



December 2015

Intellectual Property Arrangements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Sir/Madam,

RE: Submission on Productivity Commission Issues Paper – ‘Intellectual Property Arrangements’

The Australian Society of Authors (ASA) welcomes the opportunity to make a submission to the Productivity Commission’s Issues Paper on intellectual property arrangements.

The ASA is the peak organisation representing the professional rights and interests of Australia’s literary creators. The ASA was formed in 1963 and operates under Australian corporation law. Total membership in 2015 numbers approx. 3,000 nationwide.

Background

The Issues Paper states that, ‘The goals of the IP system are articulated in the terms of reference provided to the inquiry’, and that ‘The Australian Government wishes to ensure that the intellectual property system provides appropriate incentives for innovation, investment and the production of creative works, while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services.’

From the perspective of Australia’s literary creators, two areas of immediate concern are proposals for reform of the Copyright Act and the abolition of the Parallel Importation Regulations as they affect books. Taking copyright first: such innovations in the book industry and creator practice as have occurred over the past fifteen years have flowed from digitisation. It is important to note, however, that copyright law has not impeded this innovation.

Digitisation has made ecommerce and ebook formats possible, and thus has brought considerable benefits to accessors and users of copyright material. While providing creators with an additional electronic format to present their work, sales in electronic formats have generally brought insufficient financial reward to the originators and owners of such material, while fundamental principles of copyright have regularly been challenged as irrelevant or problematic to user interests.

The most telling indication that we have experienced an unequal distribution of benefits is in the fact that the greater bulk of our authors and illustrators report income loss rather than advancement over this period. The latest report on Australian authors' incomes illustrates the contemporary realities for this class of creator ('Book Authors and their Changing Circumstances', Macquarie Economics Research Papers, Throsby, Zwar & Longden, 2015).

Digitisation has not been an unqualified enabler of creativity or creators. Efforts by giant online technology companies and others to advance their commercial interests have, for instance, depended on minimising the extent to which copyright is seen as a form of privately possessed property. Arguments in favour of increasing exceptions to copyright rarely consider the cost to creators of removing such protections as creators have available to them through copyright.

This in turn has seen the craft of authorship, its creations and their potential social benefits harnessed to the interests of technology intermediaries, rather than enabled and expanded for the benefit of communities and creators themselves. There is now substantial commentary and analysis to indicate that literary creators have experienced an unequal share of the proposed benefits of digitisation.

Economics and authors

As an exercise founded generally on the premise that restraints on competition hamper the delivery of goods and services to consumers, the Issues Paper is problematic for literary creators in its (a) selective use of market theory and (b) its failure to understand the way markets actually operate in the creative industries, and in the book industry in particular.

Conventional economic concepts and language – supply and demand, markets, price signals etc – are sufficient to characterise and measure some aspects of book production, distribution and exchange, but far from all. As primary creators of copyrightable material, authors fulfil social, educational and cultural functions *in addition* to contributing to general economic activity and wealth creation.

Each literary creator is both a producer and a supplier – via the publishers they license and the booksellers they in turn service – to one or more markets. This is most obviously evident when they service markets for 'trade' (or 'general') books. Authors are also in competition with each other for the attention of audiences and markets. They weigh audience interest in what and how they write and seek to maximise their number of readers.

Over the past forty years and with Australia coming off a historically low base as a colony of British publishing interests, Australian authors have become very efficient and successful suppliers to this interest area – each year thousands of works in all genres (popular fiction, memoir, self-help etc) are regularly written, illustrated, published and sold, adding up to approx. \$1.3billion 'at the till', while another approx. \$700billion is sold to educational markets (BISG Report, 2011).

However, both trade and educational books are elements in a much larger picture – that of the nation's conversation with itself, and the conversation between our nation

and others, conducted through words and images and delivered in book format. Authors, as the primary producers of these words and images, are key suppliers of knowledge and information to the systems that mediate this kind of understanding.

The formal component of this discussion and exchange occurs in educational settings, as the words, arguments, analyses of literary creators are taken up for non-commercial purposes by schools, colleges and universities. But even those books produced with entertainment and mainly commercial purposes in mind are also part of the story of a nation and culture at work making its meanings.

