



Australian Publishers Association's
Submission on the **Digital Economy Future Directions
Consultation Paper** by the Department of Broadband,
Communications and the Digital Economy

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INTRODUCTION

The Australian Publishers Association (APA) welcomes this opportunity to contribute to the *Digital Economy Future Directions* paper. The APA wholeheartedly supports the Government's goal of facilitating the digital economy. We believe that our industry has been a leader in applying information and communication technologies (ICTs) internationally and look forward to continuing a public-private sector partnership that will maximise Australia's on-line participation in the global community.

The APA shares the Prime Minister's vision that 'our ability to engage in the global digital economy of the 21st century will be a key driver of our productivity growth.' We believe that *Future Directions* must consider a mix of supportive policy framework and market-driven incentives to achieve that vision.

Executive Summary

- The APA welcomes and supports the Government's initiative in facilitating the digital economy and is willing to engage with Government further. (p 2)
- Publishing in Australia is part of the overarching, \$10 billion Copyright Industry. The APA estimates that publishing's share of that industry is currently \$2 billion. Publishing is a leader in the implementation and development of the digital economy, the creation of Intellectual Property and its export. (pp 3-6)
- Educational publishers are a \$500 million pa industry sector, already working closely with the Government to achieve its National Curriculum goals. Educational publishers and the APA are ready and willing to discuss how best to ensure the success of the Government's Education Revolution. (pp 6-7)
- Scholarly publishing is part of a global \$24 billion industry that has already made the transition into the digital economy and has delivered on-line solutions in the following areas: peer review and article submission; policing of plagiarism; linking and cross-referencing articles through DOI technology; international digital standards; digital archives; openly accessible medical information to the public; subsidised research literature for the developing world; research into scholarly publishing. Scholarly publishers are at the forefront of the digital economy and are willing to engage with Government to further enhance the digital economy of the future. (pp 7-11)
- Public Sector Information (PSI) needs to be carefully defined to avoid unintended negative consequences for publishers and re-users of government-funded material. The APA recommends the UK model of definition and regulation. (pp 11-13)
- Open Access is a complicated area that requires very careful investigation and management if the Government's aim is growing the investment in our future digital economy. The APA welcomes the opportunity for open discussion with Government around this, in order to ensure that Australia's economy and investment in research is safeguarded and grown. (pp 13-16)

- Copyright is crucial to all publishing. The Government should look to strengthen rather than dilute its copyright regulations and introduce no new exceptions to the Copyright Act without conducting a thorough, fundamental review of the legislation to take into account the needs of the digital economy. (pp 16-17)
- No safe harbour extensions and no orphan works. (pp 17-18)

SUBMISSION

This submission is in two parts. In Part 1, we offer some background on the APA and outline the ways that publishers have been innovators in applying ICTs within the digital economy. Part 2 will discuss the major issues for the publishing industry coming out of the Consultation Paper.

PART 1: PUBLISHING AND THE DIGITAL ECONOMY

1.1 About the APA

The APA¹ is the peak industry body for Australian book, journal and electronic publishers.

Established in 1948, the Association is an advocate for all Australian publishers: large or small; commercial or non-profit; academic or popular; locally or overseas owned. The Association has over 185 members and represents 91% of the industry, based on turnover.

The APA's current Strategic Plan includes the following pertinent objectives:

Advance Australian Publishing by:

- Protecting and promoting the interests of copyright owners, agents and licensees;
- Promoting the Australian publishing industry's contribution to Australian culture, education and the economy;
- Promoting members' awareness and understanding of the digital space.

The APA has a Scholarly and Journals Publishers Committee representing scholarly publishers in Australia. All scholarly publishers of any significance operating in Australia are members of the APA — from larger, international companies through to smaller, Australian-owned ones. These publishers have partnerships with learned and professional societies around Australia, with the joint aim of disseminating and maximising the international profile of Australian research channelled through the scholarly journals and other related publications of these societies.

The APA has a strong international connections with STM² (International Association of Scientific, Technical & Medical Publishers) and ALPSP³ (Association of Learned

¹ <http://www.publishers.asn.au>

² <http://www.stm-assoc.org/>

³ http://www.alpsp.org/ngen_public/

and Professional Society Publishers) which together represent all parts of this global industry sector, from university presses to learned societies and commercial companies; and are collectively responsible for publishing over 95% of the annual global output of learned journal articles.

The APA also convenes other committees covering the following sectors: Trade Publishers; Schools Publishers; and Tertiary and Professional Publishers — as well as a Standards Expert Reference Group which was formed in 2000 to address emerging standards resulting from the increasing importance of digital technology.

In 2004, the APA launched TitlePage,⁴ the Australian industry's on-line price and availability information service, which is available free for booksellers and suppliers. It can be access 24/7 and is updated daily by publishers and distributors. TitlePage is a unique, on-line, technological solution that enables publishers and distributors to offer booksellers current price, availability and stock information.

