

Australian Law Reform Commission  
Level 40, MLC Tower  
19 Martin Place  
Sydney NSW 2000

Dear Commissioner

Thank you for providing Civil Liberties Australia (CLA) with the opportunity to comment on the Australian Law Reform Commission's (ALRC) *Issues Paper* (42), part of the ALRC's inquiry into the Copyright and the Digital Economy. We would also like to congratulate the Commission on its use of social media and ebooks to disseminate information.

CLA is a national organisation based in Canberra. CLA stands for people's rights and advocates in favour of policies that advance human rights and civil liberties. CLA is non-party political and independent of other organisations. It is funded by its members and donations, and does not receive funding from other sources. CLA monitors police and security forces, and the actions and inaction of politicians. It reviews proposed legislation to make it better, and keeps watch on government departments and agencies. Relevantly to this inquiry, CLA makes its 'creative and literary works' available under the Creative Commons 'Attribution – Non-Commercial – Share-Alike 3.0' Australia licence.<sup>1</sup>

Intellectual property debates usually exist at the periphery of CLA's activities. However, CLA does engage in debates where there is the involvement of human rights, in particular the right to freedom of communication, freedom of speech for academics and the right to equal participation in the community. So, for example, CLA has contributed to public inquiries into the compulsory licensing of patents,<sup>2</sup> and is supportive of current efforts to amend the *Patents Act 1990* to prohibit the patenting of genetic information, believing this practice to be contrary to law and restrictive of the rights of patients, doctors and researchers.<sup>3</sup> Moreover, as is outlined later in this submission, the Internet and online communication is now recognised as an indispensable enabler of many human rights.

As a preliminary matter, the ALRC may wish to consider the extent to which its online template may hinder the ability of organisations to thoroughly comment. Our understanding is that an Issues Paper seeks general views, positions and principles. Such views can be hard to explain in free text boxes associated with specific questions. By contrast, a Discussion Paper or Draft Report, which includes specific options and proposals, is perhaps a more appropriate place for a template.

Our submission has been submitted in segments as required; however, we have also included the document *in toto* as an attachment.

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<sup>1</sup> Civil Liberties Australia website: [www.cla.asn.au](http://www.cla.asn.au)

<sup>2</sup> Civil Liberties Australia, *Submission to the Productivity Commission Inquiry into Compulsory Licensing* available at [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0010/119908/sub012-patents.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0010/119908/sub012-patents.pdf) (accessed 13 November 2012).

<sup>3</sup> See for example: *You are not a drug* (5 July 2012) (*New Matilda*) available at <http://newmatilda.com/2012/07/05/you-are-not-drug> (accessed 26 September 2012).

<b>Abbreviations</b>	
<b>ACTA</b>	Anti-Counterfeiting Trade Agreement
<b>AGD</b>	Attorney-General's Department
<b>ARC</b>	Australian Research Council
<b>AUSFTA</b>	Australia-US Free Trade Agreement
<b>CLA</b>	Civil Liberties Australia
<b>CSIRO</b>	Commonwealth Scientific and Industrial Research Organisation
<b>DEEWR</b>	Department of Education, Employment and Workplace Relations
<b>DIISRTE</b>	Department of Industry, Innovation, Science, Research and Tertiary Education
<b>DoFD</b>	Department of Finance and Deregulation
<b>DoHA</b>	Department of Health and Ageing
<b>EULA</b>	End-User Licence Agreement
<b>FCA</b>	Federal Court of Australia
<b>FFCA</b>	Full Federal Court of Australia
<b>HCA</b>	High Court of Australia
<b>ISDS</b>	Investor State Dispute Settlement
<b>NHMRC</b>	National Health and Medical Research Council
<b>PMC</b>	[Department of] Prime Minister and Cabinet
<b>TRIPS</b>	[Agreement on the] Trade-Related Aspects of Intellectual Property Rights
<b>TPPA</b>	Trans-Pacific Partnership Agreement

## **Part 1 – General Principles for the Review**

### **Question addressed**

- **Question 2:** *What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?*

It is easy enough to say that copyright law should balance the interests of creators, owners, users and the community. However, we believe it is worth going behind this slogan to examine what interests are really at stake and why copyright in the digital economy should include more exceptions – not fewer.

