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# Evaluating the Benefits of Fair Use: A Response to the PWC Report on the Costs and Benefits of 'Fair Use'

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**EVALUATING THE BENEFITS OF FAIR USE: A  
RESPONSE TO THE PWC REPORT ON THE COSTS  
AND BENEFITS OF “FAIR USE”**

Submitted to:

Australia Productivity Commission

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## INTRODUCTION

We make this submission as members of the Global Expert Network on Copyright User Rights, an international network of academics and copyright experts from across the world coordinated by the Program on Information Justice and Intellectual Property (PIJIP) at American University Washington College of Law (AU|WCL). One of the projects of the network includes an ongoing examination of the impact of fair use on economic, social and cultural development. We write in response to the recently published PricewaterhouseCoopers report on *Understanding the Costs and Benefits of Introducing a ‘Fair Use’ Exception* prepared for APRA, AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights (“PWC Report”). The PWC Report warrants that the researchers “only considered the requirements of these organizations,” indicating that it is not an unbiased or neutral study of the topic. We understand the report has been submitted to the Productivity Commission and is being broadly referenced for the proposition that adopting fair use rights in Australia’s copyright law will do more harm than good.

At the outset, we note that the PWC Report does not even purport to be evidence. Rather, it is an exercise in modelling, applying what it calls “standard economic theory” in a “stylised model” to project hypothetical outcomes. As we explain below, the PWC Report fails on its own terms because its model unreasonably frames costs and benefits and is highly selective in the hypothetical effects that it chooses to count on each side of the ledger. Moreover, as described

herein, it is our conviction that the PWC Report does not provide a sound evidence base to evaluate the true total costs and benefits that the introduction of a fair use rights would have in Australia.

- Part I points out how the PWC 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.
- Part II provides a survey of 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.
- Part III analyses the PWC Report’s evaluation of the costs of adopting fair use, criticizing the Report’s basis for concluding that adopting fair use will lead to massive shifts from licensed to unlicensed use of works, a litigation explosion and the destruction of all collective management organizations in Australia.

Ultimately, evaluating the impacts of fair use, or any specific policy change, is hard work. The diffuse and forward-looking benefits of open exceptions like fair use may be hard to measure, but they are no less real. The PWC’s evaluation of the costs and benefits of fair use are not real. It is full of imagined horror stories that are unlikely to take place in fact and should be disregarded in their entirety.

#### I. IDENTIFYING THE INDEPENDENT VARIABLE: DEFINING FAIR USE

In order to complete an impact analysis of any policy change it is of crucial importance to define what that change being measured is relative to the baseline of what exists now. The PWC Report fails in this regard.

As the PWC Report notes, the Australian Law Reform Commission (ALRC) undertook a recent review of copyright law in Australia for the digital age and recommended that Australia adopt a “fair use” exception modelled on U.S. law. But the PWC Report fails to explain how adopting fair use in Australia will differ from present law. The PWC Report simply assumes three dramatic effects that adopting fair use would have, namely:

- A massive increase in free commercial uses of works that are presently licensed, leading to a “reduction in the incentive for professional creators of copyright works.”
- A five-fold increase in copyright adjudication, and associated litigation costs.

- The closing of all of Australia’s copyright collecting societies.

The PWC Report does not engage in any analysis about what aspects of the proposed fair use clause, as compared to Australia’s current fair dealing standard and other copyright exceptions, that would cause these changes. Indeed, as explained further below, no such impacts have been experienced in any of the countries that have adopted fair use clauses in their copyright reforms. In truth, actually existing fair use bears little resemblance to the straw man the PWC Report erects.

It is important to start with definitions. The fair use clause proposed by the Law Reform Commission has three paramount features that are shared by the U.S. fair use right:

- Openness: the exception can be applied to uses for potentially any purpose (as distinguished from a closed list of specific enumerated purposes);
- Flexibility: the exception is applied through a flexible proportionality test that balances factors such as nature and importance of the new use, the interests of the author or copyright holder, and the impacts on third parties and society at large;
- Generality: the exception applies as a general “catch all” test that can be applied to any use not specifically authorized elsewhere in the Act.

