

Att. Productivity Commission

Submission to *Inquiry on Intellectual Property Arrangements – Draft Report*

Introduction

I wish to respond to those sections in the Report that relate to authors and copyright. In this context, it is disappointing to see how little regard has been paid to the comments and criticisms first put to the PC by authors and those who work with them after the initial draft of this Report. The many and legitimate concerns of Australia's literary creators aroused by the earlier draft have been passed over lightly, indeed this Report reads as if they were never made at all.

A fair-minded observer would be unlikely to miss the sense of zealotry that infuses the current version. Rather than taking a rational, evidence-based approach to addressing the matters at hand, there is instead a significant dismissal of the role of copyright in the interests and livelihoods of Australia's authors. Zealotry might be justified if there was anything seriously amiss with Australia's intellectual property arrangements as they relate to authors and books, but the Report produces insufficient facts to support such a position.

The case for the radical changes proposed in this latest Report has not been made with sufficient force to convince. A reading of those parts related to copyright leave a strong impression that the writers of the Report have been exercised to identify a problem which barely exists, if it exists at all, and have then attempted to solve it with a sledgehammer.

Parallel Importation and Copyright

The current status and any future utility to be gained via changes to Australia's Copyright Act are not entirely separate questions to the current status and future utility of changes to the Parallel Importation Regulations covering books.

As a body of laws and practices inviolable under international treaty arrangements, copyright has its own distinct identity and purposes. Exceptions to copyright may be made under national laws, but it is vital to note that the various kinds of exceptions in Anglophone jurisdictions – eg, US 'fair dealing' or Australian 'fair use' – all take as a minimum given that it is someone's actual property at stake or in play when access is sought by someone who is *not* the creator or owner of a given work. Intellectual property is generally regarded a form of private property, inheritable and/or tradeable. This is not stressed, made clear enough or supported in the present Report.

Parallel importation rules of one kind or another meanwhile are also givens around the world in the matter of trading copyright as property. Again, the legal jurisdictions in Anglophone countries that are signatories to the Berne Convention and various trade treaties have enshrined and use these kinds of rules to manage rights activity in their intellectual production. For the PC to suggest that Australia could 'go it alone' in this arena, without breaching conventions and without also reducing the author's or licensees control of their intellectual property, seems entirely misbegotten.

Copyright has long been at base a territorial right, and parallel importation rules are what preserve and allow this territoriality to function. Managing the movement of IP across borders and into other nations, is what allows our authors to advance their – and the Australian national interest – in other

parts of the world as well as in their own country. Territoriality allows for orderly book publishing and effective bookselling markets.

The PC should be reminded that even Amazon respects territorial rules. While single copy purchases may be made by an individual purchaser of an overseas origin book not otherwise licensed to be sold in Australia, such sales do not reduce or over-ride the need for a regulated system that manages the bulk sales and distribution of printed, imported books from one originating /licensing source into another. Geo-blocking exists because territorial copyright exists, and because reciprocal parallel import rules are in place also worldwide (but for New Zealand, an outlier and failed example of what happens when they are removed).

Geo-blocking and DRMs were developed and are in place to limit unfair copying and rights abuses – and there is no significant evidence that these tools negatively impact the Australian book market or lead to inflated prices for books. Whatever their limitations or efficacy, such measures are real, they are in use, and they cannot in any case be eliminated via adjustments to Australia’s intellectual property rules.

To propose ‘findings’ so as to bolster legislative steps aimed at eliminating or disappearing this linked and viable system of copyright/territoriality/ importation rules – or more specifically, Australian creators’ access to it or part in it – in the hope that it will reduce the cost of books to Australian purchasers, would stand as an act of great naïveté, if not of deliberate and ultimately destructive obtuseness.

Fair Use

The tenor of this Report is well-summed up in the following comments which are offered as support for a ‘fair use’ regime, as opposed to Australia’s ‘fair dealing’ model:

One key difference between fair dealing and fair use is the flexibility the latter offers new and innovative copyright-dependent industries, provided those uses meet the fairness factors. Courts can determine if new uses of copyright-protected material are fair, avoiding the need for industries to wait for legislative change.

The writers go on to reference the development of search engines such as Google’s under a fair use exception regime. Authors take exception themselves at this assertion, as much of Google’s ‘innovation’ has depended on taking other people’s intellectual property as their own. The prime example being the Google Books digitisation project, entailing the wholesale electronic copying of millions of books whose owners were not asked permission - that is, unauthorised copying of a kind which copyright law was actually invented to prevent or sanction. ‘Fair use’ was thus extended in reach and purpose by legal judgement to override the interests of millions of creators. This is the vaunted US approach in action.

Authors around the world have seen their own commercial opportunities reduced or restrained as a result of such rights-infringing copying. I had personal experience of this kind of incursion, when a digitised file of one of my own in-copyright books was created by Google without my permission, and made available to the HathiTrust consortium of universities in the US, who then termed it an ‘orphan’ and readied to place online. This action was suspended when challenged legally, but it is an important point that the enterprise was progressed on a ‘fair use’ and ‘innovation’ basis, and done so as if my rights had been entirely extinguished. The cost of the defence in this instance could not be met by me, but was taken on by the US Authors Guild – another significant point.

