

# Submission in response to the Productivity Commission Draft Report on Australia's Intellectual Property Arrangements

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## 1. Scope of submission

We are writing in response to the Productivity Commission's Draft Report on Australia's Intellectual Property Arrangements. Our response is limited to the copyright component of that report.<sup>1</sup> Associate Professor Weatherall has provided further commentary under cover of a separate submission.

We are broadly supportive of the Commission's draft recommendations, and commend the organisation for its thoughtful and measured evaluation of the available evidence.

This brief submission focuses on two main points. The first is a response to the Commission's suggestion that Australia 'can negotiate internationally to lower the copyright term.'<sup>2</sup> The second arises from the Commission's assumption that Australia's intellectual property laws are primarily (or even entirely) utilitarian in nature.<sup>3</sup>

## 2. The impossibility of changing internationally mandated minimum copyright terms

The Commission notes that, while Australia cannot unilaterally alter copyright terms due to existing international obligations, it 'can negotiate internationally to lower the copyright term.'<sup>4</sup>

This is an attractive suggestion in light of the growing evidence that the existing international rules do a poor job of achieving copyright's aims.<sup>5</sup> Regardless of the merits of doing so however, there's very little scope for Australia (or any other country) to reduce current international minimums. While it might potentially be possible (albeit difficult) for Australia to extricate itself from the term of life + 70 years imposed via various trade agreements, the

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<sup>1</sup> This submission is developed from analysis in three major recent pieces of research: Rebecca Giblin and Kimberlee Weatherall, 'If we redesigned copyright from scratch, what might it look like?'; Rebecca Giblin, 'Reimagining Copyright's Duration'; Rebecca Giblin and Kimberlee Weatherall, 'A Collection of Impossible Ideas', each to be published in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016).

<sup>2</sup> Productivity Commission, Intellectual Property Arrangements Draft Report (April 2016) 117.

<sup>3</sup> See eg Productivity Commission, Intellectual Property Arrangements Draft Report (April 2016) 54-71.

<sup>4</sup> Productivity Commission, Intellectual Property Arrangements Draft Report (April 2016) 117.

<sup>5</sup> For a survey of this literature see Rebecca Giblin, 'Reimagining Copyright's Duration' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2561108](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561108).)

Berne Convention's minimum of life + 50 years is an immovable floor. It cannot be revised without a unanimous vote,<sup>6</sup> which effectively grants a veto right to 170+ member nations, each with very different interests and at very different stages of economic development. This procedure explains why the treaty has not been revised for almost half a century. Indeed, in the current bitterly fractious and contentious copyright policy-making environment, it seems possible that Berne will never be revised again. However, walking away from it is also unthinkable, in large part because TRIPS requires compliance with key substantive provisions of Berne, including regarding copyright term.<sup>7</sup> Cutting the Berne/TRIPS tie is not an option either, because TRIPS itself is also practically unamendable.<sup>8</sup> Cutting off the last potential avenue of exit, we cannot revise copyright terms downwards by entering into a new multilateral agreement either, because Berne itself also seems to limit the possibility of new treaties to those that do not detract from its prohibitions and minimums.<sup>9</sup> Leaving aside the question of whether the slightly higher minimums enshrined in trade agreements might one day be set aside, the reality is that we're stuck with *at least* life + 50 years no matter what. That needs to be recognised and factored in to proposed options for reform: most importantly, it underlines the importance of proposing mechanisms that mitigate any ill-effects that arise from copyright's excessive term.

### **3. Copyright is about incentives *and* rewards**

The second point raised in this submission arises from the Commission's assumption that Australia's intellectual property laws are primarily (or even entirely) utilitarian in nature.<sup>10</sup> This may be the case for some forms of IP, but when it comes to copyright, things are far more complex. These complexities ought to be recognised and used to inform the Commission's analysis. Failure to do so risks rendering its eventual findings vulnerable to attack.

#### **A. Rationales for granting copyright**

The two dominant historical rationales for granting copyright rights can be broadly clustered into 'naturalist' and 'instrumentalist' theories. Instrumentalist approaches justify the grant of

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<sup>6</sup> Berne Convention, art 27

<sup>7</sup> TRIPS art 9.1.

