers – via a re-tooling of copyright. It is unfortunate that these urges are overt and covert in the original terms of reference and now in the DP.

More useful to literary creators would be for the ALRC to acknowledge that, additional to the existence of and threat to moral rights, material equity may be *diluted further* via some of the proposed copyright law changes. And that the minimum extent of copyright law’s responsibility in economic terms towards creators is to *not threaten material reward*.

Maintaining the *possibility* of earning from one’s property is one very good reason why we have, for instance, sanctions against copying theft in the current Australian *Act*. The danger as well as the fact of negative material outcomes for owners/creators through misuse of a copyright is why sanctions against unauthorised copying and theft have been in the DNA of copyright – as a question of justice and rules, with breaches subject to remedy or punishment – since the beginning.

The fragility of serious creative work in the online environment – where stealing is rampant, where individual consumers are being urged by vested interests to want ‘more for less’, and where corporations seek to work around or undermine copyright rules (while also arguing that this is OK because anyone can send anything online these days and no-one can stop it) – makes serious respect for creators’ vulnerability, and better rules to uphold their market potential and earnings, more important than ever.

The ASA argues that in the making and delivery of creative cultural content literary creators, along with other individual artists, musicians, photographers, are the most committed and likely-to-last driver of benefits to the economy and Australian life through copyright creation and exploitation. This group is a vital part of the book industry, itself one of the central ‘copyright industries’ that deliver almost $90 billion dollars in GDP value to our economy (*The Economic Contribution of Australia’s Copyright Industries – Report*, 2012, PriceWaterhouseCoopers).

To the extent that they are concerned with culture at all, corporations such as Google use art, cultural and copyright works as material for drawing in advertising. Theirs are proprietary concerns which may or may not last beyond a few decades, and whose technologies may well be superseded over time. Authors are obliged to use all available tools, including but not limited to digitisation and the internet, to communicate with their society, its culture and people.

As it is almost certain that writers and the act of writing will outlive these organisations and indeed contemporary communication technologies, every effort, including a strong protections and sanctions regime, should be applied in favour of supporting their chance to contribute over the longer term. In this context, the ALRC might consider the Hippocratic injunction: ‘above all, do no harm’.

In the distribution of the world’s goods (including intellectual property), the idea of equity is very well understood by live bodies in most places and times – and that taking things away from little guys to give to big guys or undeserving guys, or affording ‘discounts’ to third parties at the owner/creator’s cost is not any kind of human value, however that is labelled.

Copyright and the ‘digital economy’?

An indistinctness of purpose is apparent where the DP considers the intersection of the digital environment, economics and copyright. It is a naïve form of market fundamentalism that sees copyright as an impediment to ‘opportunities for innovation leading to national economic… development…’ – the inference being that copyright may be just another bunch of ‘red tape’ preventing businesses from thriving and blocking consumer access to products. This, while the rest of the sentence – that economic and cultural development is ‘created by the emergence of new digital technologies’ – is, an assertion with very little evidence to support it but much to oppose it in an Australian context.

Useful technological developments in the digital environment are not so much a matter of first overcoming ‘rules problems’ as they are a matter of the nurture and support of a commercial risk-taking business culture. And this is at heart a broader cultural question, a question for Australian society.

Literary creators benefit more from a copyright regime that encourages and protects their work, as opposed to one that provides free kicks to entities which don’t need them. As Paul Aiken, Executive Director of the US Authors Guild has crisply put it: ‘Silicon Valley doesn’t need any help from Australia’ (*in commentary to Angelo Loukakis*).

The development of breakthrough digital technology and associated innovations requires very significant mass – enormous research and development budgets, and/or (depending on the national political culture) sustained government support. Even the level of technological value-add more commonly produced within Australia (for instance, applications development) is inevitably dependent on a far deeper and wider foundation than copyright law.

In terms of practical economic impact, copyright can nevertheless operate to underpin distributive determinations for creators such as authors who are essentially unsalaried piece workers. That is one of the main useful ‘economic’ tasks performed by current statutory licensing for literary creators, while allowing for actual pay rates to be adjudicated by a separate body.

It is hard to see how a copyright regime such as the DP favours

can have any direct *instrumental capacity* to generate positive economic activity. Indirectly however, by protecting those who work to create intellectual products, by encouraging more participants through a regulatory regime that functions in their favour, and nurturing their chances to contribute, economic benefits may well accrue. Indeed, one re-conception of copyright law might have it more usefully seen as a form of occupational health and safety law for brainworkers, and the rules rewritten accordingly.

The ‘protection’ function in copyright is important in a less obvious economic way. By ultimately vesting the right to economic exploitation principally in the creator/owner, copyright operates to provide *additional choices* to the creator in difficult economic times, inasmuch as they are free to contract in new and different ways according to shifts in markets. This is especially valuable to them in the current uncertain publishing climate, which sees ‘traditional royalty schemes changing and possibly declining as a source and means of distributing income,’ and ‘fewer remunerative opportunities as publishers reduce their publishing programs’ (BISG, *Final Report to Government*, 2011, p. 83).

