



Intellectual Property Arrangements
Productivity Commission Draft Report
April 2016

Submission from Hachette Australia
June 2016

Hachette Australia is pleased to present its submission to the Productivity Commission's Inquiry in response to the release of their draft report into Australia's Intellectual Property Arrangements. This submission should be read in conjunction with our submission to the Productivity Commission in response to the Commission's *Issues Paper*.¹ We support the submissions of the Australian Publishers Association, the Australian Society of Authors and the Copyright Agency.

Hachette Australia is an independently managed Australian subsidiary of Hachette UK, itself a part of the global publishing house Hachette Livre, which is owned by French media group Lagardère. Hachette Livre is considered one of the 'big five' publishing companies along with Penguin Random House, Macmillan, HarperCollins and Simon & Schuster. Hachette Australia publishes a wide range of fiction, non-fiction, illustrated, classics and children's books. It is a 'trade' publisher as opposed to an educational (schools and tertiary) publisher.

- Copyright is the legal expression of a human right. Copyright is a property right that ensures authors have the right to decide if, when and how their work is made public.
- In publishing, copyright – and in particular territorial copyright – is the core system by which writers and creators are rewarded for their ideas and creative effort. Territorial copyright both incentivises and rewards publishers to license creative works and to invest in writing, authors and the production, promotion and distribution of books.

¹ http://www.pc.gov.au/_data/assets/pdf_file/0007/194533/sub041-intellectual-property.pdf

- Hachette Australia submits that Australia’s current copyright laws are fit for purpose and, from a standing start just over 50 years ago, these laws have ably supported the growth of Australia’s most successful creative industry, the book publishing industry.
- At the annual conference of the Australian Booksellers Association (ABA) on 31st May, 2016, members agreed that strong copyright law in Australia is in the best interests of not only publishers and authors, but booksellers as well. Joel Becker, the CEO of the ABA, announced:

‘The Australian Booksellers Association is working collaboratively and cooperatively with the Australian Publishers Association. We are actively exploring options for further improving competitive pricing, available of stock, whether 14/14 code of practice is working as well as it appears to be, and ensuring the quality of the data.

Both organizations are absolutely committed to the importance of Australian territorial copyright – in providing value, range and quality to Australian readers, and to the crucial long-term value to the industry and our customers.’

- The Australian government needs to maintain an already strong copyright legal framework to ensure our writers are paid fairly now and into the future, and to ensure that investment in Australian writing continues. Australians need to see their lives and experiences documented, validated and celebrated in their books, art and music.

We respond to the Commission’s following recommendations and findings:

1. Finding: That copyright should only last 15 to 25 years after creation (reduced from 70 years after the creator’s death)

While it is not a recommendation, we have been concerned that this finding has been included in the draft report at all. Such a finding would be instantly dismissed if property law were under discussion. In fact, as the government has no unilateral capacity to alter copyright terms due to international trade agreements and in response to vocal objections raised by authors, Senator Mitch Fifield has publicly ruled out such a change. Copyright over the longer term is important both to authors and to publishers – and, just as with other property rights, authors should be

entitled to bequeath to their children and grandchildren (or their favourite charities) the fruits of their talent and work.

We remain extremely concerned that the Commission's draft finding in relation to the duration of copyright has strongly influenced its draft Recommendations. Specifically, Hachette Australia is concerned that the Commission's finding that copyright lasts far too long underlies its draft Recommendations that copyright protections be severely weakened in several important respects. The general tenor of the recommendations suggest they are clearly written from a purely anti-copyright perspective and this is particularly apparent in the Commission's Copy(not)right campaign. We submit that this is a biased report without any evidence other than out of date and previously discredited price analysis.

2. Recommendation: Move to a US-style 'fair use' on copyright

We submit that Australia's current 'fair dealing' system is fit for purpose and ensures that creators are justly financially rewarded when their copyrighted works are used. There are clearly defined and accepted exceptions, which allow copyrighted material to be used without payment and without confusion for the user.