Copyright law serves multiple purposes, only one of which is to financially reward authors, performers and other creators for their creative efforts. In fact, as most 'valuable' copyright is assigned, leased or sold to a 3<sup>rd</sup> party, the ongoing and direct financial benefits to authors and creative may be minimal. Traditionally, copyright also supported the dissemination of knowledge, by creating a tradeable property 'right' that can be sold, leased or assigned to another party (e.g. a publisher) who has the resources to bring that work to a large(r) audience. Copyright law is also one way to ensure intellectual integrity, by promoting the proper attribution of sources,

rewarding ‘transformative’ or novel uses of copyrighted material and by providing an avenue for the true author to exercise their ‘moral rights’ over their work.

Of course, in the modern era, the Internet has broken down many of the traditional hierarchies of knowledge creation and dissemination. News is no longer created or broadcast solely by the Media Barons; *MTV* was not responsible for bringing Psy’s *Gangnam Style* to almost 1 billion viewers – YouTube was; and online, often free educational materials (including videoed lectures) are not challenging the Academia’s Ivory Tower so much as building a bypass around it. Therefore, the extent to which copyright’s traditional supporters can continue to rely on claims of necessity and utilitarian good is questionable.

Copyright may also have had a social and domestic benefit, by encouraging posthumous publications of edited collections or private letters and, historically, providing a time limited income stream for dependant family members (i.e. widows) following the death of the author/husband. In the 21<sup>st</sup> Century, it may be worthwhile for the ALRC to consider the ongoing relevance and appropriateness of the assumptions that underpin this justification for post-life of author copyright terms. Of course, many spouses have been involved as silent (suffering!) partners in the creative process that led to the published work, and their rights as co-authors should not lightly be brushed aside.

However, as with all forms of intellectual property, copyright is an aberration in Australia’s traditional free market system. To paraphrase the Prime Minister, we should look at any claim to a monopoly over ideas with a jaundiced eye. Like patents, copyright should be considered a state sanctioned monopoly, which is justified only because it promotes an overall public benefit.

No doubt, the ALRC will receive evidence of how copyright has been used by rights-holders to chill free speech, stifle innovative technologies and business practices and impede the dissemination of information to the public (whether in Australia or abroad), even where that information was funded by the state. In addition to these instances, CLA also points to:

- the US-based Electronic Frontier Foundation’s ‘Take Down Hall of Shame’;<sup>4</sup>
- the Australian High Court’s decision in *Stevens V Kabushiki Kaisha Sony Computer Entertainment*,<sup>5</sup> and refusal of special leave to appeal from the Full Federal Court’s decision in *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd*;<sup>6</sup> and
- the ongoing dispute over so-called ‘Open Access’ to state-funded research publications.<sup>7</sup>

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<sup>4</sup> <https://www.eff.org/takedowns> (accessed 13 November 2012).

<sup>5</sup> [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850 (6 October 2005).

<sup>6</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59; *SingTel Optus Pty Ltd & Anor v Australian Rugby Football League Limited & Ors* [2012] HCATrans 214 (7 September 2012) (special leave denied).

<sup>7</sup> Alessandro Demaio, Bertil Dorch, Fred Hersch, ‘Open access: everyone has the right to knowledge’ (26 October 2012) (*The Conversation*) <http://theconversation.edu.au/open-access-everyone-has-the-right-to-knowledge-10342> (accessed 13 November 2012); Geraint Lewis, ‘Open-access science: be

Moreover, copyright has been used as a tool to frustrate or challenge socially beneficial and democratically endorsed programs, including the Pharmaceutical Benefits Scheme<sup>8</sup> and the recent Plain Packaging Legislation.<sup>9</sup>

Copyright should also be seen in terms of Australia's obligations to the international community, and the ALRC has identified the major intellectual property treaties that underpin (and constrain) Australia's copyright policy. However, any consideration of Australia's international obligations should also pay attention to Australia's duties as a good citizen, and promote the dissemination of knowledge to developing and least developed nations, cultural and scientific bodies such as UNESCO and WHO, and to avoid policy and legislative choices which impede the physical and intangible supply and trade of knowledge. The outrage of the community and the European Parliament to the proposed Anti-Counterfeiting Trade Agreement (ACTA), which included obligations to prevent the transit of 'counterfeit' goods,<sup>10</sup> demonstrates that the community supports the flow of information.

