

Response to the Productivity Commission Draft Report of April 2016: ‘Intellectual Property Arrangements’

The stated aims of the Commission include:

- to improve the overall wellbeing of Australian society,
- to encourage creativity, investment and new innovation,
- to allow access to an increased range of quality and value goods and services.

The draft report, however, recommends curtailing intellectual property rights.

I submit that much of this makes no sense, either in real life or in relation to the Commission’s own terms of reference.

Consider the following:

- many people do not write books as a hobby; writing is their livelihood
- writing in Australia is already one of the lowest paid professions; most serious writers, especially, but not solely those working in all the forms of creative writing, rely on either distracting alternative employment or grants to survive sufficient to function in their profession.
- despite this, their work generates national and international business for publishers, festival organisers, film-makers, critics, journalists, etc, amounting to millions of dollars.
- writers are inventors/ innovators/ researchers of ideas, human behavior, emotions, the national-human self-consciousness.

So:

(In terms of productivity, it could be argued that on the basis of cost against revenue and intellectual capital generated, writing and publishing are the most productive ‘industries’ in the country.)

(Reducing their expectation of return on their investment of time money and thought can only drive people away from fuelling the ‘ideas nation’ we supposedly aspire to be.)

(Why should artists’ products be treated differently to those working in other areas of knowledge production/ social management?)

There seems to be an underlying principle in all of this that 'efficiency' means Walmart (or Amazon) scales of bulk buying and selling. Firstly, this is directly opposed to enhancing competition; secondly, it is not calculated to get better quality goods to the consumer. When it comes to the arts, it is a disastrous concept altogether.

Patents in general are to be made harder to get: how will this help innovation? How will it make us competitive with the US? If we do not protect every nut and bolt design for a bridge or a chemical compound, we will find bridges and compounds impossible to make or redesign here because their bits will already be patented overseas. Our 'major' inventions will either fail at the outset, sell out to big overseas corporations, or cost a lot more because of the extra funds and legal resources required to establish ownership.

A new system of user rights is proposed, including fair use exceptions. We already have fair use clauses, do we need more? What rights do users have anyway? I buy a car, I have the right to drive it, so long as I have a license; I might have the 'fair use' right to start copying parts of it in my garage to repair or improve it, but I don't have the right to do so in order to sell them or start making cars. Nor should I have. The same applies to books.

Trashing the IP of writers in this country will drive those who persist in their trade to sell product to overseas publishers. How will that improve 'access to goods and services' for the Australian consumer? (Even if we can get things on line from Amazon in three days we will still be paying in US dollars, which at the current exchange rate means a significant extra cost.)

How do the current IP rights on books place 'anticompetitive restrictions on knowledge dissemination, with adverse knock-on effects for innovation'? Fair usage allows me to cite material in the development of my own ideas, and to pay a modest amount to the copyright holder if I need to use more than a minimal amount. An idea or the influence of a work may take a very long time to have significant impact, so it is only fair on the producer to ensure some kind of recognition and recompense commensurate with the nature of the product and its transmission.

Stiglitz is just wrong (p. 5): ideas certainly do come out of other ideas, but IP does not inhibit access to them; it merely ensures that due credit is given to the existing ideas on which new ones are founded. (This may not be the case for inventing gadgets, but gadgets are not ideas.)

It is true that trying to get permission to use part of a work for which ownership can no longer readily be determined is a difficult task and can inhibit ongoing creativity. This is the only area of copyright reform that immediately suggests a need for change. However, the clause that 'all efforts to contact....' Seems currently to cover such cases. If not, perhaps potential users could approach CAL who could then declare a work 'orphaned' if it were beyond, say, a 30-year period, and it would then be the responsibility of any claimant to put a case to it to reverse the ruling.

It is also true that the estates of famous writers two or three generations removed from the original production can block reasonable use of material in ongoing scholarly research.

This might be countered by reducing a 70-year embargo right to 50 years. (This need not be the same as cutting back royalty rights.)

