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Intellectual Property Arrangements  
Productivity Commission  
GPO Box 1428  
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AUSTRALIA

Dear Productivity Commission

**Submission by the International Publishers Association to the Productivity Commission Draft Report 'Intellectual Property Arrangements'**

The International Publishers Association (IPA) is the international federation of national publishers associations, representing all aspects of book and journal publishing from around the world. Established in 1896, our more than 60 members are publishers associations representing book and journal, paper and digital publishers from over 50 countries. We are an industry association, but with an important human rights mandate: IPA's mission is to promote and protect publishing and freedom to publish, and to raise awareness for publishing as a force for economic, cultural and political development.

The IPA will only comment on those aspects of the Draft Report that affect copyright, and specifically, copyright in the publishing industry. We also support the detailed submission made by our Australian member, the Australian Publishers Association (APA).

Introduction: A Calculus of Risk

The Productivity Commission (PC) Draft Report has unfortunately managed to reduce the scope of this inquiry to a spurious argument about 'winners and losers'<sup>1</sup> in the shifting balance between intellectual property rights owners and users. But such an 'us and them' narrative is a false dichotomy<sup>2</sup>. Starting from this unsupported premise and working with economic data that is incomplete and insufficient, the value of the PC's Draft Report is questionable. Notwithstanding this, we would welcome an economic

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<sup>1</sup> Draft Report p.51.

<sup>2</sup> At the Charles Clark Memorial Lecture in London in April 2016, keynote speaker Professor Michael Fraser of the Faculty of Law at the University of Technology, Sydney, said: 'This public debate between copyright owners and users has been framed as a question of finding a copyright balance. I reject this search for a copyright balance. It is a false debate. The idea of a copyright balance imports an implicit assumption that there are two opposing interests: copyright owners' rights and the public interest in access. 'Copyright balance' ends up balancing authors' and publishers' rights against the public interest in access. This is a false dichotomy. It is not the case that copyright is a selfish, corporate interest and that exceptions to copyright are in the public interest. Copyright is not against the public interest. Copyright protection is in the public interest.' 'What are publishers for?' 13 April 2016, available at [http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016\\_London/What-are-publishers-for-Charles-Clark-Lecture-2016docx.pdf](http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016_London/What-are-publishers-for-Charles-Clark-Lecture-2016docx.pdf).

framework for this debate on intellectual property policy.

Publishers maximise the dissemination of knowledge through self-sustaining business models. That has always been their mission. They are at the cutting edge of intelligent innovation, embracing the opportunities and disruption that digital has brought. Like the authors they serve, publishers want their works to be universally accessible, globally available and readable across all platforms. Publishers invest considerable sums of money in these innovations — both in the technology itself and in the employment of people who have the necessary skills to devise, develop and maintain it — and they therefore add considerable value to the initial creative input and its circulation. In the education sector, especially, it is their creativity that drives most textbooks.

Publishers are the financial engines of the copyright machine. They pay advances to authors on future royalties to give them the security and time to write; they pay editors, illustrators, typesetters and designers up-front to work on books that have not yet been printed or made available; they pay printers and app/web-designers and marketers long before a book has been distributed or displayed; and they negotiate a cut of a book's retail price with bookshops, websites and aggregators before anyone has bought a copy.

Furthermore, apart from the obvious market-related risks inherent to publishing, such as miscalculating the potential readership for a work, it is publishers who are called upon to act – at their own expense – to enforce copyright in cases of infringement, which is something that most individual authors do not have the resources to accomplish.

Whatever sector a publisher works within, whether it be trade, education or STM (scientific, technical and medical), a solid and certain framework of copyright law is the fundamental prerequisite that enables them to freely invest and re-invest in often risky, untried innovative work.

Publishers add value and assume risk, but they rely on a solid and certain framework of copyright law to enable them to earn a return on their investment.

From this perspective, the question about whether the intellectual property system balances the rights of rights owners and users becomes moot.

### PC Draft recommendation 5.3 — The proposal to introduce 'fair use' into Australian law

The IPA is disappointed with the Commission's intended recommendations on the adoption of 'fair use'. We reiterate our position as previously outlined<sup>3</sup> that the legal uncertainty resulting from the introduction of 'fair use' will have an undesirable chilling effect on investment; trying to resolve the uncertainty will result in counterproductive legal expenses; and it will transfer economic benefits flowing from creative works from authors and the creative industries over to technology companies, where new uses of copyright works considered by them to be 'fair use' will go unrewarded.