Publishers report that royalty payments for Australian eBooks are not at present a significant component of their overall royalty payments to authors; this while advances and royalty payments are overall lower than they were. The idea that less publisher sales revenue due to print bookshop closures is the cause of a decline in authors’ income does not hold, as overall, the total value of book sales ‘increased by an annual average of 4.1 per cent from 2001 to 2010’ (BISG, *Report*, p. 17). While net revenues have grown since 2001, they haven’t grown equal to inflation, which suggests a relative decline in value over the period.

Although publishers have added electronic versions of individual titles, sales of these are generally unimpressive. Publishers identify no net growth gain overall for their businesses since they started to deliver in electronic as well as print format. More likely there has been some rebalancing (or ‘cannibalisation’) of sales across the formats of their individual titles, and across their product lines. Hamstrung as publishers are by the pricing policies of Amazon, and with book revenues down across the board, the impact felt inevitably and keenly by literary creators.

Book creators are experiencing not so much the beneficial workings of something that might be termed the ‘digital economy’, but of the ‘digital delivery-displacement economy’. But if the means of distribution have changed and income to creators and publishers has suffered, the identity of the product, the literary work, remains the same in intellectual and copyright terms.

Copyright as a protection of labour

A focus on the people who create books and the intellectual 'objects' that books represent, helps foreground the idea that human labour is involved and that this labour is a value and an input requiring reward. It is not for nothing that a book or any extended piece of writing or complex piece of art is called a ‘work’. Work is also what we call the expenditure of time and effort towards an anticipated product or outcome. This is what copyright makers do.

At the same time we can point to the market 'worth' in supply and demand terms of the products that their labour creates. Whichever ways we exploit our productions and however much they might bring at market, copyright also has the important function of allowing creators to draw a clean line or border around them so that they may be identified with our person. Moral rights remain critical.

A ‘digital’ economy that is not about production and exchange (ie manufacture & price) but mainly about new delivery channels is in fact a very limited and limiting mechanism for intellectual workers. This is a key problem for authors in particular. In developing their distribution businesses, the ISPS and tech giants have effectively valorised the element of digital delivery, a distribution 'service', above so much else – and drawn attention away from producers and their role and needs as intellectual property creators.

Role of commercial contracts

Authors license rights to their work to publishers and others for commercial exploitation. These rights are exploited under agreements which are governed by commercial contract laws, and further governed by international instruments and conventions. Copyright management is also a factor where sub-licenses are entered into for commercialisation in other territories.

Commercial contracts between authors and publishers typically carry clauses and means which determine the forms of technology that may be utilised in advancement of the copyright creator/owner’s and publisher’s interests, and also how that technology may be limited according to the agreed ownership interest.

For literary creators, commerciality cannot be and is not desired to be a free-for-all. The most powerful tool they have in their own management and control of commerciality and remuneration is copyright. They may withhold it entirely or license it to others, in part or whole. There is at the same time a cost to authors in their exercise of copyright. Part of the ‘cost of business’ for an author lies in the margin that goes to publishers where they act as a form of agent for the author in the control, management and exploitation of their copyright within and ex-Australia.

Copyright ‘modernisation’

‘Policy makers around the word are actively reconsidering the relationship between copyright exceptions and innovation, research, and economic growth, with a view to ensuring their economies are capable of fully utilizing digital technology to remain competitive in a global market’ (DP, p. 21).

‘Around the world’ is an exaggeration. No-one is agitating for the kind of changes proposed by the ALRC in the copyright environments of France or Germany, or Italy or Greece or Argentina, for example. On the contrary, the German government has argued in the past that ‘there was no justification for revising copyright law in favor of users’ (Bernd Neumann, German minister of culture and media, www.billboard.com/biz/articles/news/publishing/1177692/german-culture-minister-announces-copyright-reform). It is primarily in the English-speaking territories and markets – the UK, USA, and Canada in particular – that online commercial interests have mounted a concerted attack on the respective copyright regimes for their argued shortcomings in the digital environment.

Among the most quoted example of national copyright reform in recent times is that of Canada. The anticipated benefits of the Canadian *Copyright Modernization Act*, a modernisation process ostensibly undertaken with the same ends as described in the DP, were set out by their government in the following terms:

‘These changes will enhance the ability of copyright owners to benefit from their work. They also offer Internet service providers (ISPs), educators, students and businesses the tools they need to use new technologies in innovative ways.’(http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h\_rp01153.html#amend)

But the results in relation to the first important claim are proving otherwise. Canadian authors/copyright owners are most concerned that, far from enhancing their ability to benefit from these changes, they are instead proving profoundly retrograde. The introduction of a new fair dealing exception has decidedly *not* enhanced the ability of copyright owners to benefit from their work, but has instead threatened their incomes. They report:

