

The Productivity Commission's report into Intellectual Property Arrangements has raised a number of concerns with me which I will outline in this submission. I am an author of five published novels and seven unpublished novels, and have been published with an Australian publisher as well as self-published. The sections of the report which concern me the most are those dealing with copyright term and scope, and copyright licencing and exceptions.

My first concern is with the bias of the report towards the consumer and not the creator. This seems to me quite strange as the consumer has a wide range of products available to them, whereas the creator has in comparison a small body of work that they have worked for months and years to create. That the government in their terms of reference wouldn't outline to consider the creator is extremely concerning considering copyright was created to protect the creator in the first place.

The Commission's framework which states the copyright system should be "efficient, ensuring new works are generated by the most efficient creators at the least cost to society," (pg 100) is frankly ridiculous. Creators generally create in their own time and so it doesn't cost society, and it shouldn't matter whether someone takes three months to write a book, or ten years. The statement implies that only those creators who are efficient should be protected by copyright.

The argument that copyright doesn't provide a just reward for authors (Box 4.3) because intermediaries take most of the returns is irrelevant. In all goods and services transactions there is a chain of supply from the producer, distributor and seller. In addition, over the last ten years technology has enabled creators to take more control over their products and bypass some of these steps, therefore earning more reward for their creation.

The issue of transformative works is an interesting one and the examples the Commission gave, of Shakespeare's plays deriving from Greek tragedies and Disney films based on the Brothers Grimm fairy tales and great cases of where the transformative work occurred *after* the term of copyright expired. My major concern is the definition of transformative works "works that use existing material to create new original works" (pg 109). It could be argued that a film or television adaption of a book is a transformative work. In that case why shouldn't the original creator receive some reward for that work? The transformer wouldn't have come up with the exact story on their own, and it ignores the time the creator spent creating the work. The Commission states that "the key question is whether transformative works have any appreciable impacts on the demand for, and creation of, the original material." (pg 110) I do not agree with this statement. The demand for the original material could increase or decrease with a transformative work. Book sales usually rise when a movie of the book is released, however in the case of something like the television series Game of Thrones, there may be a decrease demand for the books after the consumer has heard the story. These impacts can not be predicted prior to the transformative work being created and is it fair that the original creator doesn't receive an income from the work? If the person transforming the work had to do create something from scratch, there would be a significant amount of work involved. Payment to the creator for the ability to skip this step is fair.

The duration of protection is another key concern. The report states that the commercial life of copyrighted works is less than 5 years. The ABS report quoted (Australian System of National Accounts Concepts, Sources and Methods 2015) gets its literary figures from the Australian Publishing Association. This information does not accurately represent the whole literary sector in Australia. I have a big network of colleagues and the majority of them are published by international publishers or have self-published. Their sales figures and average returns are not taken in to consideration here. The truth is that the Australian publishing scene and the Australian market is so small when compared to the world that it would have shown a skewed result.

In reality authors are publishing their backlists and making a very decent income from them. It is a recognised fact that when a reader discovers an author they love, they will go and buy their entire backlist. This means that books published twenty years ago are still selling. I have a friend who has been published for over twenty years and when ebooks were invented, she was able to convert all of her out of print books and bring them to market again. She is earning a four figure income per month from these sales alone. If the copyright was reduced, other people would be making this money instead of her – is that fair?

The idea that twenty years is more than long enough for copyright is completely wrong. Most midlist authors make their money not just from their latest releases, but from a combination of their backlist sales and new releases. When I create books, it is with the knowledge that the more books I have available, the more chance I have of readers discovering my works, and the more I earn. Reducing copyright to such a short term would ruin this. It could also have the effect of driving creatives back into full-time ‘non-creative’ work in order to make ends meet, therefore reducing the efficiency and quantity of creative works produced.

There is also the issue of unpublished works. A creator should have the right to do whatever they want with works they create. Under the copyright act my unpublished diaries penned as a teenager have copyright protection and this is as it should be. I also have several unpublished novels that I would hate to be published. They were written while I was still learning to craft a story and are rubbish, but that’s not to say that the idea behind the story won’t be one I revisit at some stage in my career. If unpublished works are to be given the same copyright terms as published works, and the term is changed to twenty years this would mean that my diaries would no longer be protected. I would be horrified if someone published the angsty, hormonal rants of my teenaged self, but the most I could do to stop them would be charge them with theft. I would be equally upset if someone was to publish my first romance novel as it currently stands. This would hurt my brand as an author because the writing is quite frankly bad. The report does not propose how it would protect such things from occurring.

I do understand the concerns of the Commission in regards to unpublished works in particular photographs, letters, diaries etc. There are many unpublished works which have historical and cultural value and as a lover of history I would hate to lose this information, but the control should still be in the hands of the creator. In the case of orphan works, the Commission outlines several options in place overseas, such as licensing orphan works which seem fair to

both creator and consumer, but dismisses them all in favour of fair use. Their argument that the “use of orphan works and works not being supplied commercially by rights holders” (pg 121) should be permitted by fair use is ludicrous. The rights holder has the right not to make their work commercially available. There may be all sorts of reasons why they choose not to republish which will be discussed below.

The issues of tracking down rights holders could be resolved in a number of ways such as better funding for archives and libraries so they have time to record the pertinent acquisition information when items are lodged with them, and better recordkeeping systems.

