

5 August 2016

Commissioner Karen Chester
Commission Jonathan Coppel
Productivity Commission
Level 12, 530 Collins Street
Melbourne VIC 3000, Australia

Dear Commissioners

I am writing to respond to points made in the submission to the Commission's Inquiry into Intellectual Property Arrangements by the Australian Digital Alliance (ADA) (reference: DR578).

It is important that the Commission is accurately informed about the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*.

The characterisation of this treaty as a watershed 'user's right' that suggests the need for further user's rights including an uncertain and open-ended US-style 'fair use' is badly misleading.

It is important to any understanding of the Treaty that Australian copyright law already complies with its provisions. Australian copyright law, based on fair dealing exceptions, already facilitates accessibility for the print handicapped. The fair dealing provisions of the Australian legislation critically influenced the formulation of the Treaty. The *Copyright Act (1968)* does not require changes in order for the Treaty to be implemented in Australia. That was the view of the Copyright Council and the Copyright Agency and is also the view adopted by the Government. We include for your reference our response to the National Interest Analysis regarding the Implementation of The Marrakesh Treaty (at Appendix A).

US-style Fair use would not make access for the uses covered by the treaty any greater access than is already provided by the existing law.

The Australian publishing industry has a long history of supplying the print-handicapped community with publication master files and accessible format copies on demand. The APA is currently working with the International Publishers Association (IPA) as part of the Accessible Book Consortium (ABC) to increase availability, and we have welcomed the ratification of the Treaty. We attach our response to the Marrakesh Treaty Options Paper (at Appendix B).

The Marrakesh Treaty is an important step towards making the world of the written word accessible to those with vision and perceptual impairment and we strongly support the aims

of the Treaty in facilitating access for the print-handicapped. It should not be used as a beachhead for a polemical campaign for 'users rights'. Practical improvements in print accessibility are more likely to result from the discussions between key stakeholders and collaboration across publishing and print-disability sectors. Potential commercial solutions are vital to securing outcomes and are likely to be made more problematical by the rhetorical 'users rights' approach of the ADA. The Government has recognised that a commercial market will have no opportunity to develop if commercial availability is not a consideration under the Marrakesh Treaty.

We also note that the ADA submits as supporting evidence about international experience some speculation by Professor Hargreaves, and the partial reporting of the COAG Education Council's Copyright Advisory Group.

It would not be safe to draw inferences from these. The perspectives of observers closer to actual US experience can be found in other submissions. The **Association of American Publishers** says in its submission:

Prior to 2012, a well-established collective licensing regime was in place to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada. This system generated millions of dollars in licensing revenues for authors and publishers. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled new investments in innovative means to deliver textual materials to students. Today, that system has been all but destroyed.

A detailed study released by Pricewaterhouse Coopers ("PwC") in June 2015 documents and quantifies the damage. "Licensing income from the K-12 sector has been all but eliminated," PwC found, with a similar fate expected this year at the post-secondary level once current licensing agreements expire. The annual loss from the demise of licensing to copy parts of works was estimated at C\$30 million (US\$22 million). And the damage spills over to the full textbook sales market as well, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.¹²

The Draft Report seems to dismiss the Canadian example because Australian courts might reach different conclusions than Canadian ones, and because "guidance and illustrative examples would likely play a role in determining what constitutes fair use in the context of education."¹³

Both statements are true (although the second one overlooks the fact that it was "guidance" provided by lawyers for school systems across Canada, based on the statutory amendments and court decisions at issue, that directly led to the refusal to take any further licenses for uses such as copying of textbooks, preparing course packs, digital copying, and copying for non-classroom uses). But both statements also miss the point: the enactment of a broad statutory exception helped to destroy a

functioning collective licensing system, and inflicted huge losses on authors and publishers. There is little dispute about these facts.

If the Commission does not view this as a cautionary tale to which Australian policymakers should carefully attend, this simply reinforces the impression that the Commission views the Australian marketplace solely from the perspective of consumers of copyrighted material, and considers the impacts on authors, publishers and other participants in the creative sector to be of marginal significance at best. 11

The US Chamber of Commerce made the following point:

“Ultimately, the decision of whether or not to adopt fair use in Australia should not be undertaken based on faulty premises, nor should the likely and potential disturbances to the existing marketplace and the rights of creators be ignored.”

In October 2015, Jon Baumgarten, the former General Counsel of the US Copyright Office, said in the keynote address at the Biennial Copyright Law and Practice Symposium in Australia:

“So, should Australia adopt or follow the new flavour of US fair use doctrine? My answer to this is “no”...It is precisely in the context of the new digital economy where authors, other copyright owners, technology innovators, and public interest must be designed to coincide under a vital, thriving and robust copyright law that the new doctrine undermines.”

Finally, the ADA makes a brief reference to the Copyright Amendment (Disability Access and Other Measures) Bill (CADAOM). The terms of this Bill were reached through extensive consultation with stakeholders with the intention of finding a balance of interests and practical workable solutions rather than overriding the legitimate claims and concerns of authors and publishers. Arrangements that produce workable modern systems are more likely to result from that process than from the radical proposition that copyright property should be taken and used, even for the precise use for which it was intended to be offered for sale, and existing rights to equitable remuneration removed.

Thank you for the opportunity to comment on this submission. Please contact us if you require further information or clarification.

Yours sincerely,

Michael Gordon Smith
Chief Executive



AUSTRALIAN**PUBLISHERS**ASSOCIATION

Appendix A

APA Submission on Marrakesh Treaty Implementation

<http://www.publishers.asn.au/documents/item/369>

APA Submission on the Marrakesh Treaty Options Paper

<https://www.publishers.asn.au/documents/item/439>