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HarperCollins *Publishers*
Australia

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Intellectual Property Arrangements Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY 2601

Dear Sir/Madam

PRODUCTIVITY COMMISSION'S DRAFT REPORT ON INTELLECTUAL PROPERTY ARRANGEMENTS – APRIL 2016

HarperCollins Publishers Australia welcomes the opportunity to respond to the Productivity Commission's Draft Report on Intellectual Property Arrangements.

HarperCollins Publishers Australia supports the submissions made by the Australian Publishers Association and the Copyright Agency and makes the attached submissions which are limited to the Productivity Commission's questions on copyright.

Yours sincerely

James Kellow
Chief Executive Officer

HARPERCOLLINS PUBLISHERS AUSTRALIA'S SUBMISSIONS IN RESPONSE TO THE PRODUCTIVITY COMMISSIONS'S DRAFT REPORT ON INTELLECTUAL PROPERTY ARRANGEMENTS – APRIL 2016

Copyright Term and Scope

We support the comments made by the Minister for Communications and the Arts, Mitch Fifield, in his recent Media Release dated 24 May 2016 that *"copyright protection is an essential mechanism for ensuring the viability and success of creative industries by incentivising and rewarding creators"* and that the intellectual property system must provide *"appropriate incentives for innovation and the production of creative works"* which do not *"unreasonably impede further innovation, competition, investment and access to goods and services"*.

We submit that the draft finding of the Productivity Commission that the optimal period of copyright duration would be 15 to 25 years after creation certainly does not support these aims and is of course inconsistent with the various free trade agreements to which Australia is a party (as acknowledged by the Commission itself) and is therefore a pointless finding.

This leads us to question the Commission's findings and recommendations in relation to all matters of copyright, which we believe are at odds with the concepts of innovation, competition, investment and access to goods and services.

We also submit that this draft finding does not, and cannot, support the Commission's view that *"the notion that an author must get sufficient expected reward is integral to the Commission's framework as this is the driver of the incentives of creation."* Such a short period could not possibly give an author "sufficient" reward for their labours and appears to be based on a very narrow view of value. What amounts to "sufficient" reward will obviously depend on a number of factors, including the level of the copyright creator's originality (which is not necessarily proportionate to a creator's efforts), the demand for the work and market forces generally, which is not dissimilar to how reward is created in other proprietary systems (whether for tangible or intangible property). Whilst we acknowledge that "sufficient" reward is not always returned in every case, each work is subject to the same competitive market conditions, and the current term of copyright is essential in ensuring the continued creation and supply of creative Australian works.

The Commission states that *"providing financial incentives so far into the future has little influence on today's decision to produce".* Whilst the prospect of financial incentives may not always be every creator's primary purpose for creating and innovating, financial incentives do remain a significant influencing factor in determining whether a creator should invest their valuable time, originality, effort and skill and, likewise, whether a publisher should invest in publishing a work. Financial incentives, and the prospects of financial returns, are therefore absolutely fundamental to the creation and supply of creative works. Creators and publishers already operate in a highly risky industry where publishers need to make choices about which writers to support, what titles should be published, how many copies

should be printed and about how much to invest in production and promotion of titles. To decrease the term of copyright would create an even riskier landscape in which publishers would be required to operate.

We contend that the current copyright term for published works is effective, efficient, adaptable and accountable and that the interests of creators, publishers and Australian readers are well-balanced. A creator's income must be protected so as to ensure that copyright material is created for the benefit of Australians. It is only because of the current copyright framework, including both the duration of copyright and the parallel importation protections, that publishers like HarperCollins Publishers Australia are prepared to invest in Australian content.

In relation to unpublished works, we support the submissions made by the Copyright Council and Australian Publishers Association to the *Exposure Draft of Copyright Amendment (Disability and Other Measures) Bill* February 2016. Whilst we acknowledge that locating rights holders of unpublished works can be difficult, and potentially costly, we prefer a solution which provides for an appropriately limited exception targeted at addressing specific problems, rather than introducing a time limited period of protection and removing the protection entirely from creators and their estates over their work.