The US 'fair use' system allows content to be used for any purpose provided the use meets certain 'fairness' criteria. This system has caused significant problems and 'unfairness' in the US and in Canada:

- Despite years of case law, US courts cannot decide what 'fair' is and different courts take different approaches. As a result, uncertainty (and increased costs) reign for creators, publishers and users. We dispute the Commission's draft comments that this uncertainty is overstated, and in particular refer to the comments on this issue by the Copyright Agency.
- With educational institutions in Canada purporting to rely on an expanded conception of 'fair dealing', the educational publishing sector in Canada has been drastically diminished. At least one Canadian division of a high profile multinational publisher has been closed, resulting in job losses, and ultimately teachers, lecturers and students will be worse off as there will be little or no Canadian educational content being produced in the future and available to schools and universities. Schools and universities readily pay

for desks, chairs and other equipment; why should educational content be treated any differently?

- Using the 'fair use' rule, Google won the right to digitise over 25 million books without permission or compensation to the rights holders. Only companies like Google will profit from high quality free information and content. This is not fair. If Google can benefit from the advertising potential around high quality content (Google AdWords), creators and the publishers who invest heavily in creators – often for years – should also benefit.

A PwC report into the costs and benefits of introducing a 'fair use' exception found that, given the similarity of the Australian and Canadian legal regimes and economies, it is 'reasonable to expect' there will be a loss of over \$1 billion to the national GDP should fair use be introduced. The report states, 'particularly concerning, in the Australian context, could be the loss of financial incentives for creators and publishers to develop new Australian content'²

We strongly reject this recommendation, both as a matter of fairness (on the basis that those who create and invest should reap the rewards of their creativity and investment) and as a pragmatic matter (that more resources would inevitably be spent on unproductive parts of the Australian economy – such as lawyers and the courts – and Australian teachers and students will have less choice of material, and a greater reliance on material from overseas that is not as fit for Australian purposes). The current system works.

3. Recommendation: Lift parallel importation restrictions

We note that the Commission has (at least in part) acknowledged the concerns of Australian writers and publishers with its suggestion that Australian writing should be supported by government subsidies in an open market. Overall more than \$300 million has been taken from the arts budget in the three years of the Abbott-Turnbull government (including \$6 million earmarked for The Book Council of Australia, which was scrapped by Treasurer Scott Morrison in December last year) and these cuts suggest that it is highly unlikely that the government will be able to match the current level of publisher investment in Australian

² PricewaterhouseCoopers, *Understanding the costs and benefits of introducing a fair use exception* (2016), prepared for APRA AMCOS, PPCA, Copyright Agency | Viscopy, Foxtel, News Corp Australia and Screenrights, p.16

literary works of \$120 million a year. It seems extraordinary that the Commission would be so out of touch with political and economic realities that it would seriously consider such a suggestion. In any case, Hachette Australia rejects that it is appropriate that the government should pick ‘winners’ to subsidise. Currently, book publishing thrives in Australia with next to no government funding (with what little available funding generally going – as it should – to support individual writers).

Removing territorial copyright would inevitably lead to a dramatic decrease in the number of Australian books available to Australian readers. The resulting reduction in the diversity of books available to Australians, with less rather than more consumer choice, would diminish public welfare. We submit that the Commission should therefore recommend that the current parallel importation rules be retained.

To do so would support an ecosystem that is already both effective and efficient.

Territorial copyright is at the heart of the global publishing ecosystem. Publishers, agents and authors trade territorial rights around the globe. That’s how the global publishing ecology works. Authors have control of how their rights are sold and license their work for publication, territory by territory. In this environment, publishers are able to invest on the basis that they have some security for their investments in what is inherently a risky business.

Hachette Australia acquires the licences to publish an author’s work in Australia in two ways:

1. Hachette UK acquires UK Commonwealth rights, including ANZ, and the author’s advance and royalties are dependent on the number of territories acquired.
2. Hachette Australia acquires global or ANZ rights only to publish under our local imprint, Hachette Australia. We acquire the licence to publish work predominantly by Australian authors, and once again the authors’ advances and royalties are dependent on the number of territories acquired.

Regardless of how Hachette UK or Hachette Australia acquires the licence to publish a work, considerable effort and expense is required to take a book to market and regardless of that effort and expense, there are no guarantees that a particular book will find a public. Further, uncertainty around financial returns on investment will inevitably lead to fewer resources and less spend allocated to the marketing and promotion of both international and Australian books,

which will in fact have the opposite of the desired effect on the country's reading culture. And of course, there will be substantial job losses for Hachette, for our distribution business Alliance Distribution Services and for our printing partners Griffin and OPUS.

