

Submission to the Productivity Commission—Draft Report (April 2016) – Intellectual Property Arrangements

We make the following submissions in respect of comments made by the Productivity Commission in its Draft report on Intellectual Property Arrangements.

The effect of digital disruption

The Productivity Commission observed that Digital disruption is:

“reducing the cost for creators to produce new works and for intermediaries to bring works to market, but also threatening to ‘disintermediate’ many businesses within the copyright value chain by enabling creators to market and sell their works to consumers directly.”

This statement is partially correct, however we, as creators, would argue a subtle distinction. Digital disruption is reducing the cost of production—this is true, because the cost of creating a book, or a music album, is substantially less than it used to be, and the cost of production, transit and storage has been almost completely eliminated. However, while the overall cost is *decreasing*, the cost to *creators* is *increasing*. This is because disintermediation is pushing all those costs back on creators, who would generally incur no costs in an intermediated system and receive royalties, but now incur all costs and recoup those costs via direct sales.

For example, under an intermediated system, the only cost to an individual author was the time spent on writing books. Under a disintermediated system, the costs incurred by the author could include:

- The time spent writing and editing the book—this can easily exceed 500 hours on a medium length book of 60,000 – 70,000 words;
- Editing—can be \$1000 - \$2000 or more;
- Cover art—can exceed \$1000;
- Interior artwork—another \$500;
- Formatting—\$500;
- Marketing—no upper limit on time and money and will vary depending on the resources of the author.

This means that while previously an author could start making profit from the first book sold, now authors need to recoup their costs of production, which may total as much as \$5000 just to publish. While this is a small number for businesses of the size of traditional publishers, it is often a significant amount for individual authors.

To continue the example of a self-published book with production costs of \$5000, Amazon will pay a royalty of 70% on all list prices between \$2.99 and \$9.99. If we assume that the price of the book is \$3.99, a middling price point for a self-published work, the author will make \$2.093 per book. This equals 2389 books to break even just on outgoing costs. This also assumes no free or discounted promotions, which are one of the most significant ways to promote a book. However, promoting a free book will incur marketing costs with no return on the books downloaded free, and promoting a discounted book (usually 99c) will incur marketing costs and reduce income to 35% of 99c, or \$0.3465 per book. This is typically done as a loss leader to drive sales of the author’s other titles. With luck, the revenue from the promotion will cover the marketing cost. This means, typically sales would need to far exceed 2389 to break even.

This is also before allowing a wage for the author. Now, it is true that many business owners will work for free, or without drawing a wage, drawings, or dividends, during the growth phase of the business, but the intent is always that the owner will ultimately be able to draw a wage, and ideally, be able to generate sufficient profit for additional drawings or dividend income over and above the wage. Applying this logic to an author means that authors may well accept losses in the early years of a book's release in anticipation of ongoing steady sales from which to recoup the cost of their time.

If we assume minimum wage of \$17.29 per hour, then the cost to the author of investing 500 hours in a book is \$8645. Added to the \$5000 production costs, this amounts to a cost of \$13,645 to get a book to market. A \$3.99 book would need to sell 4885 full-priced copies to break even, or about one book every 1.12 days based on a 15 year copyright period. Many books in their initial few years of publication would be lucky to enjoy a sale per week (especially the first five books in an author's catalogue), meaning it would take much more than fifteen years for an author to recoup their costs.

Previously an author would have the time-cost (\$8645) without any need to outlay any investment from the author's personal or family budget. If an intermediated author made a royalty of 15 - 20% of the recommended retail price, they would also make around \$2 per book (on a \$9.99 book), and would need to sell 4333 copies to reimburse their time-cost but without any outlay of money.

This makes it more financially difficult for creators to get the content to market, because they need to invest their own funds, as well as making it more difficult for them to recoup those costs.

In a survey of 172 authors, respondents indicated costs to publish a book as follows:

- Up to \$2500 – 20% respondents;
- \$2501 - \$5000 – 29% of respondents;
- \$5001 - \$10,000 – 23% of respondents;
- \$10,001 - \$25,000 – 20% of respondents;
- More than \$25,000 - 8% of respondents.

Some authors couldn't calculate the cost, offering comments instead such as:

- Incalculable;
- If you are serious about it, all your spare time, tears, happiness and money;
- More than I can afford but I do it because I hope to make a living out of being a true creative;
- Time spent is more than working a nine to five job;
- Almost impossible to calculate;
- Probably equivalent to 4-5 months full-time work;
- At least 2 years when I could have been earning money;
- More than I can afford.

'Living income'

"Some participants (for example, the Australasian Music Publishers' Association Limited, sub. 34 and the International Confederation of Music Publishers, sub. 32) argued that the copyright system was aimed at providing creators with a 'just reward' or a 'living income'.

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).”

