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**Submission to Productivity Commission
Intellectual Property Arrangements
Draft Report**

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INTRODUCTION

We appreciate the opportunity to comment on the Productivity Commission's Draft Report on Intellectual Property Arrangements.

While there are some aspects of the report with which we can agree, the Commission's major recommendations for changes to the copyright system are based on a faulty premise: that Australia's copyright system has 'expanded' in ways that require 'balancing'. The Commission has also misunderstood important aspects of Australia's copyright system, and has not followed its own exhortation that policies be based on evidence.

Copyright Agency and its members are not averse to change. There are definitely aspects of the current system that could work better to deliver community well-being. Australia is part of a global copyright system, and investigations of how to improve the system are being undertaken around the world. Improvements will be best delivered by sensible, iterative, practical enhancements rather than radical overhauls that inevitably result in unintended consequences. They will be delivered by technological developments and business practices that are supported by a sensible, fair regulatory environment.

While Australia is part of an increasingly globalised world, including in the copyright arena, content created by Australians for Australians remains a key pillar of our national identity, and an important factor in formulating the right copyright environment for Australia. Not all content is the same, and Australian consumers should have choice. But that should include an opportunity to choose content that is locally created and produced. This doesn't imply a 'protectionist' attitude, but rather that creative content is not substitutable in the ways other goods and services may be.

Australia has some great exports of creative content. Many of these are not well known, particularly in the field of educational resources. Australian educational publishers export all over the world, including to the US, Middle East, Asia and Europe. For example, Queensland educational publisher ORIGO Education, whose Stepping Stones program is the only program used by every public school in the state of Hawaii, won the 2015 Queensland Premier's education and training export award.¹ And in 2015, 3P Learning (creator of online learning programs Mathletics, Reading Eggs and Spellodrome) won several awards at the British Educational Training and Technology awards.

RECOMMENDATIONS COMPARED TO TERMS OF REFERENCE

The Commission was asked to recommend changes that would:

1. **Encourage creativity**, investment and new innovation by individuals, businesses and through collaboration while not unduly restricting access to technologies and creative works.
2. **Allow access** to an increased range of quality and value goods and services.
3. **Provide greater certainty** to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others.

¹ <http://www.tiq.qld.gov.au/awards/winners/case-studies/origo-education/>

4. **Reduce the compliance** and administrative costs associated with intellectual property rules.

The Commission's 'findings' and recommendations on copyright do not align with its terms of reference:

1. **Encourage creativity:** The terms of reference contemplate positive recommendations to *further* encourage creativity, investment and innovation. The Commission has taken the view, however, that the copyright system applies to works for too long, and the only changes it recommends would dilute the copyright system for Australian creators and favour multinational technology companies.
2. **Allow access:** The Commission regrettably has definitely misunderstood the extent of access under the current copyright system (and in particular areas in which access is much broader than in the US). It also fails to distinguish areas in which it thinks there could be more access from areas in which access is clearly available under licensing arrangements (e.g. statutory and other 'blanket' licences which are extensively applied in Australia).
3. **Increase certainty:** The Commission's key recommendation on copyright – introduction of a US-style 'fair use' exception – will necessarily reduce certainty, as proven in other jurisdictions. The Commission's suggestions for reducing this acknowledged uncertainty are at best naïve and at worst somewhat more disturbing in implication.
4. **Reduce compliance:** Similarly, a 'fair use' exception would increase rather than reduce compliance and administrative costs. The application of the 'fair use' exception is highly technical: see 'Unpredictability of 'fair use' exception' below. In Canada, the guidelines issued by the education authorities on 'fair dealing' are subject to litigation (and, it must be observed, have resulted in proven severe collapse in revenues to Canadian creators which makes the recommendation all the more perplexing).

'EXPANSION' OF THE COPYRIGHT SYSTEM

The report says that 'Australia's copyright system has expanded over time'.

As we demonstrated in our submission on the Commission's issues paper (Appendix 2), the expansion has been in three areas:

1. New rights
2. New exceptions and limitations
3. New implementation or enforcement measures.

Most of the new rights have been for very specific classes of people or material (e.g. performers; computer programs). In general, new rights have been accompanied by new exceptions and limitations (not always directly relating to the new rights, and in some cases resulting in a net 'balance' to users of copyright content).

In reality there are only two changes to the scope of copyright protection since 1968 that applied across the board:

1. The new right of 'making available online (in 2000); and
2. The extension of the term of copyright protection from (in general) life of the author plus 50 years, to life of the author plus 70 years (in 2004).

The report says the first was reasonable.

Prima facie, the rationale for the extension of rights is economically sound and, were it not present, would provide creators with weak incentives to produce and publish works online to the detriment of consumers.

...

Indeed the new technology has changed the economic calculus in reaching judgments about the strength and nature of those protections. For physical forms of copyrighted material — such as a book or DVD — a consumer can freely pass on or sell the material to a third user without any further return to the original seller. If nothing else, this recognizes that any alternative is not only hard to enforce, but that the damage associated with such transfers must be small since only the original copy can be passed on. However, in the online environment, the free transfer of digital material could encompass the whole market for a product, and so additional protection is reasonable.

It is the second — extension of term — that the Commission is primarily concerned about. Commissioner Karen Chester said in a radio interview:

And we know that we now have that extension in our system after the US-Australia free trade agreement and I think that's where the system sort of started to lose its balance where you've got IP exporting nations like the US and the west coast of the US that are driving these policy changes that aren't in the best interests of Aussies.²

But the Commission's concern is actually less with the *extension* of term, and more with the international standard set by the Berne Convention in 1886: life of the author plus 50 years.

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.³

So the Commission is not actually seeking to 'rebalance' an 'expansion' of copyright since the current Copyright Act was introduced in 1968, or even since the turn of the previous century, but to reverse an international standard set in 1886.

The rationale and, more importantly, the evidence is missing from the Commission's report. The extension in 2004 was of course as a result of a government to government free trade agreement (Australian and the US) which the Commission is rather cavalier in dismissing.

