

**AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION DRAFT REPORT ON INTELLECTUAL  
PROPERTY ARRANGEMENTS**

**RESPONSE BY OXFORD UNIVERSITY PRESS**

1. **Oxford University Press (“OUP”)** is a department of the University of Oxford. It furthers the University's objective of excellence in research scholarship and education by publishing worldwide. OUP supports the wide dissemination of excellent academic and educational materials in the belief that it will enable knowledge to build on knowledge.
  
2. **We are responding to the recommendations set out in the Productivity Commission’s draft report on Intellectual Property Arrangements (“Report”)**. Specifically, the Commission has recommended that (i) a broad fair use exception be adopted by Australia; (ii) the term of copyright be reduced to between 15–25 years; (iii) an open access policy for publicly-funded research be introduced, setting a 12-month embargo period; and (iv) parallel import restrictions for books be repealed. We object to these recommendations in the strongest terms, on the basis that they will be bad for Australian authors, bad for Australian students, bad for Australian researchers, and bad for the thousands of Australians who rely on the publishing industry for employment. The community as a whole will not be better off.
  
3. **As an academic and educational publisher, we fully endorse the Australian Publishers Association’s response to these recommendations**. In addition, we shall respond to each of those four recommendations in turn; not just on behalf of Oxford University Press Australia, but also on behalf of OUP as a whole, which publishes a wide range of academic books and journals relied on by Australian researchers.

**BACKGROUND**

4. **The purpose of copyright is to incentivize the creation, investment in, and dissemination of original literary, artistic and other such works**. This goal is accomplished by providing in law that a creator has, for a limited time, the exclusive right to exploit, and to grant to others the right to exploit, his or her work. With respect to literary works, publishers require this protection in order to sustain ongoing investment in high-quality content. The advancement of the arts and sciences requires appropriate access to the latest knowledge. We share the Report’s public interest concern regarding ensuring appropriate access to educational materials, but we disagree profoundly with the Report’s recommendations on how to achieve such access. There is a crucial balance to be struck between rewarding creators and otherwise providing incentives for the ongoing investment in the development and dissemination of creative and scientific works, on the one hand, and, on the other hand, permitting some free use of otherwise protected works. To ensure this balance, it is important to have sufficient clarity in the law such that creators, those who play a role in dissemination, and users (who of course may themselves be creators) can fulfil their respective roles in a sustainable ecosystem.

5. **Copyright and ideas:** In respect of that balance, we find it unfortunate that the Commission would, in the current day and age, link copyright protection with censorship<sup>1</sup>. Whilst it may have originated as a way of maintaining authenticity and accuracy, its purpose now is to protect economic rights – by providing a reliable framework for creation, reward, and use. More specifically within the context of these recommendations, it is important to appreciate that copyright does not generally prevent the free reuse of facts or information within the copyright work. It protects the expression – not the idea. So the argument that copyright law prevents researchers from using knowledge to build on knowledge is a wholly insubstantial one.
6. The Commission asserts that those who stand to lose most from IP protection are dispersed and less aware of what is at stake whereas those that seek to gain most are concentrated and actively seek to shape policy for their benefit. This greatly simplifies a complex ecosystem. Authors are widely dispersed, but they rely on copyright protection to earn a living. They in turn rely on intermediaries such as publishers to make significant investments in editorial, sales, and marketing to ensure their works reach a wide audience. Without copyright protection, the ecosystem will grind to a halt.