Copyright Licensing and Exceptions

Parallel Importation Protections

We maintain that the removal of the parallel importation protections erodes the basic and essential right of authors to decide how to distribute their work, in what territories and for what price (if any). The principle of parallel importation protections – territorial copyright – is the international book commerce standard upon which the publishing industry is based. It ensures creators are able to trade their proprietary rights, like any other proprietary right, and to receive fair return on their investment. This principle has proven effective in maintaining and developing Australian literature and culture to Australia's benefit while ensuring that individuals have access to any book published anywhere.

The Commission states that comparing the price of books in the Australian market over time (from 2003 to 2013) is *"not the right comparator for assessing the price impacts of PIRs"* and instead relies on data and findings from its Research Report of 2009 which examined price comparisons drawing on data contained in the Nielsen Company's BookScan database for 2007-2008 and the first 11 months of 2008-2009. This data is outdated and, in our view, does not provide a true position of the current publishing industry, which has undergone substantial change since 2009.

Whilst comparing the price of books in the Australian market over time may not be the right comparator for assessing parallel importation restrictions, it does seek to highlight the current position of the publishing industry and how it has changed in recent times, thereby providing the parameters against which the parallel importation restrictions should be measured. The latest evidence suggests that the publishing industry is more competitive than ever before, providing cheaper prices, greater choice, faster availability with customers able to purchase from anywhere in the world. Australian book prices

are now similar in price to comparable markets. The industry has achieved this within the current parallel importation protections and while allowing new Australian content to be created to the benefit of all Australians. We contend that the Commission's concerns about the anti-competitiveness of the current parallel importation restrictions are not relevant to today's publishing landscape and that the Commission has taken an overly simplistic view of the industry, based on outdated data, which does not take into account what is in fact a highly complex and innovative industry.

We submit that the Commission has dismissed the evidence submitted by publishers and has ignored the more recent and more relevant evidence of the New Zealand experience, which in our view, is significant.

In New Zealand, since the repeal of territorial copyright in 1998:

- the range of titles has significantly reduced (by 34.5%); and
- the average selling price has decreased by 14% (after adjustment for CPI) since 2008.

In contrast, in Australia:

- the range of titles has increased (by 15% since 2008); and
- the average selling price has decreased by 25% (after adjustment for CPI) since 2008.

The removal of territorial copyright would weaken the copyright system and would mean:

- reduced advances and royalties for Australian authors;
- reduced income for Australian publishers;
- fewer Australian authors published;
- fewer Australian books published;
- less promotion of Australian authors internationally;
- less trade in Australian rights internationally;
- less investment in Australian authors;
- less choice for readers;
- reduced taxation revenue and local business;
- more expensive print runs;
- risk to the sale-or-return distribution model;
- fewer Australian booksellers; and
- job losses right across the industry.

We contend that the Australian publishing industry depends on territorial copyright in order to maintain a healthy and prosperous publishing industry and to continue to enable risky investments to be made and Australian authors to be published in Australia – an essential factor required for building a publishing list. To remove the protections would make Australian publishing a far less viable business and would not achieve the Government's intended outcomes and, ultimately, would not be in the best interests of Australian consumers.

We also contend that territorial copyright is essential so as to ensure that Australian authors are not disadvantaged as against their UK and Canadian counterparts and to ensure that foreign publishers cannot dump books into our market without Australian publishers being allowed to do the same in theirs. Australia must maintain the concept of territorial copyright so as to ensure Australian authors and Australian publishers stay competitive against their English-speaking competitors. To ignore these significant impacts, if the parallel importation protections were to be removed, would be to do a grave disservice to Australian readers who enjoy Australian content.

We disagree with the Commission's view that the concerns of authors in relation to eliminating parallel importation restrictions *"would be addressed by ensuring direct subsidies are aimed at encouraging Australian writing … continue to target the cultural value of Australian books…"*. We query why a successful publishing industry, which currently does not rely on Government subsidy, should be distorted into one that would. If the protections were repealed, the Government would be putting at risk a $2 billion industry that currently operates successfully and independently as well as the $120 million that local Australian publishers invest in Australian writers every year. We query why the Australian publishing industry should rely on Government subsidy particularly given that, in our view, the removal of the parallel importation protections will not achieve the intended outcomes – lower prices for consumers and ensure the timely availability of titles – and which will instead likely lead to the opposite effect of higher prices, a narrower range, reduced choice, fewer jobs within publishing houses and fewer Australian authors published, as in New Zealand. In any case, the Commission's suggestion that direct Government subsidies would ameliorate the effects on authors of the removal of the parallel importation restrictions can only be characterised as naïve in light of budgetary restraints and the ongoing cuts to bodies such as the Australia Council. We submit that any Government subsidy would ultimately be funded by the Australian tax payer.