Special conditions for the period of the extended term

If the Commission's concern is, in fact, with the extended period of protection (to life plus 70) rather than with the 130 year old international standard, then there may be options for special conditions for content in that period. For example, the US Register of Copyrights has suggested:

² Commissioner Karen Chester speaking on ABC Radio National, 29 April 2016: <http://www.abc.net.au/am/content/2016/s4452475.htm>.

³ Draft Finding 4.2

Perhaps the next great copyright act could take a new approach to term, not for the purpose of amending it downward, but for the purpose of injecting some balance into the equation. More specifically, perhaps the law could shift the burden of the last twenty years from the user to the copyright owner, so that at least in some instances, copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner. And if they did not, the works would enter the public domain.⁴

Australia does not have a government registration system, but could consider other mechanisms for assertion of rights that would differentiate 'active' from 'inactive' content.

'Commercial life' of copyright content

The Commission cites ABS data to assert that the 'commercial life' of most copyright content is between two and five years, but it has reached unsound conclusions.

It apparently ignored two important factors:

1. the 'incubation' period between the creation and commercialisation of a work; and
2. multiple revenue streams over a period of time.

The period between creation and commercialisation of a work can be decades: for example, the realisation of a film script into a film.

And commercialisation in one form is usually followed by commercialisation in other forms, often over a long period of time. A work may be initially published as a printed book, and later as an ebook and audio book, adapted for film or licensed for inclusion in aggregated products or services.

For example, the 'commercial lives' of a fiction book could include:

- initial release;
- film or television adaptation
- tie-in release
- listed for study on a school or university curriculum.

And for a music composition:

- initial release
- cover version by another performer
- inclusion in a work for theatre, or a film or television program
- inclusion in an anthology.

It is simply ridiculous that the primary commercial life of creative works is to five years; it is facile and wrong. It is not only an egregious error but has offensive value judgement overtones.

Cost of term extension

The Commission says [at page 114]

⁴ Maria Pallante, *The Next Great Copyright Act*, www.law.columbia.edu/kernochnan/manges

When considered from a community-wide perspective, these costs can be significant (Concept Economics 2009; Dee 2004). For example, it is estimated that the obligations in the Australia-United States Free Trade Agreement to extend copyright from life plus 50 years to life plus 70 years, resulted in Australian users paying an additional \$88 million per year — after accounting for the extra revenue accruing to domestic rights holders (Dee 2004). A similar obligation on New Zealand as a result of the Trans-Pacific Partnership was estimated to cost \$55 million per year (Concept Economics 2009).

But, as we noted in our submission on the Issues Paper:

These estimates are meaningless, as they are based on an assumption that there is a constant flow of royalties to each author. This assumption is completely contrary to common sense, and contrary to the statement on page 22 of Dr Dee's report that "Some products, such as computer software, have a very short economic life. For these products, the extension of copyright term will have no effect at all".

This point is also made by the New Zealand Publishers' Association in its fact sheet 'The Actual Cost of Term Extension' (March 2016),⁵ and in the paper by George Barker and Stan Liebovitz 'Copyright Term Extension Economic Effect on the New Zealand Economy'.⁶

The underlying assumption is also completely contrary to the Commission's assertion that the 'commercial life' of copyright products is usually six years or less. The Commission can't have it both ways – the logical inconsistency is unsupportable and represents a consistently flawed analysis.

Availability of 'out of commerce' content

All exceptions in the Copyright Act apply to orphan works and out of commercial works. In some of the exceptions, the fact that a work is an orphan or out of commerce work can weigh in favour of application of the exception, such as the fair dealing exceptions, and library exceptions.

There is, however, no exception that applies merely because a work is an orphan or out of commerce.

There is a case for arrangements that enable cultural institutions to digitise and display items in their collection for Australians to view. Internationally, this is increasingly being done under an 'extended collective licensing' framework, that includes reasonable compensation provisions for applicable content. Schemes have recently been introduced in the UK, France and Germany, and recommended by the US Copyright Office.⁷ These developments indicate that a similar scheme would work well in Australia.

⁵

https://gallery.mailchimp.com/42b314e0d84583c181fd3e27b/files/PANZ_TPPA_submission_11_March_2016.pdf

⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770914

⁷ Orphan Works and Mass Digitization: A Report of the Register of Copyrights (June 2015)

Representation of ‘consumer’ interests

The major powerful proponents for dilution of the copyright system are multinational technology companies that are building their businesses using content inputs created by others. Content creators are not seeking to stifle those developments, but rather to receive payment for the value of their inputs. The proposed settlement between Google and content creators on Google’s book digitisation program, had it been facilitated by the appropriate legal framework, would have delivered a better solution for all concerned, including consumers and content creators.⁸ The outcome of the litigation on the application of the ‘fair use’ exception (which ran for a decade) resulted in a severely curtailed service from Google to consumers.

One way that multinational technology companies have pursued their interests is by aligning with other interests such as libraries and the education sector (and in some cases organisations that represent consumer interests), and formulating a position that a ‘fair use’ exception will address the disparate concerns that each of those sectors has raised. This can mean that opposition to the aspirations of multinational technology companies can cloud potential solutions to concerns raised by other sectors.

Even large content companies (that pay royalties to creators) feel constrained by the power and wealth of the multinational technology companies: see for example ‘Too Big to Sue: Why Getty Images Isn’t Pursuing a Copyright Case Against Google in the US.’⁹

The Commission’s position is based on shaky logic and ideology rather than evidence, resulting in a prejudicial approach that is, in our view, to be deplored in a Commonwealth Agency.

HOW THE COPYRIGHT SYSTEM WORKS FOR EDUCATION

Australia’s copyright system enables teachers to copy and share content more extensively than anywhere else in the developed world. It is certainly more extensive than the US system. Indeed, the US Copyright Office has suggested US Congress consider compulsory licensing for education:

And in compelling circumstances, you may wish to reverse the general principle of copyright law that copyright owners should grant prior approval for the reproduction and dissemination of their works — for example, by requiring copyright owners to object or "opt out" in order to prevent certain uses, whether paid or unpaid, by educational institutions or libraries.¹⁰

This both suggests that the current environment for educational use of content in the US requires review, and that under an ‘opt out’ regime, at least some uses made without permission would be subject to payment.