Dismantling territorial copyright also endangers the local book industry ecosystem. Booksellers rely on publishers to acquire and invest in the best books from Australia and from around the world that have resonance and meaning for Australian readers. Booksellers rely on publishers to promote, market and publicise these books to Australian consumers and drive readers into bookshops. Publishers rely on bookseller feedback to identify the best books in the market, support our campaigns and welcome authors to stores for events. Printers rely on publishers to print Australian and international books locally. The industry is a web of connection and if one strand is weakened the whole industry is at risk.

Most importantly, the Commission's draft recommendation fails its own tests of accountability – that recommendations be evidence-based. Hachette Australia submits that an open market will not lead to significantly cheaper books, outside of dumped or remaindered US and UK books. There is no evidence to suggest that prices would fall. According to pricing analysis done by the Australian Publishers Association:

- The average selling price of books in Australia has fallen by 25% in real terms since 2008.
- The average selling price of books in New Zealand, an open market, has fallen by only 14% in real terms since 2008.
- Pricing analysis of the top 150 books published in Australia in 2015 across the US, UK, Australia, New Zealand and Hong Kong reveals that, in the main, Australian prices are generally comparable. It is particularly interesting to note that prices in the open markets – Hong Kong and New Zealand – are higher, sometime significantly higher than in Australia.

Hachette Australia is therefore concerned that the Commission has drafted its recommendation in the absence of evidence and in the face of evidence that contests its position.

Hachette Australia also notes that, on moving to an open market in New Zealand, the New Zealand government promised substantial benefits to the people of New Zealand. The promised benefits have not, however, been delivered. Prices have not fallen as dramatically as they have

in Australia, sales volumes have fallen by 16% since 2009 (suggesting a diminishing reading culture), almost all physical distribution has moved to Australia and the investment in local writing, books and authors has been curtailed. Hachette Australia provided a detailed analysis of Hachette's business in New Zealand to the Commission in its submission on the *Issues Paper* but, in summary, Hachette stopped investment in New Zealand authors and writing, closed their distribution business and New Zealand is now serviced only by a small sales and marketing office of eight staff (down from 42 in 2008).

An open market will certainly enable UK and US publishers to dump overstocks into our market, but at what cost to Australian society? Are we, or our children better off reading offloaded books from other markets because they are cheaper, or stories that reflect our own, culturally appropriate, experiences? Again, the Commission's draft recommendation fails its own test of effectiveness and efficiency. It is also important to note that Australian authors often receive substantially lower royalties on books exported from the UK and US into the Australian market and they receive no payment for books remaindered into this market.

It is likewise important to note that Australian consumers are already free to buy any book from anywhere in the world.

In summary, an open market will result in less investment of both time and resources by authors and publishers because of increased uncertainties around financial returns, which will inevitably lead to fewer Australian books being published. Pulitzer Prize-winning Australian author Geraldine Brooks agrees:

'Anyone who believes Australians need to read their own stories and hear their own voices reflected in a diverse and vibrant literature should be appalled by the report of the so-called Productivity Commission. As a writer, I'm already feeling the effects of these bad proposals as Australia's publishing firms find themselves unable to project future revenues and face a bleak outlook. You think Google and Amazon care if our authentic Australian voices are heard, nurtured, developed? We'll be drowned out and silenced by the thud of cheap product being dumped on our shores. As someone who is published in many countries, I can say with absolute conviction that the Australian publishing industry is the best in the world. Please let's not break it for the spurious, untested assumptions in these recommendations.'

In conclusion, a weakening of territorial copyright law will disadvantage Australian writers, with absolutely no real evidence to suggest that books will actually be cheaper or that readers will be better off. The US 'fair use' law has cleared the way for Google to digitise over 25 million books for its Google Books project. Google was able to do this without seeking permission from publishers or authors or paying creators for their work. If the proposed ideological changes in copyright law are supported by this government, which prides itself on investment in ideas and rewarding innovation, they will in fact be doing exactly the opposite.

Robert Koopman, the World Trade Organisation's Chief Economist, recently commented that the Productivity Commission's report recommendations to weaken Australian copyright was selling local firms short. He said 'Clearly to have a strong innovative economy you need a strong IP [system].' We agree.

We submit that the Australian book industry can work together to improve the consumer offering, as they have done in the past by substantially improving speed to market by formally agreeing to the 14/14 day industry standard.

Yours sincerely,

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