There are hidden and not so hidden costs to a litigation-based determination of 'fairness'. And it is plain fact that most Australian authors do not and will not have the money to defend their rights in the courts in egregious examples of theft such as the above.

Another problem with the techno-romance that lurks behind the boosting of 'fair use' in this Report is that the innovation being referenced is no longer innovation at all, but a matter of technological fact now more than twenty years old. In many respects the great age of online technological breakthroughs that led to the creation and distribution of IP in digital forms and online has already passed. Australia was never a party to that innovation, and it is only in innocence that we can imagine Australia replicating the venture capital-driven technological achievements of Silicon Valley at this late stage, and even more far-fetched to believe that it can be done by adjusting our Copyright Act or PIRs.

Authors economics

To the extent that this Report takes into consideration the economics of literary creators, it asks or implies that they will or can somehow arrange their creative activity and livelihoods around the 'price to the customer' of their books. Authorial economics are a fragile entity. Authors are by and large sole trader/freelancers who are in essence only ever working as contractors on a return-on-personal-risk basis. Their risk – risk being also part of the personal commitment and investment they make in their own creativity – includes the time and labour expended to produce a work. They take this risk in anticipation of covering their costs and perhaps finishing up ahead financially from sales whose achievement is largely outside their control.

Authors are artisans, at the same time as they are workers typical of any vulnerable or low-paid industry which has wholesale and distributive intermediaries (primary producers and book authors have much in common). Authors are in essence paid fees. They cannot and do not bid up costs in any way significant enough to impact the end user, the book purchaser. They are more often as not paid a dollar advance against future earnings, which is conceived of as a kind of 'investment cost' by the publisher or entity seeking to license their work for publication and sale. They do not set prices.

The chance to boost otherwise low income via the sale of rights through a copyright-integrated territorial system is an important additional possibility to our authors income stream. With the growth of a strong author base, we have seen improved export sales for general as well as educational books, both finished books as well as rights alone. This has been one of the major achievements of the Australian book industry over the past fifty years. This achievement does not feature in the PC's Report, and nor does it anticipate any negative outcomes for Australia's literary workers

The cost and price of books

Australian authors are rightly worried about the proposed changes to Australia's so-called intellectual property regime in these areas. Deflecting to the cost of imported books ignores questions of local origination and our author's rights to control and license and benefit from their work in telling Australian stories. They are additionally frustrated by a Report that attacks an imagined problem in book prices with blunt instruments that are inappropriate to the issue the PC believes it has identified, and that if acted upon will rebound on authors themselves and their chances for further publication and remuneration.

The cost of imported books is far from the whole story of the Australian book industry - roughly half of this \$2 billion dollar pa local industry's revenue comes from Australian-origin books. undermine the publishers, printers, booksellers and writers who comprise this industry. Nevertheless the unfettered importation of bulk book titles into this country will have a profound effect on the viability of the branch offices of the large multinational publishers, who have built their own local lists and dramatically multiplied the number of Australian books and authors in this market.

Without publisher investment in authors and rights trading, there will be a significant shrinking in local activity – fewer local books contracted, less income to their authors, at the same time as price to the customer for local and imported books will either be unmoved or likely increase due to reduced competition.

There is presently a great deal of healthy activity in the Australian book market, revenues are up, and book prices are lower by an overall minimum 15% than they were a decade ago. Competition between publishers and between booksellers is evident in the Australian physical book market, just as it is evident among online sellers, local and overseas, in their efforts to capture a greater share of book sales. It is this competition that has led to a drop in prices over time. It has not waited for any tinkering with copyright law or PIRs.

An entirely demand-side/price methodology is inappropriate as a way of encouraging cultural activity or re-engineering markets for efficiency. In the creation and exchange of cultural goods such as books, the PC seems to have settled on a blunt instrument from a tired economic toolkit that contemporary thinking is modifying or moving away from globally. At the same time, Australia's writers do not seek protectionism or subsidies, but a rational and economically viable approach to intellectual property production and its creators. In all the respects that matter, they already have one and it is functioning well.

The PC should take very seriously the likelihood that in removing the PIRs and thus eliminating Australia as a separate copyright territory, our authors could then only effectively license their books through overseas publishers for sale back into their country. This is not only insulting to their and the nation's sense of independence, it will also carry the very real risk of enabling the eventual dumping here of Australian authors' books otherwise separately licensed for other territories – either as remainders or without a regular royalty.

Naïve changes to exceptions to the Act and the PIRs will, on the evidence of the New Zealand and Canadian examples, be almost certainly counterproductive to our broader national cultural and economic interests. At the prospect that such changes are even being contemplated, the UK and US publishers with whom I worked for many years today simply laugh in disbelief – when they are not anticipating the future boost to their own activity and profits that will flow as a result.

Finally, I'd like to suggest that the next useful task for the PC to undertake before it passes on final advice to government, is to seriously counsel itself to 'first, do no harm'.

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