TitlePage currently represents more than 80% of the publishing industry and reaches more than 90% of the bookselling market. Booksellers and suppliers are increasingly using TitlePage as their primary source of price and availability information, and it now receives over 3.5 million hits per month, from at least 7000 individual users.

This on-line service was developed by a group of founding publishers on behalf of the industry to:

- Improve the competitive position of the industry by applying digital technology that delivers a user-friendly, cost-effective service interface between publishers and booksellers;
- Enhance the efficiency of the Australian industry and offer better services to members and the public; and successfully compete with global suppliers;
- Align Australia to global standards for bibliographic information (ONIX);⁵
- Encourage booksellers to continue to source their product locally.

The publishing industry is eager to continue to play a leading role in building a global digital economy that will position Australia as a key player in the 21st century.

1.2 Publishing Now

Publishing is one of the 'core copyright industries' as identified in a recent report prepared for the Australian Copyright Council by PriceWaterhouseCoopers.⁶ The key findings of this report were that in 2006/2007 Australia's copyright industries:

... employed more than 837,000 people (8 percent of the nation's workforce) — up 21 percent since 1996; generated \$97.7 billion in economic activity (10.3

4 <http://www.titlepage.com>

5 An international standard for storing and sharing title information between publishers, distributors and booksellers.

6 PWC, 'Making the Intangible Tangible: The Economic Contribution of Australia's Copyright Industries' <<http://www.copyright.org.au/policy-research/research/economy>>

percent of GDP) — up 66 percent since 1996; and accounted for \$6.8 billion in exports (4.1 percent of all exports) — up 6.3 percent since 1996.

Significantly, the PWC Report concludes that productivity growth in the copyright sector in the past decade has been ‘spurred by’ (p 3) and is ‘largely due to digitisation’ (p 23).

Publishing, globally, has been at the forefront of the take-up of digital technology. There are few industries that are more thoroughly digitised:

- Virtually all authors and illustrators now compose their work on-screen and deliver drafts to publishers electronically;
- editing, design and pre-production processes are performed almost exclusively on-line;
- printing is now increasingly digitised, often consisting of uploading and deploying electronic files, some of which have been sent from the other side of the world;
- traditional booksellers and other retailers are exploring various print-on-demand and digital printing options;
- the largest on-line retailer in the world (Amazon.com) developed its business plan primarily from the selling of books;
- the world’s pre-eminent search engine Google is in the throes of creating the biggest virtual library in history;⁷
- the electronic delivery of text through e-readers, 3G phones and other devices⁸ is progressing at a breakneck pace;
- and the management of this whole system, including the warehousing and delivery of hard-copy texts, and the electronic delivery of digital texts in multiple formats, is entirely dependent on complex and customised software solutions.

Every stage and process in the supply chain producing a text and delivering it to consumers is now either completely transformed through the introduction of digital technologies or is on the cusp of such a sweeping transformation. The very content of books is being transformed and new genres being invented,⁹ and the effects of the current global economic crisis will only serve to re-double the pace of change as publishers look for cheaper and more efficient ways of producing, packaging and delivering content to consumers.

In recent years we have seen an explosion of new content arising from the inter-connected on-line world which has taken more than 25 years to become established.

⁷ Robert Darnton, in *New York Review of Books*, ‘Google and the Future of Books’
<<http://www.nybooks.com/articles/22281>>

⁸ Lev Grossman, in *Time Magazine*, ‘Books Gone Wild: The Digital Age Reshapes Literature,’
<<http://www.time.com/time/magazine/article/0,9171,1873122-1,00.html>>

⁹ Lev Grossman, op cit, writes about ‘an entirely new literary form [in Japan] called *keitai shosetsu*: novels written, and read, on cell phones’ as well as the fan fiction format: ‘fan-written stories based on fictional worlds and characters borrowed from popular culture — Star Trek, Jane Austen, Twilight, you name it. There’s a staggering amount of it on-line ... [Fanfiction.net](http://www.fanfiction.net) hosts 386,490 short stories, novels and novellas in its Harry Potter section alone’

The publishing industry is playing a vital role in the management and delivery of new and traditional content via new technologies. The functions of copyright management, editing, design, layout, packaging in various formats, and of marketing and distribution to multiple audiences, have become more important and valuable, not less, in the age of new media. The phenomenon of user-generated-content on social networking and other self-publishing sites, for example, is growing rapidly and conventional publishing businesses are working with it, and increasingly supporting its growth. Trade publishers are implementing automated layout and multi-channel formatting systems to make content respond faster, move faster, and to be simultaneously accessible within multiple user environments and on diverse mobile technologies. Different publishers are also implementing various hybrid electronic and print delivery systems. And all publishers are continually seeking new business opportunities to participate in the growth of Australia's knowledge economy and to ensure that our unique cultural and educational landscape retains its distinctive character in the global knowledge marketplace.

