

Submission on Intellectual Property Arrangements

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My submission is in three parts. In Part 1, I consider the issue of copyright. In Part 2, my focus is territorial copyright and the practice of securely holding territorial copyright.

In Part 3, I put on my poet hat and consider the impacts on poets of fair use and the ways in which poets will be even worse off if fair use comes in and the Copyright Agency is no longer able to pay as much to writers for the copying of their works. As I argue, writers already live on low income, I ask why this should be further reduced.

Part 1

The contradictions in government policy on copyright

Do the PIR recommendations fit with the terms of the AUSFTA?

I am writing this section based on a solid background in intellectual property, in particular how it has played out in Free Trade Agreements with reference to the Australia United States Free Trade Agreement (AUSFTA) which the Howard government entered into in 2004. Among the items that were included in the negotiation were changes to Australia's copyright act so that it would harmonise with copyright laws in the USA. Under the AUSFTA there is an extension of copyright terms from 20 years to the life of the author plus 70 years. The upshot of this is that Australian owners of copyright will continue to receive payments from their works and copyright holders who live outside Australia will also continue to receive payments for their copyrighted works. Given the amount of time taken to produce creative works and the low immediate returns for writers, this long period is more than justified. Unlike the mining industry, writers and publishers do not receive massive subsidies ahead of their investments.

This raises some interesting contradictions between what was foisted on to us as copyright holders in 2004 and the various recommendations of the recently released [Productivity Commission report which states:](#)

Overly long copyright terms impose costs on the community. Empirical work focussing on Australia's extension of copyright protection from life plus 50 years to life plus 70 years (a requirement introduced as part of the Australia–United States Free Trade Agreement) estimated that an additional 20 years protection would result in net transfers from Australian consumers to foreign rights holders of around \$88 million per year. But these are likely to be a fraction of the full costs of excessive copyright protection. The retrospective application of term extension exacerbates the cost to the community, providing windfall gains to

copyright holders with no corresponding benefit. (p. 31)

Link: <http://www.pc.gov.au/inquiries/current/intellectual-property/draft/intellectual-property-draft.pdf>

The report has recommended copyright reform to supposedly protect consumers - including tougher laws about patenting, free import of books and "fair use" copyright provisions. The "fair use" provision will mean that Australian creators are far less likely to receive the income from copying that the Copyright Agency currently collects on authors and publishers behalf. This is one the most important income streams for many writers and a significant one for small publishers also. The proposed "fair use" provisions will gouge author incomes which are already far too low as shown by research released last year.

Importantly, as *The SMH's* economics editor Peter Martin observed on 29 April 2016, when it comes to copyright reform, our hands are tied by trade agreements. He writes:

"What [the Productivity Commission] wanted to do was to wind back Australia's 120 years plus copyright terms. It reckons 15 to 25 years is all that's needed. It says the average commercial life of a book is 1.4 to 5 years. Beyond that, the harm copyright does by locking things up outweighs any conceivable benefit to the authors in extra income. But it couldn't. Australia's trade agreement with the US prevents Australia backsliding, as do the new agreements with Korea and Singapore and the upcoming Trans-Pacific Partnership. It says the Australian government shouldn't have made the commitments on copyright without first assessing the costs and benefits. It wants Australia to try and unpick those deals, something it acknowledges is next to impossible."

Link:

<http://www.smh.com.au/federal-politics/political-opinion/the-productivity-commissions-hands-were-tied-on-copyright-20160429-goi0lx.html>

So the Productivity Commission recommends to unpick free trade agreements which it itself concedes will be next to impossible. Why then base a report on something that seems unlikely to happen? This so-called unpicking would unpick the income streams of writers significantly, a group already struggling to be adequately paid for their originality and work.

It is also very interesting that the Productivity Commission thinks an average book - whatever that is - has a commercial life of 1.4 to 5 years. But the books that make big or at least decent money for authors and publishers are not your average books, though they may look like that for 20 to 50 years. Think of J.R.R. Tolkien's *Lord of the Rings*, first published 1954-1955 as three books because of post-war paper shortages. Book sales back then were nowhere near the 150 million sales they are now. The book really took off in the 1970s when it became a cult book for young alternative readers. It then went into abeyance in the early 80s and took off again when the three movies were released in the early 2000s. They were: *The Fellowship of the Ring* (2001), *The Two Towers* (2002) and *The*

Return of the King (2003). The Harry Potter books also rode the wave of Tolkien, so that influenced sales as well.