We recognise that the Commission’s perspective appears to be oriented to the consumer’s perspective, being that the appropriate reward is the one that encourages creators to continue creating content. While this may or may not be a ‘living income’, we note that creators must necessarily invest time in content creation. Many creators also have families. The more hours creators must work in paid work in order to sustain the costs of producing creative content, the less time creators have available to produce that content—particularly around other obligations such as family commitments. Therefore, the better the reward for creating content, the less a content creator need work in paid work, and the more time they can dedicate to creating content.

While the ‘struggling artist’ is a fact, it is also a fact that not all content creators can find time around paid work, or have enough family support, to create content. Even where families are prepared to support a creator, often this is a short-term arrangement for the creator to make a concerted effort to make their creativity profitable. If that effort fails, often these creators must return to the paid workforce.

In our survey of authors, the group fell roughly a third into full-time work, a third into part-time work, and a third into not working. Of those that did not work, 64.6% stated they are temporarily being financially supported while they attempt to make writing a success, but if that effort fails they will ultimately return to work. 44.1% of those who work said they would write less if they had no hope of making an income from writing.

Interestingly, in our survey of authors we were surprised that 16% reported being able to live off the earnings of their creative work, suggesting that the previous idea of the ‘struggling artist’ is beginning to fade in this age of disintermediation. To be one of the 16% is not nearly as aspirational as to be one of the very rare few who reaches movie-star status.

Most benefits accrue to intermediaries

“In practice however, relatively few of copyright’s rewards find their way to those creators. Indeed, such a huge proportion of the benefits of increased protection are captured by other cogs in the cultural production chain that authors are sometimes viewed as a mere ‘stalking horse’ masking the economic interests of others. In the case of the US term extension for example, the beneficiary of the unbargained-for windfall from the US term extension was the rightholder at the time it was granted; very little of it accrued to the original author or their family if it had previously been transferred. (2015, p. 16)”.

While historically this has been the case, disruption and disintermediation means that this is shifting, with authors taking the lion’s share of revenue generated from book sales and intermediaries taking a much smaller proportion—noting, of course, that revenue in total dollars is falling as a result of the fall in book prices. Again, we refer to the fact that 16% of the respondents to our survey indicated making enough to live on.

We also find this argument distasteful, because it smacks of the suggestion that authors have already been exploited to such a degree by intermediaries that changes to copyright won’t materially impact on them.

We note that changes to the Australian unfair contracts laws for small businesses will also shift this power balance back to a more neutral footing after its inception later this year, giving authors greater bargaining power with intermediaries should they choose to continue to use them.

For those who don't choose to use intermediaries, they have more opportunities to reap the rewards of their own effort, and to directly negotiate deals that would previously have been 'secondary' deals negotiated by intermediaries e.g. authors now have the opportunity to directly negotiate movie and TV deals that would previously have reaped huge rewards for intermediaries and less for authors.

To argue there is no great loss to content creators is a fallacy.

Excessive copyright terms

"If the term is too short, creators and rights holders will have difficulties recouping their development costs and may lose an incentive to create their works. However, an excessively long period of protection has the potential to harm consumers because:

- after a relatively short period of time, further returns make little or no difference to the incentives to create
- the marginal costs of reproducing the content are zero (or close to it)
- even many years into the future, some consumers value the output above zero value.

Consequently, after a certain period of time, the benefits of positive prices in creating incentives to supply are less than the benefits to consumers. The degree to which this is a problem depends on conduct by the rights holder:

- they may reduce prices in recognition of the lower inherent value of older works, which will then commensurately reduce the consumer costs of extended exclusivity rights
- they 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). This induces potentially significant welfare losses for those consumers who do not consider the material to have a close substitute (such as a vintage computer game enthusiast)."

Incentives to create

You have stated that further returns make little or no difference to the incentives to create. While this may be true in literal terms, we argue that the Commission is discounting the effect of *hope* of greater returns. Every commercial content creator lives in *hope* of finally getting a break and 'making it big'. In our survey of authors, 91.3% of respondents who do not currently make a living from their work hope to do so one day. 84% hoped to one day have a big break, 68.1% hoped to one day sell movie, TV or other rights, and 41.7% had other long-term plans.

Overnight success said to be years in the making, so achieving success of any kind is a long-time process. A book may have middling sales for years before suddenly taking off, which may then be followed by film or TV adaptations. By way of example:

- The hugely successful *Game of Thrones* is based on George R. R. Martin's series *A Song of Ice and Fire*, the first book of which was written in the 1990s. The books themselves didn't really become well-known until this millennium, and the TV series was created this decade—this is

some fifteen to twenty five years *after* the book was written, and towards the tail end (or after the end of) the copyright period the Commission proposes;

- The *Shannara Chronicles* (which aired this year on the SyFy channel) is based on the book *The Elfstones of Shannara*, written by Terry Brooks in 1982. Under the longest copyright period the Commission has proposed, the book would have been out of copyright at the time the TV show was produced.