We are therefore perplexed by Commissioner Karen Chester’s comment on ABC Radio National:

⁸ The US Copyright Office report on mass digitisation recommends a legal framework to enable this type of arrangement in the future.

⁹ <http://www.pdnonline.com/news/legal/copyright/Too-Big-to-Sue-Why-Getty-Images-Isn-t-Pursuing-a-Copyright-Case-Against-Google-in-the-U-S-16515.shtml>

¹⁰ <http://www.copyright.gov/regstat/2013/regstat03202013.html>

You only need to see what schools have to go through to get access to copyright material.¹¹

While it is certainly true that some in the education sector would like to reduce the amount of compensation they are currently paying (which is based on determinations by the Copyright Tribunal), the level of access to content enabled by the Australian system is world-leading. It includes any content from anywhere in the world, from any source and in any format. The uses allowed include printing, scanning, emailing, inclusion in coursepacks, publishing on learning management systems and recontextualising.

It is unacceptable that this is not reflected in the Commission's analysis and report.

Issues raised by National Copyright Unit

The National Copyright Unit (NCU) provides secretariat services to the Copyright Advisory Group to the COAG Education Council (CAG). Its principal role is negotiating licence fees with copyright collecting societies. It therefore has a keen and primary interest in the amount of fair compensation paid under the statutory licence schemes for education.

The draft report cites 'concerns' raised by NCU. These concerns all relate to the calculation of fair compensation, not to access to copyright by students and teachers. In response:

- **Internet content:** Schools' use of any content within the terms of use set by the website proprietor is excluded from fee negotiations (e.g. 'non-commercial use'; 'free for education'). Content used outside the terms of use is taken into account (e.g. content published online for individual personal use only, or a chapter of textbook made available to assist a purchasing decision).
- **Reliance on 'general' free exceptions:** The educational use scheme is intended to allow systematic, widespread use of educational resources. Most 'general' exceptions are for ad hoc, small scale uses of content that (when introduced) were not covered by standard licensing arrangements.
- **Not fit for digital age:** The scheme was extended to digital uses of content in 2000, and in practice has adapted to a whole range of technological developments (such as electronic whiteboards, learning management systems and tablets). The government is proposing to introduce amendments that reflect that adaptation, and combine the regulatory elements that deal with 'hardcopy' and digital use.

Teachers support current system

In submissions to the Australian Law Reform Commission inquiry into Copyright and the Digital Economy, organisations representing teachers supported the current licensing arrangements, including the payment of fair compensation to creators of educational resources.

For example, the Australian Education Union said:

It is extremely important that authors continue to have the motivation to produce quality resource material and that they are adequately remunerated.

¹¹ <http://www.abc.net.au/am/content/2016/s4452475.htm>

The quality of education for students around Australia is dependent on access to a range of appropriate resource material.

In the field of education, it is particularly important to consider the following factors. Firstly, some of the best resources are those that are tailored specifically to state-based, or increasingly, Australian curricula. As 'education' is listed explicitly in the ALRC's proposed illustrative purposes, these resources will potentially be used almost exclusively within what falls into the classification of a 'fair use exception'. This runs the risk of a significant reduction in remuneration for the creators and publishers of such content. This problem is more significant for the producers of educational resources than for some other authors and creators. With limited or no income to be gained from doing so, many authors and publishers will likely choose to cease the production of such material. As a result, teachers and students in classrooms may have access to fewer resources tailored to specific curriculum needs written by educational experts.

WHY A US-STYLE 'FAIR USE' EXCEPTION IS A BAD IDEA

The main reasons put forward by proponents for an introduction of a US-style 'fair use' exception can be grouped as:

1. 'legitimising' trivial uses of content that may be technical breaches
2. reducing or eliminating licence fees that are paid under current arrangements
3. enabling content inputs to online products and services without payment to the content creators

The Commission dismissed (1).

Its reasoning on (2) is not clear. It acknowledges the 'safeguard' of the Copyright Tribunal's jurisdiction to determine licence fees,¹² but does not explain why (in the context of its terms of reference) it thinks activities to which the Tribunal has ascribed value would no longer be subject to fair compensation. This absence of explanation or rationale is cause for very real concern as it appears to be capricious.

On (3), the policy question is whether the government should be supporting licensing solutions (as the UK Government has done, and as the US Copyright Office has recently advocated), or enabling large technology companies to get free inputs for their online products and services. This issue is not confined to Australia, but is the subject of current robust debate in other areas of the world, including the US and the EU. The absence of a reflection of these trends in the report is again cause for concern about objective appraisal.

'Fair use' is a disproportionate response

The Commission's rationale for the introduction of a US-style 'fair use' exception is:

Australia's copyright system has progressively expanded and protects works longer than necessary to encourage creative endeavour, with consumers bearing the cost.

¹² Page 134.

A new system of user rights, including the introduction of a broad, principles-based fair use exception, is needed to help address this imbalance.

As noted above, the Commission's key concern is the *length* of copyright protection. That concern is fuelled by some fundamental misunderstandings about the ways in which copyright-based products and services are developed, produced and distributed. In any event its recommendation is a completely disproportionate response to its concerns about the term of copyright (particularly given its recommendation would apply as soon as a work is created). And indeed appears indifferent to understanding the ways in which the copyright system operates and its relationship to production and remuneration for use.

'Normal exploitation' includes secondary and future exploitation

The Commission recognises the importance of the term 'normal exploitation', an international standard for enabling exceptions to rights:

The fair use exception should be open ended and based on a number of fairness factors, which the courts would consider when testing whether a use of copyright material interferes with the normal exploitation of the work.

But the Commission has missed two key elements of the concept of 'normal exploitation':

1. it applies to secondary as well as primary mechanisms for generating revenue; and
2. it applies to likely future forms of exploitation as well as current exploitation.

