## The Executive Director

## Australian Law Reform Commission

## GPO Box 3708

## SYDNEY NSW 2001

31 July 2013

## Submission in response to *Copyright and the Digital Economy Discussion Paper* (2013)

Thank you for the opportunity to make a submission to this inquiry. I will confine my submission to a very specific proposal in response to the following:

**Question 4–1** What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

**Proposal 14–1** The fair use exception should be applied when determining whether a government use infringes copyright. ‘Public administration’ should be an illustrative purpose in the fair use exception.”

# “**Proposal 14–2** If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.”

For the reasons outlined below, I propose that:

The reference to “public administration” in the list of illustrative purposes in a fair use exception should be expanded to cover “public administration or public accountability”.

Alternatively, if a fair use exception is not enacted, a new exception should be introduced for “fair dealing for public administration or public accountability”.

The Discussion Paper explains the need for fair use to cover government use of third party copyright material for public administration; this would cover internal administration and material that is open to public inspection or on official registers. It would also cover uses required by statute, notably under freedom of information laws. The need for a fair use exception to facilitate freedom of information is particularly important for State and local governments that are bound by State freedom of information laws, but are not protected as Commonwealth agencies are.[[1]](#footnote-1)

I would emphasize at this point the importance of the fairness factors in any proposed exception. The kinds of material and uses being discussed here are those that serve the public interest, they are not commercial uses that would have a significant impact on the market for copyright material. It is open access to information about the workings of government that is being considered.

The focus of the discussion in chapter 14 of the Discussion Paper is upon government use. While that is an important reform, and one I support, in a modern democracy open access to information and government accountability does not end with the release of documents by a government agency to an individual applicant. Recent reforms to freedom of information at the Commonwealth level (and in some States) encourage proactive disclosure to the world at large on agency websites.

Open government goes beyond government use and extends to re-use by the wider public. Whether it is whistleblowers releasing documents, media reporting, community groups engaged in public campaigns, or individuals engaged in online discussions, a wide range of non-government users play an important role in ensuring government accountability and these activities should also be covered by an appropriately worded exception.

An interesting example to illustrate my point is the Australian website: “The Right To Know” <<https://www.righttoknow.org.au>> and its United Kingdom counterpart: “What do They Know” < <https://www.whatdotheyknow.com>>. These websites are run by not for profit organisations and are a one-stop shop for sending freedom of information requests to all levels of government. They operate in the public realm: emails to public authorities are submitted to and appear on the web site. When a public official replies to the website they take part in a very public exchange of correspondence. The websites offer the public far more than is available on a government agency disclosure log including: the story of the request, timelines, comments from applicants, all the correspondence from the agency processing the FOI request, and copies of the documents once (if) they are released.

Copyright owned by government and third parties has the potential to restrict disclosure of documents on these non-government sites. In the United Kingdom, “What do They Know” has had copyright battles with government authorities, notably the London Borough of Brent (Local Council) and the House of Commons. These authorities refused to respond to freedom of information requests submitted by “What do They Know”, or to supply documents to the website, because of concerns about government and third party copyright. The Brent Council explained:

“The making of a Freedom of Information request cannot invalidate the council's rights to control further use of its own information or abrogate any duty it may owe to third party copyright holders. The concern is that disclosing information in the manner requested would make the council complicit in any such breach.”[[2]](#footnote-2)

The UK Information Commissioner held that public authorities must deal with requests for information in accordance with the Freedom of Information Act and commented that refusal to do so because of copyright concerns was neither within the spirit nor the letter of the Act.[[3]](#footnote-3) However, the UK Information Commissioner went on to note that “the subsequent publication of the information by the website automatically can still be addressed separately by the Council as a copyright issue, outside of the jurisdiction of the [FOI] Act.”[[4]](#footnote-4)

Modern Australian copyright law should recognize public use for the purposes of public accountability. Copyright ought not to be misused to prevent disclosure of government information that has a place in the public realm. Freedom of information laws, breach of confidence, and a myriad of secrecy laws, all balance the various public interests surrounding the disclosure and use of government information. Without an appropriately worded exception, copyright in the form of expression and material recording that information has the potential to distort that balancing process.

Yours sincerely

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1. *Freedom of Information act 1982* (Cth) s 90. [↑](#footnote-ref-1)
2. Information Commissioner UK, ICO Decision Notice FS50296350 Brent Council, 2 December 2010 [35]. [↑](#footnote-ref-2)
3. Information Commissioner UK, ICO Decision Notice FS50296350 Brent Council, 2 December 2010 [37]. [↑](#footnote-ref-3)
4. Information Commissioner UK, ICO Decision Notice FS50296350 Brent Council, 2 December 2010 [26]. See also Information Commissioner UK, ICO Decision Notice FS50276715 House of Commons, 7 June 2010 [30]. [↑](#footnote-ref-4)