* During the process of copyright reform, the education sector assured writers that our copyright royalties – small payments for the copying of our works, cumulatively significant to all of us – would survive changes to copyright law;
* as soon as the Copyright Modernization Act was passed, many in the education sector immediately and aggressively pushed an expanded definition of fair dealing, with the purpose of avoiding paying for collective licences – licences that have been in place in schools, colleges and universities for over twenty years;
* a recent Supreme Court of Canada decision affecting a small fraction of the copying in elementary and secondary schools is now also being broadly misinterpreted as expanding what can be considered “fair dealing”;
* tens of millions of dollars in annual copyright licence revenue – income relied on by the writing and publishing sector – is now endangered;
* this over-reaching interpretation of fair dealing by the education sector needlessly complicates and jeopardizes ongoing, affordable and legal access to a comprehensive repertoire of high-quality Canadian and foreign content for teachers and students

(http://www.writersunion.ca/writers-students-and-teachers-it-s-time-talk-about-fair-dealing)

Technology and innovation

There is an element of cargo cult or ‘techno-cringe’ in the conceptualising of ‘innovation’ and ‘digital technology’ by the ALRC in the DP. On display is a most uncritical acceptance of the digital technologies and commercial mechanisms of overseas tech corporations, as if these are beyond reproach or immutable for all time, and as if these somehow cannot compromise value in their handling of intellectual property.

Missing also is a notion that certain corporate digital interests may – quite separately from any unauthorised territorial copyright activity – deliberately use technological means to manipulate copyright material for purposes that finally deliver little cultural or creator benefit.

In *Who Owns the Future?*, Jaron Lanier outlines the way server systems are used by some of the tech giants to gather, reconfigure and reuse data without paying for it. With regard to ‘automatic’ translation services, he says: ‘with each so-called automatic translation, the humans who were the sources of the data are inched away from the world of compensation and employment’. He might also have referred to the dubious quality of such machine-made translation.

Here we have technology used to create derivate, second-order ‘imitations’ of – not the original work, but an imitation of a translation. The originator, their copyright and their needs or wants are deeply buried under such manipulations and junk. In this and numerous other instances, the DP lacks originality of insight into the sue of technology, and therefore also lacks understanding about how technological ‘innovation’ may be used in ways detrimental to the needs of actual consumers and creators in Australia and elsewhere.

Copyright and educators

There is little evidence presented in the DP that working teachers have any substantial issues with the current rules. This at the same as some of their education department employers and other interests have run campaigns that conflate resourcing issues with copyright matters.

These arguments from institutional interests are decidedly at odds with what teachers are telling creators or the ALRC itself about the interface of access, usage and intellectual property/copyright. (Submissions to the Inquiry by teachers are strongly supportive of the current copyright approach represented by statutory licensing for instance, and strongly supportive of literary creators.)

Further freeing up access

The ASA is curious as to why the DP does not reference the fact that an enormous amount of potential teaching and learning material is already available to Australian schools. No-one is ‘stopping’ schools from using this material, creators simply say ‘pay us if/when you do’. If the argument is more about freeing up other material online, such as found on non-education specific websites and similar, because it appears unfair that this should be remunerable, we would point out the obvious, that *all* image and text etc is copyright, unless the owner has declared otherwise; and beyond that, there is no real obligation to use such secondary materials when there are quality, educationally-valuable materials already created by our authors for use in our schools.

**Framing Principles for Reform**

The Principles appear worthy enough, but the recommendations that follow are often so at odds with the Principles that the overall intellectual structure of the document is compromised.

***Principle 1: Acknowledging and respecting authorship and creation***

Section 2.8 states that ‘proposals for reform should operate in a way that acknowledges and respects the rights of authors, artists and other creators’. As mentioned, the ASA believes that respect for authorship and other forms of creativity is most properly expressed in an active respect and defense of the possibility of material reward for creators’ intellectual property *via* copyright.

Principle 1 fails as a guiding value on at least two counts. It is absent of any mention of moral rights, which has a formal presence in the current *Act* and a social and ethical weight beyond it. And it is absent a mention of property rights, as if respect for creativity can somehow be divorced from ownership, saving the idea of property solely as incentive for creativity. The ownership of an item of intellectual property subject to copyright certainly operates as an incentive, but also as much more.

The best form of respect for the ‘other’ is founded on, actually depends on, learning about the ‘other’ and treating them as your equal. Authors were among the chief agents of the development of modern copyright law in Australia, and also of some of the most important mechanisms subsequently designed to make copyright a valuable entity – for all. It is insulting that our ideas and concerns and role have been given such short shrift in this Inquiry.

A serious and concerned inquiry should have asked questions about the nature of literary creation in Australia. That would have revealed the following facts at the very least:

Authors and other content creators – such as photographers and illustrators – are the essential drivers in the creation of books. There are approximately 7,600 to 10,000 book authors in Australia… (BISG, *Final Report to Government*, 2011, p. 22).

Authors derive income in a variety of ways in addition to royalties paid by publishers. ‘Working authors’ that is, those who take a craft or semi-professional or professional approach to their activity (as opposed to hobbyists or ‘oncers’) often try to establish a notional basket to which they add their variously sourced income, or else work to build a series of small income streams… for those whose works are copied in educational/institutional settings, payments from the Copyright Agency Limited are added to the pot… (BISG *Report*, p.83).