The meaning of 'normal exploitation' was considered in detail by a World Trade Organization panel that determined a dispute between the European Union and the United States.¹³ The Panel found that the term, as used in international treaties, has both an empirical and a normative element.

On the empirical element, it rejected arguments that 'normal exploitation' is confined to 'primary' sources of revenue:

If a copyright owner is entitled to a royalty for music broadcast over the radio, why should the copyright owner be deprived of remuneration which would otherwise be earned, when a significant number of radio broadcasts are amplified to customers of a variety of commercial establishments no doubt for the benefit of the businesses being conducted in those establishments.

On the normative element it said:

... one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.

A consequence of the Commission's misunderstanding is that its formulation of a 'fair use' exception is at completely at odds with international standards on which Australia has always been a vigorous proponent and adherent.

¹³ https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf

PC 'fair use' examples are happening in Australia or controversial in the US

The draft report gives the following examples of activities that it says are, or could be, allowed by the 'fair use' exception in the US.

Most of these activities are already occurring in Australia. Those which are not are controversial in the US.

PC example	comment
An Internet search engine publishes thumbnail images of websites in its search results.	<p>Search engines publish images (including thumbnails) to Australians who use their facilities. Introducing a fair use exception would not result in any change for 'discovery' of images by users of search facilities.</p> <p>Publication of high-resolution images is controversial, as indicated by the litigation recently instigated by Getty against Google in Europe,¹⁴ and the introduction of legislation in France.¹⁵ In general, creators of images are fine with search engines as a mechanism for discovery, but only if there is a clear path to acquiring a licence if one is required. Users of search facilities may, of course, choose to use images that are released under 'open' licences such as Creative Commons licences.</p>
An author quotes a number of unpublished letters and journal entries in a biography.	<p>The right to choose if and how a work is first made available to the public is an important copyright right. For this reason, the fact that a work is unpublished weighs against 'fair dealing' in Australia, and against 'fair use' in the US.¹⁶</p> <p>In Australia, an author can use a quote that is not a 'substantial part' of a work, and can, of course, describe the contents of document such as letters and diaries.</p>
An artist creates a collage using images from a photography book.	<p>The court decision in <i>Cariou v Prince</i> (to which this example presumably refers) was extremely controversial in the US. The artist sold barely altered photographic images for millions of dollars without any payment to the photographer.</p> <p>And the court's approach was criticised by another court assessing a similar situation, suggesting a different outcome if the case had been brought before that court.¹⁷</p>
A database of TV clips enables users to search broadcasts using keywords, and then view a clip containing the keywords.	<p>This example appears to refer to the TVEyes service, which is the subject of continuing litigation with Fox News. Fox News has said it 'is not objecting to providing search to help find content, but rather to the delivery of high-definition video clips'.</p>

¹⁴ <http://cpip.gmu.edu/2016/05/03/google-image-search-and-the-misappropriation-of-copyrighted-images/>

¹⁵ France has introduced a bill on freedom of creation, architecture, and cultural heritage, which includes an 'ancillary right' for images: <http://www.senat.fr/petite-loi-ameli/2015-2016/341.html>

¹⁶ The Standard Universities Libraries guide to fair use says: 'The scope of fair use is narrower for unpublished works because an author has the right to control the first public appearance of his or her expression.': <http://fairuse.stanford.edu/overview/fair-use/four-factors>

¹⁷ Seventh Circuit Criticizes Second Circuit's "Transformative Use" Approach to Fair Use: <http://www.proskauer.com/news/detail.aspx?news=12849>

PC example	comment
Scenes from a film are used in a subsequent biographical film about the lead actor.	Australian films include clips from other films.
An election advertisement uses a sample of a song used in an opponent's advertisement.	The use of music is licensed by APRA AMCOS and owners of copyright in music recordings. The use of music for political purposes is very controversial in the US, as it is in Australia. Songwriters are rightly concerned that their reputations not be associated with political positions they regard as abhorrent.
A rap song pays homage to another well-known song by using the opening lyrics.	Music samples are licensed in Australia by APRA AMCOS and owners of copyright in music recordings.
Researchers access a database for text and data mining.	To the extent that text and data mining is not covered by existing exceptions, it should be considered as a particular issue (as it was in the UK, and is being considered in the European Union), rather than as part of a grab bag of disparate issues that have quite different policy considerations and different potential solutions (including non-legislative ones).
A teacher wants to record a specific TV or radio news program for use in class.	These activities are all allowed by Australia's statutory licensing arrangements for the education sector, which deliver much broader entitlements to teachers to copy and share content than arrangements in the US.
A teacher copies a chapter of a book for inclusion in a set of class materials (30 copies).	
A teacher scans pages from textbooks to use in their lessons via an interactive whiteboard.	
A school library copies thumbnail images of books from the Internet for use in online library catalogue.	

Unpredictability of 'fair use' exception

Much has been written about the unpredictability of the US fair use exception in the US courts. This includes different views in different court circuits about the proper interpretation of the law.¹⁸

Of particular interest in this context is practical guides to fair use. The Commission says:

Fair use guides have been developed to foster certainty for users.

The Stanford Universities Libraries online guide to Copyright and Fair use says:

Unfortunately, the only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in federal court. Judges use four factors to resolve fair use disputes, as discussed in detail below. It's important to

¹⁸ Seventh Circuit Criticizes Second Circuit's "Transformative Use" Approach to Fair Use:
<http://www.proskauer.com/news/detail.aspx?news=12849>

*understand that these factors are only guidelines that courts are free to adapt to particular situations on a case-by-case basis. In other words, a judge has a great deal of freedom when making a fair use determination, so the outcome in any given case can be hard to predict.*¹⁹

Similarly, the University of Central Florida says on its webpage for students:

*It is not advisable to apply this four-pronged test [for fair use] yourself, since it is highly subjective and may not stand up in a court of law.*²⁰

The US Copyright Office, in its report on mass digitisation²¹ said the fair use exception was 'ill-suited' for mass digitisation projects:

