Copyright Advisory Group to the COAG Education Council (CAG)

Supplementary in response to the Productivity Commission Draft Report Intellectual Property Arrangements

This supplementary submission by CAG responds to a number of matters that have arisen during the public hearings conducted by the Productivity Commission, including the 27 June 2016 hearing attended by National Copyright Director, Ms Delia Browne.

It addresses the following matters:

1. Can Copyright Agency or the Copyright Tribunal apply a zero rate to some copying and communication undertaken by educational institutions in reliance on the educational statutory licence in Part VB of the Copyright Act (***the Act***)?
2. Does the EU Directive on collecting societies provide a useful guide when considering governance of collecting societies in Australia?
3. The reasons why Australian schools can't rely on the research and study fair dealing exception, and why fair use would address this.
4. The reasons why fair use would have no impact on the educational resources that were discussed by Pearson Australia Managing Director David Barnett at his appearance at the Commission's public hearing on 27 June 2016.

1. Can Copyright Agency or the Copyright Tribunal apply a zero rate to some copying and communication undertaken by educational institutions in reliance on the Part VB statutory licence?

CAG considers that the better view is that there is no scope under the Part VB statutory licence for a collecting society or the Copyright Tribunal to fix a zero rate for copying and communication.

Further, even if the Tribunal did have jurisdiction to determine a zero rate for copying that it considered should not attract remuneration, there is in CAG's view no point in imposing an unnecessary cost and administrative burden on schools - and collecting societies - by requiring schools to report, and the collecting society to process, records of copying that both sides agree should be treated as non-remunerable.
As we discuss below, the Government has clearly come to this conclusion with respect to the disability statutory licence in Divisions 3 and 4 of Part VB.

The legal position

Copyright Agency has adopted different positions over time as to whether the Tribunal has jurisdiction to determine a zero rate. So far as we are aware, the Tribunal has never been required to directly consider this question.

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In the analysis that follows we refer to the relevant provisions in Part VB, but the same analysis holds for the Part VA statutory licence.

Copyright Agency probably has no power to agree to a zero rate

The Part VB statutory licence sets out a regime whereby an administering body issues a remuneration notice to a declared collecting society (in this case Copyright Agency) undertaking to pay "equitable remuneration" for copying and communication of works for educational purposes. There is provision for the administering body and Copyright Agency to reach agreement as to "the amount of equitable remuneration" to be paid by schools for copies and communications of works that are in electronic form: s 135ZWA.

It appears that Copyright Agency has no power to agree that the equitable remuneration payable for a particular class of copying, or to a particular class of copyright owner, be zero:

- Copyright Agency is the declared collecting society with respect to "all relevant copyright owners": s 135ZZB. This suggests that Copyright Agency cannot reach an agreement that would result in one class of copyright owner not being paid for copying and communication of works; and
- When the administering body issues a remuneration notice to Copyright Agency, it undertakes to pay "equitable remuneration to [Copyright Agency] for licensed copies and licensed communications made by it": s 135ZWU. This suggests that Copyright Agency cannot reach an agreement with an Administering Body that would result in **no** payment being made for a particular class of copies or communications.

It is true that Copyright Agency *does* currently apply a zero rate to copying and communication by institutions assisting persons with a print disability or an intellectual disability in reliance on the disability copying provisions in Part VB Divisions 3 and 4 of the Act. However, this was not the result of any negotiated agreement between the relevant administering bodies and Copyright Agency. We think it likely that if Copyright Agency were ever challenged by a copyright owner who took objection to it applying a zero rate, Copyright Agency would be found to have no power to permit this copying to be done for free.

It is also worth noting that the Part VB licence does contain two provisions - ss 135ZG and 135 ZMB - that operate as *exceptions* to the VB licence: they permit educational institutions to make insubstantial copies and communications without remuneration. It is not surprising that Parliament did not otherwise provide for certain classes of works to be excluded from payment: the Part VB statutory licence was intended to compensate copyright owners for lost sales or licensing revenue when more than an insubstantial part of their works was copied or communicated by schools. Parliament cannot have anticipated that Part VB would currently be used to remunerate copyright owners where there was **no** such lost sale or revenue, such as when schools copy orphan works, or freely available internet content that is not being commercially exploited.

