
John Chapman



Wilderness Photographer
Bushwalking Writer
Guide Book Publisher

Submission INTELLECTUAL PROPERTY RIGHTS

About: Draft Report
Productivity Commission

The Productivity Commission has been charged with increasing Innovation in Australia. Most Innovation has to do with Patents and there has been some interesting changes suggested to Patent laws, but do not interest me much.

However, it seems the authors of the Draft Report have confused Copyright and Patents and considered them to be much the same thing. Copyright is not like a Patent and Innovation for authors in writing and publishing is well and truly alive. The suggested changes to copyright will probably reduce the number of local authors and actually reduce Innovation if it's measured by the number of local authors and the number of books produced by local authors.

Copyright is there to encourage me and others to write and get published, it gives me protection of my expression of ideas for a period of time. It was never meant to protect the information that I have written, just the way I have expressed it.

I agree that copyright has expanded over time, much of this has been due to court cases and ad hoc amendments. Perhaps it's time to redefine what it really is. It provides protection to an author for their **expression**, the original laws were not aimed at the protection of ideas. There have been some cases that have given copyright protection to detailed contents such as those found in databases. Databases are something new that did not exist when the original copyright laws were formulated. Databases are not really produced by 'authors' and the producers of databases want the details protected, not the expression. It would be more appropriate if rules that were similar to those applied for Patents were applied to databases.

Do others use other author's data or ideas? Yes they do. In my own case, I know of other publishers who have copied some of my base data. I write walking guides and I have named some places that did not have official names, the names were invented by me and had never been used by anyone before. The other authors reproduced the names, but the way it was written and presented meant it bore no resemblance to my own writing and hence is allowed under copyright law. That is what Innovation is, using ideas or information from another source and presenting it in a new form. It is not necessary to excessively reduce the term of copyright to get Innovation into writing. The Draft Report focuses on copying and this is not increasing Innovation!

So why the push to reduce copyright to 25 or even 15 years and encourage more copying! The Draft Report states that most works have a financial life of less than 5 years. If we accept that statement then why does the current extended copyright

period cost Australia so much! The argument given in the Draft Report is not very consistent or even logical! The Draft Report tells us that extended copyright costs the country a fortune then tells us that there are almost no financial returns after 5 years! The Draft Report emphasises how much we pay overseas and implies that an extended copyright period earns almost nothing for local producers – a very flawed argument.

The report gives an example of Shakespeare using plots from Greece and uses that as an argument to reduce copyright so writers can use plots from more recent writers. Lets forget about the fact that those Greek Tragedies were written more than 1500 years before Shakespeare, way out of any copyright period that anyone has ever considered, actually a pretty dumb example to use for arguing for shortening copyright. This sort of recycling of ideas occurs all the time today. There are plenty of novels written today that use plot ideas from other recent publications. The authors must make the details sufficiently different so that their work cannot be identified as a copy and that is a reasonable requirement. The fact that copyright exists in other works does not stop an author from providing Innovation in their writing, in fact they need to do so to make it sufficiently different to another publication. As long as it's not an identifiable copy, an author can use ideas from anywhere and they do, even very recent ones. Copyright does not protect ideas, just the expression of them. Patents are for protecting ideas, so let's get that straight.

The report then goes on to state that 90% of publications are not available after several years. The report implies that its very important for these dropped works to become available as soon as possible – while I am sure there are a couple of gems in that 90%, the reality is that most of them are not great books and most of the population will not care if they are in print or not. For the other 10%, the public clearly wants them as they are still in print, but both authors and publishers will suffer from early copyright release of popular works.

The report then gives an example of how publishing activity increases when copyright ends. They use an example for best selling books:

For example, around 98 per cent of bestselling books from 1913–1922 (in the public domain) were still in print in 2006 compared to 74 per cent of bestsellers from 1923–1932 (still in copyright) (Heald 2008).