*Thus, as a means of providing a coherent and reliable set of standards to govern the broad variety of digitization activities throughout the marketplace, fair use appears ill-suited. ... And that unpredictability will slow the development of future mass digitization projects by dissuading litigation-averse users from undertaking such activities.*²²

The Copyright Office also noted the divergence of views in the courts about the proper application of the 'fair use' exception, particularly regarding 'transformative use':

*Nor is the uncertainty in this area necessarily limited to questions of how settled legal principles should apply to particular facts. The Seventh Circuit recently questioned the broad application of the "transformative use" standard that underlies much of the case law on which fair use proponents rely. Specifically, the court noted the potential overlap between transformative use and the author's right to prepare or authorize derivative works.*²³

The Copyright Office also highlighted the limitations of 'codes of best practice' developed by fair use proponents:

*Given that they typically are developed without the input of copyright owners, these codes cannot reflect an industry-wide consensus as to the lawfulness of the uses they describe, let alone a judicial determination.*²⁴

We suggest it is simply not available to the Commission to ignore such fundamentally important commentaries in arriving at its recommendations.

Consequences of uncertainties inherent in a 'fair use' exception

Consequences include:

- people will not rely on the section because they are anxious about its uncertainties: in Australia, cultural institutions have reported being reluctant to rely on the Australian section 200AB provision (which specifies the purposes for which it is available, but involves a similar assessment of 'fairness' factors as required by 'fair use'); and

¹⁹ <http://fairuse.stanford.edu/overview/fair-use/four-factors/>

²⁰ <https://library.ucf.edu/news/fair-use-week-2016/>

²¹ <http://copyright.gov/orphan/reports/orphan-works2015.pdf>

²² At page 76.

²³ At page 77

²⁴ At page 78

- the opposite: importantly, people will infringe copyright because they think the ‘fair use’ exception applies when it doesn’t. Access under Australian copyright system that is not available in the US

The US copyright system is not ‘best practice’ in terms of access to copyright content.

There are aspects of Australia’s copyright system that were world-leading when introduced and remain so. These include the provisions that allow copying and sharing in the following sectors:

- education;
- governments;
- libraries; and
- people with disabilities.

Cost-benefit analysis of introducing a ‘fair use’ exception

The draft report refers to a cost-benefit analysis of introducing a US-style ‘fair use’ exception, prepared by PwC and provided to the Commission by Copyright Agency and others. The draft report refers to five ‘shortcomings’, to which we respond below.

Commission’s comment	Response
<p>The report assumes the current copyright settings are optimal, and the balance between the incentives to creators and the costs to users are correct. However, the Commission’s analysis in the previous chapter shows that copyright is both excessively long in duration and broad in its coverage. As a result, the sector attracts resources that would likely be used more efficiently elsewhere in the economy and at a higher cost to consumers.</p>	<p>The report quite properly conducts a cost-benefit analysis using the status quo as the base case. This is consistent with the guidelines from the Office of Best Practice Regulation.²⁵</p> <p>PwC found no evidence to support benefits from the introduction of a US-style ‘fair use’ exception that outweighed the costs.</p> <p>The Commission’s ‘finding’ that copyright is ‘excessively long in duration and broad in its coverage’ is not really relevant to the exercise, but in any event is underpinned by flawed assumptions and misunderstandings.</p>
<p>The report conflates fair use and third party use. While in Australia the ALRC has proposed that education be added to the list of illustrative fair use purposes, not all education purposes will be considered fair, and Australian courts will make</p>	<p>In Canada, the education sector has decided that changes to the law mean that it no longer needs to pay licence fees to Canadian publishers and authors. The courts may eventually take a different view, but in the meantime the actions of the education sector are having a significant deleterious effect on</p>

²⁵ The Best Practice Regulation Handbook says: ‘Most regulation impact statements use the status quo as the benchmark for assessing the costs and benefits of each option. Adopting this approach will allow you to clearly identify the extent of the net benefit that would result from implementing the preferred option’ and ‘To assess the costs, benefits and, where appropriate, the level of risk associated with each option, you must present a clear picture of how each option would change the status quo.’

Commission's comment	Response
judgements based on the facts of each case.	Canadian educational publishing that are probably irreversible. ²⁶
Significant contextual differences exist between the Canadian and Australian publishing industries, and it cannot be assumed that the market situation in Canada would be replicated in Australia. In particular, Australia is not bordered by the US, which houses the world's largest English-speaking publishing industry, and was presumably able and willing to supply the Canadian market following changes in Canadian copyright laws.	It is a fact that the Canadian education sector stopped paying licence fees, and that as a direct result, revenue to Canadian publishers and authors declined to a significant extent. The Australian education sector seeks the introduction of a US style 'fair use' exception in order to reduce its licence fees. The effect on Australian publishing of Australian resources may in fact be worse than it has been in Canada because the markets and margins are even smaller here. The result is fewer <i>Australian</i> resources for Australian students.
There is debate about the extent to which all of the declines in the Canadian publishing sector can be ascribed to changes in Canadian copyright law.	Other developments may well have affected Canadian publishing, but the analysis focuses on the effects of the changes to Canadian copyright law, particularly on the production of new Canadian works. The changes to Canadian copyright law were clearly the most disruptive development to hit the industry. It is not open to the Commission to ignore the core evidence and the 'before and after' outcomes.
The cost-benefit benefit analysis was methodologically flawed. For example, it concentrated on potential impacts on publishing, ignoring the fact that fair use would apply to all of the copyright industries.	PwC conducted a literature review on all copyright industries, and identified areas in which there was evidence enabling quantification. The experience in Canada is a 'natural experiment', showing what actually occurred following legal changes of the kind advocated by the Commission. It shows, among other things, how consequences of change can deviate from stated intentions (for example, the education sector said, prior to the changes, that it would continue to pay licence fees). ²⁷

²⁶ See, for example, Access Copyright vs York University: High Stakes for Canadian Culture: <https://hughstephensblog.net/2016/05/30/access-copyright-vs-york-university-high-stakes-for-canadian-culture/>

²⁷ During the passage of amendments to Canadian copyright legislation, education authorities said:
There are processes in place via the Copyright Board for things like Access Copyright and rates to be struck for the photocopying of material.

