

Productivity Commission report into Intellectual Property Arrangements and the Ernst & Young Cost Benefit Analysis of the [ALRC](#)'s proposed Copyright Reform

In August 2015, The Australian Government asked the Productivity Commission (PC) to undertake a public inquiry into Australia's intellectual property system. The Commission was asked to consider whether current arrangements provide an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of creative works.

In July 2015, Ernst & Young was engaged by the Department of Communications and the Arts to undertake an analysis of the impact of amending the Copyright Act to implement a number of the recommendations of the [ALRC Report into Copyright and the Digital Economy](#).

The [Productivity Commission report into Intellectual Property Arrangements](#), and the [Ernst & Young cost benefit analysis of the ALRC's proposed copyright reforms](#), were each released by the Government in December 2016 and the Government is considering its response.

Both reports provide strong support for the copyright reforms sought by the education sector. Set out below is an overview of these reports.

The Productivity Commission (PC) report

The [final report](#) of the PC inquiry concludes that "Australia's copyright arrangements lack balance and have been slow to adapt to technological change, imposing costs on the broader community." It suggests a suite of reforms to maximise the welfare of all Australians.

The PC recommended reform in all of the areas raised by the education sector, including recommending:

- the introduction of a fair use exception;
- the need for expanded copyright safe harbours to include educational institutions;
- the need for improved governance arrangements for copyright collecting societies;
- provisions ensuring contractual and technological means cannot be used to override educational copyright exceptions; and
- the need for TPM exceptions to enable educational uses, including assisting students with disabilities.



The Australian education sector strongly supports the PC's recommendations, which are based on measured and evidence-based analysis. See below for additional information on the key recommendations.

Fair use

Recommendation: Australia's "narrow purpose-based exceptions" be replaced with a "principles-based, fair use exception" in the same [format recommended in 2014](#) by the [Australian Law Reform Commission \(ALRC\)](#).¹

The PC recommended that the Government enact a fair use exception. The PC found that fair use would mean Australia's copyright system will "better adapt to technological change and new uses of copyright material, without compromising incentives to create." This recommendation is supported by the Ernst & Young report, which concluded that the adoption of fair use would be a net benefit to the Australian community.

The PC rejected what it referred to as "implausible" rights holder arguments that fair use would result in schools not relying on the statutory licences. It said adoption of a fair use exception appropriately recognises that some uses of copyright material should not be remunerated.

The education sector strongly agrees. Fair use is essential to ensure Australian schools can deliver a world class education to equip Australian children to become the creators and innovators of the future. Fair use would remove the current roadblocks to innovation in Australian classrooms that prevent collaboration with industry and use of the latest teaching methods.

Fair use would also prevent the current unjustifiable waste of education budgets to pay copyright licence fees to use freely available internet materials, or orphan works where the copyright owner can't be found for payment. Some recent examples of activities considered remunerable in Australian schools due to the absence of a fair use example include:

- Telling students to print the Participation and Privacy Consent Form for the Bebras Australia Computation Thinking Challenge;
- Displaying a Spanish translation using a translation app to a Spanish class;
- Displaying an image of a cat on screen from www.petfinder.com.au;
- Taking screenshots of course offerings at a number of universities' websites;
- Taking a screenshot of a website that compares times in different cities around the world;

¹ <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>. Recommendation 6.1. Upon consideration the PC decided that that the [ALRC](#) factors were preferable to those it proposed in the draft report "in addition to achieving the outcome the Commission had intended, the [ALRC's](#) fairness factors have the added benefit of drawing on established jurisprudence and so reducing uncertainty" at 186.



- Telling students to print an information sheet on malaria from The Royal Commonwealth Society's website;
- Telling students to print a web page from the RSPCA's website giving information about how to be an animal foster carer;
- Taking a screenshot of a yellow raincoat from a Bunnings advertisement to include as a graphic in a PowerPoint presentation.

Introducing a fair use exception to cover uses such as these would in no way harm Australian authors and creators.

The PC also rejected claims that fair use would harm the educational publishing sector:

The purported impact on the education publishing sector ignores evidence from those jurisdictions where fair use and education publishing already coexist, or the fact that statutory licence fees make up only a small component of the sector's revenue, with direct licensing and purchasing of content a substantial proportion. As the Copyright Advisory Group to the COAG Education Council submitted: Australian schools spend upwards of \$700 million per annum in purchasing educational content for students. In addition to this, the sector pays approximately \$90 million each year on collectively negotiated copyright licences. As repeatedly guaranteed by the sector, these licences will continue to exist in a fair use environment.

The PC notes that rights holder interests are specifically protected under fair use: "fair use does not (as some suggest) mean free use and nor has it in any of the jurisdictions in which it operates as the exception specifically considers the impact of the use on the rights holder."²

The PC rightly identified that rather than ignore the interests of rights holders, under fair use the effect on the market is one of the factors to be considered. Where a use of copyright material harms a rights holder, the use is less likely to be considered fair. In the US, where fair use is long established, creative industries thrive.