Australian authors whose books go on to school reading lists often wait a decade or two before they are rediscovered and then go on to be read in ways the author might not have imagined when the book was first published. A few other non-average books hit the Zeitgeist and take off soon after publication. Every publisher or bookseller can give examples of books that fall at both ends of this spectrum.

So all these writers should be deprived of ongoing income because some government report deems that 5 years is long enough and copyright should be unlocked. Imagine working your way up in a job and discovering that after 5 years you are not only disposable, but also you can't expect to gain any income based on the original and distinctive work you did in those 5 years!

If you want to know more about why I think free trade and the Productivity Commission's report are a bad deal for Australian writers (and Australians in general) read my articles.

<<http://www.theguardian.com/commentisfree/2016/may/04/the-looming-threat-to-our-book-industry-is-bad-for-authors-publishers-but-mostly-for-you>>

<https://www.academia.edu/18841883/Why_the_Australia-United_States_Free_Trade_Agreement_is_Bad_for_Us>.

Part 2: The practice of territorial copyright from the point of view of a small independent publisher that has traded international rights for more than two decades

Spinifex Press is a small independent feminist press. We turn 25 in 2016. We began trading international rights in 1991, the same year Renate Klein and I co-founded the press. We have bought and sold territorial copyright or co-produced books with English-language publishers in USA, Canada, UK, India, New Zealand, South Africa, Botswana, Kenya, Turkey, Ireland. We also retain world rights on many titles and export these internationally. And we sell translation rights and have sold into 17 language markets to date.

Where secure territorial copyright comes into play is in the co-producing, selling or buying of English language rights. Spinifex has been assiduous in publishing within the required dates (30/90 rule from 1991 and 14/14 rule since 2014) in order to secure firm territorial rights.

When we travel to international book fairs (we have attended the Frankfurt Book Fair 22 times in 25 years and have also attended fairs in Japan, India, Italy, USA, and the Netherlands) and we explain to publishers the territorial copyright laws in Australia, many are incredulous and puzzled as to why we would not have completely secure territorial copyright laws as do the governments of USA and UK. It was difficult enough when the 30/90 rule was in place but it was mostly workable because there was a long enough lead time between the

overseas publication date and the Australian. Even so, in many cases we released our edition of the book before the overseas edition was published. With the shift to the 14/14 day rule, this has become even more difficult. Large multinational publishers can easily arrange either fast shipment of books or print runs of a viable size in multiple territories. They also have the luxury of scheduling book releases in multiple markets simultaneously. Small and independent publishers have no such luxuries.

Even with these rules there are many occasions on which they are breached. For example, a Canadian edition of my own book *Bibliodiversity: A Manifesto for Independent Publishing* is advertised in Australia on an online bookseller's website instead of the locally produced publication which was released five months ahead of the Canadian edition. A novel, *Haifa Fragments* by khulud khamis for which we sold rights to the UK, and we published it three months ahead of the UK publisher, continues to be advertised by Australian retailers. An Indian edition of *Making Peace with the Earth* by Vandana Shiva which we published a month ahead of the Indian release is advertised by Australian retailers and sells at a price no Australian publisher could produce a book for. Yet another novel *A Bit of Difference* by Sefi Atta published by us a month ahead of the US publisher, it the US edition that is advertised by Australian retailers.

In all these cases the overseas publisher is aware of the Australian law and that by publishing ahead of them we have secured territorial rights. However, booksellers frequently flaunt these rules and claim that they are ordering for one customer. International distributors do not respect these laws or hold to them. Large online retailers totally ignore the rules.

If we were a multinational we would be able to afford the legal costs to take legal action. As a small independent this is not possible. The large retail and distribution outfits probably think that it doesn't make much difference, but every lost sale is a nail in the coffin of a small independent press.

I have written submissions in 2014, 2015 and now again in 2016. It doesn't matter how much innovation we do as a press (and Spinifex has been ahead of the game in technological and business innovation), the persistence of these rules is problematic enough. For them to be further dismantled and the market left open as a free-for-all will have the same result as a rugby scrum or a street riot. Only the strongest will make it and the odd fleet of foot one who is not noticed. We have been fleet of foot, but exhaustion is setting in.

Part 3: The incomes of poets and all writers are at risk

As noted in Part 1, research into the incomes of writers shows that few earn sufficient to have a taxable income. Poets are particularly likely to earn very little. In a good year expect no more than \$5000.