1.3 Digital Education Revolution

The educational sector of the Australian publishing industry is focused on the delivery of high-quality content and other resources to Australian teachers and students at all levels. Over half of new Australian titles published in 2003-4 (55% or 4,610) were educational. The estimated value of the Australian education publishing sector is about \$526 million, segmented into Primary (\$158 million), Secondary \$105 million), Tertiary (\$157 million), and Professional and Reference (\$106 million).

The APA supports the overall thrust of the Government's 'Education Revolution' and commends its focus on hardware (getting more computers to students and into schools) and wetware (revaluing the importance and prestige of the teaching profession). However, we believe that there is an important part of the delivery of this Revolution that is currently under-developed and that without this third component, the Government's strategy risks looking like a two-legged stool. That third component is the content for teachers to teach and computers to contain and run.

We believe that the Government should work more closely with the content-creation industry to ensure that the Education Revolution succeeds. And we believe that education and scholarly publishers' contemporary, intimate and extensive knowledge of the digital economy will be fundamental in delivering that success.

Educational and scholarly publishers, through the APA, are already working closely with the National Curriculum Board to streamline the transition from the current fragmented, State-based curriculum regime to the National Curriculum to be introduced from 2010; and central to this work will be new on-line content-delivery and assessment systems.

On-line activity and innovation in this sector continues to build momentum. Educational publishers are actively engaging with teacher and student communities to capture, create, share, manage and deliver new content for more meaningful and localised learning experiences. Hard-copy textbooks at tertiary and other levels are

now regularly bundled with complementary digital materials which are highly interactive, often Web-based and provided free-of-charge by publishers. Scholarly publishers are investing in complex collaborative workflow systems to enable greater community and to underpin both Open Access and commercial delivery, and 90% of scholarly journals are available on-line.

Australia's educational publishers are leaders in the fields of literacy and children's books and already have had remarkable successes in exporting Australian Intellectual Property overseas. We would welcome discussions with Government on ways to invest further and in a more targeted fashion in the globalisation of Australian IP innovations.

1.4 Scholarly (STMS) Publishers

Publishers in this segment of the industry have been investing heavily in the growth of the digital economy. In 2008, the size of the global Science, Technical, Medical, Social Science and Humanities (STMS) combined publishing market is estimated to have been \$24 billion.¹⁰ The bulk of the STMS publishing revenue¹¹ continues to be generated by book and journal sales, but the fastest growing products are on-line services, and abstracting and indexing (A&I) products. Scholarly journals remain the traditional backbone of the market, but the trend is for journal articles to become more interactive, leading readers to underlying data, as well as connecting to videos and discussion forums that add value to the traditional print article.

Commercial publishers are forming alliances with scientific and technical scholarly societies to offer more specialised content to customers. All the major publishers have been launching electronic platforms and upgrading features to meet the needs of very specific science and technology market niches.

The directories/databases sub-sector continues to grow, deriving most of its sales from subscription and new electronic products designed to make it easier for professionals to find and analyse data, and the development of better, faster more relevant indexing and search tools has been well received.

The scholarly and journal publishing industry represented by the APA is at the forefront in developments in electronic delivery of texts which have, over the past 10 years, dramatically increased access to peer-reviewed journal literature worldwide, reduced the effective cost of access, and increased research productivity.

As the Ware Report states:¹²

The development of on-line electronic versions of journals has revolutionized scientists' access to the literature. Over 90% of STM journals are now on-line, and in many cases their publishers have retrospectively digitised earlier hard copy material back to the first volumes. More content is available to more users

¹⁰ Simba Information Global STM Publishing 2008-2009, Executive Summary, p 1.

¹¹ Simba Information Global STM Publishing 2008-2009, op cit, Chapter 2.

¹² Ware, Mark, *Scientific Publishing in Transition: An overview of current developments*. September 2006. London, p 8. <http://www.stm-assoc.org/storage/Scientific%20journal%20publishing%20-%20STM%20ALPSP%20White%20Paper%20140906.pdf>

than at any time in history while the cost of use of each article is falling to well below one euro. The industry has made this possible through the application of sustainable business models and the collective investment of hundreds of millions of euros in electronic developments.

The scholarly journal, with its archive of accredited and certified, peer-reviewed research has become a crucial means for judging the quality of research output by individuals, institutions and nations — witness recent decisions by the ARC on research output in the Excellence in Research for Australia (ERA).¹³ And this process is now all on-line because STMS publishers have continually enhanced and modernised the assessment and accreditation services they provided for the research community.