Commission's comment	Response
	The analysis found no evidence to support benefits, in any sector, that outweighed costs. Studies cited by proponents of 'fair use' do not provide such evidence (and in fact, when viewed in context, do quite the opposite).
The cost benefit analysis also implicitly assumes a closed economy model where transfers represent a redistribution of welfare between consumers and producers without a change in overall welfare. However, as a large net importer of copyright material, transfers from Australian consumers to foreign producers do affect community welfare.	Most of Copyright Agency's distributions are paid to Australian recipients. This means a reduction in licence fees affects production of new works in Australia. Fair use exceptions do benefit multinational technology companies like Google, making it more difficult for local content creators to negotiate reasonable licence fees.

CHANGES SHOULD BE EVIDENCE-BASED

The Commission says that *changes* to the IP system should be 'evidence-based'.

The Commission's recommendations for changes to the copyright system are not, however, based on evidence but rather on economic theory (without clear declaration) and simple, often unsupported, assertions by proponents for diluting the system.

The PwC report found that there was no evidence supporting benefits of introducing a US-style 'fair use' exception into Australian copyright law.

The Commission has not cited any evidence to the contrary. In fact it discounts studies that purport to show the 'benefits' of 'fair use', noting their

assumptions are questionable, and others have strongly repudiated these figures on several reasonable grounds, including the artificiality of the choice in growth rates and the theoretical linkage between relaxed exceptions and better long-term consumer outcomes.

And the report demonstrates that the Commission has not begun to grasp how the system – a very complex ecosystem with many variables and dependencies – works in practice. As a consequence, the Commission is unusually ill-equipped to predict the consequences of its recommendations, and to assess the risk of the inevitable unintended consequences.

We don't believe in any way that this bill would change that. All of those processes will be in place. We would not anticipate that this bill would in any way reduce the amount of money the education sector would be putting into these efforts. We think it's cost-neutral in that respect.

See evidence by representatives of the Canadian Council of Ministers of Education (CMEC) to a Parliamentary Committee in 2011 on provisions in Bill C-32 which were substantially enacted as part of the Copyright Modernization Act in 2012. There are other similar statements of this kind which we can provide to the Commission.

AUSTRALIA AS A 'NET IMPORTER'

The Commission says:

Overall, given that most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's exceptions, adoption of a fair use provision in Australia is likely to deliver net benefits to the Australian community.

The responsiveness to change will of course be affected by the importance of the Australian market to the creator. Most Australian creators are producing works primarily for the Australian market. Those works are not substitutable by works from overseas.

ACCOUNTABILITY OF COLLECTING SOCIETIES

Copyright Agency's accountability includes:

- to its members, under its Constitution;
- to the Government, as a collecting society appointed to manage statutory licences for education and government, and the artists' resale royalty scheme; and
- to licensees and members under the Code of Conduct for Copyright Collecting Societies.

This includes providing our annual reports to the Minister, who tables them in Parliament. We have from time to time been asked to include additional information in our annual reports by the Minister and the Department to address requests for information about our activities, with which we have always complied.

All information listed in the European Union Directive on collective licensing for inclusion in annual transparency reports is provided in our annual reports and/or on our website.²⁸

Both our licensing and distribution arrangements can be reviewed by the Copyright Tribunal.

Code of Conduct for Collecting Societies

The Code of Conduct for Copyright Collecting Societies was adopted in 2002.

It arose from a recommendation by the 1998 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Don't Stop The Music*, and was developed by collecting societies in consultation with the Government.

Development of the Code took account of a range of standards and other documents including:

- The report of the Task Force on Industry Self-Regulation, released in August 2000, which set out a series of general principles for industry self-regulation, including with respect to consultation, coverage, publicity, administration, disputes and complaints resolution, and monitoring and review.
- Government's *Benchmarks for Industry-based Customer Dispute Resolution* published in 1997.

²⁸ http://ec.europa.eu/internal_market/copyright/management/index_en.htm

- The Consumer Affairs publication *Codes of Conduct Policy Framework* published in 1998.
- Australian Standard 4269 on Complaints Handling.
- Examples of codes of conduct from other industries, especially the telecommunications industry, as it had a great deal of experience with codes (e.g. use was made of documents produced by the Australian Communications Industry Forum (ACIF), which published code development guidelines and various other tools for the development of codes in the telecommunications industry).
- The constitutions and/or Articles of Association of each collecting which already imposed significant obligations, particularly in respect of corporate governance and accountability.
- The Attorney-General's guidelines for declared collecting societies.
- various statements of the Government's principles, objectives and expectations.

A Code Reviewer is appointed by the collecting societies. The current Code Reviewer is a former judge of the Federal Court and former President of the Copyright Tribunal (as was the previous Code Reviewer).

Collecting societies report annually to the Code Reviewer on their compliance with the Code. Any other affected stakeholder, including members and licensees, can also make submissions or representations to the Code Reviewer. The review is advertised, and there is a public hearing.

There is also a triennial review of the provisions of the Code, which enables the Code to be amended from time to time (for example, amendments were made to accommodate the artists' resale royalty scheme, which Copyright Agency was appointed to manage in 2010).

The Code Reviewer's reports on collecting societies' compliance with the Code, and on the triennial reviews, are published online. The Commission has referred to the recent reports in its draft report.

Information to licensees

Schools and universities participate in surveys of usage, carried out in statistical samples of schools and universities by an independent research company. All data provided is available to schools and universities respectively under data access protocols.

Recently, the schools sector, through the Copyright Advisory Group to the COAG Education Council (CAG), requested additional information that is largely derived from our research rather than from data provided by teachers: the name of the publisher for works recorded as used in schools. We agreed to provide that information. CAG sought the information to assist it to contact publishers with requests for permission to use their content (rather than relying on the statutory licence scheme).