Australia already has an exception for so-called “fair dealing”,<sup>1</sup> that provides two of these three components. The fair dealing exception is *flexible* like fair use – turning on a multi-factor balancing test to determine fairness. And the current fair dealing exception is *general* like fair use – it applies as a catch-all for uses not otherwise authorized by specific exceptions.

The key difference between the proposed fair use clause and the current fair dealing clause is that the proposed fair use clause is *open* as to the purposes it can justify. The proposed fair use clause would permit the flexible and general fair dealing factors to apply to any potential use of a copyrighted work. The current fair dealing exception applies only if the use is for the purpose of research or study, criticism or review, parody or satire or for reporting news. The proposal also re-writes the current five-factor fair dealing test to emulate the four-factor test used by the United States and emulated in scores of other fair use and fair dealing statutes.

Little else about the existing fair dealing exception is changed. Importantly, for a use to be authorized, it must still be fair to the copyright holder considering the

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<sup>1</sup> COPYRIGHT ACT 1968, AUSTRALIA - s 40 – 42.

nature of the work, the nature of the use and the impact of the use on the market for the original work. These are important built-in aspects of both fair use and fair dealing that restrain the exception from unfair impacts on the markets of owners.

The core question for analysis is thus – *what are the potential benefits of an open flexible general exception, as opposed to such a flexible, general exception with a closed list of purposes.*

We find preposterous the PWC Report’s claim that this relatively moderate – but nonetheless important – legislative amendment would doom the Australian publishing industry, stoke a litigation explosion and close down all collective management organizations, all the while producing few demonstrable benefits.

In the rest of this submission, we provide information that should be considered – but was not by PWC – in any cost-benefit analysis of the impact of opening Australia’s fair dealing exception.

## II. VALUING THE BENEFITS OF OPENNESS

The PWC Report includes an incredibly restrictive definition of the potential benefits that may result from a fair use right. The Report names just one benefit of fair use – the potential for “new and transformative uses of secondary copyright materials.” It therefore asks “whether it is likely that the economic benefits arising from secondary use will more than offset the economic loss for original local producers.”

PWC’s framing overlooks many potential benefits of adopting an open fair use clause. The creation of new works is a very important benefit, but it is far from the only one.

### A. Promoting Innovation

By focusing its benefit calculus only on the introduction of new works relying on fair use, PWC fails to consider perhaps the most economically impactful benefit of opening the purposes to which a general exception may apply – creating the enabling environment for technological and creative innovation.

#### 1. *The role of open general exceptions in promoting innovation*

Structurally, the openness of fair use assures potential innovators that the law can react in a timely fashion to new developments in technology and creativity through judicial interpretation. Without such openness, any new purpose for using a work not foreseen by the legislature is automatically prohibited without license from the copyright holder. The openness of fair use enables courts and innovators alike to find permission in the law where the fairness of a new use is evident but not expressed.

The need for openness in general exceptions in the digital age is manifest. Most of the world struggles with how to reconcile out-dated copyright laws to the technology of online search – which requires the routine copying of the entire Internet through programmed ‘bots.’ Because of the openness of fair use, courts in that country held such technology to be “fair” in 1999 - within three years of its commercial emergence.<sup>2</sup> From that point on, the U.S. obviously was a hospitable site for the further development of this valuable new technology.

Practically, the significance of open exceptions for the course of innovation is even greater. The openness of fair use to unforeseen purposes, and thus the knowledge that a defence to infringement can be made if necessary, permits innovation before any formal legal clarification. In the example just cited, for instance, it is notable that the rise of search engines relying on extensive copying of web content preceded by a number of years the line of clarifying fair use decisions that begin with *Kelly*.<sup>3</sup> The openness of 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. This allowed the commitment of resources to an unforeseen technology before any actual clarification of the law.

Historically, the openness of fair use to any purpose has served as an important technology-enabling function for many other industries.

