

Introduction

I am Sulari Goonetilleke, published as Sulari Gentill. I am a writer of Australian Historical Crime Fiction, with 10 published novels to my name. I am an Australian, a lawyer and a tax payer. As all of these things, I am deeply disappointed and disturbed by the proposals of the Productivity Commission's draft report on intellectual property, glibly and offensively named "Copy (not) Right".

Copyright Term

As a corporate lawyer, I was no stranger to plagiarism. Lawyers "borrow" each other's clauses regularly. Indeed I recall, as a young lawyer, the vague thrill of recognising a clause I'd originally drafted, in a contract prepared by a big Sydney law firm. But lawyers are well paid for putting pen to paper. They are well paid for the time they spend thinking about an issue and the order of words which will best achieve their ends. In fact they are well paid for just about every breath they take during business hours. And let's face it, while legal drafting can be creative, it's hardly work of literature. It's not surprising then that lawyers do not feel particularly possessive of the legal clauses they draft. That might be very different if their income was determined solely by the royalties those clauses could generate, if they spent years drafting those clauses and they were the public face of what they wrote.

All the clauses and contracts I drafted as a lawyer are in the public domain and I could not care less, but as a novelist who relies on the intellectual property rights I hold in my novels for any sort of compensation and whose identity is tied up in her books, I take serious issue with the PC's draft finding 4.2.

DRAFT FINDING 4.2

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

With all due respect, the proposition is simply ludicrous. The use of the term optimal has to be called into question. Optimal for whom? Certainly not for creators. Certainly not for the literary culture of this country and consequently not for consumers of literature either.

If we were to apply the PC's dubious reasoning to the property market, for example, we would argue that because, on average, Australians move every 5-10 years, then a person should not be allowed to own a house for more than 15-25 years. After this "optimal" period the family home should be put back into the public pool for no compensation, for anyone who wants it to use as they wish. And of course no one should be allowed to leave their house to their children.

Certainly such property ownership laws would make housing cheaper... who's going to pay much for a house they can only own for a maximum of 15-25 years—a rapidly depreciating asset? But one wonders what that would do to the building industry and to the quality of housing. Who's going to spend money maintaining such houses? Who's going to build them

in the first place? The result would be bad for owners, the industry and eventually consumers as quality housing became scarce.

The PC's Draft Finding 4.2 would have an analogous impact on the currently thriving literary industry.

Counter to innovation

The proposition also runs counter to the encouragement of innovation to which our current government claims to be so dedicated, and which the PC uses in its own reasoning. There is no greater innovation than creating a story out of nothing, weaving words that make people think and laugh and care. But why would a publisher pay a writer for a new work when a much cheaper option would be to reissue a work on which the copyright has run out? In an already competitive industry writers would find themselves competing with "free" works created 15 to 25 years ago, which would impact their already minimal income and be a disincentive to the creation of new work.

In this scenario we could eventually see a publishing industry in which writers themselves earn nothing for the stories they produce. Writers are not performers—we cannot resort to "live" tours to make up for the legal theft of our product. If you take our copyright, you take everything.

Non-financial implications of reduction in copyright term

Even at the higher end of the term proposed, I will probably be alive to see my works come out of copyright, to possibly witness others making money out of my work without any return to me, and worse still, to see my work used in ways I would never have allowed, or to raise funds for causes I find morally reprehensible.

I do take issue to with the partisan language of the draft report which talks about a work of literature being locked up for the copyright term. It is more accurate to say it is protected by law for that time. It is a rare writer who intentionally keeps their work out of print. But on that point, if that is their wish why should they not do so?

If, for example, I was to write something of which I became ashamed, or which incited others to act or think in a way that I regretted, why should I not have the right to remove that writing from publication and dissemination by keeping it out of print.

The Draft Report does state:

Australia has no unilateral capacity to alter copyright terms, but can negotiate internationally to lower the copyright term.

So it seems that creators in Australia can only hope that our trade partners have more respect for the work, the contribution and rights of their writers and artists. Perhaps we would be better appealing to foreign governments (rather than the one supposed to represent us) to resist these negotiations. It is as I said at the outset, a ludicrous situation.

Parallel Importation Restrictions

Draft Recommendation 5.2 states

The Australian Government should repeal parallel import restrictions for books in order for the reform to take effect no later than the end of 2017.

My novels are based in Australian history. The Rowland Sinclair series is popular and has received a number of literary awards. I receive many letters from readers who are delighted to discover Australia in the 1930s through my books and connect with the worlds of their parents and grandparents. Despite suggestions that I write an alternate but similar series set in New York or London in order to appeal to international markets, I have resisted because I think it's important for Australians to see themselves reflected in the literature of the day.

The first book of the Rowland Sinclair series was published in 2010. The US foreign rights were finally purchased in 2016 and the story of my Australian hero, set in Australian history, geography and culture will appear in US markets in June. That was only possible because my Australian publisher published the books here and sold the rights to the US, who only took them on once the books had proven themselves in our market. Why would any future Australian Publisher sell my foreign rights if doing so would allow that foreign publisher to ship my books back here and destroy the market they built? Bearing in mind that my Australian publisher is not allowed to ship books to the US or the UK (because they value their own literary industries).

