

## **To The Productivity Commissioners,**

As an author, I read the draft report into Intellectual Property Arrangements with keen interest.

Although I disagree with many of the Commission's suggestions, I would like in this submission to concentrate on two items: Draft Recommendation 5.2. and Draft Finding 4.2.

### *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*

The draft report states: 'By raising book prices, PIRs adversely affect Australian consumers with little or no change in the incentives for producing works by authors (notwithstanding claims to the contrary' (p.143).

This seems to me to completely misrepresent the argument against removing PIRs for books and is, moreover, wrong in what it says about authors.

The incentives which are crucial are those for publishers.

Australian publishers cross-subsidise the publication of Australian titles through the profits they make on overseas-based bestsellers.

When the draft report says, 'Most of the additional income from higher book prices goes to overseas authors and publishers whose works are released in Australia,' it is incorrect. Yes, the royalties flow overseas. But the publishers' profits stay in Australia, and allow the publication of less profitable local titles. (Typically, the overseas publisher will receive only 20-25% of the royalties earned in Australia, and these are taken out of the author's cut, not the local publisher's.)

An excellent example of this is the Harry Potter series. The profits from this series, published by Allen & Unwin in Australia, has allowed A&U to develop over the last twenty years into one of the most successful independent publishers in the world, renowned for producing high quality, award-winning Australian fiction. They have published risky books, challenging books, books which changed the local cultural landscape and added immeasurably to the Australian culture. They would not have been able to take those risks without the injection of capital from the Harry Potter profits.

We do not need to speculate on what might happen to local publication if PIRs were removed - we have only to look at New Zealand, where removing them caused the local publishing industry to collapse, because local publishers no longer had available profits from overseas best-sellers.

Books are not like other consumer items. A dress is a dress. A toothbrush is a toothbrush. But a story about growing up in New York is not the same as a story about growing up in Sydney. As a nation, we are shaped by our stories. If we cannot share our stories, we lose our sense of nationhood.

Without PIRs, Australians might (and it's a big 'might') be able to purchase cheaper bestsellers, but the cultural loss *will* be large and permanent. It has taken 40 years for the Australian publishing industry to establish itself as one of the best in the world. We don't want - and government should protect us from - a return to the old days of simply importing books from overseas. But this is what the removal of PIRs will cause.

It appears that the Productivity Commission doesn't care about culture, only about consumers ability to access goods and services at the lowest price. But this is a very very short-sighted view.

Although the incentives which are important are those for publishers, there will still be a disincentivisation for authors if PIRs are removed. It is not

true that there will be 'little or no change in the incentives for producing works by authors (notwithstanding claims to the contrary).'

The last clause, by the way, seems to indicate that people like myself, who have made submissions on this in the past, are either lying or stupid. Given that the publishing industry holds some of the finest minds in the country, I find this either slanderous or disingenuous in the extreme.

As an author who is published globally, the removal of PIRs would seriously impact on a) my ability to have my books published and b) my income (thus my 'incentive' to write).

Getting the books published *at all* will be affected by publishers' ability to take risks on local product, as described above.

How will my income be affected? My books are typically published in Australia first, and then sold by my publisher into other territories.

The publication in Australia is only viable because the overseas publishers will not be able to dump cheaper editions into the Australian market. What will happen if PIRs are removed? My publisher will no longer sell my works into other markets. Why would they? The return of 20-25% of the overseas advance will not recompense them for what they will lose if, for example, my US publisher dumps the unsold part of their print run onto the Australian market.

Perhaps I may be able to sell my works overseas, but it's a big perhaps. All of the sales of my books overseas have been through my publishers, despite having an agent who has sub-agency arrangements in the UK and USA.

It's much, much harder for an individual author to sell overseas than it is to sell through a publisher. The book fair system is based on publishers, not individuals, and is the main way in which foreign rights are sold.

Note that it's almost impossible to make a living as a writer in this country unless you sell overseas. This means that, inevitably, fewer books will be written, because people like me will need to get full-time jobs.

The cumulative impact of fewer Australian books being published, and writers writing fewer books will be enormous.

What of those authors (very few) who already have direct relationships with overseas publishers?

Their income will also be affected because an author earns significantly less on an American or UK sale (because of lower royalty rates in those countries); and when books are 'remaindered', which dumping on the Australian market will certainly be classed as in royalty statements, we earn a ridiculously small amount - ten or twenty cents per book is common.

And in the end, who is hurt? Readers, because we will not be able to write as consistently or as often, because we will have to find other sources of income. I think if you ask readers: 'Books by your favourite author will be cheaper, but they will write fewer books', you would find that readers would prefer to pay a little more and have more books from that author. Because, remember, books are not interchangeable.