#### **FAIR USE**

7. **Risks of introducing a general exception for fair use for educational purposes.** If a wide-ranging “fair use” exception to copyright protection is introduced into Australian law, the quality and relevance of materials available in Australian primary and secondary schools and higher education institutions will be put at risk. There will be little incentive for Australian educational writers to spend time and effort creating new works, given that they will no longer be rewarded for the use of their materials in the same way, and little incentive for local publishers to invest in specifically Australian curriculum-based texts. The result will be that Australian students will find themselves having to rely on generic resources, which are (1) likely not specifically linked to the local curriculum and (2) almost certainly not Australian.
8. **The example of Canada:** The Report does not address the real issue in Canada, which is the decline of local educational publishing and the connection between the decline and the changes in the copyright law. The Report contests that the reason for OUP’s closure of its Schools publishing in Canada was the change to copyright legislation. We are best placed to assure you that the main contributing factor to the decision to close our domestic Schools publishing program in Canada was the change in practice around fair use by educational institutions, as encouraged by the interpretation of a change in Canadian legislation. We can also say that, as the government has changed, new ministers have come to realize the threat this legislative change poses to Canadian cultural heritage.
9. **Further, the issue is far broader than OUP.** The key question is: how has the Canadian court’s interpretation of the law and the legal drafting regarding fair use impacted educational publishing in Canada? We therefore refer the report to some non-OUP sources. We suggest

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<sup>1</sup> p.74 of the Report: “Copyright law was first introduced by churches and the state, in Europe, following the introduction of printing presses in the mid-15<sup>th</sup> century, as a way to prevent the dissemination of ideas.”

Australia looks very carefully at the precedent in Canada. We provide links here to a selection of such sources:

- [https://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)
- <http://www.publishersweekly.com/pw/by-topic/international/international-book-news/article/68091-canadian-publishing-2015-changes-to-canadian-copyright-law-continue-to-hammer-publishers.html>  
To quote Andrew Woolridge in this article: “We’re going to end up with Canadian schools buying their educational content from the U.S., and we’re going to end up with a U.S. curriculum in our schools if we’re not careful.”
- <http://www.theglobeandmail.com/arts/books-and-media/kate-taylor-kids-will-suffer-if-canadas-copyright-legislation-doesnt-change/article29720114/>In particular: “Teachers will gradually discover that high-quality classroom material about Canadian history, geography and politics specifically tailored to their province’s curriculum simply isn’t available either in print or online because the publishers and writers who once created it have left the business.”
- <https://www.accesscopyright.ca/media/105842/ac-annualreport-2015-screen.pdf>

10. **A lack of clarity is an impediment to bringing in wide ranging “fair use” provisions.** The Report is misguided on this point. As was pointed out by two separate parties in response to the UK’s 2011 Review of Intellectual Property and Growth<sup>2</sup>: *Fair use leads to a system of “economic regulation by litigation”*; and *LexisNexis holds records of some 233 cases in the US that went to trial around the complexities of fair use interpretation, with likely many thousands more being settled before reaching court.* If publishers view the new legislation as insufficiently clear they will not, as the Report seems to think, simply be inclined to rely on the courts to provide guidance – since this is an expensive and often protracted process. In Canada, for example, *Access Copyright v York University* has run since 2013 ([http://cas-cdc-www02.cas-satj.gc.ca/IndexingQueries/infp\\_RE\\_info\\_e.php?court\\_no=T-578-13](http://cas-cdc-www02.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-578-13)). By the same token, educational publishers will not want to find themselves in a series of litigious exchanges with the educational institutions they seek to provide for. A less risky route for publishers would be not to publish for the educational sector at all, or to publish generic texts that have such a wide reach (outside Australia) that they can withstand widespread copying in Australia. Primary and Secondary schools and Higher Education Institutions will be left with generic content, parallel imports, and cheaply produced materials. Australian authors and Australian students will suffer. We argue that comparisons with the USA’s copyright regime are not necessarily helpful given the vast market and the extensive case law. (That said, *Cambridge v Becker* has been going on for eight years, and has proven a volatile case.)

11. **The report does not distinguish between materials that are specifically designed for education and those that are not.** A general “fair use” for educational purposes might not be so damaging where the protected work is music or film – i.e. where the main market is elsewhere. But if this exception is applicable to educational materials then the permitted copying will be done by the

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<sup>2</sup> Supporting Document Q: Fair Use and the Independent Review  
<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/ipreview-doc-q.pdf>

core users. To that end, it is essential that core users should be pointed towards a licensing regime such as the one currently in place under CAL. See in particular Box 5.10 in the Report which suggests one of the fairness factors should be “nature of the copyright material” to which should be added **“including its intended market”** – meaning copying by a target end user is not acceptable whereas copying by an adjacent user might be fair.