Like few other industries, STMS publishers have led the way in ensuring technology keeps pace with the needs of its constituent community (in this case, the research community). This technological change has benefited that community most powerfully by reducing the cost of publishing the ever-increasing output of global research. Publishers have invested in digital technological solutions so that global research output can be delivered in an affordable way back to students, teachers and researchers.

A few examples of these publisher-driven, publisher-funded and digitally delivered developments are outlined below:

Peer review and submission

Peer review and manuscript assessment and processing in the paper age added significant time between the finalisation of a research paper and its publication. This was at a considerable cost. STMS publishers have developed on-line solutions for peer review where papers no longer travel from person to person but are submitted, accessed and reviewed via the Internet. One example is Manuscript Central.¹⁴ This system also allows for continuity should an editorial office transfer.

Plagiarism

There are significant issues facing the scholarly community around plagiarism and publication ethics. Previously, journal editors relied on peer reviewers with support from publisher-founded and -funded organisations such as the Committee on Publication Ethics¹⁵ and the World Association of Medical Editors¹⁶ to police these areas. In 2009, CrossRef partnered with iParadigms to launch CrossCheck¹⁷ as a digital solution for editors and reviewers — matching potentially plagiarised content across the entire CrossRef database.

Connecting content

¹³ <http://www.arc.gov.au/era/default.htm>

¹⁴ Hosted and developed by Scholar One, a subsidiary of Thomson Reuters, <<http://www.manuscriptcentral.com>>

¹⁵ COPE, <http://publicationethics.org>

¹⁶ WAME, <<http://www.wame.org>>

¹⁷ <http://www.crossref.org/crosscheck.html>

The CrossRef website¹⁸ describes the genesis of this innovative tool as follows:

Among the visitors to the Frankfurt Book Fair in October of 1999 who witnessed the demonstration of the DOI-X project, there were several representatives of the leading scientific, technical, and medical publishers. Recognizing that this prototype of a lookup system based on the Digital Object Identifier (DOI) held the key to a broad-based and efficient journal reference linking system, they took the unusual step of joining together as the non-profit, independent Publishers International Linking Association Inc. (PILA), which was incorporated in January 2000 and CrossRef went live as the first collaborative reference linking service in June 2000.

CrossRef's general purpose is to promote the development and cooperative use of new and innovative technologies to speed and facilitate scholarly research. CrossRef's specific mandate is to be the citation linking backbone for all scholarly information in electronic form. CrossRef is a collaborative reference linking service that functions as a sort of digital switchboard. It holds no full text content, but rather effects linkages through Digital Object Identifiers (DOI), which are tagged to article metadata supplied by the participating publishers. The end result is an efficient, scalable linking system through which a researcher can click on a reference citation in a journal and access the cited article.

It is notable that CrossRef was founded by a consortium of the international peak sector body (STM Association) plus a number of the larger STMS publishers and that it continues to be funded by the STMS publishing industry. This month there are over 35 million articles linked through CrossRef.

International digital policies

Because digital content is so transferable, STMS publishers have collaborated with each other and with other groups to ensure policies are developed and standards set to ensure an ordered digital world. The STM Association and ALPSP regularly release policy documents with which their members comply and they, in turn, collaborate with national publisher organisations such as the APA for agreement on global compliance. Two examples of organisations set up to address specific digital issues are COUNTER¹⁹ — dealing with standards in relation to download data — and Transfer²⁰ — addressing standards for the transfer of journals between publishers when publishing partnerships are changed.

The Digital Archive

STMS publishers began to publish on-line in parallel with paper journals in the mid-1990s. Because there existed a significant archive of paper-based research, STMS publishers have been digitising paper archives back to Volume 1, Issue 1, wherever possible, covering publications as far back as the late 18th century, and much of this

¹⁸ <http://www.crossref.com>

¹⁹ <http://www.projectcounter.org>

²⁰ <http://www.uksg.org/transfer>

is now available on-line. Two collaborations with international library communities have also resulted in 'dark archives'.²¹

Information for the public

With Internet content being so freely available to a wider range of readers beyond the research community, there are concerns about the contextualisation of data, especially in medicine. The American Association of Publishers (AAP) and the STM Association are collaborating with major consumer health associations in the USA to deliver *patientINFORM*,²² where content is drawn from the medical research literature and provided at no cost for patients, but with informed editorial context.

