RESPONSE TO COPYRIGHT MODERNISATION CONSULTATION PAPER

FLEXIBLE EXCEPTIONS – QUESTIONS 1, 2.

I am in favour of Fair Use.

However, I recognise that there is considerable opposition to this option in local content creation industries, which may unfortunately mean that Australia will be denied the benefits of this long overdue reform to our copyright regime.

If all we end up getting is the second best option of a further evolution in our list of Fair Dealing exceptions, then I support the inclusion of the seven new prescribed purposes outlined in the Consultation Paper (page 10):

quotation, non-commercial private use, incidental or technical use, text and data mining, library and archive use, certain educational uses, certain government uses.

The problem with a more comprehensive list of prescribed exceptions is that the issues surrounding interpretation and definition are significantly magnified. Factors of fairness and reasonableness in specific cases take a back seat. What, for example, does 'substantial' mean when it comes to a quotation? Would the *Down Under* four bar homage to *Kookaburra Sits in the Old Gum Tree* still be judged an infringement? Would 'certain educational uses' clearly define acceptable and unacceptable uses in this complex, dynamic and always developing sphere?

For instance, an educational exception should not include the substance of our current statutory license provisions, but simply the downloading/uploading copying that enables content to be displayed and shared in a classroom. This would presumably be covered by the 'incidental or technical' exception in any case.

Obviously the display, distribution and enjoyment of otherwise freely available online material should also be included in the exception.

As for library and archive use, I wholeheartedly endorse this plea from Jessica Coates, Copyright Advisor, Australian Libraries Copyright Committee on the IFLA blog, 23 April 2018:

And so librarians have pushed for balance and… reasonable exceptions to let them do their job. Exceptions for preservation, for the provision of material to

researchers, to make older and inaccessible material available online, to run exhibitions. Or flexible exceptions broad enough to cover all these activities.

But exceptions for libraries only do half the job. What is the point in libraries spending millions of dollars getting their collections online, if those collections can be used for little other than passive reading? This is why librarians have also long been strong advocates for the rights of others – researchers, teachers, their clients, creators – to be able to make reasonable use of the materials they provide them. Australia's amazing Trove resource makes over 18.5 million pages from the national collection of newspapers from the first newspaper published in 1803 to selected titles from the 1980's available online for anyone to see. But at the moment it's illegal for the public to do much beyond reading these – family historians can't legally use snippets of them in blog posts, academics can't reproduce them in published papers, and authors can't quote them in books – without the author's permission.

Librarians of course love creators and want to support them to achieve as much financial success as they can – librarians and creators are part of the same eco system which facilitates access to knowledge and ideas…. But they also recognise that an academic quoting 3 lines from a letter to a famous figure is not going to cause financial hardship to a creator or rights holder. They see that the rights of authors, important though they are, need to be balanced against the public goods of free speech and access to knowledge. And yes, even the rights of other creators, so that future authors can build on the past, and our cultural lives aren't smothered by laws that only look at part of the picture.

The option of Fair Use is flexible and muscular enough to deal more robustly and sensibly with all the complexities and competing interests embedded in this terrain, which is why it is far more preferable.

The Consultation Paper is very even-handed in its discussion of the Fair Dealing and Fair Use options. But the two options are far from being on the same plane.

The recently released Deloitte Access Economics report, *Copyright in the Digital Age,* lays out the case clearly, comprehensively and persuasively, and summarises all the recommendations of previous reports by the CLRC, the ALRC, the PC, and Ernst &Young. The case for introducing Fair Use into Australia has emphatically been made. Tinkering is no longer a credible option. What is required now is substance. We have a once in a generation opportunity to do the right thing by the economy, industry, our education systems, and our arts sector.

The government should not be intimidated by the apocalyptic visions of doom and destruction coming from the usual suspects in the content creation industries and their associations. These tirades reflect little more than brazen self-interest. Any potential revenue loss, no matter how minor or justified, is always aggressively resisted.

They certainly do not represent the views of the more cool-headed artists, musicians, authors, publishers, film makers and others, including company owners and executives, who support the long overdue need for a legal framework that better encourages innovation and risk-taking in a rapidly changing technological environment.

It is beyond time for Australian governments to recognise and indeed celebrate the digital revolution that currently defines our personal and social lives, and our workplaces.

ACCESS TO ORPHAN WORKS - QUESTIONS 5, 6, 7.

I agree it is imperative that a reasonably diligent search be undertaken before any use of a work whose ownership details are not immediately apparent.

If such a search, whether undertaken directly by an individual, an institution such as a library, or another professional entity such as Copyright Agency, finds the owner or their licensed representative, such as a publisher, untraceable then the user must be allowed under law to copy or access the work as if it were in the public domain.