Writers already give up a great deal in order to be creators. Regular income, superannuation, any kind of stability from year to year, the ability to get mortgages, and so on. We earn, on average, about one-fifth of the average income from our work.

Because of our population size, it is already difficult to earn anything like a living wage from writing in Australia. The removal of PIRs would make it impossible.

*DRAFT FINDING 4.2*

*While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.*

I read with considerable attention the Commission arguments leading to this conclusion. My initial reaction was outrage. Several of my books are still in print after more than 15 years - implementation of this recommendation would literally deprive me of income. Given that, like most authors, I earn significantly less than the average wage from my writing alone, this seems like daylight robbery to me.

While I am not in favour of the '70 years after death' regime which has been forced on us by international agreements (and I know of few authors who are), I am utterly opposed to any regime which prevents an author from benefiting from the sale of their works during their lifetime.

Apart from anything else, it would shift the profits from the sale of these books directly to the publisher. Although the Commission notes that works in the public domain are sold by publishers at a cheaper rate than those still in copyright, it would be naïve to assume that publishers would not reserve some of the author's customary payment when they publish books which are in the common domain. But more importantly, is it just or right that a publisher - any and all publishers, including those not of my choosing - can make money out of my work when I cannot? Not only it is unjust, but frankly, I need that money more.

Your report suggests: 'after a relatively short period of time, further returns make little or no difference to the incentives to create' (p.112).

This is based on an assumption that most 'works' sell for a relatively short period of time.

This assumption is false with regard to works of fiction and memoir.

Firstly, it is based on some hypothetical 'average'. But books are not lipsticks, subject to fashion changes and inherently short-lived. They are unique works which may cast a shadow over the centuries. It is very hard to find an 'average' book. Some disappear almost without a single sale. Some, those which become 'classics' or even merely 'well-loved', have a sales life well beyond the 15-25 years' protection suggested in the draft report. Should their authors be penalised because other people's works are not as good? Should skill and talent and sheer hard work go unrewarded because a load of dross from other people pulls down the 'average'?

Many mid-list writers aim for a 'stable' of books - each of them selling under the 'best-seller' level, but cumulatively providing an income sufficient to promote further creations. This approach to building a readership which survives the years fell on hard times in the last decade as publishers pruned their backlist, but ebooks and the cheap (and on-demand) printing of paperbacks have made this once again possible.

In this environment, the Commission's statement that authors: 'may no longer supply copyright-protected works on the basis that old material is a substitute for new material and that this may somewhat curtail revenues from new works (or simply withhold because not much is at stake for them in making them available), (p. 113) is clearly incorrect. On the contrary, with e-reading on the rise, and more readers buying books online, the more books an author has available, the more likely all of them are to sell. 'Shelf-space' is even more important in the online bookshop than it is in the bricks and mortar one.

It is bizarre to think that sale of a previously published book would be worth less than sale of a new. Unlike bread or eggs, books don't have a 'best-by' date after which they become much cheaper. Furthermore, that is not how book buyers buy books. The typical book consumer finds an author they like and then reads *all* of that author's work. It is a cumulative process, which may last over many years. It is not like buying a car, which prevents you from buying another car. You don't have to wait for the old

book to 'wear out' in order to buy the next. All you have to do it read it. One book is not a 'substitute' for another.

Further, the Commission's assumption about shelf life is demonstrably false.

The figures quoted are: 'literary works provide returns for between 1.4 and 5 years on average. Three quarters of original titles are retired after a year and by 2 years, 90 per cent of originals are out of print' ( p.128).

I don't know how old these figures are, but they are nonsense for fiction in an age of ebooks - when books can be and are kept 'in print' - that is, available for sale - in perpetuity in digital form. The pattern we are now seeing is that the publication of a new book by an author leads to a sales spike in their backlists, particularly in the digital versions of these books. The old ideas about how long a novel is 'viable' are no longer valid.

The ABS 'average' includes all books - but all books are not alike, nor are all 'authors' real people. Celebrity cook books have a high turnover rate but a short shelf life. A huge number of 'books' are actually media tie-ins and have the shelf life of the movie or TV series. Colouring-in 'books' were the one of the biggest type of book sold in Australia last year, and often used common domain images rather than original illustrations. How many of those colouring books will be in print next year?

Fiction, on the other hand, tends to stay in print. And it is the producers of fiction (not food magazines producing cookbooks, or Hollywood studios producing merchandise, but individual writers) who most need their royalties. If the Hollywood studios must be protected in order to protect the individual writers, this is an accommodation which is necessary to preserve intellectual and cultural life.

