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To participants, Ed. Use of Internet Materials – 2nd Roundtable

Copyright Advisory Group's 'Option 5' document – ASA response

In supporting the interests of authors, the ASA will continue to seek to secure additional payments for, and for more kinds of, author and rightsholder matter placed online. We do not believe all such matter with potential for remuneration has been identified, let alone categorised as liable for payment or otherwise at the present stage in the development of survey and licensing regimes.

With photocopying slowly scaling back as the chief means of copying in schools, authors will also look to draw income from the increasing use of digital copying that is occurring in its place. It is the ASA's position that where we do not know for certain authors' intentions regarding the matter they place on websites, attempts to assume or presume these intentions by CAG/Schools or other bodies are at present ill-advised.

Our view is that all uses and remunerative possibilities of the internet by authors and other creators have *not* already been discovered or set in place. This may be taken by CAG/Schools as a point of philosophical difference, with the potential for additional financial impost. But while accepting that Schools-sector financial constraints are real, the ASA remains convinced that these constraints are neither a necessary nor sufficient condition for limiting the potential return to authors and rightsholders for copying of their matter.

'Materials' or 'works'?

Under the heading 'The Copyright Advisory Group's purpose', there is some eliding of the terms 'set of materials' and 'works'. In the absence of agreed definitions, 'work' might refer to something more substantial than, say, advertising copy extracted from a department store website that may be better described as 'material'. But questions of

when and where these definitions are to be made, and by whom, are not canvassed in Option 5.

Expectation of remuneration vs. compensation for copying

The *Copyright Act* accepts the remunerative possibilities for creators – in Part VB and elsewhere – and clearly has a role in supporting those possibilities in electronic form. On that basis the ASA argues that Part VB is more than about compensation for sales lost due to photocopying or subscriptions.

'Commercially available'

We are uncomfortable with the elaborations of points 3-7 in the proposal. Critical questions of how commerciality and availability are to be established are not broached in Option 5. The document is unfortunately largely ignorant of the new conditions of internet commerce.

Beyond this, it is not our understanding that 'available for free' has become an agreed principle as a consequence of the first Roundtable meeting. Our recollection is that there was difficulty in defining terms and that this would require further thought and analysis. The ASA's position is that until we have formal and agreed terms on what may or may not be downloaded for free, and may or may not be downloaded for payment, the only meaningful, albeit provisional, status of material where intent is not defined is 'accessible for viewing'. But we also believe that there is much that is currently accessible that could be paid for, and that should be paid for.

New models of authoring, publishing and marketing

What constitutes a 'publisher' online is very much a work in progress. To reiterate a key point in our earlier submission: the internet is a developing space. It now includes 'author-marketers' who may not desire to become 'publishers', along with authors who very much believe they can and should sell their creations directly, and who happily call themselves 'publishers'.

An author may market themselves by allowing samples and promotional material of theirs to be viewable on their website (their own, and sometimes others'). They make material accessible to seek reactions, count page-hits and draw interested queries. Some authors do this to assess whether there is any commercial potential and perhaps the possibility of charging fees, others simply to engage in dialogue with interested parties.

While authors may be undecided as to their plans, and while internet practices continue to evolve, it is unreasonable to assign a 'no expectation of remuneration' label to what they put online. Even where they may be clear about what they wish, it is also unreasonable to put this barrier in place unless their *further* intent is actively sought and recorded. There should be no onus or pressure on copyright owners to agree to such a formula, let alone give anything away on its basis. Similarly, a copyright owner who does not reserve their entitlements under the educational statutory license should not be seen as having provided *carte blanche* access and use to schools.

Altering the Act

The Option 5 proposal put forward by CAG states that 'The Schools envisage a legislative solution in the form of an exception included within Part VB'. The ASA's objection to this approach was stated and detailed in our earlier submission and has not changed.

We are very concerned that piecemeal amendments to the *Act* in the terms proposed by CAG may have the effect of further problematising authors' capacity to draw adequate remuneration in the future for their materials and works in the evolving digital environment.

Another approach

In late August, we received the most recent research from Prof. David Throsby on artists' incomes in Australia. As anticipated, the remunerative situation for artists and authors has not improved, and in some areas is worse than it was when Throsby began his analysis of remuneration almost a decade ago. This is a critical context for the ASA's view of the CAG/Schools Option 5 proposals, as well as a particular situation that we cannot ignore.

We acknowledge that the schools sector fears ever-rising costs for copying and therefore seek relief. We accept that there are over-arching funding and resource issues not necessarily of the schools' own making. But we would also stress that, as characterised, the issues are not of authors' making either. Fundamentally we believe that the problem to which Option 5 seeks to respond remains ill-defined, and therefore the proposed solutions do not entirely make sense.

If this is ultimately an educational resourcing question, then we sincerely believe an exercise to amend VB of the *Act* based on CAG options to date is entirely the wrong remedy. Instead, the ASA proposes that before any further meetings are held or proposals put in relation to the *Copyright Act*, that independent research be undertaken to establish at least the following:

- 1.The nature of those internet materials and works being digitally downloaded/copied in schools that are not currently captured for remuneration
- 2.The extent of this copying

Subsequent to this, preparation of draft model mechanisms that will allow the discovery of authors' and other rightsholders' intentions and also provide suitable notices in relation to:

- 1.For-fee access and use
- 2.Free-of-fee access and use

On completion of independent research as above, a further process and forum to be agreed by Roundtable participants for discussion of research outcomes and proposed mechanisms to manage any further agreed for-fee or free-of-fee material.