



Intellectual Property Arrangements Inquiry  
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Geneva, 30 November 2015

Dear Productivity Commission

**Submission by the International Publishers Association to the 'Inquiry into Australia's Intellectual Property Arrangements' Productivity Commission's Issues Paper, October 2015**

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 Productivity Commission's Inquiry is broad, ranging across the full gamut of IP rights including patents, registered designs, trademarks, geographical indicators and plant breeder's rights. In this submission, the IPA will comment only about copyright.

We also support the detailed submission made by our Australian member, the Australian Publishers Association (APA).

We will focus on those questions in the Productivity Commission's Issues Paper that we believe are most relevant to book and journal publishing, wherever possible taking our cue from the Paper's explicit questions.

In this submission, we demonstrate that:

- The publishing industry worldwide invests not only in creative works, but also in innovation to enhance and disseminate creative output and to aid its discoverability;
- There are unfavourable economic impacts on the creative industry resulting from proposed uses of copyright material which are ostensibly free, such as US-style 'fair use' and overbroad fair dealing exceptions in education.

**A framework for assessing IP arrangements**

Publishing, like the other creative industries, relies on the certainty of copyright law. Creativity and innovation are risky. As the Issues Paper puts it, 'While IP rights are intended to provide a window in which rights holders can derive a financial benefit, they are no guarantee of commercial success [p. 4].' Therefore investing in originality in the current marketplace must be predicated upon a belief in sustainable business models that are underwritten by a stable copyright framework.

The Issues Paper goes on to state that

much creative and inventive work is done with no expectation of remuneration or reward, but is done for the personal benefit or joy it provides creators. Coding software as part of the open software movement, writing a travel blog, and tinkering in the shed to make better farm tools are all forms of creative and inventive work that do not rely on IP rights to take place. And many involved in basic research are motivated more by expanding the stock of human knowledge than by financial reward.

It should be remembered, however, that more and more of these creators are subsidising their after-hours 'tinkering' with salaries paid by the expanding creative industry sector. And their supposed opting out of an immediate financial gain from their non-remunerated work is more a measure of the flexibility of the copyright framework that supports them, than some kind of innate moral flaw in that framework.

The IPA believes that the digital content economy, of which publishing is a part, needs professional authors, editors and publishers to sustain it, and that public policy must therefore respect creators' and publishers' rights by providing a legal framework that supports the creative industry.

### **Effectiveness: do IP rights target additional innovation and creative output?**

Publishers are sometimes disparaged as somehow wanting to stifle innovation and trying to decrease the number of readers of their published output, when the opposite is the truth. Publishers 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.

There are many examples of publishers embracing change, investing and bringing to market products and resources that could not have been realised or envisaged other than with the underlying support of a strong and stable copyright framework. We list some examples of innovation below. We would be willing to assist the Productivity Commission in exploring any or all of these examples further.

Mozaik<sup>1</sup> is a Hungarian education publisher using innovative technological solutions to create a bridge between traditional and new digital ways of teaching. The result is a hybrid where textbooks are integrated with new technologies, but with teachers' needs and students' outcomes always paramount.

Carlsen Verlag's LeYo!<sup>2</sup> is a multimedia library for children. The free complementary augmented reality app ensures an interactive and unique reading experience by providing additional sensory impressions such as sounds, music, games and more.

Verlag Friedrich Oetinger GmbH's TigerBooks<sup>3</sup> are ebooks for children, which are digitally enriched with animated graphics, visual effects, games and more. TigerBooks is a product of the publishing house but provides with 'Tiger Create' a software tool which enables other publishing companies to create TigerBooks as well.

Repetico<sup>4</sup> helps students study flashcards online and on mobile devices. Users can buy professional flashcards by publishing companies or create their own flashcards. By adding friends, users can compare and discuss their work and motivate each other in study groups. The tool provides detailed statistics on progress.

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<sup>1</sup> <http://www.trnoman.net/Upload/file/MS-9858-mLearn.pdf>

<sup>2</sup> <http://www.carlsen.de/leyo>

<sup>3</sup> <https://www.tigerbooks.de>

<sup>4</sup> <https://www.repetico.de>

Lectory<sup>5</sup> provides the possibility for schools to offer their students a social reading experience. By purchasing books from certain publishing companies, which will be read in school, the students receive access to an online library where they find the ebook version as well as word definitions and the possibility to comment and ask questions.

The German Booksellers and Publishers Association, the Börsenverein, is actively encouraging such innovation through initiatives like the following: Future Forum,<sup>6</sup> Arena Digital<sup>7</sup> (which includes competitions asking entrants to 'create physical worlds of experience for digital content'), protoTYPE<sup>8</sup> and startup-club.<sup>9</sup>

The Dutch Publishers Association (NUV) is taking a similar approach, harnessing the inherent creativity of the sector to come up with innovative solutions. The program is called Renew The Book<sup>10</sup> and is about introducing start-up companies with new ideas into the publishing world.