Data about usage of content in the government sector has been limited in recent years. We have therefore distributed licence fees in accordance with content likely to have been used in the sector, based on information from a variety of sources. Information about how we distribute licence fees is available on our website.

The NSW Government has sought information about payments to individual recipients. Our position is that, consistently with obligations to members in the Code of Conduct, we should not do this without the consent of the recipients concerned.

The NSW Government and CAG also requested additional information about distributions of licence fees in our annual report, which we provided in our recent annual report (and will continue to include):

- a more detailed breakdown of primary recipients of licence fees (at page 26);
- a breakdown of recipients of licence fees paid by governments (on page 28); and
- a breakdown of funds held in trust, by licence fee source (pages 35 and 36).

These requests for information are discussed by the Code Reviewer in his report on the 2014 triennial review of the text of the Code, to which the Commission referred in its draft report.

SUMMARY OF RESPONSES TO ‘FINDINGS’ AND RECOMMENDATIONS

The following summarises our responses to each of the ‘findings’ and recommendations from our submission above.

Draft finding 4.1: ‘expansion’ of copyright system

The Commission’s concern is essentially confined to the extension of the term of protection from life plus 50 to 70 years, which resulted from the Australia–US Free Trade Agreement. That change prompted a government review of exceptions, and the introduction of a range of new exceptions in 2006. The ‘balancing’ has already occurred. Any residual concern should be directed at the extended period, not the entire period of copyright.

Draft finding 4.2: ‘reasonable’ copyright term

This ‘finding’ demonstrates how little the Commission understands about how the copyright system works. In particular, it misunderstands the ‘incubation’ period between creation and dissemination of the initial form of release (e.g. a book), and multiple revenue streams (e.g. film rights, audio book, translations) and diverse commercial applications and uses of work over very extended periods. The Commission is simply wrong..

Draft recommendation 4.1: unpublished works

This change is already in a draft Bill circulated as an Exposure Draft, reflecting a consensus position.

Draft recommendation 5.1: geoblocking

Members of Copyright Agency support the position of the Australian Copyright Council, opposing this recommendation.

Draft recommendation 5.2: parallel importation of books

Members of Copyright Agency oppose repeal of the parallel importation provisions for the reasons set out in submissions from Australian Society of Authors and Australian Publishers Association.

Draft recommendation 5.3: introduce a new ‘fair use’ exception

This recommendation is based on an ideological position rather than evidence. It is also based on a series of misunderstandings, including about how the Australian copyright system works, how the US copyright system works, and how the two compare. The Commission’s suggestions for reducing the inevitable uncertainty are naïve and in our view indisputably wrong.

Draft recommendation 14.1: repeal s51(3)

The Commission has not cited any evidence to support this change.

Draft recommendation 15.1: open access policy

There are some complex issues regarding open access, including incentives for adding value to ‘raw’ content. We encourage the Commission to learn more from the various classes of people affected, including students, academics, universities and people offering various forms of publishing services before advancing such far-reaching recommendations and risking unintended consequences.

Draft recommendation 17.1: support global cooperation

Australia has always remained closely involved with the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), for example through participation at the WIPO Standing Committee on Copyright and Related Rights (SCCR) meetings.

Draft recommendation 18.1: expand safe harbour scheme

We oppose the extension of the safe harbour scheme to benefit multinational technology companies, and note the current reviews of safe harbour schemes in the US, UK and EU.²⁹

Draft finding 18.1: relationship between access and online infringement

The Commission must take account of the evidence that people consume music from unauthorised sources despite practically all music being available to them from legitimate sources.

²⁹ See, for example: <https://torrentfreak.com/u-s-govt-reviews-impact-and-efficacy-of-dmca-safe-harbor-160105/>; <http://musically.com/2015/11/16/why-safe-harbour-will-be-the-music-industrys-big-battle-in-2016/>; <http://the1709blog.blogspot.com.au/2016/04/ifpi-global-music-report-2016.html>; <http://www.billboard.com/articles/business/7318658/music-industry-stars-congress-reform-copyright-act>; <http://arstechnica.co.uk/tech-policy/2015/09/riaa-chief-says-dmca-is-largely-useless-to-combat-music-piracy/>

SUMMARY OF RESPONSES TO INFORMATION REQUESTS

Information request 5.1: contract ‘override’ of exceptions

We do not have any information about copyright licence conditions that ‘override’ copyright exceptions. We note, however, that this issue may sometimes be exaggerated because people have interpreted their contracts too restrictively.³⁰ Libraries and archives can, of course, negotiate contracts before they sign them.

An unintended consequence of legal changes can be that people misinterpret the change, and infringe copyright in accordance with that misinterpretation. This is a risk with introducing a ‘fair use’ exception, for example, because people are unlikely to understand that the ‘fairness’ assessment is a technical and complex exercise.

Information request 5.3: simplification of government statutory licence

We proposed simplification of the government statutory licence in our response to the issues paper.

Information request 16.3: model agreement

In our experience, Australia’s negotiating position on copyright provisions in free trade agreements (with the exception of Australia–US Free Trade Agreement) has been to avoid any commitments that require changes to Australian law.

³⁰ See, for example, Carter, Peden and Stammer, ‘Contractual Restrictions and Rights under Copyright Legislation’ (2007) 23 *Journal of Contract Law* at page 32.

APPENDIX 1: ACADEMICS' CRITICISM OF PWC REPORT

The Commission has received a submission, *Evaluating the benefits of fair use: a response to the PwC report on the costs and benefits of "fair use"*, from a group of law academics who are proponents of the expansion of the US 'fair use' exception: both the expansion by courts in the US, and the introduction into other countries.

The PwC report, *Understanding the costs and benefits of introducing a 'fair use' exception*:

- sets out the proper approach, in economic terms, for doing a cost-benefit analysis (CBA) in this context (e.g. factors that are and are not relevant); and
- evaluates the costs and benefits of introducing an exception like 'fair use' into Australia.

The academics have not understood the PwC's explanation of benefits that are relevant to a cost-benefit analysis (CBA): for example that a reduction in price is regarded as a just a 'transfer' from the licensor to the licensee.