- *Time shifting (the VCR and DVR)*. In 1984, for example, the fair use doctrine was deployed to justify another new technology that depended on reproduction for its consumer appeal – the video cassette recorder.<sup>4</sup> At the time, no copyright law in the world contained an exception for the time shifting of content recorded from a television by electronic means. Such activity is not “criticism or review,” “parody,” “news reporting” or any other purpose commonly listed in the fair dealing rights in Australia or other laws. Indeed, it was not until many years later that Australian consumers were able to enjoy this new technology legally for this reason.<sup>5</sup> Further, *digital*

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<sup>2</sup> See *Kelly v. Arriba Soft*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

<sup>3</sup> See generally, Barry M. Leiner et al., *Brief History of the Internet*, available at <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>; see also, Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 Yale J. L. & Tech. 201 (2006) (discussing the evolution of search engines beginning in the early 1990s and the proliferation of web crawling technology).

<sup>4</sup> See *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

<sup>5</sup> Recording films and other audio-visual material broadcast on television for time-shifting purposes was not permitted by Australia’s copyright law until the *Copyright Amendment Act 2006* (Cth). Home video recorders were sold in Australia from the late 1970s, but their use within the

home video recording entered the Australian market very late: as Giblin has noted, TiVo entered the Australian market only in 2008, with a device shorn of features available in the US, with copyright being an active constraint.<sup>6</sup>

- *Reverse engineering.* The 1992 decision in *Sega Enterprises, Ltd. v. Accolade, Inc.*,<sup>7</sup> confirmed predictions that fair use would be applied to acts of necessary copying done in connection with reverse engineering: facilitating a range of practices needed to develop innovative and interoperable products in the digital world. In countries with restrictive fair dealing clauses and no specific exception for this purpose, this crucial research and development activity had to wait.<sup>8</sup>
- *Cloud Services.* In 2008, the openness of U.S. fair use was interpreted to permit the introduction of remote digital video recording devices,<sup>9</sup> giving rise to the development of myriad cloud storage services. This decision had demonstrable economic impacts – one study found that it “led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the two-and-a-half years after the decision.”<sup>10</sup> In Australia, the

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home involved copyright infringement.

<sup>6</sup> Rebecca Giblin, ‘Stranded in the Technological Dark Ages: Implications of the Full Federal Court’s Decision in *NRL v Optus*’ [2012] EIPR 632, 637. For a recent discussion of the difficulties experienced by Australians seeking to use digital video recorders or PVRs, see ‘Aussie broadcasters are winning the war of attrition against ad evasion’, *Sydney Morning Herald*, 16 October 2015, available at <http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/aussie-broadcasters-are-winning-the-war-of-attrition-against-ad-evasion-20151015-gkaihv.html>.

<sup>7</sup> 977 F.2d 1510 (9th Cir. 1992).

<sup>8</sup> Exceptions to allow reverse engineering for the purposes of creating interoperable products was not legalised in Australia until the *Copyright Amendment (Computer Programs) Act 1999* (Cth).

<sup>9</sup> See *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). In this case, the fair use interpretation was by the parties, which limited the issue to whether the cable company was directly liable for copies and playback initiated by its customers. (The court held it was not based on other limitations in U.S. copyright law.) By doing so, the parties implicitly accepted that the conduct of the customers in time shifting programming through a cloud service was fair use.

<sup>10</sup> See Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*, (2001) (suggesting that “the Cablevision decision led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the two-and-a-half years after the decision”); See also Fred von Lohmann, *Fair Use as Innovation Policy*, (2008) (describing role of U.S. fair use law in attracting “investment to technologies that are complementary goods to copyrighted works” and creating a “reservoir of incentive for tech innovators, attracting investment”). Cf Michael Carrier, *Copyright and Innovation: The Untold Story*, (2012) (concluding from a survey of technology and venture capital



specific time-shifting exception passed to authorize the VCR was interpreted by the Australian courts as being limited to use of hardware devices in the home – causing companies providing this important technology to exit the Australian market.<sup>11</sup>

- *Text and data mining.* One of the latest waves in this long line of innovations lies in the modern practice of research through data and text mining enabled by the internet. Such research requires the copying and indexing of massive amounts of copyrighted works for the “non-consumptive” purpose of research and indexing. But most copyright research exceptions are not broad enough to cover such activity, raising the need for openness in a general exception if such activity is going to be accommodated. In recent years in the U.S. and other countries with open general exceptions (and in the handful of countries with specific authorizations for the purpose), there has been a rise in individual and institutional commitments of talent and money in the development of datamining techniques and the creation of digital databases across which to employ those techniques, in the confidence that when the issue came to court (as it ultimately did in *Authors’ Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)), it would be appropriately resolved. In countries that lack open and flexible general exceptions, datamining and text mining research is rare.<sup>12</sup>