<sup>8</sup> Proposals for amendments altering Members' rights and obligations can be made, but require acceptance by two thirds of the Members (ie by 108 of the present 162 WTO members) in order to come into effect, and even then apply only to accepting Members. To make an amendment effective for *all* WTO members requires the Ministerial Conference (ie all members in conference) to decide by a three-fourths majority that it is of such a nature that any Member which has not accepted it within a specified period should be free to withdraw from the WTO or to remain a Member only with the consent of the Ministerial Conference. As a practical matter, voting rarely occurs in the WTO system: most decisions are made by consensus. The effectively unamendable nature of TRIPS is demonstrated by the fact that the TRIPS Amendment needed to make permanent the Doha Declaration accommodations to facilitate access to essential medicines for developing countries has still not garnered the needed two thirds of member acceptances to come into force, despite being supported by a consensus in the General Council over a decade ago in December 2005 (WTO Members in late 2015 voted themselves a fifth extension of the deadline for acceptance). See Rebecca Giblin and Kimberlee Weatherall, 'A collection of impossible ideas' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016).

<sup>9</sup> See Rebecca Giblin and Kimberlee Weatherall, 'A collection of impossible ideas' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016).

<sup>10</sup> See eg Productivity Commission, Intellectual Property Arrangements Draft Report (April 2016) 54-71.

copyright as a way of achieving certain social and economic aims, such as the dissemination of knowledge and culture. By contrast, naturalist approaches assume that authors have expansive rights over their creative outputs as of right, perhaps because the output emerged from the author's labour (the Lockean approach) or because it represents a materialisation of the creator's personality (per theorists such as Kant and Hegel).

While these theories may have originally emerged and taken root in different parts of the world, considerations traceable to each exist alongside one another within both major international treaties and domestic laws.<sup>11</sup> The Berne Convention requires us to both protect authors' moral rights and incorporate exceptions intended to promote socially valuable uses,<sup>12</sup> and countries with historically instrumentalist traditions adopt policies that are motivated by naturalist considerations (and vice versa).<sup>13</sup> This juxtaposition is well and truly evident in Australia's copyright statute, which despite often being perceived as primarily utilitarian in nature, incorporates moral rights and performers' rights. Naturalist considerations are also strikingly evident in the accompanying case law, with many significant copyright decisions seemingly determined largely on the basis of Lockean abhorrence of defendants 'reaping what they haven't sown'.<sup>14</sup> This shows that in Australia, as in most other countries, we're not just motivated to incentivise creation of works: we're also desirous to *reward* authors with some additional share of the social surplus arising from their creations in recognition of the personality and labour they poured into them (or, at least, to ensure that the fruits of their labours aren't reaped by those who had nothing to do with the sowing). Thus, a purely economic approach in which we aim for a legal system that gives the absolute minimum reward to creators to ensure an adequate level of culture and knowledge will be (rightly) open to challenge for failing to recognise the additional moral entitlements of authors.

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<sup>11</sup> See for example, Martin Senftleben, *Copyright, Limitations and the Three Step Test* (Kluwer, 2004), especially at 6-10; Alain Strowel, *Droit d'auteur et copyright, Divergences et Convergences* (Bruylant, 1993); Gillian Davies, *Copyright and the Public Interest* (Thomson, 2<sup>nd</sup> Ed, 2002) 348-351; Jerome Reichman, 'Duration of Copyright and the Limits of Cultural Policy' (1996) 14(3) *Cardozo Arts & Entertainment* 625, 643-4; Sam Ricketson, 'The Copyright Term' (1992) 23(6) *International Review of Intellectual Property and Competition Law* 753, 755. See also broader discussion in Rebecca Giblin and Kimberlee Weatherall, 'If we redesigned copyright from scratch, what might it look like?' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016).

<sup>12</sup> See eg Berne Convention, Articles 6bis (requiring recognition of moral rights) and 10 (mandating exceptions relating to fair quotation of works).

<sup>13</sup> As Senftleben argues, it's inaccurate to conceive of the two traditions, European and Anglo-American, as incompatible and separate. Instead, 'the two traditions of copyright law can be described as mixtures of a shared set of basic ideas derived from natural law theory and utilitarian notions alike': Martin Senftleben, *Copyright, Limitations and the Three Step Test* (Kluwer Law International, 2004) 10. See also broader discussion in Rebecca Giblin and Kimberlee Weatherall, 'If we redesigned copyright from scratch, what might it look like?' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016).

<sup>14</sup> See, for example, the decisions of the Full Federal Court in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112 and *National Rugby League Investments v Singtel Optus* [2012] FCAFC 59.

