

Tuesday, 31 May 2016

To whom it should concern,

I have assessed Productivity Commission's Intellectual Property Arrangements Draft Report in my capacity as a commercially published writer and a senior academic researcher. I note that the Productivity Commission's remit is to provide 'independent research' and 'quality advice' to Government on economic matters. I have been unable to determine how the Commission defines such 'research' or ensures research quality.

In my professional view, this report does not meet the required standards of evidence-based research, either at an industry report (grey literature) level and certainly not at an international peer-reviewed level. This report does not appear to have been subject to any systematic external appraisal or expert review.

In particular, the Productivity Commission's report appears to proceed from pre-determined conclusions, is based on several seriously flawed economic assumptions, fails to present a balanced and objective account of the evidence, confuses factors affecting several very disparate industries, misunderstands or oversimplifies key economic principles. Disappointingly, the report appears to have failed to understand the process and requirements of effective public consultation and has dismissed without appropriate consideration evidence provided by industry experts that would have significantly enhanced the quality of their report and the value of their recommendations. Even more worryingly, the authors of this report appears to be unaware of the impact of major changes in key industries in relation to digital technologies. As a result their recommendations are already out-dated and appear to be based on an impression of some industries from ten years ago, rather than addressing the forthcoming issues that already face us today and into the future. This may be because they are recycling old reports for this current work.

Intellectual property is a broad concept that has increasingly been applied in a wide range of industries and fields (extending originally from copyright on literature, to art and music to digital media and on to commercial patents). By choosing to lump all these disparate industries together, the Productivity Commission has considerably increased the difficulty of their task and, as a result, produced a report that is of little meaningful value within the specific requirements of each industry. I suggest that in future they subdivide these issues into more manageable, industry-specific areas in order to achieve more useful and appropriate results.

I will restrict my specific comments (attached) to those sections of the report dealing with books. The report has made three key recommendations in relation to intellectual property on books:

- 1) That copyright on books be reduced from 50 (or 70) years after the author's death to 15-25 years since creation
- 2) That Australian Parallel Import Restrictions (PIR) be removed unilaterally
- 3) That Australia's current legislative 'fair dealing' guidelines for copyright be replaced with the American case-by-case determination of 'fair use'

As is the case for the report as a whole, these specific recommendations are not based on substantive evidence, rely on a very poor and often outdated view of industry practices. In particular, the Commission has failed to demonstrate that its recommendations will result in any economic benefits to the industry itself, or to the community more broadly.

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Specific assessment of key recommendations for the book industry

Longevity of copyright

The recommendation to reduce copyright on books from 50 (or 70) years after the author's death to 15-25 years since creation is flawed for the following reasons:

- 1) The recommendation is based on the **unproven assumption that copyright is excessive** and restrictive. No evidence is provided for this often repeated claim.
- 2) The recommendation **is illegal under international law**. Copyright terms have evolved over centuries and are set firstly by the Berne Convention of 1886 to which Australia and 171 other countries are signatories. The recent TPP trade agreement has extended the terms of copyright protection. Recommending a course of action for government that is clearly illegal (and probably impracticable to enact) casts serious doubts on the Commission's competence.
- 3) The recommendation is based on **a misunderstanding of the function of copyright**. Copyright is not intended exclusively to 'incentivise the creation of new work' but is intended to ensure a fair distribution of rights between creators, publishers and the public – including adequate reward for past work. Stable, long-term (if small) income streams are, in any case, the best way to 'incentivise new work' and existing copyright provides an effective means of providing this while the proposed changes do not.
- 4) The recommendation is based on **a flawed economic model** of how the book industry functions, how authors maximise benefits from their work and the long-term but erratic nature of potential rewards. While most profits from sales are derived within the first few years after creation, authors (unlike publishers) rely on the accumulation of small returns from their growing backlist to support the production of new works. Authors often serve long apprenticeships with success coming late in life (or even after death), boosting sales of earlier titles. E-books and print on demand technology now allow authors to make significant returns from books which were not viable for publishers to keep in print, significantly increasing the productive lifespan of books well beyond 15 years.

I do not think there is much point in debating the many errors associated with this very poorly considered recommendation (I would be happy to provide details of these if required – the sheer volume is horrifying). But a litany of incorrect 'self-evident' facts and emotive arguments in this report does little to inspire confidence in the Commission's work.

In addition, the Commission has not provided any evidence, modelling or data that demonstrate that this recommendation will generate any economic benefits either for the publishing industry itself, or for the broader community. No realistic cost-benefit analysis has been provided either for the existing or proposed model.

