

**30<sup>th</sup> November 2015**

By email to: intellectualproperty@pc.gov.au

**Pearson Response to the Intellectual Property Arrangements Productivity Commission Issues Paper**

## **1 Executive Summary**

1.1 Pearson welcomes the opportunity to respond to this Issues Paper on Intellectual Property Arrangements from the Productivity Commission. We have not answered specific questions in our response below, instead focusing on the key issues relevant to our sector, raised by the paper. We agree with the premise of this paper that IP laws exist to empower rights holders to create, invest and innovate in content, as well as the public to enjoy fair and meaningful access to that content. This involves an important balance to be struck between respecting rights holders' need to protect their investments in order to re-invest in content and new products and services, and the rights of the public to enjoy these outputs. We set out four key areas below which would serve to maintain this balance:

- Upholding our rights to communicate to the public and distribute our works, to ensure the highest quality of services to learners
- Maintaining controls over parallel imports to support local editions and investment in content
- Ensuring that over-broad Fair Use provisions are not introduced, given that they present significant threats to Australia's vibrant publishing sector
- Making clear the distinction between IP laws and competition laws

We have set out our detailed views on these points below.

## **2 About Pearson**

2.1 Pearson is the leading educational publisher in Australia, with significant activities at primary, secondary, English language as well as at Higher Education level.

2.2 Pearson is the world's leading learning company. Our education business combines 150 years of experience in publishing with the latest technology and online support, and has maintained a presence in Australia since 1946. We provide education and assessment services in more than 70 countries. Our qualifications, courses and resources are available in print, online and through multilingual packages, helping people to progress in their lives and learn in any way that suits them.

2.3 Each year we invest millions of dollars in developing local Australian content for Higher Education and Schools sectors, activity which is supported by the revenues generated from the sale of imported Pearson product, mainly from the United Kingdom and the United States of America.

## **3 Rights of communication and distribution**

3.1 The ability of the copyright holder to prioritise how it distributes works to the public, and on what terms, enables it to make other decisions around economic activity and investment. Our exclusive IP rights mean that we have stable revenue streams and full control over our offer, which gives us the ability to provide a fair and predictable return for the writers we partner with; develop new methods of delivery taking into account technological developments; have the means to invest and re-invest in content; and ensures that we can offer the highest quality of content to learners.

3.2 The revenues that we make from our products and content is used to subsidise local innovation and content that might not otherwise be viable. Our revenues are also used to cover not only the direct costs involved in development, production and distribution of a book itself or digital products, but also ancillary products that we develop specifically to support teachers and instructors. In some circumstances we are able to offer these products at no extra cost where our textbooks have been bought. These supporting products include items such as online assessment, student websites, LMS-ready digital content, Powerpoint slides and lecture and tutorial guides. Further, stable revenues allow us to experiment and innovate with our content, particularly as we increasingly focus on digital products. For example, Pearson has developed an awarding winning digital platform for secondary school learning, *Lightbook*, specifically to meet the requirements of the local Australian market, with content further tailored to each individual state's requirements. Intellectual property is not in a separate class of economic activity when making business decisions; the creation of *Lightbook* and its associated content would be undermined if we were unable to rely on a fair return on investment.

3.3 If there are threats to these important rights of communication and distribution (explored further below), our ability to operate in Australia and ultimately the extent and breadth of our presence here comes into question. This threatens Pearson's significant contribution to the education publishing sector and our customers, including the innovative products we bring to the market, and has the knock-on effect of endangering those titles and local markets in which Pearson operates. The effects are not limited to publishers, but the rest of the industry, including authors and employees, and ultimately impact on learners and the wider public.

#### 4 **Parallel Imports**

4.1 A clear threat to content creators' rights is exemplified in the potential for parallel imports. If distributors can import the same content from overseas where there is a price differential (due to a lower quality physical product), it undermines Pearson's market within Australia and destabilises the entire industry. Further, if all content is ultimately imported outside of publishers' control, Pearson and potentially other businesses would cease to require a significant presence within Australia, as they could conduct all of their activities from other locations. This would clearly be to the detriment of the Australian publishing sector and its creative outputs. Not only publishers, but authors and all kinds of content creators would be affected. Local publishing would be unable to compete with cheaper imports, and established publishers would be unable to support the creation of new content and products. Pearson has direct experience of this in the New Zealand market, which was a contributing factor in Pearson's withdrawal from that market, and Pearson's continued participation in that market is entirely undertaken from overseas (Australia) with the assistance of local distributors. Parallel imports would not only damage the publishing industry, but the wider educational market, creating a market of low cost and low quality import editions, with questionable validity and credentials. With the combination of a reduced publisher/creator presence to provide content and an influx of cheaper and lower quality textbooks into Australia, we predict that the quantity and quality of many courses and education materials would decline as a result. This would be an unacceptable situation for learners.

4.2 Wherever possible, Pearson will always strive to ensure that our content and products are priced to their markets, offering lower costs where appropriate. The issue of parallel imports is not so much to do with pricing as it is to do with destabilising our markets. In the US and UK, a lack of threat of parallel imports ensures that we are able to produce the best quality of content for learners, and as aforementioned we are able to use that content abroad, including in Australia, to subsidise local markets and new products.