If the Draft Recommendation was adopted, then, my US publishers could take over my Australian market with cheap books (either directly or via a remainders company). For clarification, remainders occur when a publisher prints too many books (as a result of miscalculation or because they were taking advantage of economies of scale). The publisher sells the books, at a miniscule amount, to a company which deals in "remainders". That company has no contractual relationship with the Australian publisher or the author, and books which are remaindered overseas return nothing to the Australian publisher or the author, via royalties. If they were imported into the Australian market they could very well destroy demand for the Australian edition. The author and the Australian publisher lose twice: first because they are paid nothing for remaindered books and secondly because those remaindered books destroy the demand for the Australian edition.

As a lawyer, if I were advising a publishing house, I would recommend that they insist on world rights before publishing an author, and then sit on those rights to minimise the risk of being undercut by a foreign publisher. That strategy would of course mean that Australian writers do not build an international readership in the UK and US markets (which have PIR) and that those markets will be deprived of Australian stories. Moreover without the ability to sell foreign rights, the business proposition of publishing a new Australian work changes and becomes less profitable from the outset. Indeed the proposition may become unviable. Again an Australian book would be lost to consumers.

Without an Australian publisher my chances (and the chances of any author) of having new Australian book published would be seriously diminished. Yes, I could now take my work to my US publisher, but if they were putting out a book in the first instance, they would of course look to tastes and interests of their primary market: the US. I could write a book set in the US with an American hero... I don't want to, but I could. So what would be lost?

In short, our place in literature—a reflection of ourselves, our issues, our culture, our humour, our failures and our triumphs would be subjugated and sacrificed to the enormity of the American market. Gone would be references to Sydney and Melbourne, to Yass and Batlow, to the dry summer heat and mild winters, to gum trees and fauna, to Australian mateship, to our unique way of life. Issues explored in my books about class structures and prejudice, the treatment of Indigenous Australians, political movements, multiculturalism and egalitarianism would be replaced with American cultural concerns. Australian children would grow up with the subtle message that heroes were American or English. It may not show up in a balance sheet, but a great deal would be lost. Draft Recommendation 4.2 amounts in my opinion to cultural vandalism.

Fair Use vs Fair Dealing

In recommending fair use over fair dealing the Productivity Commission is advocating a move towards uncertainty. Lawyers will be primary beneficiaries of this change. The PC claims that Fair Use will allow cases to be decided on their merits, but as with most things which require resort to the courts, the merits of one's case will in reality depend on one's ability to finance a court case. At the very least the move to Fair Use will introduce a layer of litigation and inefficiency.

The PC's recommended considerations for fair use are so wide as to amount to a substantial erosion of copyright by stealth. The wording of the report firmly places the obligation to prove infringement upon the author. Most authors don't have the resources to fund legal cases to defend copyright, bearing in mind that a work has only one creator but the number of potential infringers is endless. Surely it is in the best interests of Australian culture to have our writers writing, creating new and innovative stories, as opposed to defending their copyright and the integrity of their work. I became a novelist because I wanted to write stories rather than legal arguments. The proposed reforms may make that an impossibility.

Fundamental justification for the reforms

Fundamentally the Productivity Commission is basing its argument for reform on the assertion that, as Australia is a net importer of IP, then its laws should favour the consumer over rights holders. That's a little like saying that because more Australians drive Toyotas, then the road rules should favour people driving Toyotas. Putting aside for one moment the complete lack of any moral basis to that type argument, its logic is also flawed.

If I bought and ate more food than I produced and sold, how would giving away the food I produced help me? How will that reduce the price of the food I bought? Won't it just mean that less food is produced and I have less money?

Giving up our IP rights (and the removal of parallel importation would do just that) might help overseas publishers, but it's hard to see how it would advantage the Australian consumer in the long term. It would most certainly disadvantage Australian publishers and Australian authors.

We have a tangible local example in New Zealand which went down this path some years ago with disastrous consequences for its industry and no advantage to its consumers. It's one thing to make a mistake without realising what the consequences could be, but with New Zealand as a case study we could not use that defence. Adopting the reforms to copyright advocated by the Productivity Commission could only be a knowing and intentional destruction of the Australian literary and publishing industries.

The report seems to use the reasoning that most writers do not write solely for financial gain to justify the erosion of our rights in favour of some potential (but unsubstantiated) reduction in cost for the consumer. To some extent it's true that writers, like doctors and teachers and perhaps some politicians, are not primarily motivated by money. Using that to say we don't deserve to be financially compensated for our work, our sacrifice and our contribution, however, is as untenable and unfair as saying we should not pay our doctors or teachers.

As a lawyer I have worked in government. I know that draft reports are rarely altered, that doing so creates an inordinate amount of work. But that is nothing in comparison to the years of work and sacrifice it has taken to build the Australian book industry which this report threatens to destroy. And so I urge the PC to make this case an exception to the tradition of draft reports being final reports with less formatting, to heed the reasoned arguments and heartfelt pleas of the publishing industry and authors and to reconsider the recommendations and direction of the Draft Report. Australian readers deserve to be included in literature and to have their own publishing industry. Australian authors and publishers deserve not to be undermined by the laws of their own country.