



AUSTRALIAN**PUBLISHERS**ASSOCIATION

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**RESPONSE TO**

**PRODUCTIVITY COMMISSION'S DRAFT REPORT INTO AUSTRALIA'S  
INTELLECTUAL PROPERTY ARRANGEMENTS**

**June 2016**

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## **1. BACKGROUND**

The Australian Publishers Association is pleased to have the opportunity to respond to the Productivity Commission's Draft Report on Australia's Intellectual Property Arrangements.

The APA is the peak industry body for Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has approximately 200 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, schools and academic publishing.

Many of our members have made separate submissions. We support their submissions and the submission of the Australian Booksellers Association, the Australian Society of Authors, the Children's Book Council of Australia, the Australian Literary Agents Association, and the International Publishers Association. We also support the submissions of the Australian Copyright Council and of the Copyright Agency.

## **2. INTRODUCTION**

**Australia is a nation of creators and innovators with a vibrant publishing industry and creative sector that is internationally recognised.**

The Australian publishing industry is the most successful and largest creative industry in Australia. Our publishing industry is internationally recognised with award-winning authors and innovative and best-practice publishing. Australian writers, thanks to our current copyright system, enjoy the right of being published internationally and derive income from territorial rights sales.

In publishing, both trade and educational, copyright is the core principle by which authors and creators are rewarded for the expression of their creative ideas. Australia's copyright laws are designed to encourage creativity, promote development and produce creative capital.

Competition drives the Australian publishing industry. Competition has delivered a diversity of published content to Australian consumers. Competition has driven investment and innovation, including the digital delivery of educational materials and a vibrant literary culture.

Australia's educational publishing industry is world-class and it has pioneered exemplary teaching materials for the sector that are used globally. Educational publishing is an important resource in the knowledge economy of the future and a vital part of Australia's ability to remain globally competitive.

Consumption of books per capita is higher in Australia than in any other country. Time-use surveys suggest that people spend around 3 hours per day consuming copyright material. Australians enjoy reading their own stories by Australian writers and our publishing industry has become more resilient over time. Australians also enjoy unprecedented choice and access to works produced and published globally.

Our books can be purchased from anywhere in the world and readers of Australian writing enjoy the freedom to be able to purchase books from any retailer in a competitive market. As a measure of the competitive market, Australian retail prices for books have fallen in real terms by over a third in the last decade. (Refer to Appendix 1)

The Productivity Commission's Draft Report recommends significant changes to Australia's creative economy which will seriously damage the Australian book industry, risking creativity, authors' incomes, independence, publishing in Australia and the future of our education system. It will have a huge negative impact on readership, literacy, and our continued high standards of innovation. It will mean fewer emerging and new writers will be published in Australia and this will mean a retraction in creativity and innovation which ultimately threatens our future economic growth as a nation.

The government risks seriously damaging an Australian book market that generates \$2bn in revenue per annum with its changes to copyright. It risks job losses, deskilling of a workforce, and the destruction of an efficient and effective publishing sector.

The Australian Publishers Association urges the Productivity Commission to reconsider its position. Our response to the Commission's recommendations is very clear:

- Copyright Matters to us all: It's not just good for authors and publishers. It's good for readers and all of society.
- Territorial Copyright Matters: It's how rights are traded and investments made in authors and their books. Giving it up will be bad for Australia.
- Free is not Fair: Equitable remuneration is, and it works well for Australian education.

### **3. REGISTERING CONCERN WITH THE PRODUCTIVITY COMMISSION'S DRAFT REPORT**

We have serious reservations about the logic, evidence base and integrity of the draft findings and recommendations. The report shows, not only a total ignorance of the creative industries, but an unwillingness to understand those industries, or to be open to their

perspective in any way. The report is inaccurate, partial and deeply damaging to the whole idea of copyright.

It is a contradiction to propose the demolition of intellectual property at the same time that Australia is seeking to position itself now and into the future as a knowledge-based, service-oriented economy. It is contradictory to propose a dismantling of copyright and the market of ideas it creates, on the supposed basis of 'freeing the market'. It is more than paradoxical to then propose that the consumer-facing, market-driven, competitive publishing industry be replaced by the arts equivalent of the dole only to then be treated with the contempt reserved for political rent-seekers.

The starting position of the Productivity Commission is to assume that the current system is so far out of balance - and provides no evidence to support that view. There's no indication of how the balance would be determined. There's no recognition that the balance might be very different across different forms of IP.

The Productivity Commission has almost unilaterally dismissed the evidence of the publishers without providing counter evidence of its own. It has not presented any new information to substantiate its position and it is still trading in out-of-date facts and data.