The issue of length of copyright is especially important for some classes of author.

Children's books, in particular, stay in print longer than most books. It's worth noting that children's books, especially novels, cost significantly less than books for adults, and authors must often split their royalties with illustrators, so continuing royalties for these books is even more important in incentivising their creation.

As someone who writes for both children and adults, if the 15 year copyright term was brought in, I would almost certainly write fewer children's books, as my immediate returns on adult books are higher, whereas lifetime sales of some children's books can be as great or greater, especially when PLR and ELR are factored in. The cultural implications of this are considerable, since many established authors, like me, write for both markets. Do we want fewer Australian children's books from good authors? That's what we would get.

A significant part of a writer's long-term income is from Public Lending Right and Educational Lending Right. These schemes pay those who own the copyright - once copyright lapsed, no payments would be made. This would seriously affect a wide range of authors, particularly children's authors. It is hard to overestimate the importance of PLR and ELR in encouraging the development of Australian literary culture. To gut it in the way proposed would be an act of cultural vandalism.

Fantasy and science fiction writers would be particularly harmed by a shortening of the copyright term, in a number of ways. These writers often create a 'secondary universe' in which all their stories are set; Tolkien's Middle-Earth, for example. The author usually continues to write books set in this universe for their entire writing career, even if they also write other books. These books typically stay in print for the entire term of the series' life, and for many years beyond. For example, Australian author Kate Forsyth's *The Witches of Eileann* series, first published in 1998, is still in print, with new editions happening every few years.

While copyright in the main characters may have been renewed through the publication of later books, copyright in the minor characters and in the 'world' of Eileann described in the first book would have lapsed under the Commission's recommendations, allowing rival works to be published.

This is a particular danger when there is a long pause between books set in the same universe. There was a seventeen year gap between *The Hobbit* and *Lord of the Rings*. With the lower of the Commission's recommended copyright terms, *The Hobbit* would have been out of copyright before *Lord of the Rings* was published. Now, not only might this have had an impact on whether George Allen & Unwin decided to publish *Lord of the Rings*, but given *The Hobbit's* popularity it is entirely possible that another writer would have picked up Middle-Earth as a setting and significantly reduced the impact of Tolkien's work.

Many people like to write stories set in their favourite fantasy worlds - and when a series has become popular, many people want to make movies and television series out of them. The only thing which is preventing them from profiteering from the originality and hard work of the creator is the copyright term. (And, believe me, it *is* hard work coming up with an original universe!) Fantasy and science fiction writers need to maintain the copyright in their worlds - but this is rolled into the copyright in their works.

Given the long lead times for the development and production of fantasy and science fiction movies and television series (much longer than for other types of works, because of the technical issues), and given that these movies do not begin planning until the series is popular, then reducing the copyright term to 15 - or even 25 - years is likely to seriously penalise this type of author and allow large multi-national corporations to make money at their expense. For example, planning on the *Game of Thrones* television series began in 2006, ten years after the first book was published, and the first episode did not premiere until 2011, fifteen years after the book was published. The Commission's recommendations would mean that Martin would have received no recompense for the first series beyond any option

payments already made. (Note that authors are often paid yearly options by a production company to keep the film rights to a book or series. The value of options will decrease markedly as the copyright term approaches, even if the book is very popular.)

These issues also affect crime writers who write long-running series. For example, Kerry Greenwood's first novel featuring Phryne Fisher (of *Miss Fisher Murder Mysteries* on the ABC) was published in 1989, but the series was not made until 2012.

Another kind of author who would be disadvantaged by a shortening of the copyright term is academic authors. A text book may be in print for 25 years, painstakingly updated every couple of years, but retaining the title and metadata. Should the author of such a book be denuded of a significant income stream? I suspect that, if that were the case, few textbooks would get updated at all, or perhaps be written in the first place.

Even for those books which are not updated, a classic academic text (such as Fred Hilmer's *New Games/New Rules*), will continue to provide not only income but also prestige to the author.

However, once a work goes out of copyright, the author not only loses income, but also the ability to control how the work is used. I am not referring here to sampling or mash-ups, but to the content and presentation of the work. An 'abridged' or 'annotated' copy, for example, may misrepresent the author's views or beliefs, but there will be no recourse, except under 'moral rights' clauses - which the Commission apparently also wants to do away with.

Citing Shakespeare as an argument for free use of older material is ridiculous. Shakespeare drew on non-fiction work in order to create fiction - and as the court case regarding Dan Brown's use of *Holy Blood, Holy Grail* in order to write *The Da Vinci Code* shows, our copyright system already robustly defends a creator's right to do this.