In each of these and many other cases, innovative products and services were developed in and introduced in the U.S. before other countries in part because the openness of fair use allowed them to. Fair use gave innovators the legal space to

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companies that aggressive enforcement of copyright delayed the emergence of new companies delivering better products to consumers and delayed advances in filtering, delivery mechanisms, and interoperability); Christian Handke, *The Creative Destruction of Copyright: Innovation in the Record Industry and Digital Copying*, (2010) (finding that copyright enforcement negatively affected development of German independent music industry transition from physical recordings to digital modes of distribution).

<sup>11</sup> Rebecca Giblin, ‘Stranded in the Technological Dark Ages: Implications of the Full Federal Court’s Decision in *NRL v Optus*’ [2012] EIPR 632–641. Giblin outlines how companies that had started to offer cloud recording of television broadcasts after the time-shifting exception was introduced into Australian copyright law by the *Copyright Amendment Act 2006* (Cth) exited the market after the decision in *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59 interpreting that exception as confined to devices located in the home: *ibid* 640.

<sup>12</sup> See Ian Hargreaves et al., European Commission Expert Group, *Standardisation in the Area of Innovation and Technological Development Notably in the Field of Text and Data Mining*, (2015) (finding that research based on datamining or text mining techniques occur primarily in countries that either have an open general exception such as fair use or are one of a few countries in the world that have a specific datamining exception).

justify their practices without pre-approval by the legislator. This a key benefit of fair use for the willingness to invest in technology and service innovation.

## **2. Research on Fair Use and Technology Industry Growth**

The literature generally supports the conclusion that high technology, software and other industries that rely on copyright exceptions grow faster in countries with fair use; that the traditional copyright dependent industries experience little resulting harm; and the benefits outweigh what harm can be observed.

- Ghafele and Gilbert (2012) compare industry-level data from Singapore before and after the country amended its copyright law in 2006 to add an open fair use exception.<sup>13</sup> The authors examine data from the private copying industries – defined as “those industries that manufacture and sell technologies and related electronic components, infrastructure and services, that enable consumers to record, store and transmit copyrighted materials for their own personal use.” They find that “fair use policy is correlated with higher growth rates” relative to a control group of other industries. They also find that the traditional “copyright industries” continued to grow, albeit at a slower pace. Specifically, the authors found that growth of Singaporean private copying industries grew at a much higher rate than a control group (10.18% growth vs. -0.22% for control) while growth in copyright dependent industries also remained positive (6.68%) and higher than the control group. The growth for the copyright dependent group was slower than growth in the same industry before the legal change, indicating what the authors conclude was a “negligible” impact of the private copying industry growth.<sup>14</sup> The study concludes that the gains to industries that relied on copyright exceptions more than made up for the slower growth experienced by the copyright industries, yielding a net positive impact on the Singapore economy.<sup>15</sup>
- Palmedo (2015) examined performance of various industries in “fair use” and “non-fair use” countries, with “fair use” defined as the law including an open, flexible and general exception. The study compared outcomes in industries classified as *dependent on copyright exceptions*, including computer hardware, IT services, software and internet service industries, compared to those *dependent on copyright protection*, such as consumer publishing, entertainment production, and broadcasting. He compared the performance of the sets of firms in seven fair use countries – the U.S., the Philippines, Singapore, Israel, Taiwan, Malaysia, and Korea - to the performance of like firms in countries with no such systems. The study accounts for the dates in which countries changed to fair use. All of the

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<sup>13</sup> Roya Ghafele & Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact of Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* (2012).

<sup>14</sup> Id. at 39.