In France, publishers like Cairn.info<sup>11</sup> in the Social Sciences and Humanities sector have developed licenses which allow students and researchers to access content remotely for research, including across borders. These licenses allow many uses (copying and pasting, printing, downloading, forwarding to a colleague, etc.) and can be easily adapted.

In the educational sector, textbook and academic publishers are proactively offering their books in paper and digital formats to educational establishments and universities. In France, all textbook publishers have been offering most of their works in both digital and printed formats since 2008, with more than 2,000 digital textbooks now available through a huge array of licences. They have developed digital platforms and portals (such as Canal Numérique des Savoirs,<sup>12</sup> Kiosque Numérique de l'Éducation,<sup>13</sup> and WizWiz<sup>14</sup>) which allow teachers and parents to consult, order, download and use these resources in the classroom or elsewhere.

Three examples of projects requiring investments by the broader publishing industry and not just individual publishers are the Linked Content Coalition,<sup>15</sup> which has a goal of enabling greater legitimate use of digital content through better management of rights data across the network; the Arrow<sup>16</sup> project in the European Union, which is a tool to facilitate rights information management in any digitization project involving text- and image-based works; and the Copyright Hub<sup>17</sup> in the United Kingdom, which aims to achieve the highest possible level of automation in licensing.

Scientific, technical and medical (STM) publishers have consistently publically committed themselves to make the research they publish as widely accessible as possible<sup>18</sup>. They have actively contributed to initiatives to enable the easy discoverability of scholarly publications and their authors in the digital world. These include the Digital Object Identifier (DOI)<sup>19</sup> for

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<sup>5</sup> <https://voicerepublic.com/talks/lectory-social-reading-fur-schulen>

<sup>6</sup> [http://www.boersenverein.de/de/portal/Forum\\_Zukunft/810029](http://www.boersenverein.de/de/portal/Forum_Zukunft/810029)

<sup>7</sup> <http://arenaforbooks.jovoto.com/https://arenaforbooks.jovoto.com/ideas/37642>

<sup>8</sup> <http://innovation-prototype.de>

<sup>9</sup> <http://www.boersenverein.de/startup>

<sup>10</sup> <http://www.renewthebook.com>

<sup>11</sup> <http://www.cairn.info>

<sup>12</sup> <http://www.cns-edu.com>

<sup>13</sup> <https://www.kiosque-edu.com/accueil>

<sup>14</sup> <http://www.wizwiz.fr/>

<sup>15</sup> <http://www.linkedcontentcoalition.org/>

<sup>16</sup> [http://www.arrow-net.eu/>\),](http://www.arrow-net.eu/>)

<sup>17</sup> <http://www.copyrightclub.co.uk/>

<sup>18</sup> [http://www.stm-assoc.org/2003\\_11\\_04\\_Publishers\\_Mission\\_to\\_Make\\_Research\\_Information\\_Widely\\_Accessible.pdf](http://www.stm-assoc.org/2003_11_04_Publishers_Mission_to_Make_Research_Information_Widely_Accessible.pdf)

<sup>19</sup> <http://www.doi.org/>

scholarly papers and the ORCID<sup>20</sup> digital identifier for researchers. In addition, in response to demand from funding organisations, STM publishers support FundRef, a service by CrossRef<sup>21</sup> which provides a standard way to report funding sources for published scholarly research. Similarly, STM publishers support Kudos,<sup>22</sup> a web-based service that helps researchers, their institutions and funders to maximize the visibility and impact of their published articles.

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 dissemination. In the education sector, especially, it is their creativity that drives most textbooks.

Also, apart from the obvious market-related risks attached to publishing, such as misjudging the size of the readership for a work, it is publishers who are called upon to act, at their cost, to enforce copyright in cases of infringement, which is something that an individual author would likely not have the resources to accomplish.

Whatever sector a publisher works within, whether it be trade, education or STM, 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.

### **An efficient system ensures that IP rights are tradeable — copyright**

Licensing of electronic content has become the life blood of publishing. As a vehicle for trading IP it is enormously flexible and able to accommodate all kinds of business models — from outright purchase to rental, whether itemized or as collections, databases, tailor-made for all shapes and sizes of users.<sup>23</sup> This is true for all sectors of the publishing industry, not just STM or the education sector.

More and more technical solutions are being devised to allow for frictionless access to increasingly granular content. This trend should be encouraged, including through supporting collective management organisations to help remove complexity from the system.

Licensing income is a significant part of the income of most education publishers in Australia and helps ensure continuous re-investment in more innovative local content.

### **Fair use — the cost of litigation**

IPA strongly advises against the introduction of ‘fair use’ type exceptions following the model of the Copyright law of the United States.

Fair use is a litigator’s dream because it opens up the law to endless legal debate. An immediate effect of the introduction of a US-style ‘fair use’ defence in Australia would be an increasing surge of litigation, much of which would end up in an appeals court due to the body of precedent in Australian law being significantly smaller than that in the USA, the country which originated the concept.