Leading digital economies such as the United States, Israel, South Korea and Singapore have all adopted fair use style copyright exceptions with great success. The misleading scare campaign by groups opposing fair use must not be allowed to railroad this very important reform.

The following Smartcopying information sheets provide more information on fair use:

- Fair Use and why Australia schools need it: www.smartcopying.edu.au/law-reform/fair-use-and-why-australian-schools-need-it

² Ibid at 165.



- Fair Use and why Australia schools need it –
Infographic: <http://www.smartcopying.edu.au/law-reform/fair-use-and-why-australian-schools-need-it--infographic>
- Mythbusting fair use: www.smartcopying.edu.au/law-reform/mythbusting-fair-use
- Answering teachers' common questions about fair use: <http://www.smartcopying.edu.au/law-reform/answering-teachers'-common-questions-about-fair-use>
- Myth: Fair use decimated educational publishing in Canada: <http://www.smartcopying.edu.au/law-reform/myth-fair-use-decimated-educational-publishing-in-canada>
- Myth: fair use would harm Australian authors: <http://www.smartcopying.edu.au/law-reform/myth-fair-use-would-harm-australian-authors>

Oversight of copyright collecting societies

Recommendation: The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.

- The review should consider whether the current voluntary code represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.³

The PC highlighted the urgent need for greater transparency and accountability for collecting societies (eg Copyright Agency and Screenrights). The education sector welcomes this recommendation for a review of governance arrangements. For many years now, the sector has raised concerns regarding the lack of transparency with respect to information that would potentially enable statutory licensees such as schools to seek direct licensing arrangements with authors and publishers, or ensure that payments under the statutory licences are appropriate.

Each year, Australian schools pay large amounts of money under the educational statutory licence that Copyright Agency cannot distribute to the relevant copyright owner. A typical example of this is copying from freely available websites, such as free health resources or information sheets. Another common example is so-called 'orphan works': works where the copyright owner is either unknown or unable to be located.

³ <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>: Recommendation 5.4



Schools have been concerned for many years now that Copyright Agency members who have no connection with the works that schools have copied, have received windfall payments as a result of Copyright Agency's long standing practice of paying these 'undistributed' funds to its members if the relevant copyright owner is unable to be identified or located after four years. The PC shared the education sector's concerns regarding this practice, and said that any undistributable funds should instead be returned to the education departments that have paid to use the content.⁴ In 2015, this would have resulted in more than \$2 million being returned to education budgets.

Orphan works

Recommendation: liability should be limited for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.⁵

As mentioned above, Australian schools pay significant funds for the use of orphan works (ie works for which no rights holder can be identified or located). Money is collected from schools as agreed under the statutory licence, including for uses of freely available materials and orphan works, and is paid to rights holders. If the rights holder cannot be found, as is the case for orphan works, Copyright Agency retains the money paid by schools. It is not returned to education budgets. This is an unjustifiable waste of public funds.

The PC supported the education sector's preferred two-pronged approach to dealing with orphan works:

- it agrees with the [ALRC](#) that a fair use exception would cover many uses of orphan works (as well as works that were no longer commercially available); and
- it says the Government should enact the [ALRC](#) recommendations to limit liability for the use of orphan works where a user has undertaken a diligent search to locate the relevant rights holder.

The Ernst & Young report concluded that the largest benefits from adopting fair use in Australia would flow from use of orphan works (alongside cost savings to education). The report recommends that the payment for use of orphan works currently occurring under the statutory licences for education and government use should stop.

Copyright and contract

Recommendation: any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception should be unenforceable.⁶

The PC notes that the inability to use copyright exceptions due to contractual override has "the potential to restrict uses that have been expressly permitted by Parliament, reduce competition

⁴ Ibid at 160.

⁵ Ibid: see recommendation 6.2

⁶ Ibid: see recommendation 5.1



and efficiency, and increase the return to creators over and above what is necessary to incentivise their creation.”⁷

In the pre-digital environment, rights holders had no ability to override the copyright balance that Parliament struck between the interests of rights holders and users. That’s no longer the case. In the digital environment, contracts and technological protection measures (TPMs) are increasingly being used to re-write the balance set out in the Copyright Act in favour of rights holders, putting at risk the public benefit that the copyright exceptions and limitations are intended to provide. Ensuring that contractual arrangements cannot override copyright exceptions will ensure that exceptions can operate effectively in the digital environment.

Technological Protection Measures (TPMs)

Recommendation: consumers should be permitted to circumvent technological protection measures for legitimate uses of copyright material.⁸

The PC notes that similarly to contractual override, TPMs can be used to “prevent uses permitted under copyright exceptions” as well as having the more expansive potential to “prevent use of public domain material and...limit products which have little or no link to copyright”.⁹ It notes the paradoxical situation in Australia that even where “circumvention of a TPM is permitted under the Copyright Act, it is still illegal to supply technologies or services to enable such uses.”¹⁰ The PC echoes the [ALRC’s](#) decision to underscore “the importance of concurrent reform of contracting out arrangements and TPMs.”

