The Australian Society of Authors’ Response to the Intellectual Property Arrangements Productivity Commission Inquiry Report

Submitted by Juliet Rogers on behalf of the Australian Society of Authors

BACKGROUND

The Australian Society of Authors (ASA) is the peak body representing the interests of more than 3,000 author and illustrator members throughout Australia. We appreciate having the opportunity to respond to the Productivity Commission’s final report on Intellectual Property Arrangements.

There is little doubt that technological advancements have changed the way creators produce their work and the way in which consumers interact with and purchase that work. The digital era has also exacerbated issues such as orphan works, which were considerably less problematic in a print only world.

The ASA welcomes the opportunity to join a vigorous and widespread debate on the ways in which copyright can better balance the realities of a changing world with the requirement that creators need to earn a fair return for their work. In our view, the changes recommended by this report fall well short of that aim. There are two major areas of concern for our membership: Parallel Import Restrictions (PIRs) and 'Fair Use'.

PARALLEL IMPORTATION RULES (PIRs)

The issue of PIRs is of course not new, having been subject to numerous reviews in the past. The argument in support of abandoning these rules has been based on the premise that PIRs negatively impact availability and price. While this argument had some legitimacy 5-10 years ago, the industry has worked hard to obviate those concerns.

It is therefore frustrating that despite significant and prolonged debate about this issue in recent years, some critical factors continue to be ignored, misunderstood or overlooked. We submit the Productivity Commission’s assumptions are flawed, undermining the reliability of its findings.

Availability

The argument about availability is a non-issue, because timely access to new titles is no longer a problem for the consumer:

- The consumer can legally buy any book, from any source, on the day that it is published anywhere in the world.
- All major text based titles are now printed in Australia and made available on the same day as anywhere else in the world.
In addition, publishers have agreed that they can only retain their territorial exclusivity if they have a book on the market in Australia within 14 days of its first publication anywhere in the world.

Price

After the release of the draft report, the Productivity Commission was criticised for their reliance on out-of-date pricing information and for seemingly ignoring price data provided by both the Australian Publishers Association (APA) and the Australian Booksellers Association (ABA). This final report therefore contains the Productivity Commission's own pricing survey, which in essence argues that while there is little difference between the Recommended Retail Prices (RRPs) in the USA, UK and Australia, there is a difference between the Average Selling Prices (ASPs). They further contend that the ASPs are the best indicator of unfair pricing.

Without getting into a lengthy discussion about exchange rates, title range and number, formats and other intricacies that affect such pricing models, it is our contention that the report fails to understand the levers that affect the pricing of books and the simple reality that those levers will not change if PIRs are removed.

Unlike most other industries, the book industry works on a system of supplying product to retailers at a discount off the RRP. The RRP is therefore the only like-on-like price comparison that can fairly be made across markets, because the ASP is affected by a myriad of different trading factors, all of which relate to the territory within which the relevant retailer operates:

- Large retailers have the buying power to place large orders and receive high discounts
- Large retailers are the only customers set up to purchase in one-drop from the supplier and handle their own store-by-store distribution
- Large retailers can buy direct from the publisher while smaller independents have to buy through a wholesaler, incurring another margin
- The actual buying terms in relation to risk: firm sale, sale or return or consignment
- The retailer profile of the different markets (i.e. USA and UK are both dominated by large volume, mass-market retailers, with low market share for independent booksellers).

The Productivity Commission has disregarded all of these factors and has simplistically assumed that the removal of PIRs will automatically lower ASPs in Australia to the same level as the USA and UK.
This is flawed thinking.

If there were no PIRs, the reality is as follows:

- In many instances, USA and UK publishers would be contractually unable to sell direct to Australian booksellers who would have to buy from wholesalers
- Australian booksellers would be purchasing for a market that is 90% smaller than the USA, hence their orders would be considerably smaller than large overseas retailers, leading to less discount and higher ASPs
- Purchases from an international wholesaler would always be firm sale and the Australian retailer would have to account for that additional risk in their pricing formula
- In reality, the only Australian retailers positioned to potentially buy in large volumes at attractive wholesale prices, are the large discount department stores that have the infrastructure to handle the currency exchange issues, shipping and the logistics that would allow them to purchase in one drop into a central warehouse. Furthering the power of those retailers would be at the expense of the independent bookstores, when the number of independent bookstores in Australia is twice that of the USA or UK
- Some international remainders could become more available to Australian consumers at reduced prices in large volumes, but not high quality, well-produced, new books.