I append the following poem, written in 2015 and first published on the Copyright Agency website in September 2015. I am pleased to report that I kept my ABN, but to be questioned in the way that occurred, was not only galling but

also disrespectful. It's just as well I was able to keep my ABN or I'd have had to have acquired a new one when I received a grant from the Australia Council for my next book, a grant I received after many years of writing experience. Writing for many of us is not a career that begins at an early age. It takes time and dedication.

The 'fair use' provisions raised in the Productivity Commission Report would devalue the work of writers. It would amount to theft of intellectual property. In common parlance, it is standard to be paid for work, to be paid for hiring out of property (as in photocopying in schools and universities), and to be paid for leasing (as in PLR and ELR arrangements through public and educational libraries. Why would writers be among the few not to be paid for these. As you'll see in the poem below, Copyright Agency is a major contributor to my income.

Business plan for poetry

it's 4 am and I'm working on my business plan for poetry
it's not looking too good

I received a phone call from the government
conducting an entitlement review of my business
they say I have to have a reasonable expectation of profit

but the application for funding I spent two months preparing was cancelled
because of new government policies
the results of another application won't be known before the evidence is due

the prizes I've entered my book for haven't come to anything yet
shortlistings for prizes don't pay except in short-lived glory
two years ago it cost me more to travel to the ceremony to find out if I won
than I earn in a year of sending out poems

festivals are a great opportunity for making that business plan work
but the reading at the festival is 50 kilometres from the central venue
only a handful of people turn up to this early morning session
book sales can be counted on the fingers of one hand

the next poem I write has to make a profit
or else the \$100 fee will have all the tax taken out
I'll have to live on \$51.50

I worry I haven't included all my earnings in my tax
the reading I did where they gave me \$30 in cash
I needed it to pay my friend who lent me \$48.50

I've written a screenplay based on my novel
I'll present this to film producers
does this mean I have a reasonable expectation of profit?

I have a half-written novel

but no publisher will give money for a novel in that state
 I need money to live on to finish the novel
 the application for funding will probably be cancelled

pull out the university position
 they call me an Adjunct Professor
 I teach writing whenever I can
 they don't pay me between classes
 more glory for me

they say teaching is employment
 not in the business plan
 I say
it's only one day
do you call that employment?
 they say
how do you get paid?
I send an invoice with my ABN

a pity it can't be in my business plan
 it's a great marketing strategy
 students buy books written by their professors
 more often they download them for free from some illegal site

this poem has to make a profit and the next one too
 or else my business plan will come to nought

the training for poets is long and arduous
 thirty years of training and I still have so much more to learn

residencies to the rescue
 they provide enough money to live on
 but it's lower than that received by most apprentices in their first year
 the experience is everything
 you'll have to live on that for your next thirty years of poetry

the biggest retailer in the country is advertising my latest book
 at double the price set by my publisher
 no one in their right mind will spend \$39.95
 for a book whose RRP is \$19.95

the magazines I've been sending my poems to
 the good ones who pay \$100 a poem
 and the not so good who pay \$20 or nothing at all
 those magazines have been defunded

part of my marketing plan is to make myself as visible as possible
 I'll post this poem on my poetry blog
 which doesn't pay at all but does have an international audience

downside is I won't be able to enter this poem in any competition
if it's been on my blog

royalty statements they say

do you get paid royalties?

yes I say

I have twenty books

some still earn me money others don't

one year I received 16 cents on my first book from a big publisher

and I had to share that with the co-editor

my poetry books earn me more

this poem has to make a profit

get onto courses

be lent out by librarians

be copied by schools like that short story I wrote

that keeps on earning me a living

just in time galloping over the hill comes Copyright Agency

and their distributions to writers

a lottery for writers

don't get me wrong like all lotteries they can provide serious money

but it's not my poetry earning income

it's the photos I took a decade ago

can I claim photos as a sideline to my poetry business?

I forgot to mention the forthcoming translations of my latest book

I have contracts but receiving the money takes longer

I've known writers with contracts and the money never arrives

if the government decides I have no reasonable expectation of gain

I'll have to declare that poetry is my hobby

and they'll take away my ABN

I ask the government whether they have applied the same test to Amazon

they've been in business for many years

they've destroyed the bookshops who used to order my books

and they still haven't made a meaningful profit

seems like the government is after poets

whose business looks shaky

instead of writing profitable poems

I'm having to sit up at 4 am preparing a business plan

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<http://copyright.com.au/wp-content/uploads/2015/09/Business-plan-for-poetry.pdf>