12. **How an amended exception could work.** As Canada has shown, the introduction of a broad fair use exception can cause irreparable damage both to the publishing industry and the students it caters for. Any change to the current fair dealing exception would therefore need to be accompanied by clear specific legislation and a robust Copyright Agency Limited (CAL) licensing regime. CAL should be seen as facilitating access to excellent materials, not as a barrier. If Australian curricula require Australian specific content then someone, somewhere has to pay for it – and if authors and publishers are not remunerated for use of their materials by core target markets, then the costs of creating those materials (including the cost of an author’s time) will not be recovered, which is unsustainable. As mentioned above, it is likely that this would result in a reduction in the quality of educational content produced for Australian primary and secondary schools and higher education institutions by Australian authors and publishers. Essentially we see a distinction between limited use or access to short excerpts from educational material for a non-commercial, instructional purpose (i.e. to illustrate a point) and the systematic copying of educational material in order to avoid paying for it.
13. **It would be easier and clearer to retain the existing fair dealing exceptions and to add to them as necessary to provide greater flexibility.** In the UK, for example, education is carved out as being a fair dealing exception to copyright infringement where use of materials is solely for the purpose of instruction. What’s been made very clear in the UK Act, however, is that schools still cannot make or use such copies if licences are available in relation to that kind of usage which the establishment was aware of, or should have been aware of. In other words schools don’t have a blanket right to use and copy valuable content for free. The UK Act also limits the amount of copying of a work which can be undertaken in any one quarter. This clarity protects authors and publishers whilst also giving schools the flexibility they need to use materials in the classroom.

#### **REDUCING THE TERM OF COPYRIGHT**

14. **Cutting the term of copyright protection from 70 years after the death of the author to 15 - 25 years from creation (draft finding 4.2) would pose a major problem for the authors of both educational and academic textbooks.** Our own experience does not support the Report's assertion that the commercial life of most works is less than 5 years. Textbooks frequently take many years to draft and, in our experience, it’s often the case that they won’t reach peak sales until their 5<sup>th</sup> or 6<sup>th</sup> edition (which can be 25 years after initial publication). The length of time during which authors are able to earn royalties must reflect the years of labour that will have gone into writing their materials – and for publishers, the significant costs of developing and marketing a text effectively. If an original edition goes into the public domain just as the 5<sup>th</sup> edition is published, this will inevitably undermine sales and have a seriously detrimental effect on that author’s income. Further the idea of the period running “from creation” must be

clarified. The process of creation can take many years, as we've said: surely the date of publication can be identified more readily?

## **OPEN ACCESS**

15. **“Open Access” must be more carefully defined.** There is no generally accepted definition of “Open Access” and it is commonly used to describe a wide variety of conditions. The US government instead uses “Public Access” to describe their policy (the significant difference being that Open Access usually denotes liberal reuse terms under a Creative Commons license, while Public Access denotes making a copy of the article freely available to readers.) Further, the international policies described in the Report require access only to the author’s Accepted Manuscript version of such articles, rather than the published Version of Record. Such clarifications must be made clear in any potential policy. If the policy requires the use of Creative Commons licensing or the use of the Version of Record, authors will be required to pay Open Access charges in order to comply, creating increased costs which must be accounted for.
  
16. **Great care should be taken in designing and implementing effective open access policies for funded research.** There is a wealth of experience that has been gained from similar policies instituted throughout the world. Any such policy must, for instance, acknowledge the significant costs involved in the careful vetting and publication of this material. While funding may pay for the costs of the research itself, it frequently does not pay for publication costs. The use of public repositories also comes with significant costs. The US National Institute of Health’s PubMed Central [reported an annual budget<sup>3</sup>](#) of USD \$4.5M in 2013 and NIH officials have noted significant increased costs in the intervening years. Policies that lack significant oversight, including monitoring and enforcement of compliance, have consistently shown low levels of success. In the UK, administrative costs in the first year of the RCUK policy [were over £9.2M<sup>4</sup>](#) and achieved only 20–30% compliance. Low cost alternatives, such as [the CHORUS initiative<sup>5</sup>](#) being used by the US National Science Foundation (amongst others) should be investigated as potential alternative mechanisms.
  
