



Submission to Senate Standing Committee on Environment and Communications

Inquiry into the *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013*

30 August 2013

News Corp Australia welcomes the opportunity to make a submission to the Senate Environment and Communications Legislation Committee (the Committee) inquiry into the *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013* (the Bill).

As we have stated in various fora, News Corp Australia strongly believes that the orderly management of copyright is essential to promote the continued production of original copyright materials, to ensure sustainable business models and on-going investment and employment in Australia's creative industries. As the Bill does not advance this approach, and would very likely erode content creation and its economic and cultural benefits to Australia, we urge the Committee to reject it.

Specifically, we observe that the while the Bill purportedly '*seeks to balance the rights of content holders and creators to benefit from the commercial sale of their creative works, and the rights of citizens to share and create information in the digital age*¹', the effect of the Bill would actually be contrary to its objectives. We are concerned that the Bill does nothing to enhance the existing copyright provisions, and would actually undermine the existing balance encompassed in the *Copyright Act* (the Act) by:

- Watering down the protections and rights afforded to artists and authors, and overriding the right for artists and authors to decide how their work could be distributed through the proposed introduction of a 'fair use' defence; and
- Expanding the safe harbour scheme, which would provide 'safe harbour' legal protections to intermediaries, who serve to benefit commercially from increased volume and use (legitimate or otherwise) of copyright material for which they seek legal protection – for (allegedly) merely 'carrying' and 'facilitating'.

We are also alarmed that the Bill contends to support creators and artists but does not include provisions to address the substantive matter of online copyright infringement which is well understood globally, and is already addressed in various international jurisdictions. Notwithstanding this, we are also concerned that a 'fair use' defence would likely serve to exacerbate online copyright infringement, as 'fair use' appears to normalise and increase infringing behaviour – which does nothing to support and protect content creators and rights holders.

Again, we urge the Committee to critically assess the Bill, and reject it, for the following reasons:

¹ Explanatory Memorandum, *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013*

The Bill pre-empts existing Government reviews and processes

The Bill pre-empts a number of Government reviews and consultations regarding the important issues that the Bill seeks to 'address'. We believe that the processes currently being undertaken must be allowed to be concluded in full prior to the consideration of legislation – if in fact legislation could or would be an appropriate response.

Those reviews and consultations include:

- Australian Law Reform Commission (ALRC) inquiry, *Copyright and the Digital Economy*
- Attorney General's Department consultation, *Revising the Scope of the Safe Harbour Scheme*
- Attorney General's Department consultation, *Review of Technological Protection Measures Exception Made under the Copyright Act*
- House of Representatives Standing Committee on Infrastructure and Communications, *Inquiry into IT Pricing*.

While The Greens acknowledge the ALRC copyright inquiry², it is also important to draw attention to what appears to be disregard to the real impact and outcomes of the introduction of substantial and significant legislative amendment regarding copyright – in advance of the conclusion of the ALRC report and any subsequent Government response. Specifically it is stated:

'The Greens believe that testing how fair use might translate to the Australian legal system is worth beginning in parallel with that process'³.

The economic contribution of the copyright industries to Australia is significant, and was reported to be \$93.2 billion in 2011, which represented 6.6 per cent of GDP⁴. It is the case that we do not support proposals that take such a cavalier approach, and threaten to undermine the creative industries in Australia. On this basis alone, we urge the Committee to reject the Bill.

The Bill is not based on sound policy principles

To our knowledge, the Bill has not been borne of sound policy processes and is not based on robust policy principles.

For example, the materials associated with the Bill, and the Bill itself, lack:

- Evidence and analysis of the issues that need to be 'addressed';
- Quantification of the size of the market failure;
- Consideration of whether – or not – a response is required;
- Consideration of the appropriate – proportionate – response, which could include supporting existing regulations and legislation to deliver improved outcomes; a self-regulatory response, a co-regulatory response, a regulatory response, or a legislative response;
- A cost-benefit analysis; and
- Consultation throughout the policy/legislation making process.

² Senate Hansard, Senator Ludlum, Second Reading Speech, *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013*, 27 June 2013, p4243

³ Ibid

⁴ PWC, 2012, *The Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11*, <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

Furthermore, the Bill does not consider the interaction and consequences the interaction of a proposed 'fair use' provision with the existing fair dealing provisions in the Act.