Mean creative income earned by writers in 2001 was $23,200, but this had fallen to $11,100 in 2007-08, a drop of 52%. Equivalent median figures for the same periods were $5,400 and $3,600 respectively (BISG *Report*, p.22).

Operating on a paid-for-the-piece basis, and augmented by additional writing-related work, authors’ average income appears not to have moved positively at all between 2001 and 2010 (see Throsby & Hollister 2003; Throsby & Zednik 2010). In other words, over a decade in which most Australians incomes have risen significantly, authors’ incomes have been in absolute and relative decline (BISG *Report*, p.83).

It is this hugely important sector and its contribution, and the already precarious existence of those who provide that contribution, that the key proposals of the DP threaten so blatantly.

***Principle 2: Maintaining incentives for creation of works and other subject matter***

As we have argued, respect and incentive are intimately linked in a proper expression of copyright.

Since the late Middle Ages and with the development of mass forms of production and distribution, both authorship and the products of authorship have gradually acquired a ‘twin’ character. The literary work, defined broadly, has for at least three centuries become a vehicle of both culture (including sometimes ‘art’) *and* money. In earning from their work, paying tax and so forth, the author has come over time to function as an economic ‘unit’; in Australia, increasing numbers now operate in ways that satisfy the criteria of a ‘small business’.

Dr Johnson asserted that ‘No man but a blockhead ever wrote, except for money’ (Boswell, *Life of Johnson*, *1776*). If he meant the words more as a lament for his own parlous activity, countless authors down the centuries have indeed sought to write for fortune – successful creators of mass genre fiction or non-fiction are today’s exemplars in this regard.

For the majority of working authors, the greater incentive has lain elsewhere. Creators have typically also wanted to contribute to their society or culture, to improve or at least understand the fate of lives and the state of the world around them – by providing written matter that entertains, instructs, illuminates, educates.

They have wanted to do this as citizens and contributors to their society – but, as basic sustenance requires money, they have accepted that the measure of money cannot be ignored as the work of creation proceeds. Australia’s semi-professional and professional authors, as originators of remunerable intellectual property in written form, are exactly in this tradition.

Authors may also write for the pleasure of writing and with no commercial aims and they may do this either serially or occasionally – there are many temperaments and desires in the world of writing.

Blogs are a common platform for work where there is no expectation or requirement for payment. But whether casual or otherwise, a piece of online writing is a ‘work’ that may also be remunerated if required. The choice, historically and under every contemporary understanding of Australian copyright law, remains with the creator. Copyright protects the remunerative *potential* for the creator, as well as their moral rights over their creation.

But whether their status is amateur, novice or professional, a writer generally appreciates they are in a market economy when they see that, in addition to whatever cultural value is assigned to their creations, a price may also be attached. And that with the *sale* of their work comes the chance to go on *doing* their work. Even if the income from their output is insufficient to feed themselves and/or their families, an indication of commerciality represents an imprimatur and a personal encouragement. It is of a different order but often as welcome as critical accolades.

Section 2.16 ‘…no property rights are ever unconstrained and it was noted in the United Kingdom Hargreaves Review that property principles cannot alone form the basis for copyright law as protection of creator’s rights may today be ‘obstructing innovation and economic growth’.

It is highly provocative that the DP recycles this idea at all, let alone in the context of a review of copyright. That ‘no property rights are ever unconstrained’ is an argument from the vantage point of state power. It smacks of authoritarianism and the imputed warning that if those in charge don’t like your claim on something, be warned, they reserve the right to take it off you.

This may in fact be the case with ‘real’ property such as land, which may be expropriated for certain purposes by governments. But it is not the case – so far – for the works, and property, of the mind. The ASA takes this statement to be also extremely damaging to any workable conception of copyright for authors. We have pointed out elsewhere that it is not the business of authors or other creators to advance economic growth on behalf of governments or the economy.

Copyright material creators… could hardly be required to be responsible for the health of the broader economy – and nor do they have any special duty towards achieving such a goal. Their responsibility extends as far as the creation of potential ‘social goods’ represented in their intellectual property. It may, however, be argued that society owes *creators* a duty – to make such laws as best ensure the conditions needed for their creativity to flourish (from ASA letter to ALRC re Draft Terms of Reference).

Legislators are ill-advised to target the instincts of individuals to protect that which they have made, and to imply or infer that their wish to protect or defend it may represent an economic problem. To see creators as some kind of impediment to the economy is to be offensive and deeply misguided. Those who ‘make’ must decide when and in which circumstances their product goes to market – to tamper with property rights with a view to removing a fulsome notion of property because that causes issues for some potential accessors is to step into dangerous waters indeed.

Section 2.23. The DP’s selection of a quote from the Box Hill Institute of TAFE, that the relevant balance of interests lies ‘between public interest… and the right of copyright owners to profit at any point in time’, is in line with other quotes in the DP that seek to range creators *against* something loosely termed the public interest.

The ASA would like to remind the ALRC that there can *be* no ‘public interest’ without the creation and protection of the very works whose accessing is apparently so problematic.