17. **“One size fits all” policies are inappropriate for scholarly literature.** Intellectual property concerns and reader behavior differ vastly between different research communities. Because of this, great care must be taken in setting appropriate embargo periods for the amount of time allowed before public access to articles based on funded research is required. While much of the world has settled upon a 12-month embargo period as appropriate for biomedical research literature, longer embargo periods are generally employed for other areas of funded research, particularly in the Humanities and Social Sciences. If embargo periods are too short, authors will be required to pay publication charges in order to comply with such policies, increasing costs and taking vital funding away from research itself.

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<sup>3</sup> <https://scholarlykitchen.sspnet.org/2013/07/16/the-price-of-posting-pubmed-central-spends-most-of-its-budget-handling-author-manuscripts/>

<sup>4</sup> <http://www.researchconsulting.co.uk/new-report-highlights-9m-compliance-cost-of-uk-open-access-requirements/>

<sup>5</sup> <http://www.chorusaccess.org/>

## PARALLEL IMPORTS

18. **Repeal of parallel import restrictions may have unfortunate consequences for the Australian economy, publishers, and authors.** In OUP's experience, if it is permitted for print (or even digital) textbooks, including those published by Australian publishers, to be imported into Australia after having been purchased by importers in low-priced markets, the publishers and authors will suffer between 30 and 50% reduction in revenue for each title, and resulting in the reduction of the number of Australian books published for Australian educators and students. The Australian publishing industry will go the way of the Australian automobile manufacturing industry. While we agree that Australian consumers should not be subject to artificial price inflations for luxury goods, there must logically be a link between pricing and the local GDP per person. Local economies inform the price at which items like books are sold – the idea of having a single, lowest price for all across different markets is unrealistic.
19. **Geographic price differentiation for books is done to achieve two laudable goals:** (i) To make high-quality books available in developing markets that otherwise would not be able to afford them (one could do this so long as the low-priced market price was at or above the margin cost of production), and (ii) to further reduce the prices of those books in the home market by allowing for longer print-runs and providing small incremental revenue to offset other costs. If the US experience is replicated, publishers would have no choice but to respond to a relaxation of restrictions on re-importation. And there are only three ways a publisher can do so (these are essentially mutually exclusive for any one title):
- a. They can decide not to resell or license their books outside of the markets that support higher prices. This will effectively cause a drop in the value of Australian exports.
  - b. They can par-price their product globally at the higher market price. In the case of Australian-produced products, this will result in an only-slightly-less significant drop in exports of books by Australian authors published by Australian publishers. This will also cause a rise in prices on the books in Australia.
  - c. They can invest in producing adapted version of books for export markets, these adapted books being different enough that they cannot substitute for the book in the home market. This causes local price rises, as the significant costs of adaptations are recovered from the higher-priced markets. This is only worthwhile in cases where the books are big sellers in low-priced markets.

## CONCLUSION

20. In summary, Oxford University Press strongly opposes these four suggested changes to Australian IP law, and fully endorses the APA's submission on this. As a mission-led member of the Australian educational community, we assert that these proposed amendments would cause irreversible damage to local, Australian publishing. Of course we speak from a publishing point of view, but from our experiences (and those of our peers) regarding the implementation of fair use in Canada, we also know what a fundamentally damaging impact these sorts of amendments

can have on local authors, educators and students. In essence a successful copyright regime is one which balances the requirements of creators and users in the clearest way possible. Ambiguity only leads to litigation, generic content, and economic uncertainty at all levels of the creative ecosystem.

Signed by:

Peter van Noorden  
Managing Director of Oxford University Press Australia & New Zealand

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