Research literature to the developing world

As the world's research literature became digitised, its availability in developing nations became a problem. The STM Association in partnership with the World Health Organisation (WHO) launched HINARI²³ to make the world's medical research content available to the world's 100 poorest countries for free. AGORA²⁴ (with content of relevance for agriculture) and OARE²⁵ (for the environment) followed, with similar philanthropic ideals. The number of countries gaining access to the content has increased. The three initiatives together are now referred to as HI-AG-OA.²⁶

Research in relation to the digital age

Realising there has been little research on scholarly publishing itself, the STM Association, ALPSP and several national publisher associations have funded a growing body of peer-reviewed published research on publishing. ALPSP started its own journal *Learned Publishing*²⁷ and a number of publishers agreed to support the Publisher Research Consortium.²⁸

On-line journals users' ratings

Journals underpin the work of the scientific, technical, medical social sciences and humanities research communities and the powerful, deeply interconnected, digital ICT infrastructure that has been developed by publishers and research institutions brings extraordinary functionality to the desktop of virtually every Australian researcher. As Mark Ware wrote:²⁹

Journals form a core part of the process of scholarly communication and are an integral part of scientific research itself. Journals do not just disseminate information; they also provide a mechanism for the registration of the author's precedence; maintain quality through peer review and provide a fixed archival

²¹ An archive with no real-time, on-line access to the content by anyone except repository staff.

²² <http://www.patientinform.com/>

²³ <http://www.who.int/hinari/en/>

²⁴ <http://www.agInternetnetwork.org/en/>

²⁵ <http://www.oaresciences.org/en/>

²⁶ See <<http://www.youtube.com/watch?v=vx91YAR2pFY>> for an introduction to these three publisher-led initiatives.

²⁷ <http://www.ingentaconnect.com/content/alpsp/lp>

²⁸ <http://www.publishingresearch.net/>

²⁹ Ware, Mark, op cit, p 5

version for future reference. They also provide an important way for scientists to navigate the ever-increasing volume of published material.

The fact that researchers are highly satisfied with the levels of access being delivered is supported by Ware who refers to recent surveys:³⁰

Independent research by City University (London) in 2004 found that 70% of researchers believed that access to journal literature was better or much better than 5 years ago. Only 10% of authors said that access to the literature was poor or very poor. Another survey found that access to the literature came a long way down a list of possible barriers to research productivity, well behind factors like funding, ability to recruit suitable staff, insufficient autonomy in setting research direction, bureaucracy, lack of job security, etc.

Australian researchers were included in these surveys and, in addition, we have substantial informal feedback from the local research communities that support these findings.

PART 2: REPLY TO THE CONSULTATION PAPER

The Department's Consultation Paper has six broad headings. The APA will focus on particular issues that arise under these headings — especially Issues 1 and 4 — and largely from the point of view of publishers of scientific, technical and medical journals, educational publications and other journals. We will also make some general comments on copyright — the cornerstone of the entire publishing edifice.

2.1: Public Sector Information (PSI)

Defining PSI

The APA has no in-principle objections to allowing open access to Public Sector Information (PSI) as long as the Government's definition of PSI fully and fairly takes into account the realities of producing and disseminating copyright material in today's marketplace. Where the PSI in question is covered by Crown copyright, it is obviously uncontroversial to allow open access to it. However, 'materials that result from publicly funded cultural, educational and scientific activities'³¹ should only be defined as PSI if the entire process — from creation of the manuscript to the production and dissemination of the published material — is entirely and exclusively funded by the public sector.

To understand the import of this distinction, we need to consider the two essential forms of copyright which have most significance in publishing:

³⁰ Ware, Mark, *op cit*, p 13

³¹ Australian Government, Department of Broadband, Communications and the Digital Economy; *Digital Economy Future Directions Consultation, Draft for industry and other stakeholders' input and comment* — 18 December 2008, p 3

1. The author's or creator's copyright, which is the intellectual property right protecting a work as a text; and,
2. The edition copyright, which is the right of the publisher to develop, promote and profit from the author's copyright within agreed parameters (including territory, timeframe and form of publication).

These two distinct forms of intellectual property are intimately involved, and the second form (the edition right) is a derivative and an extension of the prime right of the author to protect and share their property without infringement.

When it comes to definition, the APA recommends that the Government consider how the PSI regime operates in the UK, especially with regard to the re-use of public sector information.

Regulations introducing the EU Directive on the re-use of PSI (2003/98/EU) were published in December 2003. The EU adopted the PSI Directive to overcome barriers that limit the re-use of PSI. The Directive regulates how public sector bodies should make their information available for re-use, and deals with key issues like transparency of what is available and under which conditions, fair competition, and non-discrimination between all potential re-users. Essentially, the EU's PSI Directive sets out rules for allowing individuals (and companies) the right to re-use public sector information for commercial or non-commercial purposes and certain practical arrangements to facilitate re-use. All of these matters are in keeping within the 2008 OECD Seoul Declaration.