<sup>15</sup> Id. at 45.

firms in each industry group in fair use countries report significantly higher net sales & revenues, assets, and employees versus like firms in countries in non-fair use countries. The only variance to the trend is that consumer publishing and entertainment firms in countries with fair use spent less on average on R&D in those countries, although they still were found to earn more money, accumulate more assets and create more jobs than in non-fair use countries.<sup>16</sup>

- Studies of the size of industries that are reliant on fair use and other copyright exceptions show them to be generally larger and faster growing in terms of employment, income and impact on the economy than those industries commonly labelled copyright-dependent. Andrew Szamosszegi and Thomas Rogers, CCA, *Fair Use in the U.S. Economy* (2010) concludes, for example, that industries which benefitted from fair use saw substantial growth in five key areas: revenue, value added, employment, productivity, and exports.<sup>17</sup> One major area of growth in fair use industries, the report notes, is seen in the 36 percent increase in revenue in 2007 from 2002.<sup>18</sup> Although these studies do not generally attempt to prove any causation between specific copyright provisions and the outcomes of such industries, they are generally useful in examining the potential for economic impacts of expansions or delineation of copyright exceptions to specific economic actors.

The PWC Report goes to great lengths to deny all the positive effects on the technology industry that are apparent from existing research and theory.

The Report oddly reports Ghafele and Gibert's finding of a reduced (but positive and faster than a control group) growth in copyright dependent industries after fair use was introduced in Singapore as a cost of fair use. It then refuses to adopt the same study's finding of greater and offsetting growth of the technology sector over the same period, citing methodological errors that would apply as well to the finding it accepted.

The PWC Report also discounts its own original econometric research showing that countries that score higher on Consumer International's Access to Knowledge Index (a measure of the breadth and openness of copyright exceptions) enjoy higher GDP and capital investment.

Perhaps most confusingly, PWC concludes from the fact that "Australian exceptions industries constitute a larger portion of the Australian economy (12.9

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<sup>16</sup> Palmedo 2015 (finding "that adoption of fair use clauses modeled on U.S. law is associated with positive outcomes for the firms in our dataset, both those that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection.").

<sup>17</sup> Thomas Rogers & Andrew Szamosszegi, CCA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, 2010, at 8-9.

<sup>18</sup> *Id.* at 8.

per cent) than the equivalent United States industries do in the United States (10.5 per cent),” that Australia is *less* likely to benefit from fair use than the U.S. It undercuts its own argument that fair use will cause massive costs to Australia by arguing that the reason the larger exceptions industry means fewer benefits from exceptions is because Australian law already provides all that fair use would.

The research, including PWC’s own, supports a conclusion that the openness of fair use is favourable to economic growth, both in specific industries and for the economy as a whole, and that Australia – with a large exceptions industry – is particularly well positioned to enjoy these benefits.

### **B. Diffuse and Third-party Benefits**

The PWC Report’s focus on the direct benefit of fair use to the production of new works also fails to account for the many diffuse and third party impacts of fair use. The openness of fair use is part and parcel with free expression protections in the U.S., and the benefits of free expression are broad indeed.

Literature describes how many of the benefits of copyright exceptions in general, and fair use in particular – including both reproductive and consumptive benefits – may be diffuse, even society-wide. “Using a work for educational purposes, for example, not only benefits others in the users’ community with whom users have interdependent relations - reading and learning builds socially valuable human capital.”<sup>19</sup> Economists call these third-party positive effects “positive externalities” or “spillovers.” As Lemley and Frischmann explain, promoting such spillovers is one key benefit, and often an express aim, of the openness of fair use to any purpose.

The PWC Report assumes that fair use will lead to a dramatic reduction in the licensing of educational works. Were that to occur, however, many associated diffuse and third party positive effects could be expected. Research has shown, for example, that reducing the cost of access to published scientific materials in the U.S. during WWII demonstrably increased both research publication and inventions relying on the price-reduced material.<sup>20</sup> The PWC Report makes the crucial error of reporting an arguable cost of a presumed decrease in the price of copyrighted materials in a fair use regime, but not the associated benefits of that change.

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<sup>19</sup> See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257, 289.

<sup>20</sup> See Barbara Biasi & Petra Moser, *Effects of Copyrights on Science: Evidence from the WWII Book Republication Program*, available at <http://ssrn.com/abstract=2542879>, (2016) (finding that “a 10-percent reduction in book prices was associated with a 38 percent increase in follow-on science” and “a 70 percent increase in US invention”). Cf. Gunther Eysenbach, *Citation Advantage of Open Access Articles*, PLoS Biol, (2006) available at <http://dx.doi.org/10.1371/journal.pbio.0040157> (showing that open access articles are cited more often, and more immediately after publication, than non-open access articles).