Likewise, given the interaction of copyright law with speech (political, scientific, religious and personal), Australia's commitments to human rights treaties should be kept in mind throughout the review. Relevantly, ALRC should consider the impact of any reforms on:

- Articles 17, 18(1) & (3), 19 (1)-(2), 25 and 26 of the *International Covenant on Civil and Political Rights*;<sup>11</sup>
- Articles 6, 11(2), 13(1) and 15 of the *International Covenant on Economic, Social and Cultural Rights*;<sup>12</sup> and
- Articles 12, 18, 19, 21 and 27 of the *Universal Declaration of Human Rights*.<sup>13</sup>

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careful what you wish for' (8 October 2012) (*The Conversation*) <http://theconversation.edu.au/open-access-science-be-careful-what-you-wish-for-9971> (accessed 13 November 2012).

<sup>8</sup> Amendments to the *Copyright Act* were required to prevent pharmaceutical companies from suing generic medicine manufacturers for copyright infringement, where the generic company – in conformance with Australian therapeutics law – provided identical or similar Product Information with its medicines: *Therapeutic Goods Legislation Amendment (Copyright) Act 2011*. In the absence of such legislation copyright law suits could constitute a form of 'evergreening' and impair the price reduction process for PBS listed medicines, see generally *National Health Act 1953*; T Faunce, T Vines & H Gibbons 'New Forms of Evergreening in Australia: Misleading Advertising Enantiomers and Data Exclusivity: *Apotex v Servier* and *Alphapharm v Lundbeck*' (2008) 16 *Journal of Law and Medicine* 220; T Vines & T Faunce 'Freedom of Information Applications as an 'Evergreening' tactic: *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* (2011) 19 *Journal of Law and Medicine* 43.

<sup>9</sup> *T International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43.

<sup>10</sup> One country's counterfeit Ugg® boot is another's generic (and not protectable) ugg boot. Similar problems would arise over the transit of textbooks, which could legally imported, via parallel importing channels, in the destination country, but not in the transit nation.

<sup>11</sup> *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, New York. Entered into force in Australia 13 November 1980 (except for Article 41). [1980] ATS 23.

<sup>12</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1976 (New York), entered into force in Australia 10 March 1976, [1976] ATS 5.

<sup>13</sup> *Universal Declaration of Human Rights* (1948) at <http://www.un.org/Overview/rights.html> (accessed 14 November 2012).

These provisions cover, *inter alia*, the right to freedom of expression, enjoyment of cultural, artistic and scientific benefits, and respect for privacy.

The ALRC should consider, and CLA recommends, the development of a general objects clause for the *Copyright Act 1968*. This would fulfil the ALRC's goals of 'reducing the complexity of copyright law' and 'promoting an adaptive, efficient and flexible framework'. Moreover, the importance of objective provisions was made clear in the recent *iiNet* case,<sup>14</sup> where the existence of section 116AA – while not determinative in that case – was referred to by the High Court as reflecting an attempt to 'to strike a balance between conflicting policy considerations.'<sup>15</sup>

From the above discussion, CLA recommends the ALRC adopt as its first, guiding principle that Australia's copyright law should 'Promote the participation of individuals in their communities and of Australia among the community of nations'.

CLA supports the eight other principles set out in the Issues Paper and applauds the ALRC for its recognition that 'laws that are irrelevant and do not fit with community practice are undesirable'. CLA hopes the ALRC will continue to place the community at the forefront of its deliberations.

## Part 2 – Fair Dealing Exceptions and other Free-use Exceptions

### Questions addressed

- **Question 47:** *Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?*
- **Question 49:** *Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?*
- **Question 50:** *Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?*
- **Question 53:** *Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

Also: Crown use of copyright material and Educational institutions.

As discussed above, copyright serves multiple purposes, many of which are socially-oriented, including the promotion and dissemination of information and artistic works and the advancement of culture through the development of transformative works and a fertile public domain. However, the growing centrality of intellectual property to Western economies has led to copyright law becoming less about promoting innovation and knowledge dissemination and more to protecting vested proprietary interests.<sup>16</sup> As copyright terms ratchet up,<sup>17</sup> and penalties for infringement increase inexorably, the importance of free and fair-use exceptions becomes stronger.