In the example above, they only looked at best-sellers. First, nearly $\frac{3}{4}$ of best selling from the 1923-32 period were still in print after 90 years, amazing, not too many orphaned works in that decade! Most of the best selling books were still being printed, once copyright expired there has been an increase in titles, but it is perhaps not as dramatic as the Draft Report would lead us to believe, a 22% increase for 90 year old books! What I would have liked to see is how many of the books that were published in the 1923-32 period that vanished within 5 years (in other words the dud 90%) came back into print once copyright ceased. I suspect the number is insignificant, I am sure someone has it, but as it did not support the Draft Report, the data was not presented.

The proposed change to say 15 years will mean best sellers in the decade from 1990-2000 can be copied, while I don't have figures, I would expect 95% or better of the best seller books in that decade to be still in print, very few of them would be 'orphan' works. Removing copyright for that decade will not increase the number of titles from the 1990s in the market much at all. All it will do is remove the requirement to pay the authors. Yes prices will drop if you cut out the 10% author fee – that's logical. Is it

supporting Innovation to stop paying people who are already poorly paid? That's an interesting way to encourage writing and Innovation.

A big problem is that the Draft Report assumes that all books have a limited commercial life of several years. The argument is by selecting a life of 25 or 15 years, the main commercial value of most publications will be close to zero.

Unfortunately there are a number of publications that have multiple editions. These have a long life cycle and in fact sales and income often grow slowly over time as the author and publisher gain a reputation and spend more time and effort on them. While I will discuss a particular segment of the market, this problem will be the same for any book that has had multiple editions over a long life span. It even applies to novels where authors create a series or a 'world' over an extended period that often takes several decades.

Obvious examples I can think of are Gregory, UBD and Melway street directories, and any guide books for outdoor sports or travel which have gone into multiple editions such as Lonely Planet and myself.

To start with the obvious, a new edition will get copyright protection for 25 or 15 years from publication, that's easy. However, as that edition will have used a considerable amount of content from earlier editions what will happen to the rights for the content of any editions more than 25 or 15 years old?

Will the release of a new edition renew the copyright of material that appeared in the earlier editions so others cannot reproduce it legally? Or will it mean that anyone can copy and commercially use any material from the older edition regardless of the fact that it forms a significant part of a newer, updated edition?

As the report stands I would assume anyone will be allowed to copy the 25 or 15 year old work in its entirety and use the contents in any way. If they wanted to, this would include showing the author as creator, reproducing the cover which will include the author's name plus trademarks, etc. Also for the internals, the design and layout and any other intellectual property could be copied and used/altered – it's out of copyright so it will all be allowed.

Over time, guide books and street directories keep getting updated and modified, but in many cases somewhere between 70 and 90% of earlier editions appears unchanged in later editions. Some will think that these books get completely rewritten, but the fact is that the only guides that proceed into multiple editions are already good and often are great books. If they were written and designed well like the early Lonely Planet guides or maybe a great design like Melway then the public demands more editions. The publication was successful because it was initially done very well so there is no need to make major changes to contents or design. Much of the content gets reused with some small updates in each edition, that's logical.

Another fact is that it is common for these books to take a lot of work to produce the first edition and initially sell slowly but steadily and then as the author or publisher gains a reputation sales increase. It takes some time, sometimes several editions, to recover the full costs of creating them. This is not the short-term profit end of the market, which dominates most of the publishing industry. The success of Lonely

Planet and Melway are perfect examples of how this happens. This is the exact reverse of what happens with the majority of published works. Does the government want to effectively restrict or close down these successful publishers and authors because they are in the minority?

