AUSTRALIAN
DIGITAL ALLIANCE

Supplementary Submission to the

Productivity Commission Inquiry into Australia's Intellectual Property Arrangements

March 2016

Contact: Jessica Coates
Web: digital.org.au

The Australian Digital Alliance (**ADA**) has become aware of a report by PwC on the costs and benefits of introducing a fair use exception into Australia's Copyright Act.[1] This report, which was commissioned by collecting societies and select copyright owner interests, was provided to the Productivity Commission by way of a submission in February of this year.

This supplementary submission sets out some fundamental concerns the ADA has with the approach taken by PwC in its report.

1. The report suggests fair use means a tilt in the balance away from creators towards users. However, the purpose of fair use is not to tilt this balance in a particular direction but to move from a prescriptive test to one based on principles

The starting point of PwC's conceptual framework is the assumption that fair use weakens the protection of copyright owners, instead favouring users of works. However, this is a misunderstanding of fair use. Most fair use disputes are between two creators, and not between creators and users. In a dispute between two creators, each of whom are contributing new expression and learning to their works, it is nonsensical to describe fair use as tilting any balance away from creators.

Rather than tilt the balance in a particular direction, fair use simply moves away from a rigid, top-down prescriptive list of approved forms of creativity based on specific legislated exceptions, to one dependent on a series of principles, namely:

a. the purpose and character of the use;

b. the nature of the copyright material;

c. the amount and substantiality of the part used; and

d. the effect of the use upon the potential market for, or value of, the copyright material.[2]

The application of these principles may or may not lead to a particular use being seen as fair. Fair use is merely a defence that can be asserted but must be proven, with the burden of proof being on the party asserting it. It does not, as some seem to believe, automatically make permissible all uses of copyright materials. In fact, it explicitly incorporates considerations of the impact on copyright owner interests into its fairness test, ensuring that uses that unduly impact commercial interests of creators will not be permitted. The test makes it clear that only a small subcategory of uses will qualify as fair.

---

[1] PwC, 'Understanding the costs and benefits of introducing 'fair use' exception' (Report, February 2016) <https://www.screenrights.org/sites/default/files/uploads/PwC_Fair_Dealing_CBA_Final.pdf>.

[2] Australian Law Reform Commission 2014, 'Copyright and the Digital Economy', Recommendation 5-2.

It is the flexibility that fair use provides, rather than particular changes in the balance between (the increasingly ill-defined categories of) 'creators' and 'consumers', that need to be at the heart of any analysis of its costs and benefits. From the inception of copyright laws, fair use has existed as a mechanism by which creativity and innovation are allowed to evolve as technology and applications develop, without relying on ad hoc legislative amendments to deal with issues such as reverse engineering, caching, transformative use or non-consumptive use. Creativity and innovation are by their very nature flexible; if we truly wish to encourage them, our laws must be flexible too.

2. PWC's analysis of the costs of moving to fair use is largely based on the Canadian experience of educational publishers which appears to have been driven by factors other than the shift to fair use

We note that the submission to the Inquiry by the Council of Australian Governments' (CAG) National Copyright Unit provides a detailed rebut to the claims made by the PWC report regarding the impact of Canada's copyright law on educational publishers.[3] We support this submission.

In addition, we would like to draw attention to the Canadian Supreme Court's 2012 finding that a range of others factors helped explain the downturn in education publishing revenue in Canada:

> as noted by the [educational representatives], there was no evidence that this decline was linked to photocopying done by teachers. Moreover, [they] noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.[4]

The CAG submission points out a number of other disruptive factors - including open access publishing, student preferences for second-hand books, reduced spending on new curriculum, new media players such as Google and Apple, and changes in the oversight of collecting society funds - which can all be seen as contributing to the changes in the Canadian industry. The effect of copyright changes would be contributory at best in the face of this multitude of factors.

[3] See http://www.pc.gov.au/__data/assets/pdf_file/0010/194851/sub097-intellectual-property.pdf, particularly 6.1 and Attachment D
[4] 2012 SCC 37, para.33

3. PWC's estimate of transaction and litigation costs is based on false assumptions.

The generally accepted economic rationale for fair use is that it will reduce transaction costs, particularly for users.[5] Nevertheless, the PWC report estimates a large increase in transaction costs from fair use. This estimate arises from a major assumption by PWC - that if fair use were introduced royalty collection societies would cease to exist. It is clearly implausible that the movement from a prescriptive to a principles based regime would result in the demise of collection societies.

This would require the courts to determine, under the fair use principles, that the appropriate remuneration for rights holders across the board for all uses by educational, government and commercial institutions making use of copyright material was effectively zero. Not only is this highly unlikely, it has also not been the experience in the US, or other fair use jurisdictions. For example, in the U.S. fair use has been rejected for photocopying for educational uses that harm the market. See. e.g., *Princeton University Press v. Michigan Document Services*, 99 Federal Reporter 3d Series 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp*., 758 Federal Supplement 1522 (S.D.N.Y. 1991).