It is the ASA’s contention, therefore that price and availability are no longer an issue for consumers and that removing PIRs thus delivers no proven benefit, but does risk destabilising an industry that is currently not broken and significantly worsens remuneration and international opportunities for Australian authors.

Although the Productivity Commission acknowledges that books have cultural value, they assert that Australian books and authors are already given adequate support through government funding, to the tune of an unsubstantiated figure of $40 million. They go on to state that publishers do not provide such support and indeed could only do so by increasing prices.

These contentions are very wrong, and reflect a total lack of understanding by the Productivity Commission, as explained below.

**Why PIRs support local authors**

Publishing is a high risk, low margin industry, primarily because every product is unique. This makes brand marketing and selling a challenge. Publishers chase a
dream of delivering a net profit of 10% of revenue, but rarely achieve more than half this level. As a result, a relatively small change in the business can have a significant impact on overall profitability and sustainability, which in turn impacts on their acquisition and retention of Australian authors.

In general terms, an Australian trade publisher has two to three channels of product, all with different costs and risks attached. Those channels are:

1. A **sales and marketing agent** for international publishing companies, which can include a parent company. This means that the Australian publisher purchases finished stock to sell in this market, which can be printed here but equally can be freighted in from overseas. The defining characteristic is that the costs of bringing that book to market are lower for the Australian publisher, because they are not responsible for any pre-print costs, and therefore there is less risk attached.

2. A **purchaser of rights to an international book**. This means that an Australian publisher buys a territorial licence to publish a book in this market. This type of product carries a higher level of risk and cost than the first alternative, but once again, the source publisher has largely covered pre-print costs.

3. An **originating publisher of an Australian author**, which carries with it the same attendant risks as any originating publisher (i.e. all the editorial, design, production and print costs involved in making a book, plus the sales, marketing and distribution costs incurred in all scenarios).

The publisher’s task is to try and keep those three channels in **balance**, so that they can maintain the overall margin they need to stay in business.

If PIRs were removed, the second of those three channels comes under threat, because Australia would have lost territorial copyright. This would mean that an Australian publisher could not risk spending a lot of money buying a licence for a market in which any retailer can purchase the same book from anywhere else in the world. This would then change the risk-and-return profile of the Australian publisher, which is likely to affect the balance of the business and their ability to take as many risks and spend as much money in the all important third channel of product: the local authors.

Not only is the Productivity Commission’s understanding of the way in which authors and publishers work in this country fundamentally flawed, but they also completely ignore the APA’s statement that publishers currently spend $120 million supporting local authors every year, in terms of advances, royalties and marketing support. It has been well publicised that average author earnings from their writing has halved in the last 10 years, so to place publishers’ financial commitment to local authors under further threat is playing very fast and loose.
with the ability of Australian writers to continue to develop the cultural identity of this country.

This flawed thinking is exacerbated by the Productivity Commission’s proposition that any loss of income for writers will be offset by Government funding. In the Australia Council for the Arts’ annual report for the 2015-2016 financial year, (the primary Government funding body for the Arts), Literature received just 2.7%, of the total discretionary funds, the lowest of any arts form. This total of $4.6 million was a drop of almost 30% on the prior financial year. Regardless of where the Productivity Commission’s claim of $40 million funding comes from, the reality is that arts funding has taken a battering in the last few years, and Literature has been particularly hard hit.

Regardless of the level of available funding, however, it is illogical to change territorial copyright and turn a self-sustaining industry into one that would be dependent on taxpayer funding when it would produce no tangible benefit to anyone, including the consumer. If the costs are going to be high, and the benefit is non-existent, why would a sensible government do it?

**PIRs enjoy widespread community support**

The ASA's petition against the repealing of PIRs attracted 20,302 signatures. We do not believe repealing PIRs has the support of the public.