### **C. Correcting Market Failure**

The PWC Report also fails to recognize the role of an open fair use clause in promoting uses of works that would not occur in a licensing environment. This is an area where fair use has been theorized in producing consumer surplus with no associated producer cost.

Wendy Gordon's influential work on the topic explains the role of fair use in correcting market failures and thereby producing gains to aggregate social welfare. In her account, "the courts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market" because the transaction costs of finding the owner and licensing the use are higher than the user places on the value of the permission.<sup>21</sup> Without a free use provision, such uses would not take place, resulting in deadweight loss to society – neither the consumer nor the producer gain. Consumptive uses authorized by fair use in the context of market failure present a benefit with no harm. This is an important distinction because these uses are frequently mislabelled 'transfers' by PWC. But if the copyright holder would not have been able to license the use because of a market failure, then authorization of the use is not a transfer but rather represents a net benefit to society.

## **III. ANALYSING THE COSTS OF FAIR USE**

As described above, the PWC Report's flawed economic model does not seek to measure the actual or potential impact of increasing the openness of Australia's existing fair dealing clause at all. Instead, it imagines that adopting fair use in Australia will lead to the collapse of the publishing industry, a five-fold increase in copyright litigation and the folding of all copyright collective management organizations. These are remarkable broad-brush assertions, and these "predictions" are little more than hypothetical imaginings. Based upon them, however, the PWC Report then proceeds to analyse the cost of each of changes, rather than the cost of the actual independent variable it should be studying. Both its assumptions and its methodology are suspect.

### **A. Experiences of Countries that have Adopted Fair Use**

There is a trend in modern copyright reform toward providing open and flexible general exceptions modelled on the U.S. fair use clause. Such fair use rights have been included in copyright reforms in the Philippines, Israel, South Korea, Malaysia

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<sup>21</sup> Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case* First of all, Canada did not adopt a fair use clause – it rather affirmed that its existing fair dealing provision could be applied in educational sector.<sup>21</sup> *e and Its Predecessors*, 82 Colum. L. Rev. 1600, 1601 (1982).

and Singapore. In none of these countries have there been reports of massive reductions in copyright licensing, explosions of litigation or crumbling of collective management organizations.

### **B. Canada's Educational Publishing Industry**

Much of the PWC cost analysis is based on an analysis of the supposed impact of copyright reform in Canada on the educational publishing industry in that country. This example is of little weight to the question of what might happen in Australia under a fair use regime.

First of all, Canada did not adopt a fair use clause – it rather affirmed that its existing fair dealing provision could be applied in the educational sector.<sup>22</sup>

Independent analysis documents that the publishing industry in Canada is doing well and any reductions in licensing and other structural changes in the market cannot be attributed to copyright exceptions reform.<sup>23</sup> As explained above, if the legal change in Canada did vastly reduce licensing fees for educational institutions, then those reduced costs are likely to have other positive impacts in Canada in terms of increased access and reduced cost of education – an impact not analysed by PWC.

### **C. Fair Use and Collective Management Organizations**

PWC concludes further that under fair use all copyright collective licensing

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<sup>22</sup> The change in the legal environment in Canada surrounding fair dealing was a result of a series of decisions of the Supreme Court of Canada holding that fair dealing should be given large and liberal interpretation, a specific holding that the purpose of “private study” can encompass copying made by or at the initiative of teachers for use by their students, and finally, a statutory amendment that added “education” as an explicit allowable purpose under Canada’s fair dealing provision.