Fair Use

We submit that the current balance between creators and consumers is appropriate and that the fair dealing exceptions as they currently apply – together with the various statutory licences for Government and educational institutions and the various free exceptions for libraries and archives – strike an appropriate balance in incentivising and rewarding creativity thereby promoting new innovation, to the benefit of Australian copyright users. Indeed, Australia's range of exceptions is generous by world standards and they provide clarity and flexibility to creators and users of copyright material.

If an open-ended "fair dealing" exception were adopted, this would lead to less income for creators, less incentive for creators to create, less investment in Australian content, a high degree of uncertainty and unpredictability, an increase in litigation while the new exceptions were established, a loss of jobs and, ultimately, a devaluing of Australian content which would lead to less Australian content for Australian readers, particularly in the educational sector.

The Commission provides that *"legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself*". Whilst we acknowledge that legal uncertainty alone is not a sufficient reason not to introduce a "fair dealing" exception, we do not believe

the perceived advantages of any such change would outweigh the disadvantages – even where a non-exhaustive list of illustrative purposes were provided as guidance – which, in our view, would be significant.

We contend that any open-ended "fair dealing" exception would destabalise a successful industry that supports Australian creators and will put at risk Australia's print and digital content, in an environment where the existing fair dealing exceptions provide sufficient flexibility, benefiting the community overall. It would not promote Australian creativity or innovation and instead would stifle it. In this context, we particularly note the damage caused to the Canadian publishing industry as a result of the recent broad interpretation of exceptions in the Canadian Copyright Act.

It is also important to note that the publishing industry – including through Copyright Agency – is already examining further improvements including better print disability access, improvements to statutory licensing and changes to treatment of unpublished and unavailable works. The publishing industry has proven that it can innovate and evolve, and it can continue to innovate and evolve, to respond to developments in technology. It does this as a natural corollary of a competitive market in which a successful publisher will only remain successful if it provides publications that its customers want and at a price they are willing to pay, and timely access to those publications – and particularly digital access – in myriad formats and by myriad methods.

Intellectual Property Rights and Competition Law

Whilst we agree with the Commission that competition is important as it *"improves choice and prices for consumers and encourages the efficient allocation of resources and innovation, both drivers of economic growth"*, we do not agree that the licensing or assignment of copyright can have adverse implications for competition or can cause an aggregation of market power.

We contend that section 51(3) of the *Competition and Consumer Act* appropriately balances the interests of copyright holders and users and we do not see any benefit in the section being repealed and guidance on the application of part IV of the *Competition and Consumer Act* being issued. We also have not seen any evidence proffered by the Commission in support of this change.

Instead, the repeal of that section would inevitably introduce a period of instability and legal uncertainty, without the Commission having clearly articulated the actual practical problem (other than ideological tidiness) that needs to be addressed through such a repeal.

Licensing and assigning copyright is an inherent proprietary right of all copyright owners, which provide an important incentive to creators to innovate. The "monopoly" that a licence or assignment provides to a copyright owner is limited – it is only in relation to a particular expression of a unique work – and does not apply to the ideas in the work. Significantly, it does not prevent others from creating rival or similar works and is therefore inherently not anti-competitive.

We contend that, if section 51(3) of the *Competition and Consumer Act* were repealed (even where guidance was issued on the application of part IV of the Act), this would lead to a substantial increase in transaction and compliance costs which, in our view, would outweigh any perceived benefits.

Compliance and Enforcement of IP Rights

Safe Harbour and Authorisation Liability

Whilst we generally support the Commission's view that the safe harbour scheme could cover a broader set of online service providers, we submit that a more effective mechanism should be developed to limit the liability of service providers and to clarify their responsibilities in order to provide creators with a more effective and less costly remedy to address online copyright infringement.

We disagree with the Commission's view that the operation of authorisation liability and the coverage of Australia's safe harbour regime are separate issues. In our view, the scheme should only apply to those service providers that take reasonable steps to cooperate with rights holders in order to deter copyright infringement. To provide the protections to providers that are not obliged by law to take any positive steps to be able to obtain limited liability from authorisation liability, in our view, would undermine the original purposes of the provisions.