

Sub 4 – COAG Education Council – 21 Oct 2016

Dear Committee

Thank you for the opportunity to give evidence to the Joint Standing Committee on Treaties' TPP hearing on Monday 17 October on behalf of the COAG Education Council's Copyright Advisory Group (CAG). At that hearing I undertook to provide the Committee with further information, which is set out in this email.

1. PWC report on fair use and claims about the Canadian publishing sector

I was asked by Ms Templeton to comment on research conducted in Australia by PwC on behalf of some rights holder organisations and claims in relation to what has happened in Canada.

I undertook to provide the Committee with CAG's submissions to the recent Productivity Commission review, which addressed a similar report by PwC in Canada in relation to claims made about the economic impact of copyright reform in Canada.

CAG made three submissions to the Productivity Commission:

- Submission to the public inquiry: http://www.pc.gov.au/data/assets/pdf_file/0010/194851/sub097-intellectual-property.pdf
- Submission to the draft report: http://www.pc.gov.au/data/assets/pdf_file/0011/201116/subdr429-intellectual-property.pdf
- Supplementary submission arising from matters discussed at public hearing: http://www.pc.gov.au/data/assets/pdf_file/0004/202288/subdr429-intellectual-property-attachment.pdf

I have attached to this email CAG's submission to the draft report. Part 3 of that submission (pp 13-26) is most relevant to the Committee's questions about these issues. I have also attached Attachment D to CAG's initial submission to the Productivity Commission, which contains our detailed response to what we consider to be misleading claims made by some organisations to the Commission in relation to the Canadian experience.

I also wish to draw the Committee's attention to page 151 of the Productivity Commission's draft report, which specifically addressed the Australian PwC research cited by Ms Templeman:

Box 5.9 Industry assessment of the costs and benefits of fair use

APRA AMCOS, Copyright Agency, Foxtel, News Corp Australia, PPCA and Screenrights commissioned PricewaterhouseCoopers to undertake an assessment of the ALRC's proposed fair use exception.

Specifically, the PwC report finds: ... an increase in litigation costs, a reduction in Australian publishing and increased transaction costs for licensing. PwC's findings are based, in part, on the experience in two countries where changes similar to those recommended by the ALRC were introduced: Singapore and Canada. In Canada the effects for Canadian educational [publishers] were severe: a 98% reduction in copyright fees for Canadian authors and

publishers and the closure by a major publisher of its Canadian K to 12 publishing operations. PwC also finds no evidence to support offsetting benefits and no evidence that copyright impedes innovation. On the other hand, there is evidence that firms that use intellectual property are more successful and attract more investment than those that don't, and that innovation is driven by certainty of regulation (sub. 133, p. 1).

The analysis has several significant shortcomings:

- First, 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.*
- Second, 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 judgements based on the facts of each case.*
- Third, 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.*
- Fourth, 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 (see below).*
- And finally, the cost-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. 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. Source: APRA AMCOS, Copyright Agency, Foxtel, News Corp Australia, PPCA and Screenrights (sub. 133, att. 1).*

Similar criticisms of the PwC report were made by academic experts in fair use at the American University Washington College of Law, available at <http://infojustice.org/wp-content/uploads/2016/04/Joint-Academic-Reponse-to-PWC-Report-on-Costs-and-Benefits-of-Fair-Use.pdf>.

2. Why Australian schools need fair use

I appreciated the opportunity to highlight for the Committee the difficulties faced in Australian schools which would be resolved by the introduction of a fair use exception. This simple infographic highlights some of the key issues facing schools in the absence of a fair use exception:



As well as the submissions to the Productivity Commission, CAG has explained these issues in great detail in its submissions to the ALRC's copyright review.

- Submission to the Issues
Paper: http://www.alrc.gov.au/sites/default/files/subs/cag_schools_submission_-_ip_42_-_corrected.pdf
- Supplementary submission to the Issues Paper:
http://www.alrc.gov.au/sites/default/files/subs/290._org_supcopyrightadvisorygroupschools.pdf
- Submission to the Discussion
Paper: http://www.alrc.gov.au/sites/default/files/subs/707_org_cag_schools_submission_-_dp79_-_final_version.pdf
- Supplementary submission to the Discussion
Paper: http://www.alrc.gov.au/sites/default/files/subs/861._org_supplementary_copyright_advisory_group-_schools_cag_schools_.pdf

I have attached for ease of reference just the Executive Summaries of the two main submissions to the ALRC's issues and discussion papers.

3. Summary of the need for copyright reform.

I gave evidence of some of the challenges facing Australian schools, and how CAG believes that Australia cannot be fully compliant with the IP chapter of the TPP without:

1. Passing the *Copyright Amendment (Disability and Other Measures) Bill* to ensure that the safe harbour provisions cover all providers of online services, including schools; and
2. Introducing a fair use exception - as previously recommended by JSCOT - to ensure that Australia's laws reflect a proper balance between the interests of rights holders and the wider public interest, as required by the TPP.

Please let me know if I can assist the Committee in any other way.

Kind regards

Delia Browne

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COAG Education Council

Got a copyright question? See the Smartcopying website at:
www.smartcopying.edu.au - the official guide to copyright issues for Australian schools and TAFEs