In the four jurisdictions where 'fair use' has been adopted (USA, Israel, Philippines and Singapore), only the US has extensive forensic experience. Fair use regulations have been considered, but rejected by many jurisdictions, and for sound reasons — most recently, by the UK on advice from Professor Ian Hargreaves<sup>4</sup>. Apart from the legal uncertainty already mentioned, which would result in a culture that deters creative innovation and collaborative solutions, the introduction of a 'fair use' doctrine in Australia would:

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<sup>3</sup> Please see our submission of 30 November 2015.

<sup>4</sup> Ian Hargreaves 'Digital Opportunity - A Review on Intellectual Property and Growth', May 2011, paragraphs 5.19 and 5.41

- create a serious risk that Australia may violate its obligations under international copyright treaties, in particular the three step test of the Berne Convention, WCT and TRIPS;
- require the introduction or importation into Australian jurisdiction of an entire body of legal precedents, adjudications and case law, carrying with it unpredictable legal consequences, uncertainty and therefore business risks.

In the main, the risk associated with the ‘fair use’ defence will fall on copyright owners. In the United States, this risk is balanced by the prospect of the rights owner being able to claim substantial statutory damages if infringement is found. In Australia, however, statutory damages are not available for copyright infringement, or for any other civil remedy that we are aware of, nor does the PC recommend statutory damages in its section on enforcement. The cost of litigating on a proposed ‘fair use’ exception could hardly be described as productive. This cost cannot simply be waved away (as the PC does) as ‘not a compelling reason’<sup>5</sup> and will have to figure prominently in the decision whether to import ‘fair use’ or not.

Copyright management organisations (collecting societies) often are fully engaged in ‘fair use’ cases in the United States where a ‘fair use’ defence is asserted against uses of copyright works which are ordinarily licensed by means of collective licensing. The same has happened in Canada, where AccessCopyright has had no option but to declare formal disputes with educational authorities in the light of the fair dealing exception for education. We submit that the uncertainty created by ‘fair use’ in relation to uses which have heretofore been licensed in Australia and the cost of litigation could impact on the distributions by Australian copyright management agencies, undermining the efficiency desired by the Commission.

‘Fair use’ in the USA is rooted in over 150 years of case law and judicial interpretation. Even so, there remain **substantial** concerns regarding legal certainty, freedom of speech and international treaty obligations. Rather than solve any problems about access, the introduction of ‘fair use’ in Australia would simply create a new point of argument, a new term that encourages dispute rather than resolution.

Introducing an entirely new legal concept into the Australian Copyright Act would be radically intrusive, unpredictable and of dubious utility. Given that there is no international mechanism to coordinate and resolve tensions between different applications of the ‘fair use’ doctrine in different countries, there is no such thing as a single, homogenous, uniform notion of ‘fair use’. Therefore, to what extent would Australian courts make use of the legal precedents of foreign jurisdictions, which have been set within a different legal framework and if they diverge from them in practice, or develop them, will this not lead to further confusion rather than legal certainty?

If ‘fair use’ were introduced, Australian courts may or may not agree with precedents set abroad. This will create confusion because the expectation of homogeneity and consistency cannot be borne out in practice. The importation of an entirely new legal concept as loosely formulated as ‘fair use’ would leave both rightsholders and users with a high degree of uncertainty as to whether a given use is legal or not, thus stifling both investment in innovation and freedom of expression. The US Constitution provides a countervailing safeguard for freedom of expression that is missing from the Australian legal context. In the end, ‘fair use’ can be described as being of most utility for lawyers and clients with the deepest pockets. As one of the most prominent academic copyright critics, Lawrence Lessig, puts it: ‘Fair use in America simply means the right to hire a lawyer.’<sup>6</sup>

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<sup>5</sup> Draft Report p. 147

<sup>6</sup> ‘Fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad — in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the

It is arguable that ‘fair use’ is incompatible with the three-step test enshrined in the Berne Convention and TRIPS, because, without the existing case law and legislative foundation, it is not clear whether it limits a copyright owners’ exclusive rights only in ‘certain special cases’. The US can point to a highly developed set of precedents that have, over decades, calmed (but not silenced) critics with regard to the ambit of the ‘fair use’ doctrine. If Australia were somehow to introduce a fair use doctrine without fully taking on board US precedents, the question of compatibility with the three-step test would need to be freshly examined.