We understand the Australia Council for the Arts in its submission has raised a crucial point in the way ABS data has been interpreted by the Commission, highlighting the relevance and dated nature of much of the information. In particular, the use of the term 'out of print' is becoming a defunct term in the industry as books are increasingly made for digital formats.

The tenor of the Draft Report is so polemical that it casts doubt on the independence of its authors to make recommendations to Government that are so biased against creators rights.

We note the Commission's preoccupation with devaluing copyright - even to dedicate a chapter in this report called *copy (not) right*. This intemperate disrespect and ideological stance is of grave concern to the creative industries in Australia.

#### **4. RESPONSE TO THE REPORT: COPYRIGHT AND PIRs**

##### **Copyright and competition in the publishing industry**

In our submission to the Harper Review we stated that the publishing industry is a core copyright industry. It is based upon a trade in intellectual property ownership across territories through an international copyright system that recognises and protects the rights and investment of copyright owners and the rights and income of authors.

**It is misleading to construe the copyright of an author or publisher as a restraint on trade.**

This frequent characterisation encourages a simplistic response. A right to exclude in intellectual property can be regarded as being “no different in principle from the right to exclude in physical property...no more a monopoly than is the right to exclude others from using your barn”.<sup>1</sup>

### **Parallel Importation Rules: how they operate**

Parallel importation rules have a very limited application in the market. They only apply to the importation of commercial quantities of a title that a publisher holds the rights to publish in Australia. And even when a publisher holds those rights, in order to retain the right, they must make the title available to the Australian market within a short time of its release anywhere in the world.

### **The Nature of Investment in Publishing**

The book industry exhibits high “blockbuster” effects. A recent study by Jock Given and Marion McCutcheon of entertainment markets in Australia found that the book industry had a very high measure of concentration of product sales - more than in other copyright-based industries.

This feature of the industry makes it absolutely necessary that publishers invest in a portfolio of titles. Any changes to copyright rules that negatively impact on the diversity of titles impacts on the sustainability of the industry as a whole.

To hand over highly successful titles to overseas wholesalers is rewarding free-riding in the Australian market and the anti-competitive behaviour of global corporate behemoths.

## **5. RESPONSE TO DRAFT FINDINGS 4.1 & 4.2 AND DRAFT RECOMMENDATION 4.1**

### ***Draft finding 4.1***

*Australia’s copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.*

### ***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.*

### ***Draft recommendation 4.1***

*The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.*

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<sup>1</sup> Frank H. Easterbrook, ‘Intellectual Property is Still Property’, Harvard Journal of Law and Public Policy, Vol. 13, 1990 p 113

**Copyright matters to us all. It's not just good for authors and publishers. It's good for readers and the whole society.**

The assessment of the Productivity Commission that the Australian IP system has illegitimately 'expanded' without evidence-based policy analysis belies the fact that the Productivity Commission's own report seems to lack a solid evidence base. The finding regarding term of copyright is based on a radically narrow notion of commercial value. This has in turn informed the report's stance on a raft of copyright issues in an nuanced, simplistic way.

To treat any form of protection for copyright as protectionist is false. To treat *fee for use* that rewards our creators for their endeavour as a restriction to access is untenable for a body tasked with seeking ways to augment productivity in the Australian economy.

The Productivity Commission's draft findings around the term of copyright are confusing and misleading. They are findings, not recommendations, and yet phrased as recommendations. We call upon the Commission to clarify the purpose of these findings within the Draft Report.

The Commission's use of cheap rhetoric (including the misleading comparison with geoblocking and copy-not-right) risks diminishing the standing of what should be a well-respected independent public institution.

With the Minister for the Arts, Senator the Hon Mitch Fifield's outright rejection of the Productivity Commission's draft report regarding the term of copyright ultimately calls into question the validity and political agenda of the report.

The Productivity Commission has also failed to acknowledge the effect any change in copyright term will have to Public Lending Right (PLR) and Electronic Lending Right (ELR), both administered by the Department of Communications and the Arts, and how this will have a further impact on the incomes of authors.

The recommendation regarding the term of copyright and unpublished works curiously ignores that this is already part of an amendment bill to the Copyright Act 1968 (Cth). The recommendation cuts across what has already been the subject of much industry and stakeholder consultation with Government. The recommendation is, therefore, redundant.

## **6. RESPONSE TO DRAFT RECOMMENDATION 5.1**

### ***Draft recommendation 5.1***

*The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend*

*the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.*

*The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology*

**Territorial copyright matters; it's how rights are traded and investments made in authors and their books. Giving it up will be bad for Australia.**

For a Government statutory authority to recommend, as an official policy setting, legalising copyright theft and the breaking of territorial licence agreements is unconscionable and fundamentally undermines the operation of the commercial market.

