

Dear Productivity Commission,

What follows is a submission to your review into Australia's intellectual property arrangements, following the publication of your draft report.

I wish to comment specifically on three areas, as they pertain to writing and publishing.

1. Duration of Copyright

As a result of a number of international agreements to which Australia is a signatory, copyright currently stands at the creator's life plus 70 years. The Commission proposes a much reduced period, arguing that most books have lived out their financial life by five years. While that is true, there is no logical extension from that notion to one of reducing copyright terms.

The average author's income in Australia is \$13,000 a year. If an author has managed to write a work that connects with readers beyond five years, the author should continue to be able to benefit from that. It is still the creation of that author.

Some of my most commercially successful books were published between 15 and 20 years ago. They still earn me some income. I have a six-year-old child. Money I earn from my books helps feed him, clothe him and equip him for school. I can see no justification for taking an income stream away from me, when it is the result of my labour in the first place.

Some authors write books in series, often over an extended period of time. Isobelle Carmody's *Obernewtyn*, the first in the series *The Obernewtyn Chronicles*, was published in 1987, with the final volume, *The Red Queen*, not published until 2015. A reduction in the term of copyright to anything less than 28 years would mean that she would lose not only the right to earn income from the earlier books while still publishing the series (and generating backlist sales), but also control of her characters and story. Her new books would face the prospect of competing *Obernewtyn* books from other authors and publishers.

Furthermore, copyright creates certainty for those working to use written material in other platforms. A novel of mine published 15 years ago is in film development, and I signed new contracts for it last week. If it were out of copyright at 15 years, while the film company might look to save some money through no longer having to pay me for the right to adapt it, the non-financial cost of this for them would be lack of certainty. If it were out of copyright and in the public domain, anyone could attempt to make a film of it, and the reality is that the film production company currently working on it would not take that risk and the project would not get funding. Copyright might come at some price, but it gives film makers and their backers certainty. Reducing copyright significantly genuinely risks seeing fewer Australian films made.

Comparisons have been made between pharmaceutical patents of 20-25 years and book copyright, but these are two very different situations. CSL, for example – just one Australian developer and manufacturer of pharmaceuticals – grossed US\$3B in the second half of last year, around four times the total of the entire Australian publishing industry, or 615,385 times the earnings of the average Australian author (comparing one copyright owner to another). An author generates intellectual property, relies on it to earn income, and could be seriously affected personally if copyright terms were greatly reduced. In contrast, a CSL senior scientist generates intellectual property for her/his employer and earns on average a salary of over \$97,000 a year, a sum not reduced by the expiry of patents in his/her work.

Beyond this, Australia's status as a signatory to a range of binding international agreements makes a change unlikely and difficult to achieve. To change to a much reduced term of copyright, the Australian Government would have to prioritise this over a range of more pressing domestic and international issues, and devote resources to lobbying internationally, with little prospect of success. Alternatively, going it alone would see Australia perceived as a pirate island subverting copyright protections in place in other jurisdictions.

2. Parallel Import Restrictions

The principal argument in favour of removing parallel import restrictions is that doing so would make books cheaper. This argument has had its day, for a number of reasons.

First, books are already cheaper. Book prices in Australia have fallen 25% since 2008. In comparison, in NZ, a country which gave up its territorial copyright, prices have fallen only 14% in that time. Alarming, this period has also seen a significant contraction in the NZ book market and reduction in the diversity of available titles. These are both outcomes no one desires. On top of this, publishers have disinvested and removed capital from NZ and there is the significant cultural loss evident in a decrease in local NZ publishing, and far fewer new NZ authors taking their place on the international stage. No doubt there is talent there, but far less of it is being published, and having the chance to contribute to the economy and earn export dollars. This is likely to happen in Australia if PIRs are lifted.

Another historic argument in favour of lifting PIRs was that books took too long to become available in Australia. The 90- and 30-day rules no longer apply. Waiting times have been reduced to 14 days and in many cases to zero.

Furthermore, individual Australians can lawfully purchase a book from any international retailer at whatever price that retailer is offering. The current system involves no consumer detriment. All it does is block bulk imports of a title by a retailer, and for good reason. If an Australian publisher invests money in a book, including on such things as editing and design, they have a right to try to earn a

return from it. It would be unfair for their investment to aid the book to become successful enough to sell into an international English-language market, only to see surplus copies from that market swamping and undercutting the market here, making the future of the original edition in Australia unviable. This would lead to a significant reduction in investment in new writers and new books, as it has in NZ.

It's worth noting this has pattern not been seen in the US and UK, the two most powerful English-language publishing markets, as they maintain PIRs and will continue to do so. Australia would be putting itself at a disadvantage in making this change.

Australian book prices have dropped significantly, book availability has improved significantly and international cheap prices (should they exist) are already available to the Australian consumer. The job is already done. The consumer will not benefit from the changes suggested, as evidence suggests they will not achieve the intended effect, but will instead reduce the publishing and availability of Australian stories.

3. 'Fair Dealing' Versus 'Fair Use'

Our 'Fair Dealing' exceptions to copyright are working, allowing copying without permission for purposes of news reporting, personal research and study, parody and satire, and criticism. The licensing system where schools and universities pay compensation for all the copying and sharing of textbooks and other resources they do is working too. It's straightforward and it works well, allowing more than a billion pages to be copied each year.

A move to a 'fair use' system comes with significant risks. To consider the jurisdiction most associated with 'fair use', Section 107 of the US Copyright Law – the 'fair use' section – is worded in a way that is open to broad interpretation, making the courts the test of it, creating uncertainty at best and potentially far worse. Another aspect of it is that, if the particular use of copyright material is deemed to be 'transformative', it's considered fair use. By 2003, US courts found that use of thumbnail images by search engines was transformative, and therefore fair (that is, free) use.

By 2004, Google was digitizing books. In 2015, after a ten-year court battle, it got the all-clear to digitise and make available two million books with no return to the author or publisher. Google's argument was that it was only making the entire text of each book *searchable*, and revealing only extracts containing the search terms, not giving people a free read of the whole thing. They argued that it might actually stimulate sales. I don't think they argued that it actually *did* stimulate sales and I am aware of no evidence that it does. I have to admit that, any time I've found search terms taking me to a digitized book on Google, it hasn't. Because the bits it gave me for nothing were the bits I wanted to read. At the same time, Google makes money from the ads it sells during this process, so it's in its interest to have all this searchable content available to people.

A change to a 'fair use' system in Australia would risk creating uncertainty where we now have certainty. It would lead to litigation that everyone but the lawyers would be better off avoiding. It would erode authors' incomes, and the incomes of publishing companies, particularly those of independent educational publishers.

Thank you for the opportunity to contribute to this process.

Yours sincerely,

Nick Earls