

A fair balance

Impacts of US-style fair use on Australian educational publishing

Copyright and creativity

In publishing, copyright is the core principle by which authors and creators are rewarded for their creative ideas.

Many people benefit from using this 'creative capital'.

The current copyright law:

Copyright law sets out the rights of creators and users in relation to creative works. It is designed to encourage creativity and so promote development.

The *Copyright Act 1968* describes special situations in which users may use and share creative content – such as in an educational setting – while providing equitable remuneration for creators through **statutory licensing** payments.

Like many Commonwealth countries, Australia also has several **fair dealing** exceptions to the exclusive rights of the copyright owner. If dealing (i.e. use) of a work falls under one of the prescribed purposes – such as review or criticism, research or study, parody or satire, news reporting, judicial proceedings or legal advice – and the use is 'fair', it is not an infringement of copyright. In the case of research or study, five factors are used to determine if the dealing is fair.

Prescriptive uses afford clarity & flexibility to creators and users of copyrighted material

What's happening

Rather than encouraging innovation, the ALRC and Productivity Commission recommendations threaten creativity

February
2014



The Australian Law Reform Commission (ALRC) recommends drastic changes to the *Copyright Act 1968*: replace 'fair dealing' with US-style 'fair use' and allow it to include the use of copyright material for education. This would effectively eliminate statutory licensing fees for that sector.

August
2015



The Productivity Commission embarks on a review of intellectual property, including copyright law, to ensure that it provides appropriate incentives for creativity without impeding access and innovation.

April
2016



In its draft report, the Productivity Commission strongly endorses the ALRC's recommendations regarding fair use.

Fair use is found in a small number of jurisdictions, most notably the US. Unlike Australia's 'fair dealing', fair use usually allows content to be used for *any purpose*, including business purposes, provided the use meets certain 'fairness' criteria. 'Fairness' is determined by considering the nature of the use, the nature of the copyrighted work, the size and substantiality of the portion used, and the effect of the use on the work's market.

The Productivity Commission recommends including a non-exhaustive list of illustrative purposes allowed under fair use, but it would only be a guide and is not legally binding.

Because of **uncertainty around what is and isn't fair use**, the application of the exception often ends up in litigation. Despite 40 years of case law, US courts still disagree about how fair use applies.

The Productivity Commission claims that **statutory licenses** have a 'substantial regulatory cost burden', although it does not explicitly recommend the repeal of statutory licensing provisions for educational use. However, this would be an inevitable outcome of a US-style fair use environment.

Rights holders would then have to negotiate voluntary licenses on a one-to-one basis or disputing usage if they see it as unfair.

What's at stake

The publishing industry is the largest creative industry in Australia.

Educational publishing is an important resource in the knowledge economy of the future and a vital part of Australia's ability to remain globally competitive.

The Productivity Commission's proposed changes threaten:

- **world-class, high-quality resources** for Australia's education system, most often produced by Australian teachers and lecturers in collaboration with publishers
- **print and digital content** that is vital to Australia's curricula, context and cultural capacity
- creators' and publishers' ability to provide for and support 350,000+ **teachers and lecturers**, who educate more than 5 million students in over 9500 schools and higher education institutions
- a **self-sustaining industry** that generates annual sales revenue of \$410 million and statutory licensing fees of \$103 million
- **employment** of thousands of staff and freelancers in educational publishing
- Australia's reputation as a top provider of **international education**
- a **valuable export market** of close to \$100 million annually for Australian educational resources

Publishers as partners

Educational publishers work with a broad range of partners to produce print and digital resources that facilitate teaching and enhance learning.

Scholarly publishers publish journals and monographs, often in partnership with scholarly societies.

Publishers financially support:

practising teachers
educational specialists
authors
editors
illustrators
photographers
animators
graphic designers
typesetters
market researchers
literacy and numeracy experts

academics
researchers
universities
scholarly societies
assessment providers
product developers
digital and technical platform managers
software engineers
printers
professional development consultants
other professionals

Publishers partner with:

teachers
school leaders and principals
departments of education
curriculum agencies
academics
researchers
universities
subject associations
scholarly societies

Publishers' revenues support a broad range of creators and partners.

Publishers as innovators

In addition to offering new and innovative capabilities, digital products enable **greater access**, particularly for students in regional and remote areas, and those with disabilities or vision impairment.