<sup>14</sup> *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16.

<sup>15</sup> [2012] HCA 16 [26] per French CJ, Crennan and Kiefel JJ.

<sup>16</sup> See, for example, the case brought by the Nine Network against Ice TV, who provided a novel electronic TV program guide: *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14. Similar threats have been made in the context of generic pharmaceuticals.

<sup>17</sup> Ratchet is used in its technical sense. International agreements have had the effect of 'fixing' ever longer terms of copyright protection. See below.

Consequently, CLA submits that *no* existing fair or free-use exceptions should be abolished without a prior review of the economic and social impact of such a move. This review must include

- Economic impact analysis. The Productivity Commission is equipped to model the economic impact on industry and community.
- Social impact analysis. This should commence with a government panel, including officers from AGD, research agencies (NHMRC, ARC, CSIRO and DIISRTE), health and education agencies (DoHA and DEEWR), repositories (Archives and National Library) and coordinated by PMC or DoFD.
- Public and targeted consultation. Proposed policies should be subject to full public consultation and targeted discussions with universities, state libraries and rights-holder and consumer representative groups.

CLA does support moves to introduce new free or fair use exceptions, including a 'quotation right', improved access by schools to online material, and a right in favour of the Crown to publish and disseminate research findings that arise from publicly funded research.<sup>18</sup> This latter right could be conditioned on the passage of a period of time (e.g. 12 or 24 months) after original publication and/or be restricted to non-commercial or educational uses. Of course, any modification of existing rights may constitute an 'acquisition of property' under the *Constitution* and so a prospective approach is preferred.

Moreover, CLA submits that the ALRC should examine options to introduce an exemption into the *Copyright Act* which holds that copyright does not subsist in works created by the Commonwealth (and the Crown in right of each state and territory). This would extend to data, files, photos, reports etc. § 105 of Title 17 of the *US Code* could be used as a template to such a provision. § 105 provides

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.<sup>19</sup>

Such a reform is justified on the basis that Australian tax money is invested in creating various government documents, and that the fruits of government should be shared with the community. Existing Privacy, Freedom of Information laws, as well as section 70 of the *Crimes Act 1914* provide sufficient safeguards over the unauthorized release of information, but it is in the public interest for public documents and non-confidential data to be made available to the community, researchers or innovators.

It is amazing that the NSW Train Timetable is subject to copyright<sup>20</sup> but the

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<sup>18</sup> This would assist in fulfilling a further public purpose of supporting responsible research. See, Chapter 4, ARC/NHMRC/AVCC, *Australian Code for the Responsible Conduct of Research* (2007).

<sup>19</sup> 17 USC § 105.

<sup>20</sup> Asher Moses, 'CityRail puts brakes on iPhone timetable app' (5 March 2009) (*SMH Online*) available at <http://www.smh.com.au/articles/2009/03/05/1235842537210.html> (accessed 15 November 2012).

magnificent pictures produced by the \$36 million Hubble Space Telescope are not.<sup>21</sup> Certain agencies, including the CSIRO, ARC and NHMRC could be partially or fully exempt from such a general legislative provision – in the same way certain decisions are exempt from the *Administrative Decisions (Judicial Review) Act 1977*.

We appreciate, however, that such proposal may be resisted if it allowed commercial as well as non-commercial, private or education uses. While noting that the US is perfectly happy to allow commercial and non-commercial uses, should an outright exemption not be acceptable, the ALRC should recommend that AGD develop guidelines for all Government agencies that encourage or mandate the use of open-access licences following the Creative Commons model.

Finally, existing free and fair-use exceptions should be strengthened to protect the interests of the community in political communication, free expression and debate and criticism. While all US laws, including copyright laws, must be judged against the First Amendment to the *US Constitution*, no such constitutional guarantee of free speech exists in Australia. In the absence of such protection, ALRC may wish to explore enshrining general objects and principles in the *Copyright Act* and/or introducing a series of rebuttable defences to infringement where the alleged act was committed in the course of genuine protest, industrial dispute or political communication.