The Copyright Tribunal probably has no jurisdiction to determine a zero rate

If the administering body and Copyright Agency cannot reach agreement on the amount of equitable remuneration to be paid for copying and communication of copies in electronic form, it falls to the Copyright Tribunal to determine this matter, on application by either party: s 135ZWA.

The Copyright Tribunal is required to make an order "determining the amount that it considers to be equitable remuneration for the making of a licensed copy or licensed communication": s 153C. It may be inferred from the absence of the words "*if any*" in s 153C that it is not open to the Copyright Tribunal to determine that *no* remuneration is payable with respect to a particular class of copy or communication. See the comments of Burchett P in *Copyright Agency Ltd v University of Adelaide* [1999] ACopyT 1: *"Parliament created the right to make licensed copies, though it is subject to the burden of equitable remuneration".*

Copyright Agency has taken different positions on this point

In *Copyright Agency Limited v State of NSW* [2008] HCA 35 (***the Surveyors' case***), counsel for Copyright Agency argued that it *would* be possible for the parties or the Copyright Tribunal to fix a rate of zero for certain government copies":

> *MR CATTERNS: ... We fully accept that there might be a range of rates, if we were to succeed, that the Tribunal might fix. It might say zero for the act of making a copy that you put the stamp on but say five cents out of this $4 that we see on this page."*

More recently however, when the Surveyors' case came back before the Copyright Tribunal for the purpose of determining the amount of equitable remuneration to be paid by the State, counsel for Copyright Agency adopted a different position:

> *HIS HONOUR: Does that entail that* ***you say it's not possible for one to say, where a statute provides for equitable remuneration, that that could ever be zero?***
>
> *MR CATTERNS:* ***Yes, that is our submission. It says "must pay."***
>
> *HIS HONOUR: Right.*
>
> *MR CATTERNS: But fortunately, the tribunal doesn't need to resolve that, because it seems our friends accept that there should be some payment for the copies that we're talking about. And indeed, to be fair, have since 2009, as the letters show.*

In its submission in response to the ALRC's Copyright and the Digital Economy Discussion Paper, Copyright Agency reversed its submission again, submitting that the Tribunal did have power to determine that some uses under Part VB could attract a zero rate, although this submission appeared to be directed to the question of whether so-called "technical copies and communications" were remunerable under Part VB:

> *There seems to be a high degree of misunderstanding about a number of issues, such as …[t]he power of the Copyright Tribunal to determine 'equitable remuneration' for different types of content and uses (including to determine equitable remuneration at zero for uses such as 'technical copies')...*[Para 1.2]
>
> *In practice, uses that are 'zero-rated' have been agreed rather than put to the Tribunal to determine. But there is no impediment in the legislation or accompanying regulations to the Tribunal making such a determination.* [Para 6.6]

The policy arguments against requiring schools to rely on a statutory licence for copying that all parties acknowledge should be non-remunerable

It is most significant, in our view, that the Government has recognised that the copying and communication that is currently done in reliance on the disability provisions in Part VB should properly be the subject of a non-remunerable exception rather than a statutory licence that currently imposes an administrative burden on the institutions relying on it notwithstanding that no payment is required for the copying. The draft *Copyright Amendment (Disability Access and Other Measures) Bill* 2016, which the Government has indicated it will introduce into the Parliament in the first sitting after the July 2016 election, replaces the disability statutory licence with an exception (Use of copyright material by institutions assisting a person with a disability: s 113F) that contains none of the burdensome administrative requirements of the statutory licence.