## **7. RESPONSE TO DRAFT RECOMMENDATION 5.2**

### ***Draft recommendation 5.2***

*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.*

Repealing parallel import restrictions will have a major negative impact on Australia's creators and publishers. Australia's vibrant and resilient publishing industry will once again become a "territory" for powerful British and US publishers who will naturally see us as just another 'dumping ground' to distribute books. The culture and substantial reputation that we have built up over the last fifty years will be homogenised. (Refer to Appendix 2)

Australia currently trades in the sale of territorial copyright for titles around the world, and particularly in the English-language markets of the US and UK, where PIRs still operate.

With the removal of PIRs the Australian publishing right will be devalued and investment in Australian works and authors will be less attractive and more risky. It will mean fewer publishing opportunities for emerging, younger and diverse writers as publishers become more risk averse.

As we have stated in previous submissions, removing PIRs will not achieve the government's intended outcomes.

"The current case for the removal of PIRs relies on simplistic economic analysis and arguments, and a more sophisticated analysis demonstrates that the case for appropriate copyright protections, especially those that encourage diversity and the entry of new producers, is strong. The arguments for removal of territorial protections for books is similarly based on a simplistic view of the business of publishing in Australia.



Maximising benefits to society via copyright policy requires balancing social benefits of maximising access to existing copyright works with the social benefits created by future new works that will be encouraged by the returns that copyright protections enable.

A static, simplistic analysis produces a social benefits curve which presumes less copyright protection equals greater benefits to society. A dynamic analysis that incorporates the complex balance between access and availability and creator incentive produces a very different social benefits curve.”<sup>2</sup>

## 8.RESPONSE TO DRAFT RECOMMENDATION 5.3

### **Draft recommendation 5.3**

*The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.*

*The new exception should contain a clause outlining that the objective of the exception is to ensure Australia’s copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.*

*The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:*

- *the effect of the use on the market for the copyright protected work at the time of the use*
- *the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- *the commercial availability of the work at the time of the infringement*
- *the purpose and character of the use, including whether the use is commercial or private use.*

*The Copyright Act should also specify a non–exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission. The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.*

### **Free is not fair. Equitable remuneration is, and it works well for Australian education.**

The Productivity Commission has adopted a myopic view of what constitutes commercial value in creative works. This in turn has informed the basis of the recommendation to adopt a “fair use” exception that would undermine any term of copyright legislation and most

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<sup>2</sup> Appendix 3: Simon Molloy, ‘Territorial copyright for books in Australia: a real-world analysis informed by the theory of impure public goods

controls that creators have over their own work. It constitutes a demolition of copyright in Australia. (Refer to Appendix 4)

For example, to replace our system of “fair dealing” with a US-style “fair use” exception that includes the use of copyright material for education will effectively eliminate statutory licensing fees for the education sector. This will impact on the sustainability of educational publishing in Australia and will lead to:

- less income for creators, including writers, illustrators and designers
- less investment in Australian-specific educational content
- greater legal risks to users of copyright material
- more litigation around copyright
- loss of jobs and skills in educational publishing
- less Australian educational content for Australian students.

## 9. RESPONSE TO DRAFT RECOMMENDATION 15.1

### ***Draft recommendation 15.1***

*All Australian, and State and Territory Governments should implement an open access policy for publicly-funded research. The policy should provide free access through an open access repository for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.*

*The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.*

The APA represents scholarly and journal publishers with a significant stake in the Open Access arena. Their representative APA body, the Scholarly and Journals Committee (SJC), has proactively established collaborative frameworks with key stakeholders in the academic and research ecosystem in Australia, through individual meetings and dedicated discussion forums in recent years. The forums have included senior executives of peak bodies in the Australian research arena, spanning the roles of government funding bodies, universities and research institutes, the academies and academic communities, libraries and institutional repository management. The discussion forums have addressed the united goals of “Enhancing Access to Australian Research” and “Enhancing the Quality and Sustainability of Australian Research”. (Refer to Appendix 5 and 6 for APA Forum Communiqués)

1. It is important not to confuse “Open Access” with “free access”. The Productivity Commission recognises that there are many different publishing and access models for research outputs; and cost recovery models necessarily vary when it comes to quality publication outlets. There is also a much more extensive value proposition for “Open” versus “free” access.