Fair recompense for a lifetime's work, particularly in the creative industries, can take more than a lifetime to be realized, and families who put up with the producer's reduced income during a lifetime might reasonably expect to draw upon any later returns on the artist's, and their own enforced if vicarious, 'investment' in the artistic career.

In terms of competitiveness, considerable care should be exercised in reducing Australia's claims on copyright. On the one hand, it might encourage more recognition of Australian work by both national and international publishing and scholarship; on the other, it will radically reduce income to the country flowing from its intellectual capital.

The Commission might do well to recall the situation when the US had not developed a regime of copyright. If this enhanced the transatlantic flow of ideas and promoted the development of American letters and publishing, it also meant that Britain's leading writers had to embark on reading tours of the States to get any return on their work, because otherwise pirate editions proliferated there without any benefit to Britain's publishing industry. Less stage-friendly or mobile writers were stuck at home with no return from a potentially large but 'offshore tax-haven' readership.

It is contradictory to make claims justifying curtailment of copyright in the name of meeting our international agreements and then argue for reducing copyright against the demands of those international agreements. (US free trade generally means they are free to trade with us on their terms; anything that equalizes the arrangement is surely a good thing.)

What is the logic of claiming that extending copyright in Australia results in loss of money from Australian consumers to foreign rights holders? Surely holding our own copyright keeps money in the country and occasionally even obliges other countries to pay us? (Perhaps the key here is the word 'consumers'. Consumers do not have a god-given right to expect that every product will reach them at bargain basement prices. Do we expect to buy a Maserati in K-Mart? Do we want to lose the Ugg boot to Walmart and be able only to buy Chinese-made synthetic facsimiles? Do we want all Australian labour to be working for 7-Eleven rates?)

(The other problematic term here is 'their window of commercial exploitation'. What is this window for a poem, a novel, a play, a work of philosophy, an analysis of global warming? Is 'commercial exploitation' even the appropriate language to use? What about 'intellectual engagement' or 'communal dialogue'?)

Any shift towards American legal usage should consider the fact of that country's morass of litigation-culture and its effects on costs, insurance, time wasted in courts, suppression of diversity by large corporations, etc. Legal certainty may well mean inflexible tyranny in some instances, but legal uncertainty will certainly mean a lot of trouble for everyone.

The real agenda behind the report seems to be reducing the costs of government administration of IP. This is a different matter altogether than the workings of IP itself

and should not be confused with the latter. Moreover, the ideological belief in users running a free market without interference from 'big government' needs to beware of surrendering the kinds of standards that guarantee equity across society and relinquishing its proper responsibilities to a 'free' system that guarantees conflict rather than fair competition and progressive movement toward monopoly control by the bigger at the expense of the multifarious individuals supposedly being championed.

Always beware of the cross-disciplinary metaphor! How is maintaining local cultural production the equivalent of 'geoblocking technology'? Is not the eradication of local cultural production by mass-culture global machinery a more meaningful form of geoblocking? (Witness the collapse of the Australian film industry under the impact of Hollywood early on, and the largely subservient state of film production here now.) Keeping some kind of control over the capacity of our books to be published, circulated and sold in this country seems to be a reasonable aim of any government espousing autonomous powers. Even a large multinational publisher such as Random House would surely argue that its regional editorial controls and contracts should be preserved as a key means of supporting recognizably Australian content and language, and as a vehicle for maximizing returns to this country through onselling overseas rights. If we worry about the effects on minorities of not seeing themselves either at all or only as stereotypes in our national media, surely we can also worry about the effect on our national collective psyche of seeing ourselves only in mirrors held up by London, New York and Los Angeles?

Section 8 is titled 'The community as a whole will be better off' but this is followed by a rationale of benefitting consumers. The two are not the same. The community as a whole is not wholly a consumer and even as consumers, its members do not have the same interests. The community as a whole is better off from engaging in thoughtful debate based on the circulation of quality intellectual material and profound artistic creations. The *consumer* is (it would seem) better off for having cheap-coffee makers made overseas that wear out in a year and produce no benefit to this country.

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