

## Australian Government Productivity Commission Draft Report on Intellectual Property Arrangements

### Response from Cambridge University Press Australia

Dear Sir/Madam

Cambridge University Press, a global academic and educational publisher, is pleased to provide the Commission with its views about the Draft Report on Intellectual Property Arrangements and, in particular, those aspects that address Australia's copyright regime. Our submission is based on years of publishing experience not only in Australia but worldwide, including in the United Kingdom where the copyright law has recently been amended, and in the United States where the fair use doctrine has been applied by the courts for several decades.

We believe that the Draft Report is based on several flawed assumptions and that its Recommendations will not further the Commission's stated aim of restoring the balance between copyright owners and consumers. As discussed in more detail below, we were very dismayed in particular to read the Commission's blanket statement, forming the basis of its Recommendations, that "*[m]ost new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's fair use exceptions*".

#### The Report Overlooks Australian Content Created by and for Australians

It is simply not the case that Australia does not produce its own innovative content worth protecting for the full term of the *Berne Convention* mandate.<sup>1</sup> In the educational sector alone, authors and publishers provide resources for more than 350,000 teachers and lecturers who education more than 5 million students in over 9500 school and higher-education institutions. Educational publishing sees annual sales revenue of \$410 million and statutory licensing fees of \$103 million.

Cambridge University Press Australia publishes for the Australian school curriculum almost exclusively. Its books and online resources are created in the main by highly-experienced practising Australian teachers, whose work is edited and produced out of our Melbourne office. Indeed Cambridge University Press Australia invests significant resources in developing its textbooks and other classroom materials, many of which go on to be published in subsequent editions and with online components.

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<sup>1</sup> While not an official recommendation, the Commission has issued Draft Finding 4.2 suggesting that a "more reasonable" copyright term would be "closer to 15 to 25 years after creation". Worryingly, this Draft Finding ignores Australia's legal, treaty-based obligation under the *Berne Convention* to implement copyright terms of at least 50 years. Such a basic misunderstanding of an IP treaty agreed by over 160 nations leaves us with little confidence that the Commission has fully understood the issues it attempts to address.

Our authors are fairly compensated with royalties to reward their creativity. Students and their parents benefit from the incentive copyright gives our authors to write content that sells well and matches the curriculum and teachers' needs and expectations. If Australian law changes to make Cambridge University Press Australia content easier to copy and re-use, our authors would be dis-incentivised as would we as their publisher. The educational sector would suffer in turn as the quality of teaching and learning resources declines. We therefore take issue with the mistaken assumption that there is very little local authorship and that local content would not be affected by the Commission's proposals.

### Removing Parallel Import Restrictions Will Not Curb Infringement

In support of its Recommendation to remove parallel import restrictions, the Commission claims that *"timely and cost-effective access to copyright-protected works — be they movies, television programs or electronic games — is the best way for industry to reduce online copyright infringement"*. We respectfully disagree.

We note that this statement is not supported by any evidence. And while we acknowledge that reducing prices and licensing fees may bring content into an affordable range for content users who respect copyright, our experience of piracy suggests that there will always be a market for illegal content no matter how low prices drop. In many of our markets where we reprint locally at low-cost in order to ease pricing to make our content more affordable, piracy is rampant both in print and digital formats. Unless and until the Commission can support its assertion that price reduction will reduce infringement Cambridge University Press Australia maintains that this is a false premise on which to recommend the repeal of parallel import restrictions.

### Fair Use Cannot Be Dropped Into Australian Law

#### *DRAFT RECOMMENDATION 5.3*

Our most serious concern is with Recommendation 5.3, which proposes an amendment to the Copyright Act 1968 to replace fair dealing exceptions with US-style fair use.

Under existing Australian law, as in the UK, certain categories of use are not considered infringing uses. As applied to literary works, these exceptions include:

- Personal research and study
- Criticism or review
- Parody or satire
- News reporting
- Professional advice
- Judicial proceedings
- Time, space, and format-shifting

- Print disability
- Use by libraries and museums

But these need not be set in stone. As an alternative to the wholesale replacement of “fair dealing” with “fair use”, Cambridge University Press Australia respectfully submits that the Commission should consider an expansion of the “fair dealing” categories, as has recently happened in the UK. For example, the Copyright, Designs, and Patents Act 1988 (CDPA) has been amended to allow short excerpts to be reused for quotation “whether for criticism, review *or otherwise*.” Additionally, the CDPA now includes an explicit exception for non-commercial text-and-data mining. Under this exception, a researcher would not require a license to copy content for the purposes of text-and-data mining if the researcher already has a subscription or other lawful access to the content.

An expansion of existing fair dealing categories is an appropriate and effective middle ground and should at the very least be trialled before the law is abruptly changed. While it is true that the United States is home to incredibly successful creative industries, it is also true that its case law, developed over 40 years since the enactment of the Copyright Act, has moulded and shaped the fair use doctrine through precedent. Without this guidance, Australian courts would be unfairly burdened with developing a new area of law. But even with the legal clarity that this jurisprudential backdrop provides (and no other country could replicate), the role of lawyers in making content use decisions is still far more prevalent than one suspects Australian educators, learners and creators would find desirable. And during the intervening years, as Australian case precedent is developed, authors, publishers, and illustrators will be less inclined to produce content without confidence that Australian law will fairly protect their creative output. This reluctance is a very real threat to Australian publishing.

A move to a fair use regime without the benefit of case precedent has the potential to reduce economic incentives for educational publishers to enter the market and for existing ones to continue to innovate. This will in turn lead to a reduction in the number of educational publishers, fewer jobs in the creative industries, and fewer educational products produced locally for local curriculums. By contrast, a fair dealing regime where categories of re-use are understood by all parties from the outset reduces litigation costs and brings necessary clarity to publishers to enable them to continue to bring innovative content to Australian consumers.

### Conclusion

Cambridge University Press fully endorses the Australian Publishers Association submission in response to the Draft Report and shares its significant concerns about the unintended consequences that would arise from the implementation of the changes suggested. As active participants in the marketplace for content, we see every day how rapidly the way in which content is created, distributed and consumed is changing. We have also seen how difficult it is to predict the effect that major changes to the law can have on online business models that by their nature

are evolving faster than the legislative process can allow. In some cases, new sui generis rights have been created that have not yet proven to have the commercial and practical application that was expected (i.e., the EU Database Right). In other cases, such as the Canadian switch to fair use, the detrimental impact on the quality, diversity and quantity of supply of high quality content (that the fair dealing regime took great care to support) risks negating any perceived public benefit from wider and broader access – particularly in the field of educational content, the sector most at risk from fair use. That is why we support a copyright framework that is based on certainty (to support investment and decision making), facilitated by licensing (to support true flexibility) and, where properly necessary, regulated by carefully crafted exceptions (to ensure public policy goals and fairness prevail).

The 1709 Statute of Anne, England’s original copyright law, was clear from its title that copyright should not enable censorship, but rather, should “encourage learning”. We at Cambridge University Press Australia and, indeed, the wider University of Cambridge community, look forward to continuing to work with the Commission to ensure that it continues to do so.

Sincerely

Mark O’Neil  
Executive Director of Cambridge University Press Australia and New Zealand

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