### Part 3 – Punishment of Copyright Infringement

#### Questions addressed

- **Question 1:** *The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:*
  - (a) *affects the ability of creators to earn a living...;*
  - (b) *affects the introduction of new or innovative business models;*
  - (c) *imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material...*
- **Question 2:** *What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?*

While a review of available remedies and offence available under the *Copyright Act* appears outside the immediate remit of the ALRC's inquiry, CLA wishes to outline its position in anticipation of submissions from rights-holder bodies.

First, with the exception of willful, commercial scale infringement, the enforcement of copyright should remain a civil matter, with the quantum of damages available to rights-holders assessed according to usual principles. In other words, punitive, exemplary damages should rarely, if ever, be available; compensation – not punishment or denunciation – should be the primary objective of the law.<sup>22</sup> While

<sup>21</sup> See NASA's Copyright Guidelines: <http://www.nasa.gov/multimedia/guidelines/index.html> (accessed 15 November 2012). Costs are in 1978 figures and do not include post-launch servicing mission costs.

<sup>22</sup> See, for example statements in *Gray v Motor Accident Commission* (1998) 196 CLR 1; [1998] HCA 70 [12]-[13] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

noting that the *Copyright Act* currently allows a court to award ‘additional’ damages, having regard to, *inter alia*, the flagrancy of the infringing activity and the need to ‘deter similar infringements of copyright’,<sup>23</sup> it is important to note that these considerations fall within a scheme of ‘additional’, not punitive, damages.<sup>24</sup> As a civil matter, punishment will rarely be an appropriate consideration for conduct falling short of willful, commercial scale infringement.

As a logical corollary, the ALRC should reject any efforts to introduce a scheme of statutory damages in the *Copyright Act*, whether justified on the basis of ‘simplifying’ the law, bringing it into harmony with the law of other jurisdictions or to afford greater protection to rights-holders. Just as CLA is opposed to mandatory sentencing in criminal law, it would be opposed to the imposition of a non-discretionary financial penalty. In summary, an award of civil damages should ‘ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.’<sup>25</sup>

Second, to avoid a chilling-effect on speech and innovation through the overuse of infringement proceedings (or the threat of), section 115 of the *Copyright Act* could be revised to explicitly allow a court to take into account the actions of the rights-holder/plaintiff prior to and during the proceedings. Currently, the law only refers to the conduct of the defendant.<sup>26</sup> Delay in bringing proceedings (e.g. *Men at Work* case),<sup>27</sup> refusal to license on reasonable terms or engage in good-faith mediation and arbitration should be grounds to reduce the award of any additional damages.<sup>28</sup> Where possible, litigation should be a last resort, with education and codes-of-conduct (for educational institutions, businesses and ISPs) preferred. Such a reform would grant users additional protection and, hopefully, lead to improved access to efficient and effective justice for consumers, users, creators and rights-holders.

Moreover, CLA believes the ALRC should show extreme caution in considering any ‘three-strikes’ or ‘graduated response’ policy that includes disconnection from the Internet as a remedy. Such a remedy would constitute punishment and, therefore, is an inappropriate remedy in a civil matter, where a lower standard of proof applies. Indeed, the difficulty of establishing who committed the infringing act or that the account holder knew or authorized the infringement means the likelihood of injustice is high. Certainly, any scheme that affords ISPs a unilateral right to terminate a user’s connection, on the basis of an allegation from a rights-holder, should be rejected as

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<sup>23</sup> s 115(4), *Copyright Act 1968*.

<sup>24</sup> See the distinction between ‘aggravated’ and ‘exemplary’ damages in *Gray v Motor Accident Commission* (1998) 196 CLR 1; [1998] HCA 70 [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ, quoting *Windeyer J Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149: ‘aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence.’

<sup>25</sup> An analogy is drawn to s 34 *Defamation Act 2005* (NSW).

<sup>26</sup> s 115(4)(b)(ib), *Copyright Act 1968*. While s 115(4)(b)(v) refers to ‘all other relevant matters’ this should be made more explicit.

<sup>27</sup> *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47.

