

Productivity Commission
GPO Box 1428
Canberra City ACT 2601

**Intellectual Property Arrangements
Submission by The Federation Press**

24 May 2016

This submission is made on behalf of The Federation Press Pty Ltd, a small Australian-owned publisher of legal, social and academic books. The Federation Press has been operating for nearly 30 years and has over 400 books in print, and publishes 30-40 new books and new editions per year.

Many of the books The Federation Press publishes are student texts used in the tertiary education sector. Most of these books feature content that is specific to Australia and that is written by Australian academics and practitioners. All editorial work and 95% of the printing of our books is done in Australia.

Given the scope and local focus of our work, The Federation Press has significant concerns about the draft recommendation of the Productivity Commission, that the *Copyright Act 1968* (Cth) (Copyright Act) be diluted through the replacement of the current fair dealing exceptions with a broad exception for fair use (p159).

First, the Commission makes a number of assumptions to support this recommendation which do not reflect our operational reality, nor, do we believe, those of other publishers working in the same area as ourselves. In assessing the impacts on consumers the Report asserts that “given that most new works consumed by Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia’s exceptions, adoption of a fair use provision in Australia is likely to deliver net benefits to the Australian community” (p152).

This is not true in the case of the market we service – overseas publishers and authors offer no substitute publications for the books we publish and are never likely to do so. We produce books which specifically look at the law, environmental management, indigenous studies, social work and industrial relations, amongst other topics, in an Australian context.

Secondly, the Commission unjustifiably downplays the level of uncertainty that the proposed fair use changes will introduce.

Education is included on the list of illustrative fair use purposes with the report acknowledging “that some school use is likely to be fair, others may not be” (p152). The suggestion is made that US case law may offer guidance in this area, but as is noted at Table 5.2 the only guidance the US case law offers in relation to “copying chapters from a book for inclusion in a set of class materials” (or scanning pages from textbooks to use in lessons via interactive whiteboards (p143) is that it is a case of “potential fair use”.

It is further suggested by the Commission that the fair use checklist developed by the Copyright Advisory Office of Columbia University will be of assistance in reducing uncertainty: “Although not definitive, compliance with such guidance assists users in arguing to the courts that their use of copyright-protected works was in good faith” (p 161). We believe this checklist inevitably produces equivocal outcomes in the case of classroom copying, with both positive (the educational value of the material) and negative factors (the possibility of replacing sales of the book) likely to be identified. Yet there is no guidance on how the factors are to be weighed and balanced against each other by potential users. Even Columbia University accepts that there is “no magic formula” and that one factor may outweigh all the others in a particular case:

<https://copyright.columbia.edu/basics/fair-use/fair-use-checklist.html>).

Although the report asserts that “legal certainty [is not] desirable in and of itself” (p147) the legal costs incurred in determining appropriate usage, monitoring compliance and resolving disagreements regarding fair use would be prohibitive to a small publisher like The Federation Press.

In addition to the financial cost, we would have to bear opportunity costs including loss of productivity due to the lengthy time of standard court actions and depreciation in the value of our works as time passes.

Thirdly, the Commission underestimates the motivations of the user. The law schools of universities are a key market for Federation Press books. These law schools generate significant revenue for universities and it is naïve to assume they won’t make decisions and assessments regarding fair use in a way that furthers their interests.

Finally, the notion that copyright protection is tilted too far in favour of creators/publishers in the case of educational publishing is an assertion rather than a validated conclusion. The only argument advanced in the Report to support this claim is the case of “orphaned” and “out of commerce” works. These two areas could be addressed without the need to resort to the introduction of the new and uncertain concept of fair use.

The strength of the current fair dealing exceptions is that it enables publishers such as The Federation Press to make investments in local content and produce creative works that contribute to cultural and academic debate and learning in Australia.

Approximately 50% of the revenue The Federation Press earns is derived from a relatively small number of prescribed textbooks. If material from these textbooks were available for free, the financial viability of Federation Press would be jeopardised.

On a more micro-level, monies earned from CAL payments can make or break our decision to publish a book. In 2014/2015 our CAL earnings comprised 10% of our total revenue. Without these earnings, we would not have published a number of titles.

Scholarly monographs and books about Australian legal history, social work and Indigenous studies are rarely profitable and it is the revenue that we make through the sale of our student textbooks, and educational and government copying schemes that subsidise these works. The introduction of a broad exemption for fair use will jeopardise our investment in this content. This obviously has a run-on effect – if educational publishers like The Federation Press do not make investments or take risks, then authors, publishing staff, printers, academics and students will all suffer.

In conclusion we fear that there is a risk that the assumption by the Productivity Commission, that most new works consumed by Australia are sourced from overseas, may well become a self-fulfilling prophecy if the new 'fair use' provisions drive Australian publishers of local content out of business. This will not, however, be of 'net benefit' to the Australian community, as the development of Australian law and society will be stunted by the absence of books by Australian authors developing and challenging the status quo. That which is lost will be immeasurably greater in significance than that which is gained.

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