Similarly, the PWC report estimates a massive increase in litigation costs in Australia as a result of the introduction of fair use. In producing their estimate, PWC cites research on the number of fair use/fair dealing cases in the US and UK. They note an average of 2 cases on fair dealing per year in the UK, and 8 cases/11 opinions per year in the US. This leads PWC to a conclusion that fair use results in a 5 fold increase in cases (we note the result should actually be 4 times the number of cases, 5 times more opinions). They then take Lateral Economics' estimate of 70 *copyright cases per year* (note - not fair dealing cases, *copyright proceedings total*) and multiply this by 5 to get an estimate of 350 cases per year averaging costs of $380,000 in legal costs. They seem to be saying, in effect, we will have 350 fair use cases a year - in a context where the research they cite says that the US has 8 cases a year.

4. The analysis dismisses the benefits its own review finds on the positive relationship between flexibility and investment

In assessing the benefits of a fair use regime, the report includes a cross-country regression examining whether copyright flexibility was associated with higher GDP per capita and investment per capita without including any controls for other variables. A deeper empirical investigation of this relationship is warranted but at a minimum the analysis PwC provides is suggestive of a positive relationship between copyright flexibility and investment. It is unclear why this was dismissed and why no attempt was made to control for other factors which PwC claimed helped explain differences in economic performance between countries.

[5] See Gordon, W. 1982, 'Fair use as a market failure: A structural and economic analysis of the Betamax case and its predecessors', Columbia Law Review, 82: 1600.

Also, PWC's economic approach to analysing benefits is different to the approach for analysing the costs. A much lower bar seems to have been set for identifying costs than for identifying benefits. For example, the PWC analysis assessed whether or not the benefits of copyright flexibility were causally related to improved economic performance. However, the analysis did not appear to test whether there was actually a causal relationship between the introduction of fair use and the decline in revenue for educational publishers, which also could have been caused by other factors.

No attempt is made to quantify even those benefits which – given the assumptions the report makes – should have been readily identifiable, such as an increase in consumer welfare. Along with the limitations of the costs analysis and benefits analysis in their own rights, using different techniques makes it hard to draw any meaningful conclusions.

As we pointed out in our original submission to the Inquiry, two recent international comparative studies which do attempt to account for such factors found that the existence of a flexible copyright exception is beneficial to the overall economy. Last year the Lisbon Council and Innovation Economics published *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*.[6] The report considers the limitations and exceptions to copyright in eight OECD countries alongside their economic growth and finds that countries that employ flexible exceptions in copyright have higher rates of growth for their overall economy and their information technology, service and traditional media sectors. They also have higher wages overall and in the communications and technology sectors.[7] The report also notes other positive outcomes from more flexible copyright systems, such as the promotion of education, independent research, free speech, user-generated content, and text and data mining. Most importantly, the report makes the following conclusion:

> Policymakers often perceive the positive externalities and innovations associated with exceptions to copyright as a trade off with the economic growth driven by strong intellectual property protection. Instead, the evidence suggests that broad and flexible exceptions to copyright embedded within a strong intellectual property framework may be the best way to achieve both simultaneously.[8]

Similar conclusions can be seen in the early results of an ongoing study by American University, which examines how a country's copyright exceptions affect its economic outcomes.[9] In its

---

[6] Gilbert, Benjamin, *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*, Lisbon Council 2015, http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-and-economic-growth-index.html#sthash.Bh4kCsTY.dpuf

[7] Gilbert, Ibid, pp.3-4

[8] Gilbert, Ibid, p.4

[9] Palmedo, Mike, Firm Performance in Countries With & Without Open Copyright Exceptions, Infojustice.org, May 2015, http://infojustice.org/archives/34386

preliminary stages, the study compares the experiences of firms, categorized by industry, in countries with and without 'fair use style' copyright exceptions. It uses a dataset with 166,920 observations over 30 years from 5,564 firms in 91 countries, including the seven countries in the world with fair use – the U.S., the Philippines, Singapore, Israel, Taiwan, Malaysia, and Korea. It has found that adoption of fair use style exceptions is associated with positive outcomes for these firms, and that this result doesn't change between traditional user sectors (ie dependent on copyright exceptions) and rightsholder sectors (ie dependent on copyright protection) showing that "both internet firms and content providers can benefit in fair use systems."[10]

5. The approach does not provide a framework to capture the fundamental changes that have occurred, and that will continue to occur, in the production, transformation and distribution of content as a result of digital innovation and which hold out enormous potential gains for Australia

Digital transformation has led to fundamental changes in the way copyright material is created. Digital innovations are often based on transformative use, which builds on publicly available material to support innovation and the production of new works. The result is to blur the boundaries between 'producers' and 'consumers', while altering the traditional meaning of a 'copy'. At the same time, there is very substantial growth in the range of non-consumptive uses which provide substantial public benefit while not implicating any consumptive markets, such as the algorithmic analysis of printed material so as to derive the capacity to translate documents (eg by Google translate). As these uses continue to develop, it is inevitable that the current, prescriptive, framework will come under rising pressure, creating uncertainty and increasing the risks faced by innovators.

While PwC's framework acknowledges the potential role of new forms of use in supporting innovation, no realistic attempt is made to quantify these benefits. It therefore does not address the issues which are at the heart of the debate.

[10] Palmedo, Ibid