**FAIR USE**

The Productivity Commission has recommended the introduction of a 'fair use' exception, as formulated by the ALRC in its 2014 report.

The ASA is open to reform of the current 'fair dealing' exceptions but opposes the introduction of 'fair use'.

**Uncertainty**

We maintain that the Productivity Commission significantly underestimates the level of community uncertainty that will result from the introduction of a 'fair use' exception. The Productivity Commission argues that uncertainty will be offset by a list of 'illustrative uses', by guidelines and by foreign case law. We submit that even in jurisdictions such as the United States, where 'fair use' has been in operation for decades, users of copyright are still routinely encouraged to seek legal advice to be comfortable their use is 'fair'.

We agree that the *Copyright Act* needs updating but argue that this is better achieved by further excepting specific categories of use, rather than introducing one broad, non-exhaustive category, requiring endless legal advice and navigation of shades of grey.
The Productivity Commission argues that ‘fair use’ is better placed to adapt to new uses, or methods of use, of copyright material. “Unless foreseen by legislators, these future fair uses would be considered copyright infringement under the status quo.”¹ We contend that it is entirely appropriate for legislators to determine whether new categories of use are fair, to clearly define that category and then update the legislation.

**Loss of Remuneration**

We are concerned that in any grey area ‘fair use’ will discourage licensing solutions, as users will be emboldened to rely on the new exception rather than seek permission from the copyright owner and pay a licence fee up front.

If an author’s book is adapted into a film, the author currently earns a licence fee. Under a ‘fair use’ regime, a straight adaptation would still attract a fee for the writer, but the waters become much muddier thereafter. What if the film is an independent production and screened for free on YouTube? What if the plot is tweaked and a central character omitted? If a poem, or an extract of a poem, is reproduced in mixed media art; is that a transformative use and therefore fair? Is it ‘fair use’ to reproduce a literary work as a sound recording, as part of a multimedia art installation? What if Google decides to offer yet another new use of its digital library which might arguably offer a public benefit but fails to remunerate authors for the content they have created to enable the offering? Many uses that clearly attract a fee under the current law will be questionable under ‘fair use’.

To quote the Attorney-General, George Brandis, copyright reform must not “come at the expense of our creative industries”.² The risk, acknowledged by Senator Brandis in the wake of the ALRC Report, is that Australian creators will be "cheated of the fair compensation for their creativity, which is their due".³

The Productivity Commission argues that secondary creative content will be encouraged by the introduction of ‘fair use’, precisely because use of the original copyright work will be more permissive. The other side of that coin is that remuneration to the copyright owner will be reduced, a consideration not given sufficient weight by the Productivity Commission.

Secondary uses of literary works are an important revenue stream for many of our members. While *some* revenue will continue under ‘fair use’, it will be less certain. Consider how much of Australia’s cultural output begins with a story, with books providing the basis for television series, films, music, plays, dance.

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¹ p. 664 of Final Report
² https://www.theguardian.com/world/2014/feb/14/copyright-fair-use-clause-fails-to-persuade-george-brandis
³ https://www.theguardian.com/world/2014/feb/14/copyright-fair-use-clause-fails-to-persuade-george-brandis
The erosion of creators’ ability to earn licensing fees from the ongoing use of their work is a huge concern for our members.

**Elevation of User Rights**

The Productivity Commission states that the introduction of ‘fair use’ will have a neutral net effect on social welfare: instances where a copyright owner no longer receives a licensing fee are offset by the saving to a copyright user who currently pays a licensing fee.

The Productivity Commission acknowledges that consumers will enjoy the benefits of ‘fair use’ and the cost will be borne by creators. It states that, as Australia is a net importer of intellectual property, losses to copyright owners and corresponding gains to copyright users are likely to be positive for overall social welfare.

From the perspective of our members, this transfer of benefit (from creator to user) is hugely concerning because of the existing difficulty making a living from creative endeavours. We cannot stress enough the level of financial hardship experienced by Australian writers and illustrators. It has always been tough creating cultural content for Australia’s relatively small market, but it has become much tougher over the last decade.

Also, the result of this transfer from creators to consumers will be to impede creative endeavour *within Australia*, by reducing incentives to create. This will mean that Australians will incur a heavy cultural cost that has not been considered by the Productivity Commission.

