

Productivity Commission Draft Report: Intellectual Property Arrangements Draft Recommendation 5.3 - Copyright fair use exemption

Submission by Insight Publications

This is a submission by Insight Publications in relation to the proposed fair use exception to copyright infringement which is canvassed by the Productivity Commission's Draft Report on Intellectual Property Arrangements ("**Draft Report**").

About Insight Publications

1. Insight Publications is an independent, Australian-owned company specialising in publishing resources for use in the teaching of English subjects at secondary-school level. Our wide range of publications includes texts for the English, English Language and English Literature curriculum, teaching resource texts for teachers, study guides and trial exams.
2. Insight Publications publishes in both traditional (hard copy) and digital formats. However, as the use of hard copy texts is still prevalent in schools, a very significant portion (approximately 94%) of our business remains traditional publishing.
3. Insight Publications owns copyright in the published editions it produces. As a result, Insight Publications receives copyright licence fees when third parties make copies of our publications. These licence fees are collected through the Copyright Agency and are predominantly paid by educational institutions. The collection of publications for schools is the largest source of these fees, which are paid on specific use. To determine specific use, a survey is conducted every two years by the Copyright Agency in order to collect the details of all materials photocopied by schools within the specified period.
4. As a specialist educational publisher, the nature of our publications means that educational institutions often seek a licence to reproduce the published editions. Insight Publications receives approximately 11% of our total income each year in licence fees for its traditional publications. These fees predominantly relate to copying of our books by teachers for use in schools. Insight Publications also receives separate payments that relate to electronic usage of our digital publications.
5. Insight Publications has over 40 years of experience in educational publishing in Australia. We employ approximately 20 people, based from our premises in Cheltenham, Victoria. As an independent Australian publisher of educational resources, Insight Publications makes a significant contribution to the Australian secondary education sector. We develop innovative and engaging English resources to inspire, to challenge and to promote learning, and are able to ensure that those resources evolve to suit educational needs and developments in Australian schools. As a result, Insight Publications is at the cutting edge of educational publishing for secondary school English.

Summary of submission

6. Insight Publications is concerned that the "fair use" exemption to copyright infringement proposed in the Draft Report ("**proposed exception**") would permit teachers to copy its educational texts without paying copyright licence fees in some circumstances where licence fees are currently payable. For the reasons explained in this submission, it would be unfair for this copying to be permitted, as the uses potentially covered by the proposed exception are not, in fact, "fair use" of an already purchased work, but a reproduction of a nature, and on a scale, for which the owner of the copyright should be compensated.
7. If enacted, the proposed exception would result in a very substantial loss of licence fee revenue to Insight Publications. The anticipated loss of fees from copying currently required to be licensed is likely to undermine our business to the point where we are required to reduce the scope of our operations, potentially resulting in negative outcomes for our business, our employees, the educational sector in Australia and, thereby, ultimately also Australian students.
8. Insight Publications urges the government not to accept the recommendations in the Draft Report in relation to the proposed exception. We submit that the existing arrangements in the *Copyright Act 1968* (Cth) ("**Copyright Act**") in relation to fair dealing with copyright works for educational purposes should be maintained. The existing arrangements strike the correct balance between the rights of copyright owners and the legitimate interests of educators in ensuring adequate access to resources.

The proposed exception

9. The proposed exception is an amendment to the Copyright Act to replace the current limited "fair dealing" exceptions to copyright infringement with a more general "fair use" exception. It is described in the Draft Report as follows:

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- *the effect of the use on the market for the copyright protected work at the time of the use*
- *the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- *the commercial availability of the work at the time of the infringement*

- *the purpose and character of the use, including whether the use is commercial or private use.*

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.¹

10. The recommendations by the Australian Law Reform Commission ("**ALRC**") referred to above provide that the fair use exception should contain "*a non-exhaustive list of illustrative uses or purposes that may qualify as fair use*".² "*Research or study*" and "*education*" are included on this list. While the list is characterised as illustrative, the ALRC's recommendation suggests an intention that all uses of a copyright work for, or in connection with, educational purposes, would be "*fair use*" under the proposed exception.
11. The Draft Report includes two examples that would currently require a licence in Australia but that would potentially be fair use in the United States (and therefore likely to be a fair use under the proposed exception), as follows:
 - (a) a teacher making 30 copies of a chapter of a book for inclusion in a set of class materials; and
 - (b) a teacher scanning pages from textbooks to use in lessons via an interactive whiteboard.³

Both of these examples relate to the copying of part of a published edition. However, the proposed exception potentially goes further than these examples, allowing entire published editions to be copied without infringing copyright, provided that the copying is for educational purposes.