Also, what about 'Moral Rights' and 'Design Rights' and how will 'Trademarks' fare. Will 'Moral Rights' and 'Design Rights' also expire at 25 or 15 years thus allowing anyone to use the original author's name and design even though the author and publisher are still producing new editions and putting new knowledge into those publications. Trademark will have its own problems, while the trademark or publishers name might still be current, the cover and ALL of the content is copyright free to reproduce, or is it? I suspect the proposed changes will create more uncertainty and court cases rather than reduce them. Under the current system, 70 years after the author has died, the author cannot sue for moral rights, defamation etc and it's so far in the future that brand names or trademarks have usually ceased or expired. Under the new proposal will an author or publisher still retain any of those other rights after 25 or 15 years?

If commercial copying of older books that are still being actively published was allowed, I suspect many of the original publishers would stop producing new editions. New editions involve extra costs to do research to update them and pay the author hence they will ALWAYS be more expensive than if the same publication (albeit an earlier edition) was simply copied and published commercially with no payment to the author – that's logical. In fact the report backs this up stating that when books come out of copyright prices do fall by around 10%. Of course they do, the author is the loser.

The problem in this case though is that the public does not prefer 25 or 15 year old guide books and street directories. I am certain those doing the copying of older editions will make some amendments and changes, not put a date onto the work (common with many guide books now) and it will not be obvious to the public to know which one is actually the newest work. In retail stores, there would be two or more books, same author, same title, very similar in content (in fact at a casual glance could seem nearly identical), one cheaper than the other. Many buy by price, so sales of a new edition would be reduced significantly. Even if the copy only stole 1/3rd of the market, since Australia is a small market with small print runs, that could be enough to kill off the incentive to keep producing updated editions.

The loss of up-to-date guides can come at some cost to the community. In my case, bushwalkers will be buying 25 or 15 year old guide books which describe tracks that have overgrown or otherwise vanished plus don't include other recent changes. The result is that many more will become lost and this will be at a cost to the community. While some people get lost now, the numbers are small and mainly those who don't use any information at all. Guides are most commonly used by the in-experienced and when using up-to-date guides most rarely get into trouble that involve others searching for them. That will change. When the only guides available are ancient editions containing information decades out of date it will actually help them to get lost.

The reader might ask, would someone do this, is it feasible re-publish and sell an old guide. If you look at copyright history, in the French Revolution they removed

copyright. Mass copying followed and it took only three years for ALL books and newspapers to vanish. The same will happen again with multiple edition books vanishing as they cost more to produce than cheap copies do. The authors of the Draft Report should have studied copyright in the French Revolution, they would have discovered that while the revolution removed it, after only 3 years they reinstated it with stronger rules than it was before the revolution. Essentially removing copyright proved to be a disaster. While the Draft Report is not advocating full copyright removal, with the short term proposed, there will be some similar results in some sections of the publishing market.

There are a number of publishers that seek out copyright free works to publish and they will pounce on all the 25 or 15 year old books that still have a viable market. Anything that has a current edition still in print will be a target!

I will give an example of one book that would be an obvious target that I suspect most of the public would like to see continue to exist. I have a 1988 copy of a Melway street directory, published 28 years ago. It is the 18th edition and looks very similar in design to the latest edition. Yes the latest edition has some additions, but for many buyers, a casual flip through will show them to be very similar, in the city centre the streets are still the same etc. It includes about 75% of the map area of the latest edition, unless you are going into the outer suburbs it works fairly well. If someone reproduced that 1998 edition with some advertising or feature boxes covering the date of 1998 on the cover, said it covers 'central Melbourne only' and made it cheap, I am sure they would sell enough copies to be worthwhile doing. Yes it's not as comprehensive as the latest edition, but if it has the Melway name on the cover many will think it must be as good. I am sure this would cut into Melway current edition sales and a possible result might be that new editions of the Melway street directory might cease. Melway has considerable costs as they have to pay people to drive all the streets and do updates. I know that due to Google maps the Melway products are already under market stress. If they lost the copyright of their own design I suspect they would consider closing that part of the business.

The loss to the community of our up-to-date street directories would be a disaster as many people rely on up-to-date street directories. The only directory left then would be cheaply produced copy directories with lots of errors/omissions or Google Maps, an overseas company. Is this encouraging Australian Innovation - kill off successful local publishers and shift income to an overseas company! I think not.