4.3 Another important and related point is that parallel imports must be considered in light of the growing digital market. We would ask the Productivity Commission takes into account the new questions raised by the spectre of the digital market, particularly around the extent to which digital products should have geographical restrictions in their DRM systems. For instance, the Trade Marks Act 1995 (Cth) has some provisions around parallel imports, but the fundamental principles remain that licenced or trademark owners are able to control the use of that mark within Australia. Anyone else seeking to import materials or deal in materials which carry the mark can be restricted. However, these concepts are thrown into turmoil in the context of the digital market. How are they to be enforced when consumers can purchase digital products directly from overseas sellers? Responsibility for ensuring that imports into Australia do not infringe any Australian rights must be allocated. Costs for these obligations must subsequently be decided upon and fairly divided. We do not believe that these issues have been addressed or resolved as yet, and they are topics that require serious consideration.

## 5 Fair Use

5.1 We would be very concerned to hear about any changes to Australia's fair use or fair dealings provisions, particularly in light of changes made to Canada's copyright laws with respect to fair dealing, which have had catastrophic effects on the publishing industry. In Australia's education sector, fair use provisions already exist that enable reasonable use of copyrighted materials. Any further dilution or expansion of fair use means that copyrighted works enter the public domain, and this presents a huge disincentive for publishing companies to invest in the educational sector, and for content creators to provide any works if they feel they are not suitably rewarded.

5.2 The case of Canada very clearly demonstrates the unintended consequences of over-broad fair dealing provisions. The new legislation allows copying of 10% of works, and whole chapters and poems can now be copied. As a result of the legislation, guidelines introduced by the Canadian education sector deliberately limited the need for licenses, and the subsequent payment of royalties to publishers and authors. This has led to devastating effects for the education publishing industry. Sales of textbooks have seen significant declines, and there is a growing sense amongst educational institutions that content and materials are now, or should be, free, with no recognition of the investment or effort put into high quality educational works by publishers and authors. We believe that the new fair dealing provisions have contributed to significant declines in K12 and Higher Education industry revenues and unit sales in Canada. In K12, total industry revenues declined from C\$124,585m (A\$129,500m) in 2012 to C\$116,318m in 2014 (AUD\$120,400m) (in 2014, and in Higher Ed, total industry units declined from 5,583,451 in 2012 to 4,799,268 in 2014. Access Copyright, a Canadian rights reproduction organisation, has seen its regular income of C\$2.2m (AUD\$2.3m) per annum plummet to C\$100,000 (A\$94,000) in 2015. The impact is now becoming tangible, with Oxford University Press taking the momentous decision to cease publishing in the school divisions in Canada. Indeed, Pearson has also decided to scale back its schools operations in Canada as well.

5.3 This trend, if replicated in Australia, can only have negative effects for authors, creators and employees within the publishing sector, who will be directly impacted by the declining revenue streams and royalties. Pearson invites the Productivity Commission to consider whether such developments would help new curricula and learning materials reach Australian classrooms and learners, when the local development of innovative learning materials is no longer viable. In Pearson's view; the possibility of creative activities moving overseas or simply stopping will have immeasurable impact for the public. The Australian learner, ultimately, will pay the price, as a decline in creative output means the decline of educational materials and products as a whole

5.4 In conclusion, if fair dealing or fair use provisions such as those applied in Canada are introduced in Australia, we are likely to see the same effects detailed above with respect to parallel imports: an exit by publishers from the market; fewer incentives to create content; and declines in quality and subsidising of content for the Australian market.

## 6 IP vs Competition Law

6.1 It is important to make a clear distinction between IP laws and competition law. Anti-competitive behaviour and market dominance are not black and white terms, and are not necessarily related to the exclusive ability to exploit IP rights. These exclusive rights provide incentives for people to continue to create and invest in content, without which industries would not flourish and access to content would suffer. The right to be remunerated for one's IP is not an anti-competitive idea, but rather enables competition to flourish. Should there be evidence of genuine anti-competitive behaviour in markets, it is up to competition legislation to resolve the issues or be amended to do so, rather than making unnecessary changes to IP laws.

## 7 Conclusion

7.1 We look forward to working with the Productivity Commission in its research into these areas of IP law. IP law exists to encourage creativity and investments in new content, and should certainly not be viewed as a barrier to content creation or proliferation. Our industry ultimately requires a stable IP framework in which to operate, so as to ensure certainty. This certainty enables us to invest and innovate in high quality content, remunerate authors and support the local publishing economy and works for smaller markets. We heavily rely on imports of books to service the Australian market, which also help to subsidise local and rarer titles. If the incentive to import books is lost, we simply will not be able to pay for local editions or re-invest in content, and ultimately, our (and other businesses') presence in Australia comes into question.

7.2 The damage done by parallel imports or over-broad fair use provisions would not only harm educational publishing businesses, but the entire education sector as an influx of lower quality editions flood the market and investment and innovation in content is dramatically reduced. As we have seen in Canada, copyright laws that do not strike a fair balance between the rights of content creators and interests of the public will lead to the decimation of a thriving market, meaning everybody loses out.

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