

US-STYLE 'FAIR USE' AND AUSTRALIAN PUBLISHING

Current Situation

- **February 2014** - The Australian Law Reform Commission recommended US-style 'fair use', including allowing the use of copyright material without payment for educational purposes.
- **August 2015** - The government initiates the Productivity Commission IP Review to examine if current IP legislation "to ensure the appropriate balance exists between incentives for innovation and investment and the interests of both individuals and businesses, including small businesses, in accessing ideas and products."
- **October 2015** - An issues paper was released, outlining the scope of the wide-ranging review, including patents, trade marks, registered designs, performers' rights, moral rights and copyright. The APA, along with many publishers and key stakeholders in the creative industries, make submissions arguing the importance of copyright.
- **April 2016** - The Productivity Commission released its draft report recommending a number of changes to the *Copyright Act 1968 (Cth)*, including reductions in the terms of copyright, repeal of parallel importation rules and US-style 'fair use'.

Australian 'fair dealing' vs US-style 'fair use'

Copyright law sets out the rights of creators and users in relation to creative works. Copyright law is designed to provide a framework of incentives and rewards for creativity and so promote ideas, culture and future innovation.

Australian copyright law prescribes the purpose and context in which creative content may be used and shared – as in an educational setting – while providing equitable remuneration for creators through statutory licensing payments.

Australia has a system of 'fair dealing' - exceptions that allow the use of copyright material for review or criticism, research or study, parody or satire, news reporting, judicial proceedings or legal advice. As long as the use is covered by the clearly defined fair dealing exceptions, it is not an infringement of copyright.

'Fair use', which is found in a small number of countries, most notably the US, allows content to be used for any purpose, provided the use meets certain 'fairness' criteria. Because US-style fair use applies to any purpose, including business purposes, and views about 'repurposing' content are changing, 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.

US-style fair-use: Who loses?

Implementing the Productivity Commission's recommendations around US-style fair use will hurt Australian publishers, their authors, product developers, staff and customers. Students and educators, from primary school through to university, who rely upon Australian content will lose out. The introduction of US-style fair use exemptions in Australia will lead to:

- **less income** for creators, including writers, illustrators and designers
- **less investment** in Australian-specific educational content
- **greater legal risks** to users of copyright material
- **more litigation** around copyright
- **loss of jobs** and skills in educational publishing
- **less Australian educational content** for Australian students

US-style fair use: Who gains?

Under US-style fair use, individual users of copyright material can benefit because there is less apparent constraint and cost. However the major benefits are reserved for enterprises like big information technology companies that repurpose content without having to ask permission or pay creators. In the US, for example, courts recently ruled fair use applicable in Google's digitisation of over 25 million books and a university's online use of academic book excerpts without the permission of, or compensation to, the rights holders.

Current and ongoing reform

Australia's copyright law provides certainty to the marketplace. It allows business to invest within an environment of managed risk. The publishing industry is actively collaborating with all stakeholders, including government, to ensure that Australia's copyright laws continue to serve their original purpose. This includes support for better print disability access, improvements to statutory licensing, changes to the treatment of unpublished and unavailable works, and sustainable open access.

What's at stake

- a successful, consumer-facing publishing industry that supports Australian creators in making and disseminating their work locally and exporting it globally
- world-class, high-quality resources for Australia's education system students, most often produced by Australian teachers and lecturers in collaboration with publishers
- print and digital content that is vital to Australia's curricula and context
- 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
- annual sales revenue of \$410 million and statutory licensing fees of \$103 million

Conclusion

A system of US-style fair use that creates enormous uncertainty and devalues content will destroy the capacity of educational publishers to create highly regarded and high-value Australian education resources.

Any copyright reform must give a fair deal for both creators and consumers – to build a vibrant culture, education and economy for the future.