Do not try to claim that no one will stop publishing new editions. In my own case, if copying of editions of my own walking guide books from before 1991 or 2001 was allowed, I would never do another edition. I have three books from before 1991 which are now in their 5th, 6th, and 4th editions. If I did produce a new edition I would be sending a clear signal to those seeking to reproduce older books that there is a viable market for them to attack. However if I don't do a new edition perhaps there will be no book published at all and that's also a loss to the community. This is clearly a no-win situation. Publishing always has its risks and I am prepared to compete against others in the same market. However in this case I could never compete on fair terms as I would have to compete with myself. This is very high risk as I can no longer use my reputation as a selling point – that's gone. Hence no new edition at all is the sensible business decision. Other publishers will also have to make the same

decision, publish a new edition and draw attention to themselves or simply drop further publication.

The public who want the latest, updated edition and who have clearly shown that with long term sales would miss out. I might be wrong, but I don't think the intention of the government is to stop local authors writing. . There is a lot of talk in the report about encouraging local authors, but no real help. There are some good ideas in it, but in some areas it has not been fully researched. It just assumes that as 90% of books become out of print in a few years it's really important that the public gets access to them earlier. Grand idea, but there was a reason those books vanished early! Of course the books the public value – the ones they keep buying – just don't matter much in this Draft Report.

I can see another issue for author income with copyright length being drastically shortened. Publishers hate paying authors, if they liked paying them they would not have cut their income in half over the last decade – the figures make that obvious and the Draft Report also comments on this by noting that much of an author's share gets siphoned off by others and the authors get very little. Out of copyright books don't need to have author payments so they will be very attractive to some publishers. There will be such a huge mine of older books (any book in the world from about 1930 to 1991 or even 2001) to reproduce freely that some publishers will concentrate most of their efforts in printing those instead of publishing new works. For the next decade or even longer I predict there will be a noticeable drop in newly published Australian authors and along with that a drop in average author income from books. Eventually this might even out, but it could take a decade or two – remember there will be a back catalogue of 60 years or more of books to publish for free!

The Draft Report assumes there will little loss from copyright being shortened for authors, but I suspect there will be a bigger effect than the small cut that will happen to the well-known authors from parallel imports. This will affect all authors, but will have the biggest effect on new authors. It will get even harder to get published as a smaller number of publishers will be interested in new authors. The publishers will get even more power than they have now and might end up with authors having to sign contracts that give away more than they do now. Self-publishing is an option, but from experience it's not easy – it takes many years to get a reputation and if Copyright is cut to just 15 years, by the time you have established a good reputation, you will have lost any possible income from your older works.

It has been suggested that grants or payments will compensate authors. What a joke! Two weeks ago I got an email pointing me to a site to apply for a grant for successful authors with more than 6 published books – sounds like me as I have 12 books in print. However it's not clear if self-published authors are eligible. To find if I was eligible, I inquired by telephone and left my number then also sent an email, but I have not even received the courtesy of a reply. I can guess that particular authors are already in mind so I simply don't count. That's the reality of grants, the majority of authors will never get seriously considered so for most of us grants will not compensate for any loss. The only way it can work is if a grant applies to everyone who qualifies, not just a select few.

I agree that changes are needed. The question is what copyright length should be changed to. The lengthening to 70 years after an author's death was ridiculous. I am

an author and I thought it was excessive. Copyright really should be just for the author as they created the work. As an example, if I die my inheritors don't get my weekly wage for the next 7 decades so shortening time after death makes sense. I know some see copyright as a possession, but it's not – it's an incentive to make us publish and in return, for a period of time, we get control of how our work is distributed, we don't actually own anything. Early in copyright history, the term was an author's life, but then some authors of popular works mysteriously died early (happened in England) and the laws were quickly changed to a period after the author died. A sensible compromise would be the author's lifetime or if the author has died or is a company, then a fixed period from publication. The fixed period reduces the incentive for an author to somehow die early! Making it 25 years, is way too short – some successful companies are currently running businesses based on copyright and Innovation and should be encouraged to continue rather than close down.