CAG submits that the policy rationale that led to this proposed reform is equally applicable to the educational statutory licences. Copyright Agency has suggested that uses that are acknowledged to be "fair" (such as use of freely available internet content that no one ever expected or wanted to be paid for) should nevertheless be reported by schools, and processed by the collecting society, only to then be treated as non-remunerable. Even if this were permissible under the statutory licence, it would amount to a pointless imposition of administrative burden on schools and collecting societies with no corresponding benefit to rights holders.

2. Does the EU Directive on collecting societies provide a useful guide when considering governance of collecting societies in Australia?

At the July 2016 public hearing, the Commissioners asked CAG to provide further comment on whether the EU Directive (2014/26/EU) on collective rights management and multi-territorial licensing of rights in musical works for online uses (t**he EU Directive**) provides a useful guide when considering governance of collecting societies in Australia.

The EU Directive is intended to set a high standard of governance, transparency and accountability for collecting societies engaged in multi-territory licensing of rights in musical works throughout the EU. While not directly relevant to licensing of the kinds of content licensed by Copyright Agency and Screenrights in Australia, we consider that it provides a useful touchstone in any consideration of how the governance and transparency of Australian collecting societies could be improved.

Another very useful framework when considering best-practice for management of collecting societies such as Copyright Agency and Screenrights is the UK *Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014*.[1] The Regulations require collecting societies to enact a code of practice that includes the following obligations:

- ensure that its dealings with licensees or potential licensees are transparent;
- consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme; and

[1] https://www.gov.uk/government/news/secondary-legislation-for-the-regulation-of-collecting-societies

- provide to licensees, and to any potential licensees who have requested it, information about its licensing schemes, their terms and conditions and how it collects royalties.

When announcing the Regulations in 2014 the UK Government said[2]:

> *They include powers which enable the government to remedy any gaps in the system of self-regulation should they emerge. This should improve the efficiency of collective licensing and strengthen confidence in the operation of collecting societies, delivering benefits for their members and licensees.*

The enactment of the regulations followed a detailed review of governance of collecting societies that was commissioned by the UK Intellectual Property Office.[3] That review considered models of governance in other jurisdictions - including Australia - and was highly critical of the current Australian arrangements. It said that the Australian Collecting Society Code of Conduct had served rights holders well, but not users. [4]

3. The reasons why Australian schools can't rely on the research and study fair dealing exception, and why fair use would be different

At the 26 July 2015 public hearing, the Commissioners asked for more information on why it is that CAG says that Australian schools cannot rely on fair dealing, and why a fair use exception would address this.

Unlike Canada, there is no scope in Australia for schools to rely on the fair dealing for research and study exception in s 40(1) of the Act, even for uses that would cause no prejudice to rights holders and which would amount to a fair use in the US, and a fair dealing for the purpose of education, or research or study, in Canada.

There are two reasons for this. Firstly, in 1982, the Federal Court held that schools could not rely on the fair dealing exception for uses that could be done under the educational statutory licence, regardless of how "fair" the use was. [5] Secondly, in 1990, the Federal Court held that even if a student or other user was entitled to rely on fair dealing to make a copy for their own research or study, a third party could not rely on the exception to do the same copying for them.[6] The court held that a person can only rely on fair dealing to copy for their *own* research and study. The effect of these two decisions has been that Australian schools have been required to pay for uses such as use of freely available internet material, and orphan works, which would cause no harm to rights

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[2] https://www.gov.uk/government/news/secondary-legislation-for-the-regulation-of-collecting-societies

[3] Collecting Societies Codes of Conduct, BOP Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald December 2012

[4] See in particular pages 15 to 30 of that report.

[5] CAL v Haines [1982] 1 NSWLR 182

[6] De Garis v Neville Jeffress Pidler Pty Ltd (1990) 37 FCR 99.

holders. This is despite the fact that if the copying was being done by the students themselves it would amount to a fair dealing. Australian schools are not only in a worse position than schools in comparative jurisdictions, they are also in a worse position than commercial entities such as publishers and broadcasters, who can rely on fair dealing exceptions, for example when reporting news.