While it is true relatively few authors have the opportunity to have their work transformed into other media, again disintermediation and social media is making it easier for smaller and relatively unknown authors to have these opportunities, and the vast majority of authors live with the hope that they might benefit from such an opportunity (as per the results of our survey quoted above).

Even if they don't ever enjoy such opportunities, disintermediation means that more and more authors are able to make a living or supplement their income from middling sales of their back catalogue, that is, the slow accumulation of titles over a longer period of time eventually results in an income capable of partially or wholly supporting the author, thus increasing their available time to write. However, as it takes at least five titles for this to start to occur (approximately five years or more for most authors who also work in a paid position), and so reducing the copyright period to five years would mean that an author's income from older titles would cease to exist, thus reducing the capacity of the catalogue to support the creator. On our survey of authors, 46% estimated it takes 5 – 10 years to become truly successful, 37.3% thought 10 – 20 years, and 13% thought more than 20 years, supporting the notion that authors know they are in this for the long haul. A huge 95.1% believe that the back catalogue is critical to this process.

The reality may be that authors rarely make much from their books, but every last one of them lives in the *hope* that one day they will make enough money to quit their day job and make a living writing, and they know that this is a process that will take a significant number of years. Every author is playing a long game, regularly reminding each other how long it took certain authors to become famous as a way to motivate and incentivise them to keep trying.

Destroying that hope by ending the copyright protection at exactly the time an author's efforts start to pay off, in our opinion, would function as a disincentive for authors to create.

Benefit to consumers—The Commission has also noted that reducing the copyright period would benefit consumers by allowing the creation of (we assume) more adaptations and derivative content, in the same way that the passing of Sherlock Holmes out of copyright has resulted in a proliferation of Sherlock Holmes derivatives (i.e Elementary, the Robert Downey Jnr Sherlock Holmes movies and the BBC Sherlock series). We would make two points in this respect.

Firstly, the vast majority of authors are unlikely to resist the sale of such rights, instead regarding it as an opportunity. By contrast, large intermediaries will hold onto such rights for their own benefit, or only allow licensing arrangements for substantial sums of money, thus limiting the availability of the content. This means that disintermediation alone will make available a significant amount of content for adaptation into new forms, while intermediaries cling to old content without creating new content. For example, we are aware that Disney tends to recycle a lot of old content, however disintermediation will make these types of activities of less significance.

Secondly, we assume that the creation of a TV show or movie amounts to a new copyrightable work, in which case it appears that the makers of such TV shows or movies would have been able to make money on the show without compensating the original creator while still enjoying copyright

protection of their own. For example, movie tickets to see Sherlock Holmes movies are no cheaper just because the original content was out of copyright.

Since authors are (as the Commission has observed) typically not the recipient of the lion's share of the profit of such intermediation, we have difficulty believing the cost to consumers of consuming this new content would be significantly reduced by failing to pay the author. But while the percentage of the budget allocated to paying the author is small, in dollar terms this amount can be significant to an individual 'struggling artist'.

Additionally, the production of such content as TV shows can lead to a resurgence of interest in the original book. However, if the book is also out of copyright and can be circulated freely, authors won't be compensated. Therefore, it seems to us that reducing the copyright period again benefits such intermediaries to the detriment of creators and without any additional benefit to consumers.

Marginal Costs and Consumer Value

The lack of marginal cost is not necessarily a disincentive to create, especially for books. In the case of books, generally a series will sell better than a standalone novel. The more books in a series, the more opportunity to leverage marketing efforts and to enjoy more returns for lower marketing costs. Additionally, some consumers won't read standalone books, or are more interested in series, because they fall in love with characters and want to be able to enjoy more stories with them. This means that there is an incentive for an author to write more books in order to better market the *first* book. Additionally, the benefits of leveraging a larger back catalogue (as referenced above) creates an incentive for authors to continue creating, even though production costs are zero (and we note also that production costs are zero but marketing costs are not).

Whether authors reduce costs on older works is not, we believe, relevant. This is because disintermediation has already driven costs much lower to the advantage of consumers. While a paperback book might cost \$21.99 on average, the vast majority of books can now be purchased in digital formats for prices anywhere between \$0.00 up to around \$13.99 (there are some outliers, though). This already represents cost savings of, on average 25 – 75% of the paperback list price (except where publishers price ebook versions at a higher price than paperbacks in order to protect their paperback market—however, in this respect, individual authors selling direct to consumers fill a gap and keep ebooks reasonably priced). When a book already costs less than a cup of coffee, it would already appear to be affordable for consumers without any need to argue that older works have less value—and indeed, the market will determine value. If readers consider it too expensive, they will not buy it. If they do buy it, then generally they consider it worth the price paid, according to the laws of supply and demand.