Ensuring that TPMs or contractual arrangements cannot override copyright exceptions will ensure that exceptions can operate effectively in the digital environment. For example, even though copyright exceptions allow teachers to make captioned copies of audio-visual materials for students with hearing disabilities, the lack of a corresponding TPM exception means that the exception cannot be used in practice. Australian schools should not be in the difficult position of choosing between assisting students with disabilities and breaking copyright laws.

Safe harbours

Recommendation: The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services¹¹

The PC provided further support for the calls to expand the safe harbours by recommending the extension of the safe harbour scheme to cover not just carriage service providers, but all providers of online services.

⁷ Ibid at 140.

⁸ Ibid: see recommendation 5.1

⁹ Ibid at 141.

¹⁰ Ibid.

¹¹ Ibid: recommendation 19.1.



The PC found extending the coverage of Australia's safe harbour regime will improve the system's adaptability as new services are developed. Such an expansion is consistent with Australia's international obligations and is an important balance to the expanded protections for rights holders Australia has accepted as part of its international agreements. As such, the PC recommends that the proposed legislative amendments should be implemented without delay.

Expanding the copyright safe harbours to include educational institutions is a long overdue change which will simply ensure that Australia complies with its international obligations, and that Australian schools receive the same legal protections for providing internet access to staff and students as is provided to commercial ISPs such as Telstra and Optus.

Open access policy for publicly funded research

Recommendation: Australian, State and Territory governments should implement an open access policy for publicly funded research. The policy should provide free and open access arrangements for all publications funded by governments¹²

The PC recommended that the Commonwealth, state and territory governments implement open access policies for all publicly funded research. This should provide for free and open access arrangements for all publications funded by governments, directly or through university funding, within 12 months of publication.

The PC stated that the Commonwealth Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications (such as the OECD).

The education sector strongly supports this recommendation to ensure that publicly funded resources can be widely used and re-purposed in order to achieve the maximum productivity benefits from the expenditure of public funds.

The Ernst & Young report

The Government commissioned Ernst & Young to prepare a cost benefit analysis of the [ALRC's](#) proposed copyright reforms, namely the introduction of a fair use exception. The National Copyright Unit (NCU), on the School and TAFE sector's behalf, engaged extensively with Ernst & Young during this process.

Ernst & Young found that an exception that permitted schools to make 'fair' uses of content without payment - whether fair use or fair dealing for education - would have a net positive impact on the economy and society. The main benefits would be more effective use of public

¹² Ibid: recommendation 16.1.



funds (as schools would no longer be required to pay to use freely available internet content or orphan works, and could undertake other uses of content in ways that did not harm rights holders), and greater efficiency in the delivery of education as barriers to schools making greater use of digital technologies were removed.

Based on data provided by the school sector, Ernst & Young estimated that there would be a potential for a reduction of up to \$18.3 million a year in the amount that schools pay for the Part VB statutory licence. Ernst & Young notes, however, that this estimate “must be interpreted with care” given that the schools’ data was provided on a “best endeavour” estimation by NCU of what proportion of annual licence fees might be related to activities that could be expected to come within a fair use/fair dealing for education exception.

Ernst & Young also found little evidence that fair use would substantially increase uncertainty after the initial implementation period, emphasising that “fair use is adaptive (as distinct from uncertain)”:

Beyond these short-term impacts, it is unlikely that the fair use exception, by its inherent nature, would reduce certainty for rights holders and users compared to the status quo. This judgment is based on the observations that: (1) the status quo is relatively uncertain; (2) fair use, as a concept, is likely to be relatively predictable; and (3) the available evidence does not suggest that the relationship between fair use and increased enforcement costs is as strong as commonly assumed.

Ernst & Young considered - and rejected - the claims made by Copyright Agency and other rights holder groups that fair use would cause harm to educational publishers and reduce the incentives for the creation of educational content.

More Information

If you would like to know more about why the Australian education sector supports the PC recommendations and the EY report, please read the Copyright Advisory Group – Schools’ submissions to the Productivity Commission’s Review of Intellectual Property Arrangements:

- Submission to the public inquiry:
http://www.pc.gov.au/_data/assets/pdf_file/0010/194851/sub097-intellectual-property.pdf;
- Submission to the draft report:
http://www.pc.gov.au/_data/assets/pdf_file/0011/201116/subdr429-intellectual-property.pdf;
- Supplementary submission arising from matters discussed at public hearing:
http://www.pc.gov.au/_data/assets/pdf_file/0004/202288/subdr429-intellectual-property-attachment.pdf.



You can also contact the National Copyright Unit on (02) 9561 1204 or email at smartcopying@det.nsw.edu.au.

The National Copyright Unit provides, and will continue to provide, clear and straightforward guidance to teachers about how copyright materials can be used in Australia's classrooms.