2. It is appreciated that the Productivity Commission draws a distinction between bona fide quality publication outlets and so-called “predatory publishers” (page 409) . The SJC has undertaken extensive work to promote awareness in Australia of the recently launched international campaign called ‘Think.Check.Submit’, designed to help academics take steps to ensure they submit their work to bona fide quality publication outlets: <http://thinkchecksubmit.org/> (Refer to Appendix 7)
3. It is also appreciated that the Productivity Commission highlights the importance of “robust indicators of the quality of manuscripts”; of “‘brand’ for a journal [...] in a given subject area that signals that quality”; and of the “archiving of the manuscripts to preserve findings” (page 409).
4. In terms of embargo periods for Green Open Access publishing models: we would draw attention to the sustainability of quality bona fide publication outlets as identified in the Draft Report; the need to recognise different approaches that are required across different disciplines; and the need to recognise that there is no evidence to suggest that an embargo period of “within 12 months of publication” (page 409) is sustainable.

In the context of ensuring that Australia maintains, and ideally improves, its position on the world stage in terms of the quality and visibility of its research output, it is also important to recognise that the research and research publishing arenas are now truly international. Therefore, it is ill-advised for local policies to be adopted that would hinder Australian research in this respect.

Much work is being undertaken globally, within collaborative frameworks, by all the stakeholders in the scholarly publishing arena, to understand what are sustainable models and sustainable minimum embargo periods in relation to Green Open Access. This continues to be a work in progress, whilst it is widely recognised in the global arena that views around this necessarily vary by subject and within even the broader categories of Scientific, Technical and Medical (STM) disciplines and the Social Sciences and Humanities (SSH).

However, it is true to say that stakeholders in the global arena who are closely across all the considerations around maintaining a workable scholarly publishing ecosystem, understand that an embargo period of less than 12 months is not sustainable for quality bona fide publications in STM; and an embargo period of less than 18 months is not sustainable for SSH, in the context of Green Open Access publishing models.

## 10. CONCLUDING REMARKS

The recommendations in the Productivity Commission's Draft Report on Intellectual Property Arrangements do not make an economic case for the changes to copyright and the removal of parallel import rules. In addition, the Commission has not adequately responded to the concerns we registered in our submission on the Issues Paper about its framework for analysis and its analysis of copyright. We have not reiterated those here, but note that those problems have not been addressed in the Commission's subsequent work.

In publishing, copyright, and in particular territorial copyright, is the core principle by which writers and creators are rewarded for their ideas. Copyright protects the published and unpublished works of authors. It is one half of the human right equation that makes up the cultural balance that good copyright law facilitates. Protecting creators right to their own work is not a form of censorship. It does not preclude access. It is a primitive misunderstanding of copyright that the Productivity Commission should take this approach in the 21st Century.

Australia's copyright law provides certainty to the marketplace. It allows business to invest within an environment of managed risk. The publishing industry is actively collaborating with all stakeholders, including government, to ensure that Australia's copyright laws continue to serve their original purpose. This includes support for better print disability access, improvements to statutory licensing, changes to the treatment of unpublished and unavailable works, and sustainable open access.

The publishing industry, unlike so many other industries, is not dependent on subsidies. The Productivity Commission's report suggests that authors would be better served by increased funding from the Australia Council for the Arts. This uneconomic suggestion, particularly in the current arts funding climate, is disingenuous. Arts funding around the nation is in crisis and grants to individual artists have reduced significantly in the last year.

Patronage is not the solution. Australian authors cannot and nor do they want to rely on patronage to support their writing. Publishers are not dependent on government support and patronage and to recommend such a system as a contemptuous compensation for a ruined copyright regime is completely at odds with economic realities.

## APPENDICES

### Appendix 1

An examination of Australian book prices across comparable countries

<http://www.publishers.asn.au/documents/item/422>

### Appendix 2

Australian Publishers Association Information Deck on Parallel Import Rules

<http://www.publishers.asn.au/documents/item/390>

### Appendix 3

*Territorial copyright for books in Australia: a real-world analysis informed by the theory of impure public goods*, Simon Molloy, Systems Knowledge Concepts Pty Ltd: analysis commissioned for the Australian Publishers Association, March 2016

<http://www.publishers.asn.au/documents/item/386>

### Appendix 4

Australian Publishers Association Fair Use Deck

<http://www.publishers.asn.au/documents/item/418>

### Appendix 5

Communique 2014

<http://www.publishers.asn.au/documents/item/419>

### Appendix 6

Communique 2015

<http://www.publishers.asn.au/documents/item/420>

### Appendix 7

Think.Check.Campaign

<http://www.publishers.asn.au/documents/item/421>