Educational publishers create innovative resources for students:

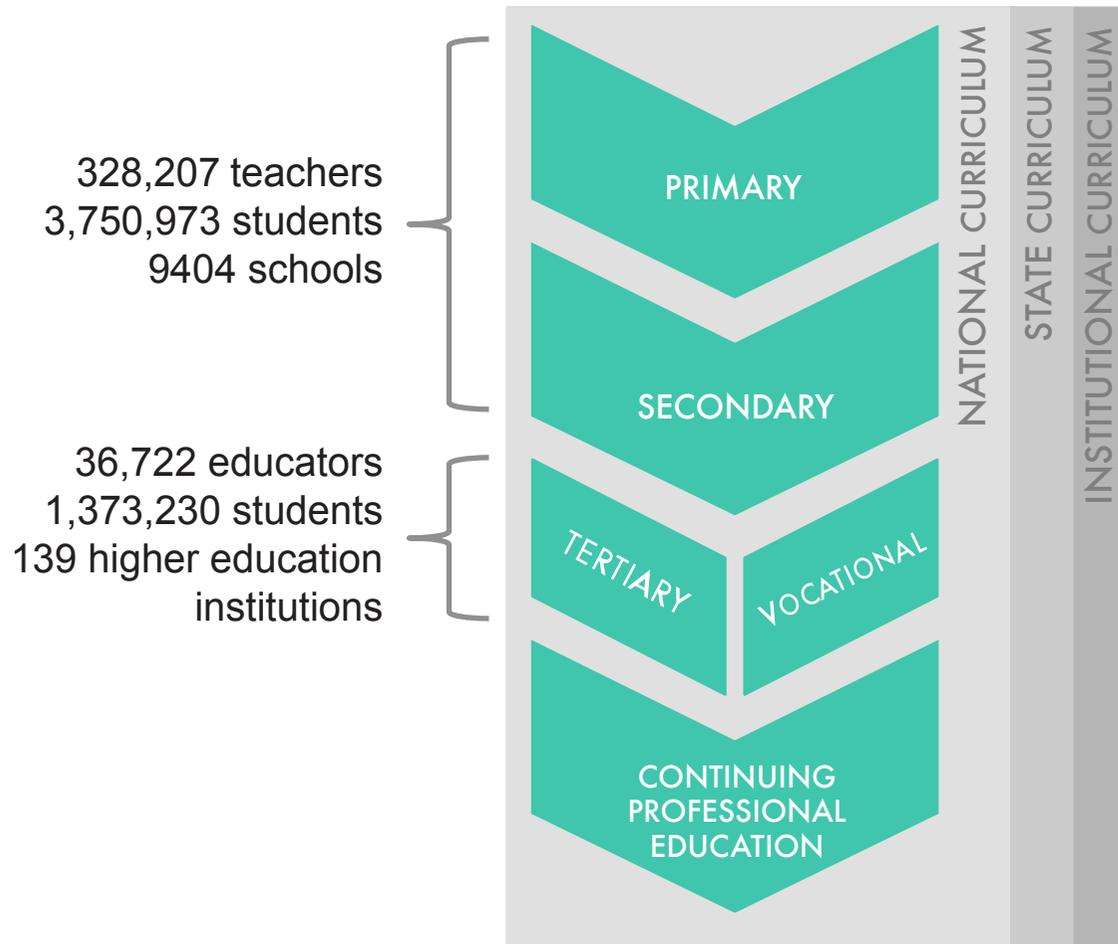
- Textbooks (print and digital)
- Digital ancillary materials, such as video case studies, animations, simulations, podcasts, interviews, links and other resources
- Comprehensive subject-specific learning programmes
- Interactive online reading and learning platforms
- Online games, activities, tutorials and study guides
- Online quizzes, and formative and summative tests
- Assessment and reporting engines with instant feedback and self-marking
- Digital dashboards tracking progress and performance
- Peer-to-peer learning tools

...and educators:

- Information about students' learning behaviour and cognition
- Software for editing, rewriting and supplementing textbooks
- Teaching materials (print, digital), including assessment and reporting tools
- Task management and test creation capabilities
- Curriculum support materials
- Professional development modules
- Operational support for state and national assessments

Publishers ensure that resources are matched to the relevant curriculum, are age-appropriate, and are pedagogically sound.