The Bill does not address the evidenced issue of online copyright infringement, and the necessity for amendment to protect rights of creators

News Corp Australia has previously put to the ALRC that immediate attention must be given to addressing known deficiencies in the copyright ecosystem, including that of online copyright infringement⁵, in a timely manner.

These illegal activities undermine investment in the production and distribution of content, which impacts employment in the sector and also outputs and benefits to consumers. The widespread incidence of online copyright infringement poses a real risk of making digital distribution a less attractive channel for rights holders. Therefore the opportunities provided by digital technologies to support and grow the creative sector are also undermined.

Legislative amendments required to address online copyright infringement

Unfortunately, the Bill has overlooked the opportunity to address the two core elements of online copyright infringement:

i. Peer-to-peer

The current copyright law is unable to deal with the problems of peer-to-peer online copyright infringement as they present today. This was acknowledged by the High Court in the iiNet case.⁶

Despite protracted negotiations between ISPs and content owners, facilitated by the Attorney-General's Department, no ISP code to address P2P piracy has been progressed. Further, the roundtable process has broken down. Legislative amendment is required to enable a code to be developed.

ii. Websites that illegally make available content by streaming or download

There is no mechanism to apply for a court order for ISPs to limit consumer access to sites that make available material that infringes copyright. Legislative amendment is required to permit rights holders to protect their rights and protect consumers from these sites.

A defence for infringement is not an appropriate basis for law – and will likely exacerbate online copyright infringement

News Corp Australia does not believe that a broad defence for infringement, fair use, is an appropriate basis for copyright law in Australia. To put it another way, it is not appropriate – and we do not support – that all copyright use be deemed 'fair' unless proven otherwise.

⁵ Evidence of the widespread nature of online copyright infringement is well documented, and we refer the Committee to our submission to the ALRC Issues Paper for details

⁶ Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16 para 79

We believe that ‘inverting’ the law through ‘fair use’ such does not address the evidenced issue of online copyright infringement – in fact it is more likely to normalise a range of misappropriating behaviours – many of which are indeed infringements of copyright.

If a fair use exception was introduced, it is likely that online copyright theft, which is having a real impact on the industry and the economy would increase – resulting in economic losses to the industry and also impacting domestic tax revenues. According to a report by IPSOS and Oxford Economics, *Economic Consequences of Movie Piracy*,⁷ the magnitude of the issue without a fair use defence, in the 12 months to July 2010 was over \$1.37 billion in lost revenue to the Australian economy as a result of movie theft alone. The study also found that 6,100 jobs were forgone across the entire economy; tax losses to movie theft amounted to \$193 million; and direct consumer spending losses to the movie industry, (cinema owners, local distributors, producers and retailers) amounted to \$575 million.

We hold that Australia’s copyright laws should not be amended to normalise infringing conduct.

The effect of the Bill is contrary to its stated objectives

As referenced above, the Explanatory Memorandum of the Bill states that the Bill *‘seeks to balance the rights of content holders and creators to benefit from the commercial sale of their creative works, and the rights of citizens to share and create information in the digital age’*. The Bill proposes the addition of a ‘fair use’ provision within the Act to achieve this.

However, it appears that the true intent the introduction of ‘fair use’ is encapsulated in Senator Ludlam’s Second Reading Speech in the Senate, which states:

‘Copyright reform is needed to...provide fair rules, fair process and fair opportunities to defend use of copyright material’⁸. (emphasis added)

The significant risk – which the Bill does not consider – is that undermining the balance provided by the existing copyright framework by introducing ‘fair use’ will dilute the current copyright framework and cut to the core of investing in the production and distribution of content, which in turn impacts the contribution of creativity to Australian society and the economy.

The ACCC submission to the Issues Paper observes:

‘To the extent that unauthorised copying and distribution reduces incentives for further investment in commercial copyright materials, then over the longer term, availability for such material could decline. This would offset some of the short term ‘benefits’ to the economy of unauthorised copying. Some empirical studies suggest that consumers benefit considerably in the short term from the availability of low cost copies. However, these studies do not consider the longer term dynamic effects of a potential reduction in incentives for investment in creative materials’⁹.

It is also important to state that the current Australian copyright regime incorporates sufficient flexibility to maximise the benefits of the digital economy. It is the case that there is nothing to inhibit or prevent a content owner from exercising absolute discretion regarding the terms on which that content can be distributed and consumed. ‘Fair use’ however, would erode the ability of

⁷ http://www.afact.org.au/index.php/core/content_protection/who_is_it_harming

⁸ Ibid

⁹ ACCC submission to ALRC Issues Paper, p29

creators to exercise these rights and benefit from the commercial sale and distribution of their creative works, in the manner in which they have chosen.