With the advent of digital media, it is also unlikely that authors will withdraw titles from circulation because of diminishing returns. As observed by the Commission, there is no additional per unit cost to supply, and so there is no reason for an author to withdraw a work from circulation. This being the case, in the new digital environment there is less likely to be such a thing as 'out of print' on a copyrighted work, so the risk of consumers not being able to access a work is quite low.

We make the following submissions in respect of the Commission's "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."

We agree that 70 years after the death of the creator is an excessive and unreasonable copyright term, but submit that 15 to 25 years of copyright protection does not adequately protect the

interests of authors for the reasons set out above. If the intention of the Commission is to incentivise creation, then copyright should be set no lower than the life of the author, otherwise a shorter copyright period can completely destroy the motivation of content creators hoping to reap the rewards of their hard work. It may be appropriate, to protect against the risk of the creator's death shortly after creation, that copyright be set to the longer of life or a fixed term from the date of publication (being somewhere between fifteen and twenty-five years) to allow the recouping of time and labour costs by the creator's estate.

In making this submission, we note the following:

- The extreme labour-intensive nature of literary works—numerous authors are known to remark, particularly during the editing phase, that they must be crazy to put themselves through the experience. It is time-consuming, tedious and repetitive work after the initial draft, and for most authors there is very little love left in the endeavour at this point. While we agree that motivations for writing are mixed, a substantial part of the motivation is the hope that one day the author will be able to support themselves on the proceeds of their work. In a survey of 172 authors, 79.1% of respondents did not make a living from their work, but 91.3% of that number hoped to do so one day. 16% already make a living from their work;
- Reducing the copyright period may have the unintended effect of reducing the quality of work available in the market. This is already an issue to some degree with the ease of self-publishing, but for those authors who are committed to producing quality works, the reduction of copyright period could deincentivise the investment of time and money, particularly where they are needing to compete with a growing plethora of freely available out-of-copyright work which does not go out of print. This could lead to a growth in the amount of content but a decline in the quality. From a cultural point of view, this is not necessarily a win. In a survey of 172 authors, 36.^a of respondents said they would change nothing if they had no hope of doing anything more than breaking even. However, 42.4% said they would reduce the amount of time they invest in writing (i.e. they would produce less content) and 41.6% said they would reduce the amount of money invested in editing, cover art and other production costs. The overlap means 20.6% of respondents would reduce time and money invested;
- There is a substantial difference between the investment in different forms of art—for example, a lot more time and work investment is required in one novel, for example, than in one song. It may be possible to explore different copyright terms for different forms of art if the Commission is concerned with optimising the period based on return on investment and incentives to create;
- Another key difference between, for example, music and literary works is that musicians can generate income by giving away music for free, or at a steep discount, because 95% of their revenue comes from ticket sales to live concerts. The authors of literary works do not have the opportunity to supplement their income or generate additional income in this way. Book signings, which are never going to be attended at the same levels as concerts, are also often provided at no cost to attendees;
- Data provided by the ABS is historical in nature and largely based, we assume, on the historical production of content via the intermediated model, where heavy investment upfront has resulted in the majority of sales occurring in a short period after publication. However, the advent of disintermediation and social media means that this may change, with a steady rise in sales over time as a new work gradually gains more exposure via organic

means. We don't believe drastic decisions about copyright term should be made on the basis of data collected from a model which is in decline.

- The Commission has noted that consumers can expect to pay 40% more for books still in copyright than for books out of copyright. We believe that going forward, in a digital environment, content that is out of copyright will not be offered at a discount but free (or for a nominal fee only) because of the ease of production and distribution. Therefore we submit that consideration should be given to the fact that removal of the copyright period will not simply reduce prices to the benefit of the consumer, but completely eliminate the ability for the content creator to charge anything for it at all;
- We submit that it may be sensible to create some kind of register for copyright so that the owner of copyright can easily be determined and identified. Copyright may vest by registration, as is the case with the Torrens land system (and as we believe is the case in the USA). Alternatively, we agree that it may be appropriate for orphaned works to be treated as out of copyright.

While we appreciate that the purposes of copyright is not to protect the creator's right to earn a living, we also feel it is worth considering the following in the wider context of disintermediation and how this may change the way creators earn income. In particular, the potential for a larger number of creators to earn a smaller share of the available creative income could potentially mean that:

- Individuals who are otherwise unable to work (due to disability, commitment as a carer, or parenting commitments) may be able to generate or supplement their income, thereby reducing the burden on the government;
- Individuals who would otherwise lack for superannuation may be able to use the steady income from a large back catalogue of books to avoid needing to rely on the government pension;
- We understand that in indigenous and low socio-economic communities, the production of creative content is often promoted both as a way of earning additional income and the growth of social consciousness.

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