Creating content for Australia



Educational publishers cater to the Australian market by:

- **supporting** students and educators in primary, secondary, tertiary, vocational and continuing professional education
- **creating** materials specifically designed to follow national, state and institutional curricula
- **adapting** materials to an Australian context, using Australian examples (e.g. discoveries, interests and experiences)
- **updating** materials (e.g. biology, history, geography, indigenous culture, economics, politics, food technology, etc.) to reflect current circumstances
- **showcasing** Australian industry and research with profiles, case studies and local journals

Schools: 2015, ABS; HE: 2014, Dept. Ed & Training

Australia's high-quality educational resources are unique to Australia

Educators as beneficiaries

Australia's current copyright laws permit educational use of a vast quantity of material at very little cost per person.

Under the statutory licensing provisions, educational institutions pay a prescribed fee to use copyrighted material without the rights holders' explicit authorisations.

Vast coverage: text and images, from any source and in any format, can be copied, shared, modified and incorporated into other resources. More than 1.5 billion pages of copyrighted material are photocopied or used electronically by schools and universities for teaching every year.

Value for money: in 2014/15, statutory licensing fees from the education sector represented 0.12% of the government's education spending – hardly the significant costs that have been claimed

Minimal compliance requirements: each year a sample of education institutions undertake a survey for a short period of time to report on the type and volume of content they use

Saves time and effort: users (such as educators and educational institutions) don't need to request permission from many different publishers to reuse a broad range of materials

Saves money: rights holders and users don't have the high administrative costs of negotiating and managing a large number of low-volume licenses

Remunerates authors and publishers: licensing compensates for some lost sales revenue due to copying

US-style fair use: who benefits?

Under US-style fair use, consumers – from individuals, educators and educational institutions to multinational technology companies and other enterprises – would have more opportunity to use and share copyrighted works without restriction and without paying equitable remuneration to creators through licensing fees.

Under US-style fair use, derivers and aggregators have greater freedom to exploit authors' and publishers' intellectual property without paying compensation.

For example, courts recently ruled fair use applicable in Google's digitisation of over 25 million books and a university's online networking of academic book excerpts – both without permission from, or compensation to, the rights holders.

“Efforts by giant online technology companies and others to advance their commercial interests have, for instance, depended on minimising the extent to which copyright is seen as a form of privately possessed property.”

“...online technology companies such as Google do not see it as their particular responsibility to support or defend or protect the commerciality, or integrity, of others' copyrights, whether professional creators' copyrights or anyone else's... – just as they do not see it as a requirement that they should pay their full share of tax in Australia.”

Quotes from Australian Society of Authors, subm. 121

Implementing fair use will **NOT** promote creativity or innovation.

US-style fair use: who suffers?

Rather than encouraging innovation, the Productivity Commission recommendations will **stifle creativity** and threaten an industry that supports Australia's future.

CREATORS

- Devaluation of their copyright
- Less control over how their creative works are used
- Less income from the sale and licensing of creative works
- Less incentive to produce new creative works
- Limited ability to protect their copyright, due to the high costs of litigation

Fewer creators, including authors, illustrators, designers and others

EDUCATIONAL PUBLISHERS

- Less revenue from sales and statutory licensing
- Less incentive to invest in new products
- Reduced diversity and innovation when publishers exit the market
- Reduced employment in educational publishing
- Fewer outlets for creators to produce educational resources

Fewer high-quality educational resources designed specifically for Australian students and educators

EDUCATORS

- Fewer locally produced resources for teaching and learning
- No certainty about what is and isn't allowed under fair use
- Less time for teaching: educators will have to prepare their own materials or find and curate content from overseas
- Less capacity to access ongoing digital developments

Education will suffer

Creators, publishers and educational institutions will all spend more time and money negotiating and managing voluntary licensing agreements, and litigating over disagreements

Uncertainty over fair use will increase litigation

Relying on the courts to decide what counts as fair use favours litigants who can afford high legal costs and the risk of litigation.

Experience in the US shows that fair use is no clearer, no simpler and no better than fair dealing for striking a balance between creators' and users' rights.

“Fair use in American simply means the right to hire a lawyer”

– Prof. Lawrence Lessig, Harvard Law School

CONFUSING

Regarding the recent Georgia State University case, in which fair use covered online distribution of academic book excerpts: “An appeals court’s [...] decision on copyright fair use makes the rules **less clear** for professors and campuses...”¹

INCONSISTENT

Despite 40+ years of case law, different US courts still reach **contradictory conclusions** about fair use. In some courts, transformative use must produce new expression, meaning or message; for others, verbatim copying of works for a different, non-expressive purpose is transformative.

COSTLY

“...[M]illions of dollars in legal fees have been spent attempting to define what qualifies as a fair use.”² *Authors Guild vs Google*, which found that the tech giant’s digitisation of millions of books was fair use, took **over 10 years** and **costs millions** to litigate, appeal and review.