The role of Parallel Import Restrictions

The recommendation to unilaterally remove Australian Parallel Import Restrictions (PIR) on books is flawed for the following reasons:

- 1) The Commission **fails to provide any convincing evidence** that Parallel Import Restrictions have caused higher book prices in Australia than in other countries (which also have PIRs in place). The data purportedly provided in evidence is outdated and could be more parsimoniously explained by other factors (such as industry size, distance, market forces etc.). Current data suggests that Australian book prices are now comparable to international markets.
- 2) The recommendation **requires the unilateral, rather than bilateral or multilateral, removal of an alleged trade barrier** for an industry with a strong domestic base and relatively small potential for overseas expansion. Given the size of the other major markets (the UK and the US) which will retain their PIRs, this recommendation places the Australian book industry at a significant disadvantage for no obvious gain.
- 3) The recommendation is **based on a flawed understanding of the economic structure of the book industry** (and indeed creative industries generally). Most creative industries are driven by a demand for constant innovation and new product. The success of these new products is not predictable, meaning that success (and reward) is highly skewed. As a result, economic reward tends to be mediated through intermediary players (such as publishers) who spread the risks associated with the creation of new work. PIRs allow some of the profits from big international successes to be shared by publishers within the local market. Contrary to statements in this report, as a net importer of books, **PIRs allow Australian publishers to access profits that would otherwise remain overseas**. These funds allow local publishers to support the production of new Australian works, increasing their chances of achieving similar success.
- 4) The report **fails to consider objectively the impact of the removal of PIRs on the New Zealand book industry**, claiming that these changes might be due to other factors (whilst simultaneously denying that such factors might be relevant to its own research).
- 5) The report **fails to consider the cultural or broader social and economic costs** of removing PIRs on associated industries (small retailers, printers, designers, editors etc.) and the provision of Australian literature to future generations.

This section of the report is disappointingly prone to emotive language particularly when dismissing arguments in opposition to the Commission's recommendation. The report presents evidence in support of its beliefs without adequate scrutiny – much of which comes from previous heavily criticised reports from either the Commission itself, or similar agencies without any process of review or authentication for their research. As a result, this recommendation appears to be based on a 'house of cards'. Much more rigorous research is required in order to model the true economic impact (positive or negative) of PIRs.

Again, the costs and benefits of this recommendation do not appear to have been reliably modelled. Until a model is developed which accurately reflects the way the publishing industry works, none of the conclusions from this work can be considered reliable or accurate.

The difference between 'fair dealing' and 'fair use'

The recommendation to change Australia's current 'fair dealing' legislative framework for copy-righted material to one based on the US system of 'fair use' suffers from the following problems:

- 1) 'Fair use' must be determined a case-by-case basis through litigation, **massively increasing court costs, reducing certainty and naturally favouring organisations with large legal budgets**. As most authors (and indeed many publishers) have extraordinarily small budgets such a litigious US-style system will naturally favour larger, richer interest groups. Recent evidence from the US (not reviewed by this report) supports this conclusion that decisions do not favour author rights.
- 2) The Commission **does not provide any estimation of the increased costs** associated with such litigation (in comparison with legislation, which might be assumed to provide similar outcomes at a much lower cost).
- 3) The report **dismisses industry concerns** over 'uncertainty' caused by fair use.
- 4) The report **dismisses evidence from the recent changes to Canada's 'fair dealing' to 'fair use'** which has seen a dramatic reduction in local educational publishing and the closure of local offices for international publishers. The report considers that this decline could equally be due to other factors, but does not analyse this conclusion.
- 5) The report **does not appear to be aware of the impact of reduced copyright income on authors**, either through the direct payment of copyright fees or the Education and Public Lending Rights scheme (ELR/PLR). Free copying of materials would significantly reduce library book purchases, particularly for schools. The report does acknowledge some impact on authors but claims that this could be made up with subsidies through government grants. Given the current slashing of the relatively minor government arts grant programs, this suggestion is frankly disingenuous and rather cruel.
- 6) The report simultaneously provides evidence of the way in which 'accepted practice' has shaped alternative legal interpretations of the fair-dealing legislation, and yet still claims that such legislation is inflexible and unable to respond rapidly to technological changes. Frequent examples are given of copyright breaches which are never, in practice, likely to be prosecuted and if they were, would provide courts an opportunity to clarify definitions (as they are proposed to do under fair use).

Technological changes in media in the creative industries have certainly placed the definitions and practices of copyright under strain and there is no doubt that changes need to be made and will constantly need to be reviewed. In practical terms, though, it is difficult to see how fair use is a more efficient system than fair dealing. Unfortunately, the Commission has not objectively assessed the full range of options available, but instead has merely presented arguments in support of a pre-determined position. As such it is impossible to assess the merits of their argument in relation to other alternatives.

CONCLUSION

In conclusion, this report fails to provide a sound analysis of the book publishing industry and the unsubstantiated recommendations are unlikely to achieve any of the goals claimed.