



Via electronic mail: intellectual.property@pc.gov.au

June 2, 2016

Productivity Commission
GPO Box 1428
Canberra City 2601

Dear Sirs:

The Association of American Publishers (“AAP”) appreciates this opportunity to comment on the draft report of the Productivity Commission entitled *Intellectual Property Arrangements* (“Draft Report”).

The Association of American Publishers (AAP) is the largest U.S. trade association for the consumer, educational, professional, and scholarly publishing industry. Our 400+ member organizations include U.S.-based multinational corporations, independent publishers, university presses, nonprofit publishers, professional and scholarly societies and industry service providers. Our members publish hardcover and paperback books, e-books and digital products, textbooks and digital learning platforms, professional and scholarly journals, and reference and religious works.

While many aspects of the voluminous Draft Report would have significant implications for the publishing industry, these comments will focus on three of the Draft Report’s Recommendations, as follows:

Draft Recommendation 5.2: *The Australian Government should repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.*

Draft Recommendation 5.3: *The Australian Government should amend the Copyright Act 1968 ... to replace the current fair dealing exceptions with a broad exception for fair use...*

Draft Recommendation 15.1: *All Australian, and State and Territory Governments should implement an open access policy for publicly-funded research. The policy should provide free access through an open access repository for all publication funded by governments, directly or through university funding, within 12 months of publication.....*

I. Importation Rights

Copyright is by nature a territorial right, and territorial licensing of publication and distribution rights is a pervasive feature of the book publishing business worldwide. This system

depends, of course, on the existence of exclusive rights to import works as one of the bundle of rights enjoyed by copyright owners. Territorial licensing has enabled considerable investment by publishers in the long-term development and nurturing of authors, including Australian authors, particularly in the tradebook sector.

The observation in the Draft Report that “most suppliers of commercial content to Australia are foreign and Australia is a small country with little impact on the decision to produce content”¹ seems to have dominated the Productivity Commission’s analysis on the parallel importation issue, and undergirds its recommendation that the dismantling of importation rights for books should be accelerated. This is far from the only area in which the Draft Report gives the distinct impression that the concerns of Australian authors, and the publishers who bring their creations to the public, are of peripheral importance at best, and must give way to the interests of Australians as consumers of content only. The outpouring of opposition from Australian authors and publishers to this recommendation amply demonstrate that this caricature of Australians as “takers” rather than “makers” of creative materials is superficial at best, and that even from the consumer perspective, abolishing importation rights risks reducing the choice and diversity available to Australian book consumers (or, as they are sometimes known, “readers”).

The Draft Report’s confidence that “direct subsidies aimed at encouraging Australian writing”² are a fully adequate substitute for one of the critical exclusive rights under copyright is indicative of the Draft Report’s seeming hostility to basic copyright concepts. In this case, the Commission seems to be either nostalgic for the pre-copyright epoch, in which authors depended upon government patronage, rather than property rights in their creations, to ensure their livelihoods; or else more comfortable with systems in which the state, rather than the marketplace, determines which books are published and distributed. In AAP’s view, neither of these options is preferable to the status quo.

One of the global benefits produced by the system of territorial licensing is the ability of publishers of textbooks and other educational and training materials to price discriminate in favor of poorer markets in the developing world, including a number of Australia’s Asian neighbors. These textbooks and other publications are critical inputs to economic development; but students and other learners in many poorer countries would be much less able to acquire them if all licensing were carried out on a global basis and at global prices. Today, low cost textbook editions and similar price tiering exercises enable developing economies to gain the benefits of educational publications. To the extent that importation rights are diluted or abolished in developed country markets such as Australia, price arbitrage is sure to divert these products away from their intended audience, and publisher discount policies for less developed markets would ultimately become unsustainable.

AAP urges the Commission to broaden, modernize and globalize its perspective beyond its current narrow focus on the strictly monetary aspects of Australian consumer welfare. This

¹ Draft Report at 128.

² Id. at 132.

broader perspective would reveal that, even if the abolition of importation rights were to result in a slight reduction in tradebook prices in Australia, that consumer benefit to Australians would come at the cost of diminished access of students across the developing world in Asia to the most current textbooks and other educational materials. These costs should be acknowledged and given significant weight in the Commission’s calculus.