**Educational Publishing**

We remain very concerned about the effect of ‘fair use’ on the educational publishing sector.

The Productivity Commission repeatedly states that ‘fair use’ will co-exist or sit side-by-side with the educational statutory licence scheme. But by recommending that “education” be included in the non-exhaustive list of illustrative uses, the Productivity Commission is recommending the introduction of a presumption that use of a work for educational purposes is fair (and should therefore be free). This is at least partly subsuming educational use within ‘fair use’ and raises uncertainty about when (if ever) licence fees ought be paid for use of copyright works for educational purposes.
For the purposes of further consultation with industry, we encourage Government to issue clear guidelines on how 'fair use' dovetails with the educational statutory licensing scheme.

The Productivity Commission rejected arguments that Canada provides a good example of the impact of 'fair use' on educational publishing. It seems persuaded by arguments that Canadian educational publishing was already struggling before its 'fair dealing' exception was expanded to include education. And it points to other reasons for the decline in the educational sector in Canada: shifts in curriculum; growth in the used book market; rental programs for textbooks; market consolidation and transition from traditional print books to digital products. With respect, several of these reasons could apply to the wider publishing industry but the wider publishing industry has not collapsed. However, the educational sector in Canada has seen licensing fees being reduced by 98%.

We realise the Productivity Commission has rejected the PricewaterhouseCoopers (PWC) Report of February 2016 on the costs and benefits of introducing 'fair use'. We make this point: prior to the expansion of 'fair dealing' under the Canadian 2012 Copyright Modernization Act, educational institutions promised that licensing fees would not be threatened. After the expansion of 'fair dealing' to include 'fair use', those fees have dropped by many millions of dollars and many educational institutions have declared they will not renew collective licensing agreements administered by Canada's Access Copyright. "The education sector now takes the position that its members are effectively not required to pay for the copying of this content by virtue of the 'fair dealing' exception in the Copyright Act." We remain deeply concerned that including 'education' as an illustration of 'fair use' will cause a similar result in Australia, leading to a similar substantial reduction in author incomes.

**Community Attitudes**

We receive many phone inquiries in which members of the public assert that 'fair use' would allow them to use copyright works in all sorts of ways. We are concerned that the public would equate 'fair use' with unfettered 'free use'. In general, they do not understand that it is not the user's subjective view of what is fair that is relevant. Any changes to this section of the Act would require extensive discussion and community-wide education to negate the likelihood of significant and inappropriate erosion of author property rights and income.

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4 Understanding the costs and benefits of introducing a fair use exception, February 2016, PWC report.
**ORPHAN WORKS**

We support legislative change to deal with orphan works and think this issue can and should be progressed, without the need to introduce 'fair use'. We endorse the submissions made by the Australian Copyright Council and are willing to participate in discussions to resolve orphan works, whether by a limited liability model or a statutory licence scheme.

**INTERNATIONAL FORUMS ON INTELLECTUAL PROPERTY POLICY**

We strongly disagree that the Australian Government should push for reforms, in international forums, that would shorten the term of copyright. We repeat the submissions we made in response to the Productivity Commission’s Draft Report on copyright term.

**SAFE HARBOUR**

We oppose the Productivity Commission’s recommendation to expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services. Limited liability for ISPs was granted with the expectation that efficient cooperation of ISPs could be relied upon by creators supported by an Industry Code. Until the safe harbor regime is improved, we do not support its broader application, particularly for companies which are not acting as mere conduits but actually have a commercial interest in content such as YouTube.

**FEDERAL CIRCUIT COURT**

We support improvements to access to justice. We support the recommendation to introduce a specialist list within the Federal Circuit Court (akin to the UK IPEC model) to provide a low cost option of resolving IP disputes. This reform is promising for our members who are individual creators; although we would be concerned if the cap on costs was at a level that would prevent such creators being able to recover their costs of litigation.

**CONCLUSION**

We are happy to answer any questions you may have regarding these submissions.

The Australian Government should take pride in Australian creativity and avoid steps that will diminish Australian content. **We call on the Government to retain the current Parallel Importation Restrictions and not introduce ‘Fair Use’**.

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