***Principle 3: Promoting fair access to and wide dissemination of content***

The DP displays little appreciation that the creation of meaning is one of the overarching activities of a ‘culture’. It is these meanings that are as often as not embodied in what is termed ‘content’ for the purpose of this Principle and elsewhere in the document. Materials produced for educational use are ‘in and of’ our culture - and so too are YouTube clips, so too is graffiti, so too is professional gallery art, and everything else ever committed to words or represented in images on this continent.

But the advancement of society needs in particular the attention of vocationally dedicated thinkers and writers. The terms and nurture of their creativity are profoundly important matters. Copyright is the single most important precept and legal tool developed since the Enlightenment to protect and facilitate ‘meaning making’ by those who actually do it for a living. The work they produce for and on behalf of us all, their addressing the question of how to live, is always far more important than the technologies used to deliver it. Printing presses never *made* human meaning, and nor today do search engines or electronic carriage services.

Who pays for culture?

Numerous insightful and important books have been produced (by authors, ironically enough) on these matters in the past few years, including – Robert Levine’s *Free Ride*, and Jaron Lanier’s *You Are Not A Gadget: A Manifesto*  – on how a humanity-centred vision of life is delivered a disservice when technological interests are allowed to prevail, disappear the individual creator, and appropriate cultural artefacts for the purpose of reselling them to the public.

Based on US experience, there is evidence to indicate that the creation of more and better local content, and the continuing free circulation of currently publicly available works, will be compromised by ‘fair use’ proposals which seek to allow greater access to intellectual property and to ‘de-copyright’ large swathes of online material.

Creators do not assume that everyone agrees about what is meant by fair access and wide dissemination. ‘Fair’ is a particularly fraught word for them as they go about trying to make their precarious livings; equally they do not necessarily see ‘wide dissemination’ as an indisputably good aim or value, not when in practice that dissemination may have been unsought or unregulated.

Removal of the educational statutory licence it is argued would improve ‘fairness’ of access to materials in schools. But the DP offers no practical proposals on a *replacement equity mechanism* for those who are expected to deliver up this fairness, ie creators. It seems to assume that this will happen, perhaps automatically, after authors and others are (again ironically) forced into ‘voluntary’ licensing deals with various elements of different education systems.

Beyond the absence of creators’ views, the views of individual teachers have no significant representation in the DP. Literary creators ask why it is that their partners in education, teachers, were not consulted directly, and asked for their views during the earlier part of this review and ahead of preparation of the DP?

Then, it is also not fully appreciated in the DP how many of Australia’s writers work as teachers, and how many teachers and teacher-librarians also work as writers. We point the ALRC to a submission from the distinguished Australian teacher, librarian and author, Christobel Mattingley:

As a writer whose main source of income for the past 39 years has been my written work, I strongly object to any change to the Copyright Act which would erode protection of my work and affect my right to earn from the use of it by others.

Copyright is a basic right for all creators. It is vital to maintain the present conditions and law to protect the livelihood of authors. Works of non-fiction and literature are the result of many years of research, writing and revision by their creators, who have earned the right to protection and control of their work from exploitation by others. Remuneration from writing is minimal in most cases. Without the protection of copyright, writers would find it even more difficult to earn a living.

Statutory licensing provisions are essential to moderate wholesale copying and the Copyright Agency fulfils an essential function in ensuring that authors are recompensed for works copied by schools and universities. As a former librarian in both schools and tertiary institutions, I am only too aware of the volume of photocopying which takes place. ‘Voluntary’ licensing would seriously compromise, if not almost entirely negate, recompense to authors for the use of their work.

If the Australian Government is serious about making Australia ‘the clever country’, persons who have demonstrated ability to create should be assisted and encouraged by inviolable copyright measures. It must remain enshrined in legislation that their works, which enrich not only our own society but also often have wider international benefits, cannot be exploited to the disadvantage of the Australian creators. The future health and well-being of Australian culture would be irreparably undermined by the addition of a ‘fair use’ exception to the Copyright Act.

Christobel Mattingley AM, DUnivSA

Mattingley presents a compelling view from all ‘sides’, if sides actually exist, regarding provision of educational copyright materials, their access and use in schools and their value to the broader culture. She is one of many creative contributors to Australia who span and bring together education, art and culture – and who look for the support of the copyright regulatory framework to allow and support them to go on contributing.

***Principle 4: Providing rules that are flexible and adaptive to new technologies***

The ASA agrees that technological neutrality must be an operative principle for copyright, whatever difficulties may attend any yet-to-be discovered or in-development technologies.

We would, however, also point out that almost all the current digital technologies have at least a 20-year history, including emails, eBooks, moving image clips, data caching and electronic storage. These all predate the *Digital Millenium Copyright Act* and the Copyright Amendment (Digital Agenda) reforms to Australia’s *Copyright Act 1968* and were considered for their copyright impact in the formulation of these acts and others.

There have been few digital developments anywhere in the past decade of such originality or importance that they compel the kind of wholesale rewriting of a copyright act to accommodate them in the way proposed by the DP.