<sup>28</sup> In a different context, the damages regime in the *NSW Defamation Act 2005* supports efforts to resolve a dispute at pre-trial stages: ss 18, 38.



incompatible with the rule of law,<sup>29</sup> natural justice and the rights set out in international and domestic human rights laws.<sup>30</sup>

Finally, we believe the three-strikes policy would be unacceptable to the community, especially if it applied to minor and innocent infringement. Just as the community would reject a proposal that allowed a phone company to disconnect a person's phone because the account owner (or someone using the phone) repeatedly sang *Happy Birthday* to a family member over a speaker phone in a public restaurant, so too would it be unacceptable for an ISP to disconnect a family from the internet because one member of that family posted a video to YouTube of them signing *Happy Birthday* to their overseas family members. As 'takedown' notices and copyright enforcement has become increasingly automated<sup>31</sup> there is the risk that innocent infringement will not be distinguished from more serious infringement.

Ultimately, CLA submits that the rejection of a three-strikes policy would be in line with one of the guiding principles identified by the ALRC: 'reform should take place in the context of the 'real world' range of consumer and user behaviour in the digital environment.'

#### Part 4 – International Treaties and Copyright Reform

##### Questions addressed

- **Question 2:** *What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?*

Specifically, Principle 3 and the comment '*this Inquiry may provide an opportunity for suggesting policy parameters within which future international negotiations take place.*'

<sup>29</sup> Nicolas Suzor, Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' [2011] 34(1) *UNSW Law Journal* available at <http://nic.suzor.net/wp-content/uploads/2011/08/Suzor-Fitzgerald-2011-Graduated-Responses-UNSW.pdf> (accessed 14 November 2012).

<sup>30</sup> Such rights include both procedural rights before tribunals and courts and positive rights to privacy and freedom of communication: s 12 (Privacy), s 16 (Expression), s 21 (Fair Trial) *Human Rights Act 2004* (ACT); see also, *Charter of Human Rights and Responsibilities Act 2006* (Vic). Internet access has also been identified as a separate human right in Europe: *Conseil constitutionnel* [French Constitutional Court], decision n° 2009-580 DC, 10 June 2009 reported in JO, 13 June 2009, 9675. (English translation available from the Council.). Internet access is also recognised as an enabler of other human rights: Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly, 16 May 2011 available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) (accessed 14 November 2012) at [49]-[50].

<sup>31</sup> Legitimate users have also suffered from these automated processes: Zachary Knight, 'Copyright Enforcement Bots Seek And Destroy Hugo Awards' (September 4, 2012) (*Techdirt*) available at <http://www.techdirt.com/articles/20120903/18505820259/copyright-enforcement-bots-seek-destroy-hugo-awards.shtml> (accessed 14 November 2012); Mike Masnick, 'Curiosity's Mars Landing Video Disappears From YouTube Due To Bogus Copyright Claim' (August 6, 2012) (*Techdirt*) available at <http://www.techdirt.com/articles/20120806/11053019945/curiositys-mars-landing-video-disappears-youtube-due-to-bogus-copyright-claim.shtml> (accessed 14 November 2012).

CLA recognises that Australia's IP policy space is not unconstricted. International trade agreements, including the *Marrakesh Agreement establishing the World Trade Organization* (WTO Agreement)<sup>32</sup> and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), have put in place restrictions on the ability of countries to modify, exempt or carve out exceptions to copyright.<sup>33</sup> However, contentious international treaties, including the proposed Trans-Pacific Partnership Agreement (TPPA) and ACTA have the potential to further restrict Australia's copyright policy space and impose new burdens on users, innovators and collaborators. We believe the ALRC should recommend that Australia's trade negotiators not undermine this inquiry and Australia's copyright policy by pursuing one-sided agreements that further tip the intellectual property balance in favour of rights-holders.

Following TRIPS, the Australia-US Free Trade Agreement (AUSFTA)<sup>34</sup> further restricted Australia's ability to exclude or modify copyright laws, and required Australia to introduce various measures to criminalise certain forms of copyright infringement, and the circumvention of Technology Protection Measures. Furthermore, the US, first through TRIPS and AUSFTA, has raised and fixed the length of copyright, from life-of-author plus 50 years, to life-of-author plus 70 years. A leaked copy of the Intellectual Property Chapter of the secretly negotiated TPPA suggests that the US and its copyright industry is pressing for this term to be extended to 100 years after the death of the author, a posthumous period that is (according to actuaries) greater than the life expectancy of a child born in the US today.