II. Fair Use

The Draft Report’s recommendation to convert Australian copyright law to a fair use system builds upon the recent recommendation of the Australian Law Reform Commission (“ALRC”). See, ALRC, *Copyright and the Digital Economy*, ALRC Report 122 (2014). The Draft Report calls it “the minimum level of change the Australian Government should pursue.”³ In effect, the ALRC called for replacing fair dealing, and a range of existing statutory licenses, with the text of the fair use provision of U.S. copyright law, 17 U.S.C. § 107. The Draft Report accepts this outcome but argues that Australia should “go further,” as discussed below.

AAP’s comments on this topic are informed by the perspective of U.S.-based international publishers that operate both in the main jurisdiction that recognizes the fair use doctrine – the United States – and in a wide range of other countries that do not. The latter group encompasses both common law legal systems, most of which (like Australia) include fair dealing exceptions in their copyright laws, and civil law systems in which only relatively specific statutory exceptions to exclusive rights are recognized. From this perspective, AAP is concerned that the Draft Report, like the ALRC report before it, not only overstates the benefits of fair use, but also significantly understates the “transaction costs” that would flow from this proposed dramatic shift in Australian copyright jurisprudence.

The most troubling “transaction cost” is uncertainty. A high level of uncertainty is an inherent feature of the fair use model. Fair use applies to a wide range of uses of virtually all works, and constitutes an exception to all of the exclusive rights. Perhaps more significantly, no one can read the fair use statute in the United States, or in any other country which has enacted the same law, and determine whether a particular contemplated use that involves the exercise of an exclusive right, and that has not been authorized by the right holder, will or will not be an infringement. Even where, as in the U.S., a fair use statute announces a non-exhaustive list of principles that courts are directed to apply to make such a determination, it does not spell out rules that would allow a right holder or user to anticipate (by reading the statute) what the answer will be to the question of whether a particular use is infringing. AAP agrees that this flexibility provides some advantages, but it also imposes costs. In particular, the radical uncertainty of the scope or applicability of the fair use exception to any particular set of facts can be a debilitating cost. Indeed, unless this uncertainty can be mitigated or managed by other features of the fair use system, it would be very difficult to maintain an orderly marketplace in which works of authorship are created, published, disseminated, and used in a predictable fashion.

³ Draft Report at 153.

In the United States, these costs are mitigated, principally by the existence of a deep and rich body of case law and precedent.⁴ Counsel to a publisher in the United States reads the statute only as a starting point in analyzing whether a particular use of a copyright work is or is not likely to be considered fair. It is far more important to consult the case law. These precedents were compiled over the course of nearly two centuries, during most of which there was no fair use statute whatever. Only the case law gives meaningful content to the broad principles stated in the statute.

Armed with this case law, counsel in the U.S. are able to provide meaningful guidance on whether specific uses are likely to be treated as “fair.” Publishers rely on this guidance every day to make critical decisions, not only about whether to object to particular unauthorized uses that are being made of their works, but, importantly, about whether a use that the publisher itself may wish to make – for example, incorporating an excerpt of another work without permission – is fair. Thus, both as right holders and as users, publishers can mitigate the inherent uncertainty of fair use by reliance upon the case law precedents. Since the same case law resources are equally available to entities whose interests fall far more on the user end of the spectrum, all market participants can have a reasonable level of confidence in the legal boundaries. This confidence can be, and generally is, further buttressed by voluntary licensing arrangements, under which the parties to a license make their own agreements about what conduct is and is not permissible with respect to the works in question.⁵

While this system works well in the United States, AAP is skeptical whether it can be successfully transplanted to Australia. Certainly it will not be enough simply to repeal fair dealing and a number of other existing statutory exceptions and replace them with fair use. The fair use doctrine is by no means identical with the fair use statute. Statutory changes can bring the latter to Australia; but without importing U.S. case law as well, the doctrine, or at least its constructive role in encouraging a robust marketplace in works of authorship, will not make the same journey.