1. <https://www.insidehighered.com/views/2014/10/20/ruling-copyright-fair-use-will-hurt-professors-students-and-publishers-essay>

2. <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>

Uncertain impacts of US-style fair use

A small number of countries have fair use exceptions in their copyright laws.

Advocates of fair use describe its introduction in other countries as successful or benign, but there are no rigorous, empirical studies to support this.

In [Israel](#), two publishers brought a lawsuit against the Hebrew University for its use of digital book excerpts and full articles in e-reserves and course packs. After mediation, the parties reached a settlement permitting a defined percentage of content to be used for a fixed period¹. However, there was no precedent or agreement on what constitutes ‘fair use’ under Israeli law¹, prolonging uncertainty in this sector.

The ALRC cites an economic analysis of the effects of [Singapore’s](#) enactment of fair use² that found no detrimental effect on copyright industries. The study, funded by Google, has been described as “seriously flawed”³ and “stunningly poor quality”⁴ by respected economists, because it discounts the size of the country’s export market and the potential effects of changes to other IP laws around the same time.

[US](#) fair use favours commercialism over culture. Unlike Australian law, US copyright law does not emphasise the moral rights of authors. The US also has amendments to its copyright laws – for example, the *Digital Millennium Copyright Act* and levies on various copiers – that support rights holders. Australian law is different – there is no certainty that precedents there will be applicable here.

Negative impacts in Canada

In late 2012, Canada expanded its fair dealing exceptions to include education.

The Productivity Commission's recommendations to implement US-style fair use would lead to harmful outcomes exceeding those experienced in Canada.

In the 3½ years since adding a fair dealing exception for education, Canada has experienced:

- K-12 schools no longer paying statutory licensing fees from 2013
- an expected loss of post-secondary licensing revenue from more than \$10 million in 2015 to less than \$2 million in 2016 (as statutory licensing agreements expire)
- a massive drop in the total distribution of licensing fees to rights holders, from \$30.8 million in 2012 (the year before the change to copyright law) to only \$13.2 million in 2015
- job losses as educational publishers reduce their local publishing activity
- at least one educational publisher exiting the Canadian market

A report examining the market impacts notes that these are just the early signs. "In the longer term, Canadian K-12 and post-secondary students, teachers, and professors... will also be subject to negative impacts from the limited availability of digital and Canadian content, a deterioration in the diversity and quality of content... and a market framework that eliminates incentives and discourages innovation..."¹

"Given the similarity of the Canadian and Australian economies and legal regimes it is reasonable to expect that the outcome of a shift to fair use in Australia would produce similar impacts as those in Canada."²

Misconceptions about Australia's copyright laws

MYTH

Copyright law restricts the uptake of digital technologies in Australian schools

REALITY

Educational publishers already provide schools with a broad range of digital resources that enable them to succeed in implementing innovative solutions. Not all schools have the infrastructure and technological capability yet to use digital resources.

Current copyright laws prevent Australia from innovating on par with the US

The US enjoys a market size and an economy of scale that enables innovations to make a profit much more readily than in smaller markets like Australia. The US also has a different culture of venture capitalism and risk-taking that facilitates innovation.

“[M]ost new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's fair use exceptions” (Productivity Commission report, p19)

Most new educational works consumed in Australia are created in Australia. Under fair use, their creation would be threatened.

“Australia's copyright system arguably prohibits critical technologies and innovative activities from being conducted in Australia” (Google subm. 102)

Technology and innovation do not require the free use of copyright material. Innovation needs new ideas, not the derivative reuse of existing material. Google relies on fair use to embark on projects that exploit huge volumes of copyright material without compensating creators.

The best way forward

The educational and scholarly publishing industry is under threat if the Productivity Commission proceeds with its draft recommendations around fair use.

The introduction of US-style fair use will result in more uncertainty, reduced efficiency, reduced capacity, and less diversity in Australian educational publishing products and services.

As risk increases, investment will decrease. Educational resources, authored and published in Australia for the Australian education system, will disappear, and Australia will be left to import material designed for other markets.

The APA is actively collaborating with industry and government to ensure that Australia's copyright laws continue to serve their original purpose. Ongoing initiatives include better access to copyright materials for people with disabilities, improvements to statutory licensing, changes to the treatment of unpublished and unavailable works, and sustainable open access.

Australia should retain fair dealing and the statutory licensing provisions around educational use, but implement sensible and timely updates where necessary.