It should also be noted that the majority of professional content creators exercise their right to decide terms, by actually applying terms and conditions to the sale and distribution of their content. This supports the position that a 'fair use' provision is not the appropriate approach to supporting creators and artists in the digital economy.

Creator, author John Birmingham, in an article about online copyright infringement¹⁰, writes of his personal experience as an author, and the importance of copyright in content creation:

It's the restricted channel that stops the value of the work from dissipating. For instance, when I write a book, I could, I suppose, invite you to my house and read it to you. But that is inefficient. So I allow my publishers to create copies and distribute them. I get paid for each copy thus sold.

Let me repeat that. I get paid for each copy sold. If lots of people buy the copies, I get to write more. My readers get to read more.

I get paid nothing for each copy distributed outside the channels I authorised. I created value by doing the work, but I realised that value by controlling the distribution channel. When you make your own copy you have, quite literally, robbed me of that value.

Please don't expect me to be your friend when you do that. Please don't tell me I actually benefited because it raised my profile or you told your other friends to get the book. And please don't tell me that copyright is dead and I need to develop a new model. I really don't want to have to invite people around to my house and charge entry to the garage where I can do paid readings and sell a few overpriced T-shirts'.

Similarly, author Linda Jaivin, also outlined her personal experience as a content creator and the importance of copyright in *Long story short: Fair use is theft by any other name*¹¹.

We will refrain from entering into chapter and verse analysis of 'fair use' here as the Australian Law Reform Commission (ALRC) is currently undertaking a review of copyright in the digital age, and has received responses to two consultation papers, including detailed responses from News Corp Australia. We refer the Committee to our submissions to these consultations for more detailed analysis of 'fair use'.

The Bill is contrary to The Greens' policy

It is useful to note here that the Bill, while having an effect contrary to its objective – and posing risk to the copyright industry and its economic and cultural contribution to the Australian economy – also appears to be contrary to The Greens' arts policy. That policy, *Standing Up For What Matters*¹², states:

'The arts contribute to the social wellbeing, economy and cultural life of Australia. The

¹⁰ <http://www.smh.com.au/federal-politics/blogs/blunt-instrument/when-you-steal-the-game-of-thrones-you-win-or-you-die-20130408-2hgqy.html>

¹¹ Sydney Morning Herald, 31 July 2013, <http://www.smh.com.au/comment/long-story-short-fair-use-is-theft-by-any-other-name-20130730-2qx6j.html>

¹² http://greensmps.org.au/sites/default/files/election_platform_screen.pdf

*Australian Greens are committed to supporting and promoting Australian artists and their work, and particularly encouraging young and emerging artists as they establish their careers.*¹³

As we have illustrated, the Bill puts at risk the economic contribution of the copyright industries and it also provides a disincentive to investing in content creation and distribution, both in direct terms and also through increased uncertainty. This increased risk does nothing to support and promote Australian artists and their work – in fact it undermines and artists and their work.

Such risks are the antithesis of The Greens' policy released on 26 August 2013, *Young and Emerging Artists*¹⁴, which states:

'The Greens want to ease the pressures on musicians, writers and artists to earn a living wage from their work. After all, creativity enriches everyone's lives'; and

'Many artists are forced into poverty and have a hard time juggling their artistic endeavours with the need to supplement their income through other work. Such pressures mean they might give up their artistic aspirations altogether'.

It is somewhat ironic that The Greens' policy statements, across various policies and documents, avow protecting creators, when the Bill does not actually support the policies, and would lead to converse outcomes, which would likely accelerate artists and creators to abandoning their artistic aspirations.

Last, but by no means least, we return to the statement by Senator Ludlam that indicates clearly that the Bill is indeed contrary to The Greens' policy:

'Copyright reform is needed to...provide fair rules, fair process and fair opportunities to defend use of copyright material'¹⁵. (emphasis added)

News Corp Australia holds that matter of such importance, as copyright is to our economic and cultural prosperity, should not be dealt with in such a slipshod manner, and therefore requests the Committee to reject the Bill.

¹³ Ibid p50

¹⁴ The Greens' *Young and Emerging Artists* policy, launched 26 August 2013, <http://greens.org.au/sites/greens.org.au/files/Young-and-Emerging-Artists.pdf>

¹⁵ Op cit, p4244