Perhaps in tacit recognition of these uncertainties, the Draft Report actually advocates that the Australian law “go further” than the ALRC recommended, by enacting an “expansive and enduring” fair use statute would elevate a single factor above all others: “Australia’s exception for fair use should allow all uses of copyright material that do not materially reduce a

⁴ The Draft Report correctly notes that a handful of other countries have recently enacted fair use provisions. Some of these countries have legal systems that are at least partially based on the common law. However, AAP is not aware of any significant case law that has been developed under the fair use statutes in any of these countries. Their adoption of fair use should carry little if any weight in resolving the issue of whether Australia should do so.

⁵ Because contractual arrangements play an important role in providing certainty in the marketplace, it is essential to preserve freedom of contract to the greatest extent possible, even with regard to licensing provisions whose subject matter may overlap with statutory exceptions to copyright protection. This is equally true with regard to licenses granted to libraries and archives as it is with respect to other licensed users. Thus, to the extent that the Draft Report, in its discussion of this issue on pages 125-126, evinces an openness to enacting laws that would strike down such license provisions, either in the library/archives context or more generally, AAP urges the Commission to reconsider, and instead to reaffirm that copyright licensors and licensees should generally enjoy the ability to agree upon and to enforce definitions of permitted and unpermitted uses under a license.

right holder's commercial exploitation of their [sic] work at the time of use."⁶ This single-factor test might reduce some of the uncertainty that would result from grafting U.S.-style fair use onto Australia's copyright law. But, the main certainty it would deliver is that Australia's copyright law regime would certainly fall short of long-standing globally accepted norms, and would certainly produce some intolerable results in "fair use" cases.

The Commission's proposed single factor test covers some of the same ground as the fourth factor in the familiar non-exhaustive list of fair use factors set out in the U.S. statute; but it extends far beyond it. While 17 USC § 107 (the fourth factor) encourages the court to consider the impact of an asserted fair use "upon the potential market for or value of the copyrighted work," the Draft Report's formulation presumes that the right holder has absolutely no entitlement to any use of the work that he or she is not actually making at the time of the unlicensed use the defendant is now asserting to be fair. In effect, this turns the U.S. fourth factor on its head.⁷ Among other things, if Australia were to enact such a statute, it may well be questioned whether someone publishing an unauthorized translation of work, or preparing without the right holder's consent an "adaptation, arrangement, or other alteration" of the work, would any longer be treated as an infringer in Australia, so long as the right holder was not at that time itself "commercially exploiting" the work in that manner in that market. This would eviscerate the author's fundamental adaptation right and establish instead a "first to adapt" fair use exception. Thus, adoption of the Commission's recommended fair use approach would imperil Australia's compliance with some of the most basic tenets of copyright law, such as an exclusive translation right or an exclusive adaptation right, both of which are international norms to which Australia has been bound for more than a century, as an adherent to the Berne Convention.⁸

Some of the other statutory factors familiar to fair use jurisprudence would mutate in the Draft Report's approach to "rebuttable presumptions" about whether a particular use meets the unitary test of "material reduction in current commercial exploitation" that would provide the dividing line between fair uses and infringements. Applying these in the terms in which they are stated would also produce some bizarre and intolerable results. For example, the Draft Report recommendation creates a presumption that any use of a work that is not at that moment being commercially exploited is "more likely to be fair." Such a presumption would benefit someone who seeks to bring a time-sensitive work to market in Australia before the actual right holder has had an opportunity to do so (a practice more often referred to as "pre-release piracy"). While in

⁶ Draft Report at 153, 160.

⁷ It is also noteworthy that case law precedent in the US has further qualified the fourth factor by directing courts to consider the impact on potential markets, not only if the particular user is allowed to make the particular use sought, but also if the assertedly "fair" use were to be exercised by others and to become widespread. *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985) ("fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (the fourth fair use factor "requires courts to consider ... whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market for the original."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (finding lower court made "sound findings related to Napster's deleterious effect on the present and future digital download market" in considering the fourth fair use factor).

⁸ See Berne Convention, Arts. 8 and 12.

such a case the presumption would likely be rebutted (or at least rebuttable), it is not immediately evident what value is created by having the presumption in place to begin with, nor whether anyone but an infringer would benefit from imposing on the actual right holder the burden of rebutting it.