A reduced term also interferes with the author's right *not* to publish a work, as would the Commission's proposed changes to fair use provisions.

There may be many reasons why an author wishes to withhold an unpublished or old book from contemporary publication. Here are some that I know of - actual reasons I have heard from authors about why they are not republishing their old work as ebooks, and thus why they would not want a publisher to publish an old book which has fallen out of copyright:

- 'It's not good enough.' Writers, we hope, improve as they go along. An early book may be so bad that it would not only embarrass the author, it might lower their potential for other sales, as readers of the early book would be far less likely to purchase other books of theirs. This is particularly important in the digital age, when all the author's books are available as a simple list on Amazon or Booktopia, and the consumer must do a fair bit of digging to find out the order in which they were published. The book will be read as though it were newly written, with damage to the author's reputation and income.
- 'It misrepresents me.' As we age, our opinions change. We learn about life. We, with any luck, become better people. A racist who has learnt the error of their ways, or an ex-cult member, might well feel that an early book will reflect badly on them in the present. This can have significant personal effects, especially with regard to employment, interpersonal relationships and online trolling.
- 'I hated the illustrations/design/layout.' Authors have very little control over how their work is represented to the world. Sometimes we are glad that a book has faded quietly into obscurity. I know of one author, for example, whose young adult novel was illustrated with entirely inappropriate 'soft porn' images. Republication of this book would affect not only her reputation, but also the sales of her new series, which is aimed at little girls.
- 'I want to rewrite the work.' The best example of this is, of course, *To Kill a Mockingbird* and the publication of the earlier, inferior, draft

of this book, *Go Set a Watchman*. There are many times when a writer attempts a theme which is beyond them at first, but which they can do justice to later. I have rewritten stories from my own first book - I know that the new versions are better. But from an economic standpoint, I also know that the sales of the new versions would have been compromised by an earlier version being simultaneously available.

- 'I'm withholding it until I finish the sequel/s.' There can be very good commercial reasons for not keeping a book in print, but rather for timing a new edition's publication to match the publication of other works, whether those works are connected thematically or not. The change in copyright term would not allow an author to manage their commercial interests - and that sequel might never be published, since the benefits would be lessened. Isobel Carmody, an Australian fantasy writer, has recently published the seventh and last in her Obernewtyn Chronicles, to much acclaim. The first book was published in 1987, and the second in 1990 - both more than 25 years ago. The entire series has now been reissued by the publishers, with new covers and significant publicity worldwide. Would this have happened if the first two books were freely available? No doubt the seventh book would have been published, but a new edition of the others? The publicity? Unlikely.
- 'The publishers still have the rights but I don't want to work with them anymore.' Not all publishing relationships are happy, but copyright licensing arrangements are skewed in the publisher's favour. It can be hard for an author to get their rights back. But should this mean that the unwanted publisher (who is, after all, in the best position to produce a new version of the book, and might well do so if they didn't have to pay royalties) profit at the expense of the author?

The original publisher will have the digital files necessary for another edition on file. I can guarantee you that, if the 15 year term is introduced (or the 25 year term) we will see a number of books go

on the 'currently unavailable/out of print' list, and then suddenly be in print once the author loses their rights over the book.

Above all these reasons, however, is an over-arching right - if I don't want to share my work, I shouldn't have to. The Commission appears to want to transform creative works into an unalloyed 'public good', while ignoring the right of a creator to decide what to do with their own work. It is as though you said to a chef, 'Well, you haven't sold that meal you cooked and put in the refrigerator, so you have to give it away. It doesn't matter if the meal doesn't taste good, or even if you intend to sell it tomorrow, you have to give it away now.'

In many shops, you will see a sign which says, 'The proprietor reserves the right to refuse service.' The Australian government business portal says: 'You can refuse a customer as long as you're not discriminating.' This is the right the Commission wishes to take away from copyright holders.

<http://www.business.gov.au/business-topics/selling-products-and-services/customers/Pages/refusing-service.aspx>

I do not understand why a cabinet maker cannot be compelled to give away a chest of drawers they made fifteen years ago, or a painter compelled to give away a painting they painted in their youth, but a writer may be compelled to give away a book - because this is essentially what the recommended changes to copyright length and fair use provisions mean.