Too often, reforms to Australia's intellectual property regime proceed on the basis that TRIPS, AUSFTA and bilateral and regional trade agreements are the only relevant international considerations. However, we note that international law also supports a flexible approach to copyright and intellectual property in general. For example, the 2001 *Doha Declaration on the TRIPS Agreement and Public Health* ('Doha Declaration') recognised that the TRIPS Agreement: 'does not and should not prevent members from taking measures to protect public health.'<sup>35</sup>

#### **Article 4 of the Doha Declaration**

*We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.*

<sup>32</sup> *Marrakesh Agreement establishing the World Trade Organization* ('WTO Agreement') done at Marrakesh 1994 (entered into force in Australia 1 January 1995) [1995] ATS 8.

<sup>33</sup> *Annex 1C to the WTO Agreement – Agreement on Trade Related Aspects of Intellectual Property Rights* [1995] ATS 8 (hereafter 'TRIPS').

<sup>34</sup> *Australia-US Free Trade Agreement* done at Washington, 18 May 2004 (entered into force in Australia 1 January 2005) [2005] ATS 1.

<sup>35</sup> WTO, *Declaration on the TRIPS Agreement and Public Health*, Ministerial Conference 4<sup>th</sup> Session, November 2001, WT/MIN(01)/DEC/2 available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (accessed 25 August 2012); see also, WTO, 'Ministerial Declaration, Ministerial Conference 4<sup>th</sup> session, Adopted 13 November 2001 WT/MIN(01)/DEC/1. Available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf) (accessed 24 August 2012).

As discussed above, this Declaration is relevant to this inquiry as copyright law has been used to undermine public health, whether through challenges to anti-smoking legislation,<sup>36</sup> or to allow a pharmaceutical company to exclude competitors via ever-greening.<sup>37</sup> It will increasingly become relevant in the future to the intangible supply of knowledge, including medical ebooks, university podcasts and 3D Printer template patterns.

In addition, human rights instruments, such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Cultural and Social Rights*, include protections for freedom of speech,<sup>38</sup> thought and expression,<sup>39</sup> and the right to take part in a country's cultural life and to enjoy the benefits of scientific progress and its applications.<sup>40</sup> There is also a positive obligation on states to foster the 'development of and diffusion of science and culture',<sup>41</sup> and a recognition of the 'benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.'<sup>42</sup>

The copyright flexibilities available under TRIPS and AUSFTA and the principles stated in the Doha Declaration are being undermined by Australia's determination to sign the TPPA.<sup>43</sup> Sadly, CLA's ability to comment on the possible impacts of the TPPA is hampered by the secrecy that surround negotiations, despite the Australian Government stating: 'The public will be well informed about negotiations for, and the content of, proposed trade agreements and have an opportunity for input.'<sup>44</sup> As discussed above, secrecy surrounding the drafting of ACTA hampered efforts for civil society and the community to provide informed input and, ultimately, undermined its passage to implementation.

Text purporting to be the draft IP and Investment Chapter of the TPPA was leaked in late 2011<sup>45</sup> and includes worrying provisions that would significantly impact the ability for Australia to use its copyright law to further free speech, promote new innovative businesses and to encourage the international trade of knowledge and

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<sup>36</sup> *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43.

<sup>37</sup> Cf. *Therapeutic Goods Legislation Amendment (Copyright) Act 2011*.

<sup>38</sup> Art. 19(2), *International Covenant on Civil and Political Rights*.

<sup>39</sup> Art. 18, *International Covenant on Civil and Political Rights*.

<sup>40</sup> Art. 15(1)(a), *International Covenant on Economic, Cultural and Social Rights*.

<sup>41</sup> Art. 15(2), *International Covenant on Economic, Cultural and Social Rights*.

<sup>42</sup> Art. 15(4), *International Covenant on Economic, Cultural and Social Rights*.

<sup>43</sup> The Australian Government considers that 'Australia's highest trade priority at the moment is to conclude a Trans-pacific Partnership Agreement': Commonwealth of Australia, 'Gillard Government Trade Policy Statement' (April 2011) available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html> (accessed 22 September 2012).