Finally, the Draft Report expends several pages discussing developments in Canada. In Canada, the enactment of a fair dealing exception for “educational” uses, simultaneously with judicial precedents giving an expansive interpretation to the fair dealing statute, have virtually destroyed what had been a stable and well-functioning collective licensing market for certain uses of copyrighted materials in primary, secondary and tertiary educational institutions across the country.⁹ While the Draft Report does not explicitly adopt any conclusions relating to the Canadian experience, it seems to minimize its relevance to the question of whether fair use should be imported into Australian law and the existing statutory licenses for educational institutions should be repealed and replaced with unlicensed uses of copyrighted materials. To the contrary, AAP believes that the Canadian experience provides a cautionary tale that Australian policymakers should closely study in order to avoid repeating it.

In order to provide strong incentives for investment in the development and distribution of copyright works that can be used for educational purposes, it is critical that any copyright reform proposal for Australia assure that publishers can control, through the exercise of exclusive rights, the terms and condition under which their works may be exploited for such purposes, or at a minimum provide consistent, predictable, and adequate compensation for such uses. AAP strongly believes that the best route for achieving this result is to foster a robust and competitive marketplace in the sale and licensing of copyright works for educational uses. Replacing the existing educational statutory licenses with broadly phrased and highly uncertain new exceptions for educational use (whether labeled as “fair dealing” or “fair use”) is quite unlikely to encourage voluntary licensing; it is far more likely to have the opposite effect. Entities that wish to use copyright material for educational purposes, and that are no longer required to pay for statutory licenses, will have strong incentives to eschew the licensing market entirely and take refuge in the broad new free-use “educational” exception.¹⁰ Rather than negotiate with publishers, these users will force publishers into costly and protracted litigation in order to obtain any compensation whatever. Courts, not the marketplace, will be deciding how much users need to pay – if anything – in order to make educational uses of copyright material. Such an outcome will be highly disruptive of settled expectations, and inimical to the steady, consistent investment needed to develop and bring to market the highest quality educational materials.

It is in this context that the Canadian experience is instructive. While some submissions, extensively quoted in the Draft Report, seem to dwell on nit-picking what was or was not said in

⁹ Draft Report at 149-152.

¹⁰ It should be emphasized that these entities are by no means limited to formally recognized schools, colleges and universities, or to current statutory licensees. A wide range of businesses, institutions and individuals could plausibly characterize as “educational” the uses they wish to make of copyright works, and thus could claim the shelter of a broad “educational use” exception.

another submitter's past annual reports,¹¹ AAP urges the Commission to comprehend the overall picture of what has happened to the Canadian educational publishing sector in the past few years. Prior to 2012, a well-established collective licensing regime was in place to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada. This system generated millions of dollars in licensing revenues for authors and publishers. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled new investments in innovative means to deliver textual materials to students.

Today, that system has been all but destroyed. A detailed study released by Pricewaterhouse Coopers ("PwC") in June 2015 documents and quantifies the damage. "Licensing income from the K-12 sector has been all but eliminated," PwC found, with a similar fate expected this year at the post-secondary level once current licensing agreements expire. The annual loss from the demise of licensing to copy parts of works was estimated at C\$30 million (US\$22 million). And the damage spills over to the full textbook sales market as well, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.¹²

The Draft Report seems to dismiss the Canadian example because Australian courts might reach different conclusions than Canadian ones, and because "guidance and illustrative examples would likely play a role in determining what constitutes fair use in the context of education."¹³ Both statements are true (although the second one overlooks the fact that it was "guidance" provided by lawyers for school systems across Canada, based on the statutory amendments and court decisions at issue, that directly led to the refusal to take any further licenses for uses such as copying of textbooks, preparing course packs, digital copying, and copying for non-classroom uses). But both statements also miss the point: the enactment of a broad statutory exception helped to destroy a functioning collective licensing system, and inflicted huge losses on authors and publishers. There is little dispute about these facts. If the Commission does not view this as a cautionary tale to which Australian policymakers should carefully attend, this simply reinforces the impression that the Commission views the Australian marketplace solely from the perspective of consumers of copyrighted material, and considers the impacts on authors, publishers and other participants in the creative sector to be of marginal significance at best.