In its Copyright and the Digital Economy report, the ALRC was highly critical of this. The ALRC said that two things were needed. Firstly, replacing the purpose based fair dealing exceptions with fair use would mean that you no longer had to ask whether the person doing the copying had the relevant purpose: the *only* relevant question would be whether the use was fair. Secondly, it should be made clear in the educational statutory licences that schools and universities did not need to rely on the licence for any use that would come within fair use or any other exception in the Act.

4. The reasons why fair use would have no impact on the educational resources that were discussed by David Barnett from Pearson Australia

At the hearing on 27 June 2016, David Barnett from Pearson Australia expressed a number of concerns, including:

- That teachers would rely on fair use to copy or communicate multiple short excerpts from the same work with the intention of copying substantially the entire work.
- That a fair use exception would make it unprofitable for Pearson to develop new and innovative digital products such as Lightbook.

To respond to the first point, the activity that Mr Barnett is concerned about would not amount to fair use in the US, or a fair dealing for education in Canada, and it would also not amount to a fair use in Australia in the event that a fair use exception is enacted. The scenario that Mr Barnett describes would not be permitted under existing Australian copyright law (without a licence), nor would it be permitted if fair use is enacted.

To respond to the second point, products such as the Pearson Lightbook - which is a digital resource that combines textbook content with assessment and instant student feedback - will not be affected by fair use. Lightbook (and products like it) are purchased directly by students for *individual* use on an iPad, Android Tablet, personal computer etc. They are completely different to a traditional textbook. The copying that is occurring in schools in Canada that Mr Barnett is concerned about is copying from textbooks, school web based digital resources such as Lightbook, that are only available under a student and/or school paid subscription.

The shift towards greater use of digital resources of this kind in Australian classrooms highlights another point that is relevant to the concerns expressed by Mr Barnett: the educational content ecosystem is rapidly changing. By way of example, educational publishers and authors currently obtain revenue from three main sources: sales of textbooks etc, direct licences with schools and parents for digital and web-based resources, and the Part VB statutory licence. For many years, the VB licence has been a significant source of revenue for educational publishers, but the shift towards digital resources - which are subject to direct licences - will most likely result in less reliance on the VB licence in future years. That will not mean that educational publishers are not

being paid, it will simply mean that the revenue will be flowing to publishers directly from schools and parents rather than from Copyright Agency.

Mr Barnett can take great comfort from the fact that in the US - where a fair use exception has been in operation since the 1970's - Pearson and other educational publishers are thriving. As noted in CAG's main submission in response to the Commission's draft report, Wired magazine has reported on the staggering success of the educational publishing industry in the US in an article headed "Why Educational Publishing is Big Business":[7][1]

> *In 2009, Pearson's Education division alone brought in more revenue than any other book publisher besides number two, Reed Elsevier, whose biggest businesses are Lexis-Nexis and Elsevier Science.*
>
> *Education publishers dwarf trade presses. Only the top trade press, Random House (itself owned by Bertelsmann) is bigger than Cengage, the little-known education publishing division that Thomson spun off in 2008 before merging with Reuters.*
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> *Education publishers are also much bigger than other media companies that attract much more attention. Pearson is far bigger than AOL or The New York Times Company (and much more profitable). In order to find publishers with greater revenue or profits, you have to go up the ladder to companies like News Corp that include global television markets, or retail entities, like Amazon. This makes companies like Pearson too big to ignore, especially when they're willing to partner up.*
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> *We talk a lot about the transformation to an information economy, but companies like Pearson, Elsevier, Thomson Reuters and McGraw-Hill epitomize it.* ***Textbooks and institutional publishing services lie at the exact juncture of knowledge and money****.* (our emphasis)

If you would like any further information please contact Ms Delia Browne, National Copyright Director .

Yours sincerely

Delia Browne
NATIONAL COPYRIGHT DIRECTOR

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[7] Carmody T "Why Education Publishing is Big Business" *Wired* 2012 available at: http://www.wired.com/2012/01/why-education-publishing-is-big-business/