<sup>44</sup> Commonwealth of Australia, 'Gillard Government Trade Policy Statement' (April 2011) available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html> (accessed 22 September 2012).

<sup>45</sup> Text purporting to be the draft IP Chapter can be found at <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf> while the purported draft Investment Chapter can be found at <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf> accessed (22 September 2012).

cultural works.<sup>46</sup> As outlined above, we would be especially concerned to see the introduction of statutory damages of the kind seen in the United States. Most concerning, a proposed investor-state dispute settlement (ISDS) provision threatens to allow foreign companies to challenge Australian changes to its copyright policy before foreign arbitration panels.<sup>47</sup> These panels can award unlimited damages against nation states and are not accountable to the Australian people.<sup>48</sup> We wonder if the recent reforms to pharmaceutical Product Information slips would be possible under a post-TPPA regime, or if the High Court's decision in the Plain Packaging case would have been different (in any event, it might have been subject to further appeal).

CLA recommends the ALRC supports the Productivity Commission's recommendations in its 2010 report: *Bilateral and Regional Trade Agreements* concerning the risks of including IP Chapters in bilateral and regional trade agreements<sup>49</sup> and its finding that:

‘The Commission is not convinced, however, that the approach adopted by Australia in relation to IP in trade agreements has always been in the best interests of either Australia or (most of) its trading partners.’<sup>50</sup>

We believe that, in modernizing Australia's copyright law, equal attention should be paid to treaties that protect the rights of the community, users and individuals.

## Part 5 – Contracting out

### Questions addressed

- **Question 54:** *Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?*
- **Question 55:** *Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?*

CLA supports the view of the Copyright Law Review Committee as outlined in the ALRC's Issues Paper: the Copyright Act should be amended to hold invalid any contractual term designed to displace fundamental fair and free-use exemptions. Objections based on the outdated and contested notion of 'freedom to contract' should be rejected. In keeping with the ALRC's guiding principle on reflecting real-world

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<sup>46</sup> Thomas A Faunce and Ruth Townsend, 'The Trans-Pacific Partnership Agreement: challenges for Australian health and medicine policies' (2011) 194(2) *Med J Aust* 83-86.

<sup>47</sup> We note that Australia is resisting efforts to include a mandatory ISDS clause in the TPPA: 'Gillard Government Trade Policy Statement' (April 2011) available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html> (accessed 22 September 2012).

<sup>48</sup> Matthew Rimmer, 'A mercurial treaty: the Trans-Pacific Partnership and the United States' (15 June 2012) (*The Conversation*) available at: <http://theconversation.edu.au/a-mercurial-treaty-the-trans-pacific-partnership-and-the-united-states-7471> (accessed 22 September 2012); Thomas Faunce, 'An affront to the rule of law: international tribunals to decide on plain packaging' (29 August 2012) (*The Conversation*) available at <http://theconversation.edu.au/an-affront-to-the-rule-of-law-international-tribunals-to-decide-on-plain-packaging-8968> (accessed 22 September 2012).

<sup>49</sup> Productivity Commission, *Bilateral and Regional Trade Agreements* (2010) pp 262-264.

<sup>50</sup> Productivity Commission, *Bilateral and Regional Trade Agreements* (2010) p. 263.

use and experience, it must be acknowledged that only large companies are realistically in a position to negotiate with many commonly encountered rights-holders<sup>1</sup> (for example Apple, Amazon, Sony or EMI). Likewise, the inclusion of this provision in Australian law would, perhaps, provide reassurance to many Australians who frequently click through long, impenetrable End-User Licence Agreements (EULAs) that at least *some* of their rights remain preserved.

Should ALRC be concerned about the impact of such a proposal, CLA suggests that this provision could apply initially to consumers (as defined under the *Australian Consumer Law*), sole traders and small businesses engaged in trade or commerce. To support a right in favour of the Crown to publish the results of government funded research (see above), a similar provision should also apply to researchers in receipt of government money – as it is the individual researcher, not their institution or government, who deals directly with publishers.

### **Conclusion**

Civil Liberties Australia thanks the ALRC for considering our submission. We look forward to engaging further with the Commission over the course of its inquiry.

Yours sincerely

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