The UK has issued Statutory Instrument 2005 known as 'The Re-use of Public Sector Information Regulations 2005',³² which seeks to give regulatory effect to the EU Directive. The APA supports a PSI framework as represented by these Regulations for several reasons:

- The UK Regulations are consistent with the principles behind the EU Directive on the re-use of PSI (2003/98/EU);
- As Australia now operates within a global context, it is appropriate that the meaning of PSI here not be unnecessarily differentiated from that operating overseas; and that a similar regime to the one operating in EU could be adopted here. In the United States, public sector information is available but there is no similar statutory regime as in the EU or the UK. The US sells PSI without any regulated framework other than the general law;³³
- The PSI regime contained in the EU Directive and the UK Regulations uphold the Seoul Declaration allowing a transparent and workable regime to operate;
- The EU/UK's PSI regime recognises the importance of copyright and permits a return on investment for the document being re-used. Both these issues are important for the development and expansion of the digital economy;

³² The Internet copy of the Statutory Instrument 2005 No. 1515, The Re-use of Public Sector Information Regulations 2005 are found at <<http://www.opsi.gov.uk/si/si2005/20051515>>; accessed 4 February 2009

³³ For a discussion on the issue in the United States see <http://www.lda.brandenburg.de/media/2628/Domenico_070605.pdf>, accessed 12 February, 2009

- The EU/UK's regime does not prohibit information sold or released through PSI to be used to create new copyright material and interests (through adaptation of the information and ideas contained in the PSI) which is an important IP principle.

The global debate on access to PSI

There is global debate occurring across different jurisdictions on improving access to public sector information and data. It is noted that the European Parliament's Economic and Social Committee on Scientific Information in the Digital Era has 'agreed to support a study on the economic implications of digital conservation as well as research on business models for publication and on the scientific publication system.' This has resulted in the eContent Plus funded PEER project³⁴ which commenced in October 2008. Nowhere has there been any impact assessment on the likely effects of 6- or 12-month embargo periods on the viability of journals.

The PEER project needs to be monitored as it may have a significant bearing on Australian Government policies in this area.

2.2 Open Access

Discussions around Open Access (OA) are fundamentally about ways of achieving three objectives:

- Finding sustainable business models that allow all involved to move forward with sufficient capital investment to grow the digital economy;³⁵
- Having the overall objective to foster future research and ongoing publication of STMS journals to advance the knowledge base and ideas within our communities, in order to make the next discovery and find the next breakthrough;
- OA is a global issue and not one based in within nation states. Policy formulation has to be developed within the global operations of the research community.

The concept that 'knowledge is or wants to be free' is a catchphrase closely associated with campaigns for OA. In any practical sense, however, OA is not about free access to free ideas if any of the above objectives are to be achieved. It is an economic axiom that a zero money price on an economic good creates a shortage of that good not an abundance.³⁶ On the most basic level, there needs to be security in place for a return on investment if the current system is to continue to deliver benefits to the scholarly communities and to society in general, along with a growing digital economy.

³⁴ http://www.stm-assoc.org/storage/2008-12-22_PEER_Behavioural_Tender.pdf

³⁵ Ware, Mark, op cit, p 8

³⁶ Alchian & Allen, *Exchange & Production, Competition, Coordination & Control*, Third Edition, Wadsworth Publishing, 1983, p 14

Australian authors are responsible for about 2% of the world's scientific literature published annually. It is therefore important to keep our role in perspective, when it comes to the international treaty arrangements and practices in traditional and on-line publishing. Even though the on-line sector is in a state of considerable flux and development, Australia's capacity to go it alone on policy issues in this area is at best negligible and carries a considerable risk. The debate about regulations in a global market is one that has traditionally been conducted in international fora. Any unilateral attempt by Australian authorities to move away from internationally agreed regulations or definitions would, in all likelihood, only serve to isolate this country and cut Australian researchers and innovators from exposure to the 98% of research generated and published overseas, as well as the verification and peer review processes that are fundamental to the scholarly system as it currently operates.

The APA supports dialogue and discussion with Government and other stakeholders on Open Access. The field, at the moment, is highly fragmented and volatile, and new business models are being tested and need much more research and monitoring before a sound outcome can be agreed upon for all interested parties, including governments, funders, publishers, researchers and on-line users.

A Short History of OA

OA has been advocated since about 2001 and has since built up momentum in the UK, USA and Europe.³⁷ A quick survey of the history will be useful to highlight the uncertain nature of the current situation.

In the UK, OA became an objective of public policy when the UK House of Commons Select Committee on Science and Technology held an inquiry into scientific publications and published a report on their findings entitled 'Scientific Publications: Free for All' in July 2004. Significantly, the UK Government rejected the findings of the House of Commons Report. The UK Government said that it did not think it should intervene to support one business model or another.

However, commentators still confuse the House of Commons Committee's recommendations with UK Government policy.