The academics argue that the effect of introducing fair use would be small, because it would be a minor adjustment to our existing fair dealing exceptions. If that were the case, proponents of fair use, such as the multinational technology companies, would not be advocating so hard for it. They want to develop business products with content inputs that they do not have to pay for.

The academics do not acknowledge that fair use in the US is controversial, particularly the courts' extension of the 'transformative use' concept from the creation of new content to the repurposing of unchanged content, and the absence of an alternative 'middle way'. They make no reference to the Copyright Office report on mass digitisation that said fair use was an inadequate solution for mass digitisation, and that the US should instead adopt an extended collective licensing framework to enable licensing solutions.

The academics cite studies on the 'benefits' of fair use but (as noted above) the Productivity Commission has discounted those studies.

The academics do not dispute the developments in Canada following changes to the law, but argue that the cessation of licence fees is beneficial. They do not refute the finding that cessation of licence fees leads to reduction in production of new works (particularly new Canadian works).

Below we respond to particular points made by the academics.

'Identifying the independent variable: defining fair use'

The academics say:

The report fails to adequately define the nature of the real change being proposed in Australia – which is effectively to subject its existing fair dealing clause to an open list of potentially lawful purposes.

They say the change would be 'relatively moderate'.

They miss a few key points though:

- recent controversial cases in the US – such as the Google Books case, the Georgia State university case, and the Cariou v Richard Prince case – would have different outcomes in Australia
- the US courts' expansion of the 'fair use' exception has been extensively criticised in the US
- the US Copyright Office has said that the 'fair use' exception is 'ill-suited' for mass digitisation projects like Google Books, and recommended a licensing solution based on developments elsewhere
- changes to the law in Canada resulted in cessation of licence fees to Canadian authors and publishers
- Australia has the most generous access provisions for the education sector in the developed world (which also enable investment in new content for the benefit of that sector)

'Valuing the benefits of openness'

The arguments argue that there are:

a range of benefits that the opening of Australia's fair dealing clause to resemble the U.S. fair use doctrine may have, drawing from published research on the topic which is not canvassed by the PWC Report.

Again, the law academics misunderstood PwC's explanation of the proper way to do a CBA. PwC said the core task of its analysis was:

to determine, based on the available evidence, whether it is likely that the economic benefits arising from secondary use will more than offset the economic loss for original local producers.

PwC found, on balance, that the costs would outweigh the benefits.

The academics cite a number of instances in which they say

the U.S. fair use clause gave innovators and investors a relatively high level of confidence in the capacity of fair use to adjust to and accommodate a beneficial technology well in advance of the issue being tested.

They cite a number of instances in which courts found the fair use exception applied. In many cases, of course, litigation is extremely protracted and expensive. As noted above, the Google Books litigation not only lasted a decade and cost of fortune, but ended up delivering a far inferior service to consumers than a licensing solution would have enabled.

A very important question, as noted recently by Professor Ian Hargreaves (who headed a UK inquiry into intellectual property in 2011), is whether the socially beneficial purposes for which content can be used without permission are identified by Parliament or the courts. These purposes, and the conditions that apply, can be technology-neutral and thus adaptable to changing technologies (as is the case with most of Australia's current exceptions).

And as we noted in our submission on the Commission's Issues Paper, the 2014 report on Australia's innovation system from the Chief Economist of the Department of Industry recognises that Australian firms are innovative, particularly in the SME sector, but could do better. It identifies six key impediments to innovation in Australia, none of which is Australia's copyright system.

‘Diffuse and third-party benefits’

The academics do not refute the cessation of licensing fees from the Canadian education sector authors and publishers, but argue that there are ‘diffuse and third party positive benefits’ such as to ‘others in the users’ community with whom users have interdependent relations’. Those benefits are, of course, equally delivered by educational access through licensing arrangements.

‘Correcting market failure’

It is not disputed that there should be exceptions that allow the use of content for socially beneficial purposes where such uses are not licensed. The best way to achieve that is, however, disputed. And the US courts’ development of the ‘fair use’ exception has resulted a scenario in which ‘repurposing’ is the only consideration, even if the use is (or could be) licensed.

Analysing the costs of fair use

The PwC report does, in fact, assess the implications of introducing a US-style fair use exception: that is, moving from exceptions that allow the socially beneficial purposes identified by Parliament to an exception that allows use of content for *any* purpose. It does this by looking at the actual experience in countries that have made legal changes.

The changes in Canada did result in a cessation of licensing fees to Canadian authors and publishers. The academics do not dispute this but say that the ‘reduced costs are likely to have other positive impacts in Canada in terms of increased access and reduced cost of education’.

It is difficult to see how there would be *increased* access give the breadth of the statutory licence.

The reduced cost to the education sector is miniscule in comparison with the overall costs of education. Of the \$25.8B of expenditure in Universities in 2014, the copyright fee of \$30.7M was 0.12%. Similarly, copyright fees for the schools sector is less than 0.15% of the costs of educating a school student.

The academics say ‘independent analysis documents that the publishing industry in Canada is doing well’, but that analysis is by proponents of fair use, and is difficult to reconcile ‘doing well’ with the closure of the Oxford University Press K–12 division.

Collective Management Organisations

PwC said:

A likely consequence of moving to fair use in Australia is lost economies of scale, especially for professional creators, resulting in overall higher transaction costs for creators and users.

In Canada one collecting society for the education sector closed its doors following changes to the law, and another (Access Copyright) has severely curtailed its licensing operations, and is embroiled in a series of court actions. It is definitely not ‘thriving’.

Litigation

As we noted in our submission on the Commission’s Issues Paper:

The filing of copyright court cases in the US is vastly greater per capita than in Australia, and the fair use exception is raised in a significant and growing proportion of them. An analysis of copyright cases filed in the US in 2014 alone showed a defence of 'fair use' was raised in 43% of the defended cases. By contrast, an analysis of reported cases of the Australian Federal Court between 2006 and 2012 showed that 94 involved copyright, but only four of those referred to a copyright exception as a key issue.