The application of market concepts relating primarily to non-cultural consumer goods is not entirely appropriate to cultural production industries – and even less when the realities and complexities of the creator's own relationship to their intellectual property is not taken into account.

For educational uses, writers may produce copyright material on either a speculative or commissioned basis. But to achieve remunerable-standard work, sometimes many years of time and labour are required to be applied. However, before any revenue is received, the economic cost of this time and labour must be met somehow. In practice, such costs are either carried by the individual themselves, through self-subsidy, or by a publisher through advances or other payments made as a form of investment towards anticipated future return.

Market functioning for literary creators

Under copyright, authors retain the right to control the release of their material. Whether this is seen as 'monopoly' market behaviour or not, the capacity to withhold the release of their material to others is essential to the creator's possession of a meaningful right in a work.

This is an internationally extant right, guaranteed and reciprocated under the Berne Convention and central to the national copyright laws of Berne signatories around the world. Without this right, authors have no means of formally identifying their intellectual property, or securing remuneration from it. In typical practice, book copyright material is licensed to a publisher first, who then makes it available under license to readers to access and use.

Such material may be licensed in other ways of value to both creators and users. The Australian Copyright Act provides statutory licenses to allow teachers and students to be supplied with creator material for educational purposes. By affording creators with some remuneration for a quantifiable reproduction of their material, reprographic regulation encourages creators to continue producing more and better works for these important purposes.

The proposition that too much material is locked by copyright in unwarranted ways and should therefore be increasingly 'freed up', authors take to be short-sighted. Such arguments mainly serve the interests of those who are inclined to disappear other people's labour and dismiss the idea that writers should be paid by users of their work.

The author's view of the 'Supply Chain'

Traditional print products have a supply chain somewhat identifiable (but not entirely) within a traditional goods manufacturing supply chain. The number of individual products generated by the book industry – where each title is taken as a uniquely individual physical item, whose content differs from one 'container' (the printed or digital book) to another – relates to other industries, but also differs in significant ways. No other industry creates and distributes something like a million different such products each year, as occurs worldwide in Anglophone publishing.

In order to reach a significantly-sized markets, the product – the book container - cannot be 'made' and prepared for distribution without the involvement of capital. This can vary from amounts as low as \$5000 to upwards of \$200,000 (not including any advance royalty payments to the author). Literary creators depend on publishers to supply that capital, so as to get their works in front of audiences.

Meanwhile, with around ten years of experience to draw on, it is now clear that self-publishing does not generally deliver industry-scale results to literary creators. By contrast Australia's book industry is today developed and sophisticated enough and by and large has available to it sufficient capital to ensure serious marketing is applied and visibility for works is achieved.

The results for self-publishing authors are – with a few sometime spectacular exceptions – uniformly poor. Studies report that most self-publishing authors, who have availed themselves of the services provided by online distributors such as Amazon (which does not operate as a capital-applying publisher, but is primarily a distributor) achieve on average an income of \$500 p.a. for their work (*The Taleist Self-Publishing Survey: Not a Gold Rush*, Dave Cornford & Steven Lewis, 2012, and others).

The functional and productive situation we have in professional Australian authoring and publishing today is the result of fifty+ years of effort, including the application of serious risk and venture capital, including the establishment of rules and regulations to support and extend and deliver the nation's literary creativity to readers and markets, whether educational, trade or scientific.

Recompense for the use of copyright material was and remains an important initiative in supporting Australian authors. Such recompense could not have been achieved without the establishment of licensing mechanism that allowed remuneration for such material under copyright law (the Statutory Licences).

Our industry is ready and willing to embrace positive change, where these are agreed and based on shared rules. One area of positive change is in the form of direct digital licensing, which we believe will play an increasingly important place in the delivery of work from writer to reader. Direct licensing has its antecedents in the print world in the form of subscription publishing, with digitisation now poised to advance these possibilities via online means (see ref. to UK Copyright Hub below).

To respond specifically to questions posed in pp. 20-21 of the Paper:

To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'? Does the 'one size fits all' approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?