The greatest concern, however, is that over recent years, ‘fair use’ in the United States has mutated from a defence for ‘follow-on creators’ to a sanctioning, in the words of noted American copyright lawyer Jon Baumgarten, of ‘regular, concerted, systematic, commercially purposed, 100% complete, uncompensated, copying, without permission, day in-day out, of millions of copyrighted books’.<sup>7</sup> This has intensified following the decisions in the *Google Books*<sup>8</sup> and *Hathi Trust*<sup>9</sup> cases – a necessary implication of ‘fair use’ now being that it allows ‘[a]n Internet search engine [to publish] thumbnail images of websites in its search results’<sup>10</sup>.

This mutation of ‘fair use’ in the United States illustrates that its application is not just a case of ‘Courts interpret[ing] the application of legislative principles’<sup>11</sup>, but rather a case of the Courts taking over the legislative role from Parliament. The same objection applies to the guidelines being suggested by the PC, which would no doubt come from an administrative body and the binding nature of which will no doubt be questioned in a Court action.

As noted in the Draft Report, ‘fair use’ was not adopted in the United Kingdom, nor, in the final instance, was it proposed in the UK’s Hargreaves Review, where the existing fair dealing copyright exceptions were reviewed and amended instead. The supposed benefits of adopting ‘fair use’ in other countries have also been questioned. The Lisbon Council report recommending a ‘flexible exception’ in the European Union<sup>12</sup> has been criticized as ‘junk science’,<sup>13</sup> as has the analysis pointing to the supposed benefits of the introduction of ‘fair use’ in Singapore, where the conclusion is reached that economic benefits have flowed to industries that manufacture goods used for private copying of copyrighted works and not to the copyright industries.<sup>14</sup>

The PC provides no economic analysis to show that the adoption of ‘fair use’ would stimulate Australia’s economy; rather, it relies on a dogmatic adherence to a neoliberal economic theory. As stated earlier, we would welcome an economic analysis of the benefits of the current copyright regime — an evidence-based, rather than ideologically driven approach.

The Draft Report then goes on to suggest that the proposed adoption of ‘fair use’ should also extend to orphan works and out-of-commerce works. We consider this to be a simplistic solution that invites unforeseen harmful consequences.

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very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.’ Lawrence Lessig, *Free Culture*, p. 187 <http://www.freeculture.cc/freecontent/>

<sup>7</sup> “Global trends in Copyright: Fair Use and Beyond”, presentation at the International Publishers Association Congress, 10 April 2016, at [http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016\\_London/Jon\\_Baumgarten.pdf](http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016_London/Jon_Baumgarten.pdf).

<sup>8</sup> *The Authors Guild Inc., et al. v. Google, Inc.*, decision of the United States 2<sup>nd</sup> Circuit Court of Appeals, 16 October 2015.

<sup>9</sup> *Authors Guild v. HathiTrust*, decision of the United States 2<sup>nd</sup> Circuit Court of Appeals, 10 June 2014.

<sup>10</sup> Draft Report p.143

<sup>11</sup> Draft Report p.147

<sup>12</sup> Referred to at p.146 of the Draft Report.

<sup>13</sup> “The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder” by Dr. George S. Ford available at <http://www.phoenix-center.org/perspectives/Perspective15-03Final.pdf>.

<sup>14</sup> “The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform” by Dr. George S. Ford available at <http://www.phoenix-center.org/perspectives/Perspective16-01Final.pdf>.

To allow a 'fair use' defence or an exception to apply to orphan and out-of-commerce works would impose an extreme form of a 'use it or lose it' rule on the owners of copyright works, in that the loss of rights would be perpetual — dispossessing the owner of the ability to re-introduce the work into the market on a commercial basis.

There are clear and rational licensing solutions for resolving issues relating to orphan and out-of-commerce works. Some of these newly introduced schemes, like those in the European Union and the United Kingdom, should be given an opportunity to develop and be assessed before an exception in Australia is even considered.