12. The list of factors to be taken into account in identifying "*fair dealing*" for the purpose of research or study under existing Australian law includes reference to reproduction of a "reasonable portion" of a copyright work (i.e. 10% or a single chapter).⁴ Under the proposed exception, there is no such limiting factor identified in connection with determining "fair use". At the very least, equivalent limiting factors should be incorporated.

Risk from lost revenue from educational institutions

13. Although the proposed exception does not expressly provide that an entire publication may be copied provided it is for educational purposes, this possibility is clearly within the potential scope of the proposed exception. We believe that, even without judicial interpretation confirming the position, educational institutions,

¹ Draft Report, Draft Recommendation 5.3, p.162.

² Draft Report, Recommendation 5-1, Box 5.10, p.154.

³ Draft Report, Table 5.2, p.143.

⁴ Copyright Act, s 40(5).

themselves under budgetary pressure, will tend to rely upon the enactment of the proposed exception as a basis to cease payment of current copyright licence fees.

14. While these fees may be comparatively modest from the point of view of the institutions paying them, the loss of this income has the potential to result in the difference between viability and non-viability for a specialist educational publisher.
15. The effect of the recent implementation of similar changes to copyright law in Canada provides a salutary lesson. In 2012, broad exceptions were introduced for "fair dealing" (not defined in the legislation)⁵ for the purpose of "research, private study, education..."⁶ and for reproduction for display in an educational setting or use in an exam.⁷ In order for the latter exemption to apply for digital copying, it was required that the material not be commercially available - however that restriction did not apply to books.⁸
16. Following this, "the Canadian education authorities issued guidelines that had the practical effect of 'authorising' the copying of works as 'fair dealing', which were previously covered under licences with the Canadian collecting society".⁹ Most Canadian universities and schools ceased paying copyright licence fees.¹⁰ Following a decrease of approximately 98 per cent in licensing revenue for educational publishers from publications in Canada, a relevant collecting society closed.¹¹ Other consequences of the changes to copyright law in Canada included the following:
 - (a) Nelson, the largest local educational publisher, went bankrupt;
 - (b) Emond, another local publisher, stopped publishing educational textbooks;
 - (c) Oxford University Press ceased making Canadian textbooks; and
 - (d) McGraw Hill and Pearson reduced production.¹²

⁵ While "fair dealing" is not defined in the Canadian legislation, the Supreme Court of Canada in *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 set out that relevant factors in determining whether a dealing is fair include: (a) the purpose of the dealing, (b) the character of the dealing, (c) the amount of the dealing, (d) available alternatives to the dealing, (e) the nature of the work, and (f) the effect of the dealing on the work. These factors are similar to the fairness factors proposed for the proposed exception.

⁶ *Copyright Act*, R.S.C., 1985, c. C-42, s 29.

⁷ *Ibid*, s 29.4(1) and (2).

⁸ *Ibid*, s 29.4(3).

⁹ PricewaterhouseCoopers Australia Report, "Understanding the costs and benefits of introducing a 'fair use' exception" (February 2016) ("**PwC Report**"), p.16.

¹⁰ Kim Williams, "Fair doesn't mean free: changes would crush local content", *Sydney Morning Herald* (Sydney), 6 May 2016, p.19 ("**SMH Article**").

¹¹ *PwC Report*, p.iii; *SMH Article*.

¹² *PwC Report*, p. 17 citing Cambridge University Press 2015, *Submission: Response to Intellectual Property Arrangements Productivity Commission Issues Paper*, October 2015, p.2; *SMH Article*.

17. We believe that a similar chain of events is likely in Australia if the proposed exception is introduced. Instead of improving educational standards by increasing access to copyright works, the ultimate outcome would be a reduction in, or, indeed, the demise of, Australian-produced educational publications. Local publication of educational texts has many advantages in allowing for innovation and customisation to the Australian educational setting; the loss of locally produced textbooks would thus be extremely detrimental to the secondary education sector.

Conclusion

18. Insight Publications submits that Draft Recommendation 5.3 as it appears in the Draft Report should be replaced with a recommendation to **maintain the existing legislative framework** surrounding exceptions to copyright infringement for reproduction of copyright works **for research, study and educational purposes**.
19. If, despite this submission, the recommendation to introduce the proposed exception is to be retained, Insight Publications submits that the proposed exception should be:
- (a) limited by reference to copying of less than 10% or one chapter of a publication; and
 - (b) should be available only if the copyright work in question is not reasonably commercially available to the person relying upon the exemption.
20. Insight Publications would welcome the opportunity to discuss the issues raised in this submission with the Commission. If you wish to arrange such a meeting, or if we can assist by providing further information in relation to anything mentioned above, please do not hesitate to contact Mizz De Zoysa-Lewis

Mizz De Zoysa-Lewis

Managing Director

Insight Publications