***Principle 5: Providing rules consistent with Australia’s international obligations***

A US-style ‘fair use’ doctrine may in practice function in presently unanticipated ways. For instance, it could conceivably come to be used to work around any limitations imposed by international copyright rules or conventions.

In this respect, it is well to remember that a different kind of ‘fairness’ is enshrined in the central international instruments that guide copyright activity around the world. The Berne Convention, to which Australia is a signatory, offers a ‘Three Step Test’ to gauge any right of reproduction. The exceptions proposed for educational use in Australia by those who seek to remove statutory licensing rules would be immediately at odds with these provisions:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The ASA asserts that the ‘exclusive right of authorising the reproduction’, together with the choice of determining what represents ‘a normal exploitation of the work’, must always remain with the author and their licensees and no other parties.

**Discussion Paper Proposals – ASA Key concerns**

The ASA has considerable difficulty accepting the DP’s key proposals in Chapters 4, 6, 12 and 13 in particular. Our analysis of these propositions is as follows:

**Chapter 4 – Fair Use**

Proposal: That the Copyright Act 1968 (Cth) should provide a broad, flexible exception for fair use.

Fair to whom?

For literary creators, the essential contract, that which every creator seeks to satisfy, is the primary, unwritten contract with their unseen reader. They produce something they hope will be of interest to a desired reader, the reader seeks to satisfy their own interest by accepting the author’s offering and acquiring the book to read.

In response to this, it is anticipated that a simple and clean trade between writer and reader will ensue to satisfy respective needs and wants. In Western societies and economies it has been understood for centuries that authors spend time and effort to create their works, and fairness dictates that they be recompensed for this.

Commercially creative intermediaries, typically publishers, have served the potential relationship between writer and reader by providing editorial inputs and making the product available (whether in print or electronic form) by seeking ‘visibility’ for it through marketing and promotion, and then arranging for supply to complete the circle. The cost of this work is added to the cost of the product.

The consumer’s payment buys the essential and primary ‘fair use’ by the consumer, namely, a private reading of the contents on the pages that constitute the book ‘container’. The only other meaningful forms of use without pay are currently already covered by the fair dealing provisions of the Australian *Act* quotation, for study and research purposes, and those exceptions that authorise access by the disabled without payment to the creator or publisher.

However, an exception based on the kind of doctrine of ‘fair use’ set out in the DP, instead of those formalised under stated rules, bring enormous uncertainty for literary creators. To allow generally unpoliced, fair use exception-based access will have the added negative of potentially providing free content to otherwise derivative online businesses, of the kind outlined earlier. It also brings with it the threat of creators’ and their licensees losing control of their property to illegitimate online, third party and beyond exploiters.

Further piracy potential

Such third parties are unlikely to have invested in the creation of the original property but, where the property also exists in digital form, will nevertheless be in a position to benefit from its existence and availability for electronic distribution. These benefits of course come at no cost to unauthorised or uncontracted online suppliers of books. Piracy is already a major problem for Australian authors. To provide online and other pirates with a ‘fair use’ excuse would be to add insult to injury, materially and morally.

All that is required for exploitation without reference or benefit to the creator or their contracted publishers and other agents is for an individual or phantom institution to claim unavailability within the local territory, to assert that this is ‘unfair’ to the individual or institution, and to seek to remedy this ‘unavailability’ by sourcing and accessing the contents outside the copyright rules.

Together with the argument of providing a service to scholarship, this is precisely the justification offered for the development of a mass book digitisation program by Google, a program ultimately challenged by authors and their representatives around the world and which remains in the US courts; a similar justification was also put forward by the HathiTrust group of US universities for its ‘orphan works’ program, which had intended to make available freely via intranet means to students and others tens of thousands of works deemed ownerless.

Organisation of the ‘orphan works’ program was undertaken without effective searches into the copyright status of the works involved; in many instances, works deemed to be ‘orphans’ were found to have still very much alive creators – their works merely having been out of print or commercially unavailable. Although the orphan works program was suspended by the universities in the lead-up to litigation, other aspects of the HathiTrust matter are still in legal contest. (The matter is described in greater detail later.)

Authors believe that comprehensive digitisation exercises, purportedly undertaken to deliver public ‘availability’, cannot and should not be forced into being against the wills of rights holders – and definitely not on the basis of a ‘fair use’ doctrine which requires literary creators to reactively defend their own preferences and explain their objections in some potentially costly, and likely adversarial legal setting.

The invitation to challenges and the chances of increased litigation are among the ASA’s objections to this doctrine. Fair use in US practice, is replete with uncertainties and occasional outright injustices. US commentators highlight the uncertain nature of fair use in US copyright law:

The ALRC Discussion Paper suggests that the law concerning fair use is consistent and predictable. As far as US law is concerned, this is a rather optimistic assessment. Many in the United States - including users, legal practitioners and courts - do not regard the law of fair use as consistent and predictable, although they wish it were. The US benefits from the flexibility of the fair use exception, but that flexibility comes at a cost. Courts have described the issue of fair use as "the most troublesome in the whole law of copyright," a sentiment shared by numerous courts, commentators, legal practitioners and users. (Comments on ALRC Discussion Paper 79,

*Copyright and the Digital Economy*, June M. Besek, Jane C. Ginsburg and Philippa S. Loengard, The Kernochan Center for Law, Media and the Arts Columbia University School of Law, p. 6, footnoting removed.)