#### PC Draft recommendation 4.2 — Proposal to limit copyright to 15-20 years

We note approvingly that the Australian Government has dismissed this recommendation as unfeasible,<sup>15</sup> requiring as it would, the unravelling of decades of diplomatic and intergovernmental negotiations. We agree with Minister Fife's statement in relation to this PC Draft recommendation when he says: '... Australia is a party to a range of free trade agreements and has no unilateral capacity to alter copyright terms and that to even attempt to do so would require international negotiations and the reversal of international standards'.

#### PC Draft recommendation 5.2 — Proposal for the repeal of rules allowing parallel importation

Publishers invest in creative content to make it available to readers in general and discoverable for its market in particular.<sup>16</sup> In this context, it comes to investment choices, with a wide range of options available in the globalised economy.

The rules relating to the parallel importation of books in Section 44A of the Copyright Act are an exception to the general rule relating to the import of copyright works<sup>17</sup>, and we submit that these rules have been designed in such a way so as to benefit the market in Australia.

We are of the view that the removal of these rules and the treatment of parallel imports falling outside these rules as non-infringing, will:

- make the initial investment in Australian authors less viable or unsustainable,
- reduce the size and number of Australian print runs, and
- discourage Australian authors and publishers from exploring international sales.

These rules allowing parallel importation have actually kept costs for books affordable. Comments to the Draft Report from other stakeholders in the publishing industry, including from our Australian affiliate, the APA, will show how the cost of books in New Zealand, where the parallel importation of books was allowed from 1998<sup>18</sup>, has increased and sales have reduced. We also note that legitimising parallel importation of books without any rules was proposed in India in 2012 and not adopted, for fear of interfering with the local publishing industry and bookselling market.

In the circumstances, we cannot see any benefit in changing the rules relating to the parallel importation of books.

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<sup>15</sup> <http://www.mitchifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>

<sup>16</sup> Please see our submission of 30 November 2015.

<sup>17</sup> Section 37 of the Copyright Act.

<sup>18</sup> Section 12(5A) of New Zealand's Copyright Act, 1994, inserted in 1998.

### PC Draft Recommendation 15.1 — Australian public institutions should all implement open access policies for publicly funded research

The Draft Report's proposal for all publicly-funded research to be published under Open Access suggests that the PC has little or no information on the role of STM publishers. We are therefore surprised that the PC would make proposals on compulsory Open Access publishing without a proper understanding of how journal publications, much less Open Access journals, are produced and disseminated.<sup>19</sup> We disagree fundamentally with the conclusion reached on Open Access and the assumptions and analysis underlying it.

The International Association of Scientific Technical and Medical Publishers is responding to the Draft Report and their submission will deal more fully with the role of STM publishers and Open Access Publishing. The IPA supports their position and joins them in suggesting that the PC's final report should not deal with Open Access policies for publicly funded research at all, unless the Commission is prepared to undertake a proper study which corrects the mistaken assumptions underlying the analysis and which considers all relevant facts.

Open Access publishing is not cost free. Electronic publishing has some of the same costs as found in print publishing — editing, proofreading, styling, art and illustration handling, layout and composition designing, as well as plagiarism detection. It also has costs not found in print publishing — such as XML generation, Document Type Definitions Migration (DTD) and format migrations, integration and tracking metrics, and the development and maintenance of platforms, content enrichment, content tagging and search engine optimisation. The costs to deliver both are higher than for print or electronic only, as is the case with a number of journals (like the top medical journals *New England Journal of Medicine* and *The Lancet*). Publishing costs remain, whether funded by supply-side (producer-pays) or demand-side (consumer-pays) models.

Ultimately, Open Access is not about the intellectual property framework. Open Access results from the licensing of reproduction and other rights by the copyright owner to the world at large, on specific standardised terms and conditions available in the various standard Open Access licences. In this sense, copyright is an enabler of Open Access. Publishers, STM publishers in particular, continue to develop models to enable Open Access publishing in a way that is not only sustainable economically, but which maintains the integrity of Open Access scientific publications from the perspective of peer review and perpetual access. In order to be a successful business model, it needs to be negotiated with its customers, namely educational and research institutions as well as funders of research, including governments. We therefore believe that it is inappropriate for the PC simply to recommend to the Government that Open Access publishing be mandatory for Government-funded research without deliberation between the parties mentioned.