## B. The dangers of omitting moral considerations

Although the Commission did briefly address the question of whether copyright provides a 'just reward' for authors in its discussion paper,<sup>15</sup> its analysis did not perhaps always fully reflect the importance and validity of this motivation. This was particularly so in the case of its duration analysis. As the Commission correctly identified, there is compelling evidence that terms of between 15-25 years would be sufficient to incentivise cultural production, including those works that have the highest initial costs of production. However, the Commission's draft discussions omitted to recognise the additional 'moral' entitlement of authors to rewards in excess of the bare amount necessary to incentivise production, and that omission leaves its draft finding incomplete and vulnerable to attack.

Individual authors' interests have been consistently used to justify broader and longer copyright rights and to derail a range of copyright reforms, often with great success.<sup>16</sup> The efficacy of such strategies itself demonstrates that people care about, and recognise the importance of, rewarding authors. This history teaches an important lesson: that those who ignore moral considerations in considering copyright reform do so at their peril.

## C. How moral/rewards considerations might inform the Commission's analysis

A more fully developed analysis of the duration question might begin by explicitly identifying the main rationales for protection: to *incentivise* initial cultural production and investments in its continued availability, and to *reward* authors for their contributions to society. How might the analysis change when this second component is more fully taken into account?

Let's start from the Commission's finding that terms of 25 years would be ample to incentivise production of even those works with the highest initial fixed costs of creation. This finding is virtually impossible to rebut based on the time value of money alone, even leaving aside other discounting factors such as typical rates of cultural depreciation.<sup>17</sup> In addition though, as described above, there is a powerful moral argument that authors should have some *rewards* for their societal contribution. Importantly, while incentives could be paid to either authors or investors with equal validity, the moral 'reward' motivation applies only to authors. When the justifications are disentangled in this manner, it opens a path to some interesting possibilities for reform.

It is impossible for copyright in works (literary, dramatic, artistic and musical) to last less than life of author + 70 years under existing international arrangements, and it's extraordinarily unrealistic given current legal and geopolitical realities to conceive of them ever dropping below life + 50 years. However, it *is* possible for those rights to be reverted to their creators, and indeed the US has a type of reversion scheme already in place.<sup>18</sup> A recommendation that

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<sup>15</sup> Productivity Commission, Intellectual Property Arrangements Draft Report (April 2016) 102.

<sup>16</sup> See eg discussion in Rebecca Giblin, 'Reimagining Copyright's Duration' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (Forthcoming, ANU Press, 2016) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2561108](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561108).)

<sup>17</sup> See eg William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 *University of Chicago Law Review* 471, particularly at 476.

<sup>18</sup> See 17 U.S.C. §203.

more fully reflected copyright's dual 'incentives' and 'rewards' rationales might propose that copyrights should revert to authors after the 'incentive' period of say 15-25 years. This would direct copyright's 'reward' component to its proper recipients. Importantly, it would also free up many works that had been languishing in the hands of intermediary owners who had no further interest in commercially exploiting them, facilitating the transfer of rights to those who value them most. In addition, if authors were positioned to capture a greater share of the revenues from their works, it would open up interesting possibilities for socially-valuable collective licensing arrangements (such as digital public libraries that pay fair remuneration to authors on a per-loan basis). By no means least, this would change the reform discourse, to allow discussion to focus on the actual issues rather than a scare campaign framed around the image of literary and artistic icons losing control of their creations. Publishers would no doubt object to any reversion proposal, but they would not be able to use authors as a stalking horse to mask their own economic interests.

#### **4. Conclusions**

Australia has no real prospect of extricating itself from its current inordinately long copyright terms, regardless of the merits of doing so. The Commission should be fully cognisant of the impossibility of rolling back copyright terms via international instruments, and make proposals to achieve the best outcomes within that framework. In so doing, efforts must be made to recognise and reward authors, as well as incentivise cultural production and ongoing availability, since these considerations are fundamental to the function and legitimacy of any copyright system. So doing would bolster the validity of the Commission's analysis, open up new possibilities for economic exploitation of older works, better reflect the varied reasons why we recognise copyright rights, and recognise the valid concerns of individual authors and creators.

The matters discussed in this submission are developed much more fully in the forthcoming book, *What if we could reimagine Copyright?* Though not yet publicly available, we would be happy to provide a copy of the manuscript to the Commission on request.