Compromising Australian content

Then there are the important questions of cultural justice to be considered. Paul Aiken, Executive Director of the US Authors Guild, writes:

Fair use might appear to offer a free lunch, but that offer is illusory. The literary market abides by free market rules, rules that we understand well in other contexts.  We might want to offer free milk to families with young children, for example, but we know we can't do that without compensating farmers and dairy companies at market rates. Without that compensation, we've uncoupled supply from demand for milk, and milk production would plummet.

Fair use, if not carefully restricted, can similarly uncouple literary supply from literary demand, and decrease the number of high quality books that are written and published. To the extent we set up rules that essentially offer free copies of books to any sector, we'll have made investing time and money in writing and publishing books that are used by that sector less remunerative. Capable authors and publishers will get the market signals, and focus their efforts elsewhere. Fair use may put success out of reach to many authors and publishers.

The perils are particularly great for a relatively small literary market, such as Australia's. If Australian authors and publishers are not adequately compensated by their domestic market, the quality of Australian literary work will suffer.  The domestic market will increasingly have to find high-quality works abroad, primarily from the US and UK markets. Does Australia really want to defund its literary and artistic culture? (*Commentary via email to Angelo Loukakis*)

The ALRC must know that Australia is a long-term net importer of intellectual property. Our literary creators hope that the ALRC would argue in favour of our people being able to produce and be rewarded for more quality Australian work, not less.

Finally, in the Australian environment, meanwhile, ‘fair use’ will almost certainly clash with long-established and carefully developed licensing arrangements – of a kind unknown in the US – and with formally authorised educational and administration uses. The US copyright environment provides at least the very loose ‘protection’ of registration as a means of keeping track of copyright ownership (and therefore the possibility of rejecting a ‘use’ by someone). There is no such equivalent in Australian copyright practice.

**Chapter 6 – Statutory Licenses**

Proposal: That the statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed.

The Book Industry Strategy Group Report, to which the ASA was a major contributor, states that ‘marginal amounts of income are not conducive to authors’ productivity’ (BISG, *Final Report to Government*, 2011 p. 85). As mentioned earlier, authors rely on multiple, often small sources to make up a something more than a marginal overall income from their work. In an environment where they are already experiencing declining income, the removal of the statutory licensing provisions from the *Copyright Act* will have a profoundly negative effect on Australia’s literary creators and can only further compromise their economic situation and ability to go on working.

The payments that currently flow for copying of creators’ works in schools are vital to survival. We are convinced the income stream will not, and cannot be replaced via some indeterminate new forms of ‘voluntary’ licensing to current levels. Such a belief defies all logic.

Missed in the DP’s thinking on this subject is the fact that, for smaller creators, the statutory license operates as a kind of democratic leveller. It allows them equal footing with larger suppliers in terms of provision of material. As schools will be extremely unlikely to want to enter into dozens of voluntary deals with individual small suppliers, we may well finish up with a copyright materials supply equivalent to Australia’s two supermarket chains-only situation. A few big winners, again, and smaller operators increasingly shut out of the market.

It is further odd that few if any of the parties that actually supply and use materials in schools – creators, publishers, teachers – have actively proposed ‘voluntary’ licensing as a solution to some problem in their submissions to the ALRC.

Section 6.54 makes much of a Schools-promoted idea that statutory licenses are not suitable for a digital age, due to the way digitised information flows so speedily and the sheer ‘volume of copies’. Apart from again valorising technology over the actual facts on the ground, it is hard to see how the DP can promote the idea of technological neutrality on the one hand, while then also saying things have to change for creators and their licensing system because of technological imperatives.

In any case, neither format nor technology serve as actual measures in statutory licensing. It is a use-based system, with some uses valued differently to others and some valued at nought. ‘Technical copies’ are not the measure in this licensing, but rather a survey methodology.

There is another point worth making here. The few dozen millions that is paid for copying of content to creators hardy compares to the amounts paid for educational salaries and infrastructure. No-one doubts that money is needed to pay for copyright material and that there are insufficient allocations from government in this area. Educational authorities routinely state they ‘cannot afford to pay more and more’ for the copyright materials they access for educational uses.

But there is also no question that education needs art and writing, the work of those who produce on behalf of the well-being of our children, the work of teachers, and the effective functioning of our schools. And writers are only too willing, in fact eager, to serve these purposes in turn. Where then does the problem lie?

We can only surmise that behind all this lies in reality a simple if depressing resource question, one which politicians and governments do not have the courage to confront *as* a resource question. Authors say that perspective is seriously missing when the money paid through statutory licensing is such a drop in the bucket of the total cost of education.