Copyright has as its first important function – under international treaties and national laws – the protection of the works of creators. If a literary creator cannot draw the line of copyright around the work they have produced, they have little that is identifiable to trade and bring remuneration. In the protection of the identity and ownership of a work, copyright encourages the creation of works in the first place. Protection of the identity and ownership of a work is its *primary* purpose.

'Additional' is meanwhile an indistinct component of this question. It presupposes that, if reconfigured somehow, copyright may function as a further kind of economic activity generator in and of itself. In reality, copyright operates for authors as an indirect but very necessary tool of economic productivity.

'One size fits all approach... risk poorly targeting... the system is designed to incentivise...' Literary creators are free agents, working on behalf of their own interests, answering to public opinion, and making a vital contribution to their society. They do not see copyright as 'poorly targeting the creation of additional works'.

Writers will keep on writing, whatever competition challenges, or market incentives, might be set for them. What they wish for is a system that is supportive of them being able to continue in their work, not one where the rules and regulations needed to ensure competitiveness with other writers, and the literary production of other nations, are removed.

The controls and benefits provided by copyright are not, in our view, some form of protectionist 'red-tape' that impedes markets and competition. Far from 'locking up' properties and enabling monopoly power to maximise the return to the creator or rights-holding publisher, *copyright merely makes possible the chance of reward from an identified piece of IP*. Copyright throws a rope around *an amount of risk towards a potential return, not a guaranteed, actual return*.

In the end, it is the copyright creator and owner's own business to what extent they wish to be 'incentivised'. Not all creators produce copyrightable works for market purposes, or market purposes alone. An owner/creator may give their copyright away freely if they choose, and there are many and good reasons why this choice is sometimes made.

If copyright is weakened as a form of protection through further exceptions brought into the *Act*, and/or through unsanctioned erosions such as online piracy, it is more likely that those creators who seek to be paid for their work will be *disincentivised* from further work – as the chance to be remunerated is diminished by the inability to control and benefit from one's work.

To better address the questions posed in the Issues Paper, we believe it is essential to understand the real-world chain of production and distribution of copyright works, and how these feed into the economics of creators.

The ASA is concerned that none of the numerous previous Productivity Commission enquiries touching on Australian copyright law or proposing changes to the parallel importation rules have ever closely considered the *actual economics of live creators in questions around the efficacy of copyright*.

- On the production side, authors generate commercial activity and provide benefits to numerous others along the supply chain from writer to purchaser/reader.
- Agents, editors, publishers and distributors (online and print), designers, illustrators, booksellers and others are remunerated on the basis of material provided to them by copyright creators.
- Professional and semi-professional literary creators are often paid on an advance and royalty basis by publishers for the anticipated later exploitation of their intellectual property. This property is usually described in a commercial publishing agreement and managed via local and international copyright rules. It is the foundation of a multi-billion worldwide industry of book production and commercial exchange.
- By licensing their publishers for ex-Australia, writers authorise them to pursue sale of rights to editions in other countries. Territorial copyright thus becomes the means of earning income from their IP products if and when sold overseas. This holds for digital and print editions, and despite ill-informed claims that territoriality has been disappeared' by the internet.

We are not convinced that attempts to remake Australian copyright law through further exceptions and exemptions will result in some greater efficiency or effectiveness in managing IP creations to the originator's benefit. Rather this may have negative, if unintended, consequences for them and their licensees.

Are the protections afforded under copyright proportional to the efforts of creators?
We do not believe so. Copyright is barely, rarely policed. Sanctions for unauthorised use are not applied. Theft is common and police and other authorities are rarely provided with information or urged to pursue actions, either by the creators themselves (for whom such action is usually too expensive) or rights holders and licensees.

Are there options for a 'graduated' approach to copyright that better targets the creation of additional works?

We are not sure what 'graduated' means in this context. If it refers to the development of different mechanisms that lead to the same important principles of identity, ownership, private property and remuneration for creators, we can only be supportive. Changes of these kinds are already in train. They do not require a wholesale rewriting of the Copyright Act of the kind that a 'fair use' based law and regime would require, or the abandonment of territorial copyright that would follow the abolition of parallel importation.

Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

Copyright-based licensing solutions already exist in statutory license form and are fully functioning and delivered by the various collecting societies and schemes operating in Australia. Amounts to be paid per unit or access via a collecting society are currently matters of regulated negotiation, and we believe should remain so.

New approaches, as represented by the UK Copyright Hub, today show great promise, and direct creator licensing will be a useful addition to the current repertoire of schemes and approaches. Where an author is confident they do not need publisher input and are prepared to manage their own copyright, direct licensing and payment or free use on a 'one-click' basis as proposed by the Copyright Hub could prove a useful tool.

Authors are meanwhile concerned at what the *removal* of licensing solutions can do to their own economics. Among the most quoted examples of national copyright reform in recent times is that of Canada. The anticipated benefits of the Canadian *Copyright Modernization Act*, were set out by the Canadian government in the following terms:

'These changes will enhance the ability of copyright owners to benefit from their work. They also offer Internet service providers (ISPs), educators, students and businesses the tools they need to use new technologies in innovative ways.' (http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#amend)

But the results in relation to the first important claim have proved otherwise. Far from enhancing Canadian authors/copyright owners' ability to benefit from these changes, they have proved profoundly retrograde. The introduction of a new exception did *not* enhance the ability of Canadian copyright owners to benefit from their work, but instead seriously damaged their incomes.

'That impact is perhaps most apparent in the revenues lost when educational institutions decided not to renew collective licensing agreements administrated by Access Copyright. Under those agreements, universities pay C\$26 per student and colleges pay C\$10 per student as a flat fee for the reproduction of copyrighted material, and Access Copyright distributes royalties to the appropriate publishers and creators. According to figures provided by the organization, the drop-off in licensing renewals in 2013 resulted in a C\$4.9 million decline in Access Copyright's payments to publishers and creators last year. They lost another C\$13.5 million in 2013 because provincial education ministries also stopped paying licensing fees for the K-12 sector in public schools.' (<http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/63630-copyright-changes-hit-canadian-publishers-hard.html>)

Are moral rights necessary, or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)? What is the economic impact of providing moral rights?

Moral rights do not duplicate protections provided elsewhere. These rights have, within copyright law, a highly distinctive character. They relate to the individuality of a created work, are concerned to prevent derogation such that an individual person's reputation is not damaged by changes to a work, and also allow for attribution of a work to a given person. These differ in legal character from commercial or common law notions of deceptive conduct. Moral rights as set out in copyright law do not impact economics.

What have been the impacts of the recent changes to Australia's copyright regime? Is there evidence to suggest Australia's copyright system is now efficient and effective?

We would need some measure of what is meant by 'efficient' and 'effective' to be able to respond to this question. There are assumptions perhaps that the current system is inefficient and ineffective, in which case we would ask 'to whom and in what ways?'

There is considerable evidence to indicate that in the writing and book industries at least, the scope and duration of copyright is not especially impactful on 'the tradeoff between creators and publishers'. Contemporary publishing practice means that, while full term of copyright may be sought in an agreement put to a creator by a publisher, the realities are that limited term licenses are more and more common, and that books have short commercial life spans and are often rights-reverted within a few years of initial publication.

Much more regularly than in the past, books are also made available for relicence to other publishers in search of new markets, providing opportunities for authors to reach new audiences. 'Life of the author plus seventy years' is a notional term today in book publication and honoured more in the breach than the adherence. Very few books are denied to potential accessors or purchasers due to the traditional full term of copyright.

What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

Any prospective changes to copyright should be assessed in the context of the facts of creators' lives since the advance of digitisation. Like musicians, authors are doing much worse than they were – both in controlling their IP and being paid for its creation or reuse. Various studies, particularly in the UK and Australia, provide evidence for this.

Regulators should consider and appreciate, for instance, that online technology companies such as Google do not see it as their particular responsibility to support or defend or protect the commerciality, or integrity, of others' copyrights, whether professional creators' copyrights or anyone else's (see Google Books digitisation case

et al) – just as they do not see it as a requirement that they should pay their full share of tax in Australia. A further loosening of copyright law that could have the effect of more readily facilitating this form of conduct should not be sanctioned by regulators.

How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?