However, even if a strong resource of precedents were to exist in Australia, a ‘fair use’ defence is still conducive to litigation. Research carried out during the time of the Hargreaves Review in the United Kingdom found that, from January 1978, when fair use was codified in US law, to the end of 2010, there were a total of 21 fair dealing cases decided in the UK compared to 223 ‘fair use’ cases in the

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<sup>20</sup> <http://orcid.org/>

<sup>21</sup> <http://www.crossref.org/fundref>

<sup>22</sup> <https://www.growkudos.com/about/faqs>

<sup>23</sup> [http://www.stm-assoc.org/2012\\_11\\_29\\_STM\\_Submission\\_Australia\\_Copyright\\_and\\_the\\_Digital\\_Economy.pdf](http://www.stm-assoc.org/2012_11_29_STM_Submission_Australia_Copyright_and_the_Digital_Economy.pdf), p.2

US. Supplementary research for the year 2012 found that by mid-November of that year, 23 copyright cases had been filed in the US federal court of appeal alone in the 2nd Circuit, and 52 cases filed in the court of appeal in the 9th Circuit. Although these two circuits do not represent all US courts, both of them represent copyright-heavy industries in publishing, film, entertainment, software and other technology industries and these figures demonstrate the large number of copyright litigation matters arising in the US every year.

The current 'fair use' wording in US law reflects the state of judicial practice there in the 1970s. Today, it can no longer provide legal certainty. Technology has changed, as have business models. Best practice in copyright has moved on: incremental uses can be conveniently licensed through collective licensing mechanisms. Some corporations predicate their business models on not needing to pay for the content which their customers want to access.

Furthermore not all scholars agree that the US 'fair use' doctrine, as it is currently applied and to the extent that its meaning in the United States is actually knowable, complies with the international obligations of the United States under international copyright law. The US Copyright Office's own information on 'fair use'<sup>24</sup> demonstrates the inability for the Copyright Office and its users to safely determine whether any specific act restricted by copyright law will or will not fall under this exception. The United States, a country with many court cases and with many well-funded, and occasionally litigious, stakeholders on either side of the debate appears unable to provide stable judicial guidance that creates legal certainty for the benefit of all concerned. The risks of legal uncertainty would be an even greater challenge for Australian rightsholders and users alike.

### **Impact of Canadian 'fair dealing' on educational publishing**

Canada amended its copyright laws by passing the Copyright Modernization Act in 2012, which expanded Canada's existing fair dealing exceptions by adding 'education' as a purpose that could justify unauthorised reproduction, distribution and other uses of copyright works.

A study by PricewaterhouseCoopers<sup>25</sup> released in mid-2015 found that, without adequately paying authors and publishers who provide educational material, 'the publishing of new content for schools in Canada will for the most part disappear' and there will be 'lower competition, less content diversity, and higher prices for what is produced.' The PwC report continues:

... if present patterns persist, many relatively high-paying jobs are expected to disappear. Foreign publisher subsidiaries may be forced to transition from producing Canadian content in Canada to distributing US content in Canada. The incomes of Canadian writers, authors, and illustrators from Canadian sources will decline, and as no immediate or eventual replacement is apparent, this income will drive many from the sector.

The impact of these changes on education publishers has been immediate: OUP Canada closed down, Nelson declared bankruptcy, McGraw Hill, Pearson and Wiley all significantly scaled back their operations in Canada. Smaller, Canadian companies are downsizing or closing their doors. Canadian authors' incomes have been slashed.

Educational publishing is a strategic resource, especially in the knowledge economy of the future. To be most effective, educational materials must be of the highest quality, reinforced by the virtuous cycle of open, competitive markets, teacher feedback and editorial review. And the content must be local to best fit with students' and teachers' lived experience.

The reckless broadening of copyright exceptions in the Canadian educational publishing sector will

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<sup>24</sup> <http://copyright.gov/fair-use/fair-index.html>

<sup>25</sup> [http://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)

have serious impacts on educational outcomes in that country unless it is reconsidered and amended quickly.

It is a salutary tale for those advocating going down the same path in Australia, where education and access to knowledge and culture are rightly given a high policy priority. There is a strong interest in making sure that Australian citizens have access to high-quality schoolbooks and that literacy and reading strengthens national identity and diversity. Copyright plays a role by ensuring that Australian authors and publishers are able to invest their skills and professional careers in writing and publishing for Australian readers.

### **Conclusion**

Copyright and the benefits that accrue from it for creators and publishers, helps determine whether local writers and publishers will invest their careers and resources into writing local books. 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>26</sup> all have strong copyright regimes.

The above are our main responses to the Issues Paper. 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

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<sup>26</sup> <https://www.globalinnovationindex.org/userfiles/file/reportpdf/GII-2015-v5.pdf>