In addition, the recommendation of the 'fair use' provision which allows free 'educational use' would have a serious impact upon writers, particularly writers for children and non-fiction writers. Many non-fiction writers earn as much or more from CAL payments than they do from sales of their books, especially after the book goes out of hardcopy print. Many fiction writers earn a useful amount also. The Commission's arguments seem quite weak in this area. 'America does it' is hardly an argument, when in the same document the Commission argues for challenging the system America uses for copyright terms. And there is no evidence at all that the current system

does not work. The central question is: why should anyone have free use of a work without recompense going to the creator?

Finally, regarding the length of copyright terms, my belief is that, once publishers can publish relatively recent books without paying royalties, they will invest less in new work. Profit margins in publishing are small, especially in Australia; most fiction doesn't 'earn out' (that is, sell enough for the author to 'earn' their advance).

In this climate, and with traditional publishing under pressure, I believe it highly likely that the balance of newly commissioned work vs public domain work would skew significantly towards those works which are out of copyright. Why produce a new 'chick lit' novel if you can produce a much cheaper edition of *Bridget Jones' Diary* for a new generation (first published 1996, and now an unknown work to most 20-year-olds)? You could even update it in-house - after all, author Helen Fielding would have no recourse if you changed the pop culture references, because she would have lost control of her work entirely. And if she objected under passing-off legislation, why the publisher could just change the name on the cover.

In this type of marketplace, it wouldn't matter whether a debut author was 'incentivised' to write a new book - the book would be far less likely to be published even if it were written. It is already extremely hard for a debut author to get a book published by a traditional publisher. It is hard for a mid-list author to get a book published! A reduction in the copyright term to a risible 15-25 years would make it even harder; impossible for many.

If one includes the possible removal of PIRs into this scenario, the situation becomes even worse - large multi-national publishers will be able to pick up and publish out of copyright Australian writers' books with no recompense to anyone in Australia. There is no doubt but that Australian publishers and writers would be ruined.

In terms of natural justice, it's worth remembering that few writers have superannuation. The long term payments from previous works still in copyright are crucial to the quality of their later life and old age. To put them in a position in which their publishers can reap profits from their work while they cannot is unconscionable.

As the Commission itself acknowledges: 'Evidence suggests much of the returns from copyright protected works are earned by intermediaries, rather than authors, musicians and the like. The stereotype of the 'struggling artist' has some degree of truth to it, and evidence suggests many involved in creative endeavours work multiple jobs and receive financial support from their families (Throsby and Zednik 2010)'. How much more important, then, to allow authors to fully capitalise on their work for the entire length of their lives.

If any change in the copyright term is suggested (which is not necessary at all), I would argue that the lifetime of the author, or 50 years from publication if the author is dead, is appropriate. I have consulted other authors, and have received considerable support for this option. There is, however, some significant dissent from those who wish to be able to leave their copyrights - effectively, the goodwill in their 'business' - to their children in perpetuity, as any other small business owner would be able to do. This is particularly important as writers, as noted earlier, are unlikely to have amassed other kinds of property which they can bequeath to their children. If an author dies (for example, with minor children), the copyrights may be all that they have to pass on.

A period of copyright protection after death also allows the literary executor of the writer to ensure that posthumous editions of their work are appropriate and respectful. Most writers would prefer their literary legacy to be handled by people known to them, who understand and respect their work.

However, there is universal agreement among the authors I know that any system in which copyright does not last the life of the author is unjust, punitive and likely to *dis*-incentivise authors. In an Australia which must constantly fight to maintain its culture in the face of overseas imports, fewer Australian books would be a disaster, yet this is what the Commission's proposal is likely to lead to.

In summary:

- The removal of parallel importation restrictions would destroy the Australian publishing industry, as it has done to New Zealand publishing. In particular, it will reduce the incentives for publishers to publish new Australian work.
- The removal of PIR would significantly reduce the income of Australian writers, and therefore their incentive - and financial ability - to write
- The reduction of the copyright term to 15 or 25 years is immoral as well as misguided. It would seriously reduce the incentive for fiction writers, and transfer profits from creators to publishers. Combined with the removal of PIRs, most profits from Australian writing - especially fiction writing - would move off shore.
- The reduction in term is also likely to disincentivise the publication of new Australian work, and to lead to the republication of popular, relatively recent out of copyright work, predominantly from overseas, with disastrous cultural effects.

Overall, the Draft Report treats authors with contempt, suggesting that our rights be thrown away, our income reduced without recompense, our moral rights be trampled on, and our professionalism brought into question. It ignores the size and strength of Australian cultural industries, and devalues cultural content completely. It is hard to understand why a government organisation is so set on the destruction of Australian culture.

Yours sincerely,

Pamela Freeman  
(aka Pamela Hart)

1<sup>st</sup> May, 2016