We are not entirely sure what this ‘balance’ refers to, but presume it relates to a commonly described binary – between a creator’s ‘monopoly’ via copyright on one hand and a user’s ‘right to freely access’ on the other – and the achievement of some equilibrium between the two. However, we see this binary as only a schematic construct, one that has the effect of valorising an imagined ‘right’ to free use. Instead, we commend the following real-world commentary provided by the distinguished Australian teacher, librarian and author, Christobel Mattingley:

As a writer whose main source of income for the past 39 years has been my written work, I strongly object to any change to the Copyright Act which would erode protection of my work and affect my right to earn from the use of it by others.

Copyright is a basic right for all creators. It is vital to maintain the present conditions and law to protect the livelihood of authors. Works of non-fiction and literature are the result of many years of research, writing and revision by their creators, who have earned the right to protection and control of their work from exploitation by others. Remuneration from writing is minimal in most cases. Without the protection of copyright, writers would find it even more difficult to earn a living.

Statutory licensing provisions are essential to moderate wholesale copying and the Copyright Agency fulfils an essential function in ensuring that authors are recompensed for works copied by schools and universities. As a former librarian in both schools and tertiary institutions, I am only too aware of the volume of photocopying which takes place. ‘Voluntary’ licensing would seriously compromise, if not almost entirely negate, recompense to authors for the use of their work.

If the Australian Government is serious about making Australia ‘the clever country’, persons who have demonstrated ability to create should be assisted and encouraged by inviolable copyright measures. It must remain enshrined in legislation that their works, which enrich not only our own society but also often have wider international benefits, cannot be exploited to the disadvantage of the Australian creators. The future health and well-being of Australian culture would be irreparably undermined by the addition of a ‘fair use’ exception to the Copyright Act.

Christobel Mattingley AM, DUnivSA

Mattingley is one of many important creative contributors to Australian society who span and bring together education, art, culture and commerce – and who look for an author-supportive copyright regulatory framework to allow them to go on contributing.

Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?

User knowledge of copyright in Australia is inadequate. Some of the ignorance authors encounter is deliberate and self-serving – eg, ‘copyright stops me having what I want when I want it’ while some is genuinely innocent.

‘Fair dealing’ has worked well for a very long time in defining what material may be used without payment or permission by an individual. The degree to which a user sees ‘certainty’ is rather more dependent on their personal motivations – what they feel they should be entitled to, for instance – rather than the law as it exists. At the same time an Australian version of ‘fair use’ would, by contrast, be a far more uncertain and fraught concept in our view in defining ‘certainty’ for users and creators/rights holders.

Do existing restriction on parallel imports still fulfil their intended goals in the digital era?

Speed to market has already been achieved for foreign-origin, imported editions. Booksellers and publishers and readers can attest to this. No-one has to wait very long for their next James Paterson thriller or similar. Such books are made available on simultaneous release by the originating publisher in the US or UK and the author’s copyright licensed for this territory.

The idea of a go-it-alone open market Australian copyright territory strikes us as naïve. Without territorial copyright available for local creators there can be none or far fewer of the benefits outlined earlier for those writers seeking to win audiences and remuneration from the sale of their IP rights to other countries. That territoriality rules should still be accessible and used by competitor nations, but denied to Australians, seems only self-defeating.

Price to the end customer/consumer/reader is an important question, and commonly examined in economic analysis seeking to understand and advance market functioning. However, we see no evidence that book prices have been artificially elevated by Australia’s current copyright regime, or parallel importation regulations.

Greater availability, however, has made a difference. Ecommerce and digitisation have helped get more books into the hands of more readers than ever before. The internet and ecommerce have of themselves led to more efficient price comparisons among consumers. Publishers and booksellers report that book prices in Australia have reduced as a consequence of new distribution and pay mechanisms, which are neither impeded nor advanced by our current copyright law.

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?

On the evidence of US practice, the retention of a 'fair dealing' regime would be more efficient and effective than the adoption of 'fair use' inasmuch as the potential for disputation and litigation in Australian copyright management – currently minimal – would be avoided. 'Do no harm' would be preferable to experimental changes with the potential to cause damage to literary creators' interests and rights.