<sup>23</sup> As Ariel Katz notes, there are a large number of confluent factors bearing on how educational institutions use and license content in Canada. These include, perhaps most importantly, the increased availability of digital materials for course packs at the same time that Access Copyright was changing its licensing structure to remove per-page royalties. Those developments convinced many Canadian educational institutions that they could safely avoid paying unnecessary, and at times duplicative, license fees to Access Copyright. Ultimately, the decline of Access Copyright in Canada has been associated with *increased* sales and revenue in both the K-12 and higher education sectors. See Ariel Katz, *The Loss of Access Copyright Royalties and the Effect on Publishers: Sifting Fact from Fiction (Part 1)* (June 4, 2014) available at <http://arielkatz.org/archives/3281>; Ariel Katz, *The Loss of Access Copyright Royalties and the Effect on Publishers: Sifting Fact from Fiction (Part 2)* (June 6, 2014), available at <http://arielkatz.org/archives/3327>; Ariel Katz, *The Loss of Access Copyright Royalties and the Effect on Publishers: Sifting Fact from Fiction (Part 3)*, available at <http://arielkatz.org/archives/3375>; Michael Geist, *False Alarms: Examining the Misleading Claims About the State of Canadian Publishers* (March 18, 2016), available at <http://www.michaelgeist.ca/2016/03/false-alarms-examining-the-misleading-claims-about-the-state-of-canadian-publishers/>

organizations will cease to exist, imposing transaction costs and compliance costs on society that collective management organizations are designed to decrease. But the conclusion that all collective management organizations will cease to exist because of fair use in Australia is preposterous. None of the countries that have adopted fair use have experienced the closing of collective management organizations. As described above, it cannot be said that the disbanding of one collective licensing agency in Canada was because of copyright reform in that country. In any case, there are other such organizations that still thrive in Canada, as they do in the U.S. and other countries that have fair use regimes. There is simply nothing in fair use law that prohibits collective licensing or makes the institution non-viable.

#### **D. Fair Use and Litigation**

PWC argues that switching to a system of fair use would lead to more litigation. The Report supports its premise with data that the number of copyright cases in the United States has risen in recent years and that there are five times as many assertions of fair use defences in the U.S. as there are assertions of fair dealing defences in the UK. Neither fact indicates that fair use promotes litigation.

Litigation in the U.S. – and everywhere – is being driven by rights holders, and the increased prizes they can obtain through successful litigation, not by defendants asserting fair use.<sup>24</sup> It is important to note that fair use is a defence – it does not drive the filing of litigation because in almost no conceivable case does the fair use right provide an affirmative cause of action.

The fact that there are five times as many assertions of U.S. fair use as U.K. fair dealing may be a function of the utility and generally applicability of fair use. That is a benefit, not a flaw. But the five times higher rate of citation may also be a function of population.<sup>25</sup> There should be more assertions of fair use as a defence to litigation because it is open as to the purposes it can cover. That is the point. Giving defendants an opportunity to justify their actions in the face of litigation by rights holders is a feature, not flaw, of the fair use right.

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<sup>24</sup> See Mathew Sag, Copyright Trolling, An Empirical Study. *Iowa Law Review*. Vol 100. 2014 (concluding that 43% of U.S. copyright cases in 2013 were brought by the new phenomena of copyright “trolls” spurred on by the pursuit of high statutory damage levels, of which there currently are no Australian equivalents).

<sup>25</sup> The U.S. has close to five times the population of U.K. See Office for National Statistics, <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates> (indicating that as of June 2014, the U.K. had an estimated population of 64.6 million people); see also United States Census Bureau, <http://www.census.gov/popclock/> (indicating that at same time in June 2014, the U.S. had an estimated population of 318.9 million).

## CONCLUSION

Evaluating the economic impact of any legal change is difficult work. One must correctly identify the policy change being studied and then generate tools to measure possible benefits and costs of that change. In the case of adopting a fair use clause in Australia, the change being proposed is to open the existing general exception (aka “fair dealing”) to any purpose, as is presently the case in the U.S. and some other countries. The weight of theory and empirical evidence available today indicates that this change would have significant benefits for exceptions industries, little harm and some benefit in the traditional copyright-dependent industries and significant diffuse and third party effects throughout society.

None of the claimed costs of fair use identified in the PWC Report are likely to occur. What is likely to follow fair use is that innovators and creators in Australia will find it easier to do their work and the providers of new technology will find it easier to market their products. These will result in modest gains to Australian society over time, likely with little in the way of costs. Further study of the impact of fair use in other countries is under way and well deserved. But the PWC Report does little to add to that endeavour.