The presumption should be that, if the work is verified as an orphan work, then it has effectively been gifted to the public domain. If the author emerges subsequently and reclaims copyright ownership of the work then the work from that date resumes its status as privately owned and protected by copyright, and permission would be required for any copying from that date onwards.

My position is that there should be no upfront payment for the copying of orphan works nor any subsequent penalty if the rightful owner emerges. In other words, the principle should be 'no payment; no penalty' in all circumstances.

This would considerably simplify the orphan works issue, and simplification is desperately needed.

The ALRC report disagrees, as does the Productivity Commission report. They both support 'reasonable' or 'adequate' compensation, and submit that whatever would have been charged as a license or permission fee had the work not been orphaned be deemed appropriate.

My view is that this position shows a misplaced reverence for copyright ownership under extreme circumstances. The original diligent search should be sufficient to isolate 'real' orphan works - those with actually untraceable owners who have in effect abandoned their works - from those whose ownership details have been incidentally lost or not adequately recorded in subsequent copies or transmissions - photographs being the prime example. The search would in those cases be reasonably successful in identifying those owners, denying the work an orphan classification.

Under the current terms of the Statutory License Copyright Agency collects a fee for copying what turn out to be orphan works, holds those funds in trust for four years, then distributes the remuneration to known copyright holders in the same genre class. The Agency also submits that any diligent search be solely carried out by copyright owners or their representative bodies.

All parts of this policy position must be rejected. Although the license payments to the Agency are calculated on a flat fee basis across all categories of works - orphan works are not isolated - the volume of all copying (15% being orphan works according to the Ernst &Young report, page 58) is a key factor in the calculation of the fee. Accordingly, the Agency has over the last few years collected, upfront, approximately $9 million annually for orphan works. Only a fraction of the amount collected is subsequently remitted to identified owners after a rigorous search process is completed.

In my view the remaining money should be credited to the educational and government institutions in the next annual invoice. There is no justifiable reason for a four year wait. And there is absolutely no justification for distributing the money to other rights holders. As both the ALRC and the PC agree, such a practice is not consistent with copyright's essential purpose.

Copyright Agency in its submission to the ALRC enquiry justifies treating orphan works similarly to other works as a necessary mechanism to protect commercial markets from being undermined. Free orphan works would attract more usage, skewering the market in their favour.

There is little logic to this position. Most creative works are unique and non-replaceable. The existence of the public domain similarly does not essentially undermine vigorous commercial markets for in-copyright works.

CONTRACTING OUT - QUESTIONS 3, 4.

As shown by the different recommendations in the ALRC and PC reports, what exceptions should be protected from legal enforceability of contractual terms is a highly contested field.

Personally I am not persuaded by the ALRC's more conservative approach that not all of our current fair dealing exceptions should be unenforceable. And I am not in favour at all of their total exclusion under a fair use regime, if enacted in Australia. The ALRC agrees with the rationale underpinning US law, which countenances unenforceability only in the 'most egregious or obviously overreaching of cases' (page 443).

The ALRC argues that exceptions can be of differing importance. It quotes favourably a UK scholarly paper (page 452) distinguishing between exceptions that safeguard 'fundamental freedoms' or 'reflect public policy norms' and those that affect 'less fundamental principles' like market failure. It contends that 'unnecessary limitations on freedom to contract may reduce the flexibility and adaptiveness to new technologies of the copyright regime' (453).

The PC is not so concerned. It recommends all exceptions, including under a possible and more open-ended fair use regime, be protected from contractual limitations.

I agree with this position for the following reasons:

- Protecting only a limited number of exceptions would introduce a great deal of confusion and hesitancy into the decision-making processes of individual users and user institutions at the coalface. Inevitably a default position of caution and risk aversion would become the norm.

- Under a possible fair use regime one major benefit of a total disallowance legal framework would be that a fair use mindset would be gradually cemented into customer thinking and practice. There would be clarity across the board, and very importantly, at the front end. The fear of litigation at the back end would be considerably reduced, especially if universally applying protocols were developed by institutions to define allowable user behaviour, as they surely would be.

- It would also go a long way to ending system access to digital content governed by the particularities of individual contracts. The user/content interface would be liberated from frequent and oftentimes constant denials, and end any institutional obligations to tailor interfaces to particular contracts. This would also solve the TPM issue.

- Content owners would not be negatively affected by a universal statutory limitation on enforceability. Their focus would continue to be offering useful and quality content with distinct functionalities that defined their competitiveness. As in the analogue non-contract world customers would opt for value. Limiting fair and rational user behaviour around the margins would cease to be an obsession that makes any competitive sense.

Thank you for the opportunity to make this submission.

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