¹¹ See Draft Report at 152. It seems rather incongruous for the Commission to consider submissions interpreting another company's decision to withdraw from the Canadian market as a factor in arriving at its recommendation. It would be prudent for the Commission to hear directly from said company regarding the market conditions arising from the change in Canadian law that caused it to close its Canadian Schools publishing program rather than to quote the suppositions of another submitter.

¹² See Pricewaterhouse Coopers, Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines (June 2015), available at http://accesscopyright.ca/media/94983/access_copyright_report.pdf, at 6, 7.

¹³ Draft Report at 152.

III. Open Access

AAP appreciates that the Draft Report acknowledges that scientific, technical and medical journals provide “a major mechanism for diffusion of ideas,” and that copyright protection for such journals has played an important role as “a vehicle for dissemination of research work.”¹⁴ AAP also agrees with the observation that the digital environment has opened up alternative means for this dissemination; many journal publishers have fully engaged with these new dissemination channels. Publishers continue to make significant editorial, technological and financial investments in producing high-quality, peer-reviewed journals that report on research – including but by no means limited to government-funded research – in a wide range of fields. Due in great part to these investments, the public today enjoys broader access to these journal articles faster, and at a lower per-article cost, than ever before. We hope to see these facts reflected in the final version of the Commission’s report.

The Draft Report opens its chapter regarding “IP and public institutions” by referencing prior findings that “the system has to encompass all varieties of research.”¹⁵ It also correctly notes that, when governments or quasi-governmental institutions impose open access mandates on articles arising from publicly funded research, they often allow embargo periods, during which commercial journal publishers can seek to recoup their investments, and that these periods vary in length “depending on the field of research.”¹⁶ Thus it is surprising and disappointing that the Draft Report recommends a one-size-fits-all approach under which “all publications funded by governments, directly or through university funding,” must be deposited in an open access repository within 12 months of journal publication, regardless of the subject matter. Instead of this rigid and arbitrary approach, the Commission should be calling for an examination of quantitative evidence to set the optimal time frame during which researchers should continue to rely upon the existing proven commercial journal infrastructure to disseminate their findings.

Such quantitative evidence is now available, in the form of a study commissioned by AAP that looked at the “half-life” of journal publications: the period of time during which half of an article’s lifetime downloads occur.¹⁷ The study examined articles published in 2,800 different journals in ten distinct scientific disciplines, and found a wide range of variation in “half-life” periods. In the field with the shortest half-life – health sciences – it took more than 24 months for the majority of articles to experience half their total downloads. In fields such as mathematics, physics and the humanities, median half-lives exceeded 48 months. Overall, articles in the majority of journals received more than 50% of their usage at least 36 months after publication. Only 3% of journals in all fields experienced half-lives aligned with the arbitrary 12-month embargo period proposed in the Draft Report.

This research strongly suggests that the appropriate embargo period should vary by discipline, and that if any standard period were imposed, 12 months is far too short. A similar study that focused on research supported by Australian public entities might produce different

¹⁴ Draft Report at 405, 406.

¹⁵ Id. at 401.

¹⁶ Id. at 407.

¹⁷ See <http://publishers.org/sites/default/files/uploads/PSP/journalusagehalf-life.pdf>

results. But whatever the outcomes, such data could provide a firmer basis than anything the Draft Report provides for fashioning an embargo period that best serves the public interest by permitting journal publishers to recoup their significant investments in digital dissemination, while guaranteeing that all such articles will ultimately become freely available through open access.

AAP also appreciates that the Draft Report notes the many different models for facilitating open access, and the importance of publishers in enabling the development of such models. Individual publishers provide a variety of avenues to enable access, and non-profit organizations – most significantly CHORUS in the United States – have been developed to enable access through a public-private partnership working with copyright holders. Such public-private partnerships have the benefit of minimizing public investment and compliance burdens for researchers, while also taking advantage of the expertise of the primary disseminators of these materials. We hope that the final report will consider the benefit of working directly with publishers and other copyright holders in enabling access

AAP appreciates the Productivity Commission's consideration of its views. If there are any questions or if additional information is needed, please contact the undersigned

Yours sincerely,

M. Luisa Simpson
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