In the USA, the National Institutes of Health (NIH) introduced an initially voluntary policy of requesting researchers to deposit the post-peer-reviewed articles of research funded by the NIH to PubMed Central, but this was converted into a statutorily backed mandate when author compliance was revealed to be very low (less than 5%). This mandate took effect from April 2008.

A number of institutions (most famously Harvard University) have also mandated that their researchers deposit articles into institutional repositories (IRs) — with the policy sometimes preceding the existence of the repositories! Often, there is a lack of clarity regarding article versions, opt-out waivers, the position of co-authors in other institutions, and the rights that authors are ceding to their employer.

Even IR protagonists paint a picture of IRs being underpopulated, underfunded, and underutilised.

³⁷ Robert Campbell and Cliff Morgan, unpublished paper, January 2009.

In the EU, governments have shied away from imposing legal mandates for OA, although a number of funders have declared policies that vary from recommendations to mandates, and which may or may not be clear about article versions and acceptable embargo periods.

The STM Association has been an instigator of the aforementioned PEER project in Europe. The project will investigate the effects of large-scale, systematic depositing of authors' post-peer-reviewed manuscripts on the following variables: reader access; author visibility; repository costs; journal viability; and the productivity of European research. If successful, this major project, which brings together publishers, libraries, repositories and funders, should help to determine the publishing policy of the EU.³⁸

Overall penetration and form of the OA sector

Although the STMS publishing business model is still overwhelmingly reader/library-pay, major publishers have recently begun to experiment with author-pay models. Much of this shift has been driven by research funding bodies mandating that their authors make final research papers available on open access repositories.³⁹ Broadly defined, Institutional Repositories (IRs) are repositories set up and maintained by universities and research institutions to post, for public access, information and data about research projects coordinated by their faculty and employees, and which sometimes include versions of scholarly papers. Scholarly publishers recognise that IRs serve a number of useful purposes for universities and research institutions.⁴⁰ If properly conceived and executed, they can help disseminate knowledge and promote institutions to funding agencies and recruits.⁴¹

The UK House of Commons Select Committee's report established two distinct OA business models. One is known as the 'Gold Road' (where the author or funder pays for the published article to be made freely available) and the other, the 'Green Road' (where OA is achieved by authors self-archiving their articles on Institutional and Subject Repositories for free access over the Internet). What is apparent is that even within these two broad categories there is much experimenting with business models.⁴²

For the moment, the APA sees the 'Gold Road' alternative as a more stable and viable business model, but we recommend that the Government open a dialogue with publishers and other stakeholders about this issue, as soon as possible, while monitoring developments overseas, in particular the PEER project.

³⁸ Campbell & Morgan op cit.

³⁹ Simba Information, Global STM Publishing 2008-2009, p 6.

⁴⁰ University presses are usually more dedicated to the task of creating highly focused, well regarded material for scholars. University presses strive to achieve their academic-driven goals first before attempting to break even financially. Most university presses operate at a loss, and as a result receive further subsidies through their parent organizations. A few presses, however, thanks to the generosity of endowments and other private contributions, are self-sufficient.

⁴¹ STM paper on IR, details contained in Reading List.

⁴² Campbell & Morgan op cit

2.3 Copyright

An essential precondition to publishers' continued investment and innovation in the creation and dissemination of digital content is the legal certainty of robust copyright protection.

Ideas are expensive to publish, but cheap to copy. The costs of publishing are high and the return not necessarily certain. This makes publishing an industry with a high level of business risk. Without adequate technological protection, it is even easier in the digital economy to copy and market a work at a reduced cost and consequent high profit for the 'free-rider'. The increased risks for publishers in a digital world are manifest from the title of a recent article in the on-line newspaper *Independent.ie*: 'Have books become the new target for internet piracy?'⁴³

It is the statutory and internationally recognised protection of copyright law that provides the financial security and opportunity for publishers to innovate.

Copyright is the essential mechanism that enables holders of copyright to recoup the investments that are necessary to publish high-quality, specialised and technically advanced material that is at the core of professional education and research content.

The Australian Government needs to ensure that any measures it adopts to promote and grow the digital economy do not in any way weaken the copyright measures that currently operate. In fact, copyright measures need to be strengthened and updated to meet new challenges and opportunities in the changing technological environment of the digital economy. This does not imply that the copyright itself has altered, rather that the regime in which it is protected and enforced needs to be enhanced.

The APA would welcome the opportunity to discuss with Government ways to remove barriers to growth and at the same time provide incentives to innovation and growth in the digital economy.

Enforcement of copyright

Enforcement of copyright in the digital economy is fraught with difficulty. The Government needs to consider adopting current tools that might assist copyright holders to protect against the unlicensed exploitation of their interests. One example is taken from a US provision where a copyright holder can apply to a Court to obtain an order that an ISP will provide details of illegal use of material. In the US the ISP has to disclose the identity of an alleged infringer upon receipt of what is known as an administrative subpoena. To be available within Australia as a stand-alone measure this would require legislative support.