My suggestion is very similar in length to what others have proposed.

'Copyright applies for the lifetime of the author or if the author has died or is a company, 50 years from first publication. For unpublished works, copyright applies for 50 years from creation.'

This has elements of what was the established custom before, 50 years for works created by a company makes a lot of sense as some businesses have based their business on that 50 year model.

This would seem to me to be fair, both from the point of view of an author and a user of books while keeping with the Draft Report thrust of generally freeing up copyrighted material earlier.

If the shorter period of 15 or 25 years is adopted, there are a number of other issues that will happen. I assume an author will simply lose their 'Moral Rights' in the work when copyright expires. That will present its own problems if the author is still alive! What about design rights? Will anyone be allowed to copy the work in its entirety, including the design! Also what about trademarks – branding that appears in books and on covers, posters, in advertising etc. Will the new publisher simply be allowed to copy those as all publications will be copyright free? If copyright is shortened to the proposed 25 or 15 years clear guidelines should be included in the new act to make it clear what law will apply on these issues as most will simply assume they can copy everything to do with the publication. The Draft Report states that these can be sorted out with the court system. That's a bit of a flawed argument, as the courts don't write the law, they just interpret what they have been given. As changes to the law are being proposed it makes sense to give better guidance about issues that can be expected. I see some lazy law-making here, just let the courts work it out.

Without clarification, I can see a number of new lengthy court cases coming along when current authors and publishers try to protect their designs, trademarks or other intellectual property for longer than the new copyright period of 25 or 15 years. If the courts rule that old publications cannot be copied due to a trademark, design or other IP issue, I can see many publishers using them to effectively claim protection for much longer periods than the new copyright life will be. Just leaving it to the courts to decide might produce an unintended result from what the Draft Report is seeking. These issues need clarification as otherwise copyright for some publications might

effectively remain as something similar or even longer than it is now. If a trademark or unique design is ruled as protecting a publication, the result may be that the work is protected for the entire life of the company!

The report clearly states under '8 The community as a whole will be better off', that, *'These changes are designed to better target IP protection to instances where 'free riding' by users would undermine the economic incentive to create and disseminate inventions and works.'*

It's pretty clear to me that implementation of the Draft Report will create plenty of 'free riding' and will undermine authors and publishers who produce multiple editions. That's the opposite of what the above statement claims. It could kill off a productive section of our publishing market. For consumers there will be a negative gain as they will be offered old publications and not have access to what they really want, which are current up-to-date publications. For some books they might even simply disappear even though they are still wanted by some and this will also be a loss for the community. A losing situation for everyone!

Parallel Importing should not be allowed unless our major trading partners, England and USA also allow it to happen. While some books overseas are bit cheaper, usually between 10 and 30%, if you bring them into Australia, pay freight, demurrage and Customs Inspection fees, the prices would be getting close to the current shelf price here. Any retail price drop would not be that much. I know you don't believe me so I will give an example. I have exported stock of some of my books to Canada, I sold them at my normal wholesale price, I sell all my books at the same price to everybody. After freight, customs etc costs were added, the retail price of the books ended up being 40% dearer in Canada than they are in Australia. In reverse, if a book sells for 30% less in another country, by the time it gets here, it will be end up almost identical in price to what's already being sold here. I wonder if the Canadians are thinking that a Parallel Import of my books will result in a price drop of the books in Canada! The Draft Report argues that Parallel Importing will bring down prices. For most books that are selling well it will not make much difference except the author will get even less. It's common for authors to get half the normal royalty for overseas editions so they will be the main losers.