### PC Draft recommendation 18.1 — Proposal for expansion of the safe harbour scheme

The extension of the safe harbour scheme to entities beyond Australian carriage service providers should not be undertaken lightly. The burgeoning number of take down notices for infringement, the rise of 'structurally infringing sites' (further described below), the prevalent use of privacy and other masking services by those who profit from copyright infringement, and the restrictive application of notice and take down processes by platforms, as evidenced by the responses to the recent study on

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<sup>19</sup> Draft Report p.406: 'the role of (and costs borne by) publishers in marketing copyrighted works in fiction, music and video content to consumers are not as obvious in the academic journal arena.'

the safe harbour in the United States,<sup>20</sup> all indicate that an extended safe harbour serves only to facilitate the traffic of illegal copies of copyrighted works and to make their removal even more difficult.

The long-standing problem in the United States stems in part from the broad definition of 'service provider' in the Digital Millennium Copyright Act (DMCA), under which any and all types of 'service providers' – including online entities not anticipated by Congress – appear to be eligible for safe harbour protections. When the DMCA liability limitations were negotiated, Congress, as reflected by the definition of service provider in Section 512(k)(1)(A), primarily had in mind service providers that were true common carriers – i.e., telecommunications companies that (like other common carriers) could not choose which communications they would transmit through their networks, and online forums (such as Usenet groups) that merely allowed for intermediate storage of user communications – as is the current situation in Australia.

Many content-hosting web sites operate under business and operational models that exploit safe harbour provisions — enabling them to claim safe harbour protection while incentivizing copyright infringement on a massive scale. These hosting sites are commonly referred to as 'structurally infringing sites' because, while their technology is content neutral and they generally comply with take down notices to claim safe harbour protection, their businesses are structured to flagrantly encourage an ongoing supply of books and journals without authorization and in a way that infringes their copyrights. These structural infringers also facilitate the infringing supply of all kinds of other copyright works, including music and films.

Many sites that host infringing content insist that take down notices be sent to them via dedicated web reporting forms, others by way of application process interfaces. Some have even stopped accepting email notices altogether. Some of the web reporting forms they use are non-standardised, often updated without warning, do not work or are subject to considerable downtime, and have varied and complex 'captcha' and 'hints' security checks that limit automation of notice sending. Such practices and structures promote inefficiency and wastage, and inhibit rightsholders from enforcing their legitimate rights.

In the circumstances, we disagree with the proposed blanket extension of the safe harbour scheme.

## Conclusion

Copyright, and the benefits for creators and publishers that accrue from copyright, have a decisive role in determining whether local writers and publishers invest their time and resources in producing local creative content. Copyright law that enables uses without reward for the creators, or the absence of copyright enforcement, will foster a dependence on content from countries that do reward creators, respect publishers and take enforcement seriously. It is no coincidence that the countries on the top of the Global Innovation Index<sup>21</sup> all have strong copyright regimes.

The development of a healthy national publishing sector is in the national interest. There is not only an interest in developing this as part of the national digital knowledge economy, but there is also a direct interest in harnessing the innovative capacity and the improvement through competitiveness that a free, competitive and entrepreneurial market for copyright protected content brings. If Australia wants to stimulate the digital economy, then publishing should be considered a strategically pivotal industry. From this perspective, cultural expression, information and educational content are not ordinary commodities; they are indispensable to ongoing national development.

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<sup>20</sup> US Copyright Office "Section 512 Study" – see <http://copyright.gov/policy/section512/>.

<sup>21</sup> <https://www.globalinnovationindex.org/userfiles/file/reportpdf/GII-2015-v5.pdf>

Beyond the pragmatic and economic argument for strengthening copyright and the local publishing industry, there are also broader policy implications: authors are a society's moral conscience. They are the way we tell ourselves who we are, where we've come from and what we could be.

Copyright is the mechanism that our society has invented to ensure that authors are rewarded for their creativity and encouraged to continue creating. In an increasingly globalised, digitised and mediated world, authors are the people who create an intelligible conversation out of the anarchy, the dissonance and the babble. Publishers are the engines that drive that conversation and ensure that it reaches its broadest audience.

Australian creators deserve the opportunity to be confident and productive participants in the global dialogue that is modern publishing. The IPA urges the PC not to jeopardise the continued development and success of the creative copyright industries in Australia by implementing unnecessary and unpredictable changes to the Copyright Act.

The above are our main responses to the Draft Report. We would welcome an opportunity to answer any supplementary questions you may have and present our perspective in more detail.

Yours sincerely,

José Borghino

Secretary General