It should not have to be stated that those who will suffer the greatest hardship through removal of statutory licensing will not salaried teachers, education bureaucrats and copyright lawyers, or even the electorate which foots the bill for education overall, but independent, self-employed creators.

Finally, it is most sad that so many of the attacks on the statutory regime that provides authors with income as compensation for wholesale copying/downloading, now occur with the approval of education authorities and government.

**Chapter 12 – Orphan Works**

Proposal: That the fair use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.

In September 2011, and together with the US Authors Guild and writers’ organisations and individuals in the UK, Europe and Canada, the Australian Society of Authors joined an action against the HathiTrust consortium of five American universities, led by the University of Michigan. We asked for a legal brake on the use of an estimated 7 million unauthorised scans of books that those libraries had obtained from Google (the libraries having previously allowed Google access to their collections for this purpose).

That digitisation program included works by authors from dozens of countries. The works digitised by Google without explicit permission include at least 25,000 titles published in Australia (and probably far more that were originally published in Australia and then in the US, where Google has digitised the US edition). In the event, District Court Judge Harold Baer gave a ‘divided’ ruling, one that supported the mass scanning exercise itself, but which passed no judgement on the universities’ associated ‘orphan works’ program.

That the consortium’s so-called orphan works program was going to be a disaster was apparent early on. A relatively simple investigation revealed supposedly dead authors to be alive and kicking – not to mention outraged. One orphan works ‘candidate’ was by a French author sadly on his deathbed in Paris, his book thought ripe for the taking since HathiTrust decided it couldn't locate him.

The HathiTrust program has been an exercise in institutional power and overreach, where a group of American universities and their libraries lost sight of their foundational tasks in favour of a program to shore up their fragmenting identities. This is power wielded not only without reference to general principles of equity and justice for the author, but without reference to that individual's actual legal rights.

The questions raised by the HathiTrust decision are wide-reaching. If society is truly interested in reaping the benefits that authors and authorship are acknowledged to bring, something more is needed from the law. As Terry Hart puts it: ‘society benefits when creators get paid. The private right that copyright law secures is what advances the public’s interest in new expressive rights’. (www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/)

When governments and courts fail to extend and protect the creator’s copyright rights and interests, the negative consequences simply multiply. An official and proclaimed faith in copyright is a first bulwark against, for instance, that piracy which dismisses or disappears a real human being as the origin or cause of a work. But the US court’s judgment illustrates how some who should know better have lost sight of where books come from and what is required to produce them. The ASA sincerely hopes the ALRC does not ultimately follow suit.

Judge Baer accepted that the copying of millions of books not in the public domain – the results of other people’s labour past and present, books that did not belong to the universities, or libraries, or Google – was legal under the ‘fair use’ provisions of the US Copyright Act. But the doctrine of fair use was developed to allow for copying for genuine, limited purposes such as quotation and study. It is inconceivable that it should be interpreted in ways that so traduce the rights of creators in the US and overseas.

The kind of mass digitisation program described here – conducted without reference to the rights and wishes of copyright creators or owners (such as heirs or charities to whom copyrights may be granted) – has many serious downsides. For one, the wholesale production of older books in electronic format, and the provision of means to make those versions available for free, compromises any plans authors themselves might have for the further release of their past titles in digital format.

To the dismay of authors, the HathiTrust decision itself accepts that a commercial, profit-seeking entity may advance its interests by copying material it does not own, and then to trade off that material one way or another. The decision also sets an unholy new standard for the treatment of individual creators. Absent a prohibitive ruling on the ‘orphan works’ component of the case, authors around the world remain subject to the threat of their works being digitised and/or ‘orphaned’– whether by the HathiTrust or by other libraries, groups or institutions who find themselves thus emboldened – without their being asked first.

**Chapter 13 – Educational Use**

Proposals: That the fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

That if fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for fair education. This would also require the fairness factors to be considered.

That the exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* be repealed.

The proposals on what would constitute an educational use, as operative under ‘fair use’ factors, would be another means of driving a wedge between authors and their creations, and in doing so reduce potential remuneration.

By applying a fair use exception that denies the chance of pay via the educational environment for a piece of work, genuine cultural productivity becomes further devalued or compromised. If creators go unsupported, sooner or later wholesale ‘exceptioning’ will mean fewer and poorer works for our schools and students.

A literary creator whose work is not deemed to be worth paying for by school systems is a creator whose worth is likely to thereafter also be diminished in the eyes of the community. We do not believe that teachers think anything but the best of their literary colleagues, who they overwhelmingly see as their friends and collaborators in education. Creators for their part, acknowledge and deeply respect the work of teachers in schools.

Yet if these proposals were to be adopted, there would almost certainly follow an unnecessary contestatory relationship between authors and teachers, with suspicions or conflict arising when one item is excepted under ‘fair use’ while another is not. The ALRC already has substantial evidence that these two important groups are working in harmony – including under current copyright rules –to educate the nation’s children. The ASA argues they should keep being supported to do their best.

Angelo Loukakis

Executive Director

For and on behalf of The Australian Society of Authors