The only books that will be significantly cheaper here with Parallel Importing are those being 'dumped', excess stock that did not sell in another country and the publisher is willing to sell for almost nothing. If our major English market countries such as England and the USA don't allow Parallel Importing then we will be at a significant disadvantage as our publishers will not be able to reciprocate and dump their excess print runs in those countries. Hence unless everyone allows Parallel Importing we should not allow it either.

Does dumping exist now. We already have thousands of dumped books already, most of them done by our own publishers. Just visit any discount bookshop, there are plenty of cheap 'dumped' books to buy already and none of the books in the discount area will get any cheaper because of Parallel Importing. If you want to buy a cheap book, there are plenty already available. It's not necessary to try to make ALL books cheap!

Regarding 'fair use', the Draft Report recommends this, then basically leaves it to the courts to decide what is 'fair use'. This is a bit too open ended, no wonder everyone is frightened by the idea! As an example, if someone copies a printed publication and places it onto the web on a non-commercial website, will that be 'fair use'. I know the authors and publishers will consider it's no, but that could be the outcome, court results cannot be predicted. More obvious, what about a University copying and printing an entire book for 'educational purposes', the students then sell the copies, will that be 'fair use' for education? A law that can change with time makes sense, but not something so open ended that no-one really understands what it is until we have had a multitude of court cases to sort it out. Courts are not there to create the law, just interpret it. Give us a clear set of examples and you might get some support. As it stands, I am sure my books will be copied and I will get 'fair use' claimed. As I cannot afford to run an expensive court case, I will have no way of stopping it. The same will apply to all small publishers. At present we can quote 'case law' and sometimes get compliance.

As it stands I cannot support 'fair use'. It's too open ended with no clear definition.

Applying the same term of rights to unpublished works as published works makes a lot of sense. However if AFTER the copyright period has expired, the text becomes published, does the work then gain normal copyright protection for the author/owner? If it's out of copyright, does the new author/editor get copyright protection for their edits or annotations or is copyright no longer possible for any part or derivation of the work. I cannot find any clarification of issues like this in the Draft Report. The report wants to make these works accessible, great idea and I agree with it, but as the work will then get 'published' with 'amendments', will it then gain rights? As the original source is probably not publicly accessible, no one will be able to copy the published version as you cannot find out what the amendments are that gives it copyright protection – see the problem? This sort of issue needs clarification.

Overall, I find the Draft Report seems to be just seeking a way to make copyright as short as possible so anybody can copy anything. It did not take into account the effect on multiple edition books and the more successful authors and publishers in Australia. It just focused on book prices without considering the quality of books that such changes might encourage. This will be disastrous to some sections of the local publishing industry. The community overall will lose as while copyright will cost less, there will also be less published works available that the community really wants. Those will be the works that the community valued and was previously prepared to pay for. Overall there may be more works published, but they will be ones where there is less demand or ones less desirable. Is that encouraging Innovation?

Free or very cheap is nice, but if the resulting product is not what you really want, it's still expensive!

Please consider these issues when drafting the final report. If the current Draft Report is implemented as is, there will be less authors, less publishers putting out new work and less quality up-to-date information available, not more. Cutting copyright to a very short term will not increase Innovation as it will discourage some from even trying.

Summing up, considering the issues, I think the following is a fair compromise,

'Copyright applies for the lifetime of the author or if the author has died or is a company, 50 years from first publication. For unpublished works, copyright applies for 50 years from creation.'

If the Productivity Commission decides to continue to proceed with a much shorter copyright period to free up orphan or out-of-print publications earlier then, at the minimum, please consider providing a longer copyright period for multiple edition publications. The following is a suggestion that would do both. With the ISBN system, it's very easy to find the date of the latest edition. It is not my preferred option, but is better than the flat 25 or 15 year period that has been proposed.

'Copyright applies for 25 years from publication of the latest edition with a maximum copyright period being 50 years from first publication. For unpublished works, copyright applies for 25 years from creation.'

John Chapman