In terms of copyright licensing and exceptions, the statement by the report that “Australia’s current exception for fair dealing is weighted too much in favour of rights holders” (pg 121) is absolutely incorrect. Copyright was designed to protect rights holders and therefore any fair dealing clauses should naturally favour rights holders. The whole premise of moving from fair dealing to fair use is based on shifting the ‘favour’ to the consumer. Currently if a consumer wants to use a copyrighted work, they must go to the effort of seeking permission. If the work is relatively current, it is not too difficult to track down the rights holder. If fair use is brought in, this shifts to the rights holder having to track down any unauthorised use of their material and if a compromise can’t be reached, going to court to resolve it. How can that be fair, when the consumer has access to millions of options, some of which are out of copyright, while the creator is trying to protect their small body of work?

Overall the proposed fair use arrangement is far too broad and favours the consumer far too much. The statement “Efficiency is also reduced in cases where a rights holder refuses to licence a work at any price” (pg 144) has echoes of a child throwing a tantrum for not being allowed a chocolate. You wouldn’t force an owner of a vintage, limited edition car to sell to the highest bidder just because that bidder wanted it, nor should the law force a rights holder to licence a work they don’t wish to licence. As it is, as the fair use changes are proposed it would be a huge task to manage and police it.

The Commission states other countries which have adopted fair use but neglects to mention the outcomes of doing so. It implies that because everyone is doing it, we should too, though there are also numerous countries who have rejected fair use, but the report does not explore these reasons, again showing its bias. A reasonable compromise would be expanding fair dealing to deal with the new issues brought about by the digital age.

The fair use argument uses the idea of consumer welfare often but does not consider creator welfare. “Where a rights holder has made a choice not to supply their works to the market (or refuses to supply a market), granting consumer access to that work, such as through a fair use exception, improves consumer wellbeing” (pg 156). There are multiple reasons why a rights holder would choose not to supply their works, one of which is because the contract terms they were offered were not to their best interest. There are many disreputable businesses out there trying to pray on the uninformed, and contracts which will sign over all rights of the work in perpetuity, which the author should not sign. This does not mean the consumer should be able to do what they want with the work. Another reason for not supplying their

work might be that they don't have the finances or expertise to supply to market. This is often the case with translations of a work or audiobook and film rights, but again, this doesn't give a consumer the right to steal their work. The statement "few books are commercially available beyond an initial print run or two, and very few books are available commercially throughout the full protection of copyright" (pg 155) may have been true in the past, but with the digital age and ebooks this is very quickly changing.

As a creator I am not greedy. I do not clutch the rights that I own like Gollum clutching the One Ring, though I do feel my work is precious. All I want is to earn enough from my writing to make a living. I would love to see my work transformed into film, television series, audio books, and into different languages. If I had the skills and the funds I would do it myself. But this is not possible for me yet, and finding the correct contacts who can do this is not easy. But this doesn't mean that someone with those skills should be able to take my works which I have spent months creating and transform them without giving me some reward for that. Do not forget that if the work didn't exist in the first place, they would have nothing to work from. The same goes for mashups of music. Yes it takes a different skill set to take multiple songs and put them together but without the creator making the original, this person would not be able to use their skills.

Finally parallel imports are another area in which this report is again focused on the consumer. Consumers already have the option of where to buy their books and can quite easily purchase books from overseas should they choose to do so. Authors on the other hand can negotiate publishing deals with different English speaking territories around the world which include Australia, UK and US. An author could get a different royalty from each territory and introducing parallel imports could affect their earnings. In addition to this, the Australian publishing industry is able to make money by buying the Australian territory rights and publishing international best-sellers themselves. If the market was flooded with internationally made copies, this would decrease the income of publishers, therefore decreasing the amount of new Australian authors they could take on.

It is generally accepted in the publishing industry that international publishers do not publish books set in Australia. The concept is that readers aren't interested in reading about Australia. Whether this is true or not is irrelevant, because it is what they believe. This means that if the Australian publishing industry begins to struggle due to parallel imports, Australian stories will not be able to be told.

The argument that "The concerns of authors that eliminating the remaining PIRs could chill local writing would be addressed by direct subsidies aimed at encouraging Australian writing – literary prizes, support from the Australia Council and funding" (pg 132) grossly underestimates how many authors there are in Australia and overestimates the benefit of these subsidies. Literary prizes and grants really only help those authors who write literary fiction and not those that write genre fiction. Very few awards or grants are awarded to writers of genre fiction. In fact when I applied for a grant this year, it was implied by the grant administrator that the reason I didn't receive it was not because the application was missing information or sub-standard, but because I wrote romance.

The recommendation that “the Copyright should be amended to introduce the concept of ‘user rights’ to counterbalance the exclusive rights granted to rights holders” (pg 159) completely undermines the whole principle on which the act was created. As the report states, fair use “reinforces the consumer interests that should ultimately lie at the heart of Australia’s copyright system” (pg 160) and this shows the Commission doesn’t understand copyright at all. Under the recommended fair use recommendation “The objective of the new Australia fair use exception would be to ensure that the copyright system applies only to those works where infringement would undermine the ability of rights holder to commercially exploit their work at the time of the infringement. **All other uses of the material should, by definition of the exception, be considered fair.**” (pg 159) With a statement such as this, you might as well scrap the whole Copyright Act.

I agree that changes need to be made to the Copyright Act to bring it up to speed with technological changes, but the Commission’s report has shown how out of touch they are with the reality of the industry. I can not support such a blanket fair use policy which is everything but fair for the creator, and I can not support lowering the copyright period to 15-25 years. I would support additions which deal with orphaned works in a fair way and unpublished works having a protected period rather than being protected permanently, as long as that period is at least for the length of the life of the creator. The government needs to seriously think about any changes they implement, and should think about the creators before the consumers.

Bibliography

(2016). *Intellectual Property Arrangements, Draft Report*. Canberra: Productivity Commission.