Enforcement is a key issue and it is suggested that a review be conducted of all Australian and overseas means of enforcement of copyright interests in the digital economy to see how this aspect of the Copyright Act can be strengthened and enhanced without impacting on the growth of the digital economy. This same review

⁴³ Marsden, Rhodri 'Cyberclinic: Have books become the new target for internet piracy?' *Independent.ie*, 12 December 2008, <<http://www.independent.ie/business/technology/cyberclinic-have-books-become-the-new-target-for-internet-piracy-1535384.html?r=RSS>>

could look at voluntary agreements between parties to act against infringement activities within the digital economy.

Library, museum, educational and archive exceptions in Copyright Act

The Consultation Paper refers to the EU Green Paper on Copyright in the Knowledge Economy, which refers to library, museum, educational and archive exceptions.

The APA believes there is neither need nor justification to change the current Australian exceptions relating to these areas, in isolation. Copyright is a unique beast in that it acknowledges the worth and ongoing value of the creative output of humans, rewards it, encourages more of it and then (after a period of 70 years), confers it as a public good to all humanity to share. To continually chip away at the benefits of copyright for creators by an ever-multiplying range of exceptions is to mock the essential creativity that is the basis and cornerstone of every library, museum and archive, and without which they would not exist.

The only circumstance in which the APA believes that the exceptions should be looked at is as part of a comprehensive review of all Australian copyright exceptions to see how they compare to similar international exceptions.

2.4 Safe Harbours

The current international copyright treaties that Australia is a signatory to, are based on the premise that exceptions are intended to be invoked only in special circumstances — they are not, and must not be allowed to become a tool for wholesale expropriation of intellectual property.

It is suggested that the underlying legislative philosophy of the Federal Government in growing the digital economy where copyright operates should be to create an environment where ‘behaviours of privacy’ are actively encouraged to become legitimate enterprises.

In line with this philosophy, the APA is not in favour of the safe harbour provision currently contained within Australian copyright law being extended in any form.

As an operator of a business, an ISP needs to provide a service that complies with the laws of the country. It seems an odd argument for a Government to suggest that, to grow a segment of the economy, activities associated with that business that harm the commercial interests of others need to be ignored. This is essentially what a safe harbour argument does. The notion that the safe harbour only applies when there is no knowledge of the activity or the activity cannot be detected seems at odds with how citizens expect society to operate.

Contained within the Consultation Paper is an example of the application of the principle of ‘never ending extensions’. The principle states that once an exception is provided it will be argued that it needs to be further amended. The authors of the Consultation Paper have raised the extension of the current safe harbour for ‘carriage service providers’ with respect to copyright interests. The International copyright regime has the ‘tripartite test’ (TRIPS Art 13) which contains clear

provisions to restrict and contain the use of exceptions. These need to be rigorously applied.

As well, the concept of 'safe harbour' as an exception is a questionable and problematic issue. It has the considerable potential to send the message that within a 'safe harbour' anything goes. Without a detailed knowledge of the law, the general belief tends to be that the 'safe harbour' exception prevails. But the real outcome is oddly the converse. Rather than excluding a small but key sector of the economy from the provision of a particular law, what actually occurs is that a larger section of the community, who should not have the protection, believe they do; and issues of infringement and enforcement are enhanced not reduced.

The use of contractual licensing

The APA believes that a better way to proceed is to encourage licensing of digital content between users. There are many commercial examples of such licences. The benefit is that these contractual structures grow the digital economy without the necessity of legislative assistance. The holder of a licence has a copyright interest that is supported by a legislative framework, but the commercialisation and availability of a commodity operates by using commercial and legal methods. The growth over the past 10 years of the on-line journal is a prime example of this in operation.

Licensing, ideally, is the preferred way forward rather than multiplying the exceptions to the Copyright Act — a document already buzzing with sub-sections, sub-clauses and codicils. Licensing is a well-known mechanism supporting progress in a fast moving, dynamic environment which is the global digital economy. Statutory exceptions are the preferred model only in the absence (or the impossibility) of a licensing arrangement being effected.

Licensing has been described as having the key advantage of being customisable, flexible and adaptable over time and at short notice. In essence it has the power of the contractual arrangement. By contrast statutory measures are rigid, difficult to amend, not at all flexible and fixed in time.

APA members advise that licences are very broad and deal with all questions of usage appropriately as transactional and commercial relationship arrangements. Licence terms can often encompass uses that previously were addressed by reliance on exceptions and/or collective licences. Cross-border issues relating, for example, to variations between different countries' legal requirements for the operation of exceptions, can all be accommodated by licensing.

Orphan Works

Likewise, the APA believes there is neither need nor justification to change the current legislative arrangements.