

Submission to the Draft Productivity Commission Report on Intellectual Property Arrangements

Garth Nix

Background

I am an Australian author of more than thirty books, published all over the world. I have also been a bookseller, a book sales representative, an editor and a literary agent. I have worked in the book business for more than twenty-five years, and in that time have been involved in nearly every aspect of it, on both a national and international level.

What follows is based upon this practical, real, in-depth and ongoing experience of intellectual property business.

Introduction

I am not going to comment on patents or other aspects of this Report, but confine myself to those matters which lie in the sphere of my practical knowledge and experience of writing and book publishing business, in particular the following:

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.

I would also have addressed the following, but as it appears to have been included only as a “dead cat on the table”, a ploy to misdirect attention from other parts of the report, I will simply say that any *reasonable* person would conclude that it demonstrates the ideological tenor of the report (an evident dislike for the basic concept of copyright) and the Commission’s apparent disdain for Australian creators, who don’t deserve to benefit from their work for very long.

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.

I am also mostly confining myself to the business aspects, rather than the cultural concerns, which have been addressed very comprehensively by many other authors who have made submissions or public statements. This is not because I think they are less important than the business ones, they are perhaps even more important, but others have commented very eloquently and I support what has been said by Jackie French, Richard Flanagan, Thomas Kenneally and many others authors and publishers.

Parallel Importation

I have made many submissions over the last two decades on this subject, all are part of the public record of various enquiries and reports. This particular report has taken a neoliberal ideological position and then cherry-picked old data and made selective quotes to support that position. It has also neglected the realities of international publishing as opposed to economist's theories on how they think it ought to work.

I also note that the Productivity Commission has presented no modelling for what would occur to the Australian publishing, bookselling and printing industries under its proposed changes, and no specific case studies.

Theory, theory everywhere, and no common sense in sight.

So rather than rehash all my previous submissions and those of almost everybody else worldwide who actually works in the book business, I am going to present some very real and likely case studies of what would occur if the Australian copyright territory is surrendered, which is what removing parallel importation actually means.

This is What Removing Parallel Importation Means for Australia

Case Study One

Author Worse Off, Australian Publisher Destroyed

Australian author and former PM Malcolm Turnbull writes his memoir *It's My Lodge and I'm Staying In It*. The primary market is, of course, Australia, but there is interest overseas. The PM chooses an independent Australian publisher and English-language rights are sold in the US and UK.

Publication is simultaneous. But on publication day, the Australian paperback, reasonably priced at say \$18.99, is undercut by both the US and UK editions which have been intentionally sold in at a lower price to kill the Australian edition. Let's say it's \$16.99 and those editions sit next to the Australian one in the bookstores.

It turns out that both overseas publishers, also correctly presuming Australia will be the primary market, have sold 90% of their print runs to a wholesaler who specialises in sourcing overseas editions of books likely to do well in Australia. They've sold to a wholesaler to avoid any possibility of being contractually restrained, in case Turnbull has tried to prevent them selling their books in Australia through this means (which doesn't and can't work, since third party or onward distributors and resellers are not party to the author-publisher contract).

As it is a special sale, ex-PM Turnbull gets a price-received royalty, 10% of the price it was sold for to the wholesaler, which was at a 60% discount from the cover price, so Turnbull gets 0.67c rather than the \$1.89 (10%) or perhaps higher royalty he might have achieved from the Australian edition.

The US and UK editions sell say 5,000 copies each in Australia, totally gutting the Australian edition which sells 1200 copies. Author Turnbull ends up receiving only \$8968 rather than the \$21,168 he would have made from an Australian editions selling 11,200 copies. Luckily he has his parliamentary superannuation, not to mention a few other investments here and there! Which most authors, of course, do not.

The US and UK publishers make a decent buck out of a territory not their own, but the Australian publisher loses a lot of money and cannot make it up by exporting because the US and the UK sensibly not do not allow parallel importation. So the Australian publisher probably goes out of business, because **all the most successful books will have US or UK editions which can be sold freely in Australia while keeping their own territories secure.**

Case Study Two

Let's make opportunities for overseas businesses at our expense!

A clever businessperson in let's say Singapore (or Pakistan, or Kenya, or Iceland or anywhere where there is an English-speaking audience) buys English-language rights for their own small country. They don't have to pay much, because it's a small country. American agents in particular are happy to sell because these rights normally go unsold, and it won't affect their home market because those books will not be able to come into the USA.

The smart businessperson then prints and sells books (and ebooks) specifically for Australia, not in the country where they have brought the English-language rights. If they've managed to secure say 200 top-selling titles this would be a great platform to totally undercut Australian publishers. It could even be a largely virtual business, with very small overheads.

Even worse, this would also be a viable business for a US or UK publisher, to buy rights with the aim of selling most if not all of a print run in Australia rather than their own country. In the old days when there was little or no Australian publishing, UK publishers used to count on Australia selling 20-30% of their print run, or as a place to dump overstocks and make up losses in the UK. Even now, this still occurs, but is lessening as Australian authors and publishers manage to keep Australian rights separate.

If parallel importation comes in, there is no Australian territory to keep separate, and both US and UK publishers would find Australia an even more useful market to bolster their print runs once more and to dump excess stock, again without any fear of reciprocation.

Case Study Three

The pop-up store kills the bookshops

With the ability to source bulk books from anywhere, it would be possible to find or even do deals to obtain bulk copies of say the top 250 best-selling books in Australia. US and UK publishers or particularly wholesalers won't care who they're selling to if the price is right, and publishers who hold English-language rights for small territories as in Case Study Two would welcome such offers.

So the smart businessperson again sources multiple thousands of copies of the bestselling books from anywhere in the world, finds a cheap temporary location close to an existing successful bookstore that draws an audience, and opens a store in October with low-paid, entirely casual staff and closes it after Christmas with a close-out sale.

Bookshops make sometimes as much as 50% of their sales in the three months up to Christmas. But not if there's a pop-up store with incredibly low overheads six shops along selling all the most popular books at a lower price.

Bye, bye long-term Australian bookshop.

Case Study Four

Let's Give Australia to Amazon

Amazon is the most economically powerful retailer in the world. It has unparalleled power to extract the best possible deals for itself from publishers, and it is also well-known that it sells books as loss leaders for its other products.

Amazon already has a significant market share selling books to Australians. In the new world of surrendered Australian copyright, we'd make it **even easier for Amazon**.

With its economic power and unfettered ability to buy and sell whichever editions it wants, and its readiness to lose money on book sales, Amazon could sell any book in Australia at a price no Australian bookseller can ever match. Eventually, it could easily gain an effective monopoly.

Amazon is also expanding into bricks and mortar stores and parallel importation would make Australia absolutely perfect for Amazon to move in here, supplying US editions bought with its great market strength. It could establish major bookstores in each city that sell **only** US editions (including all the most successful books by Australian authors which will usually have US editions), buying no books locally, printing no books locally and likely also repatriating all its revenue and paying no tax.

Case Study Five

Every book is a unique product and represents an incredibly diverse range of possibility. Anything can happen with a book, it may become a film, a play, a TV series, a computer game, a radio show, it may suddenly resonate with the zeitgeist, it might be adopted by celebrities, a copy might stop a bullet and become famous, be seen under the arm of a President's child -- there are so many possibilities for a book to work and sell a lot of copies.

But the sad fact is most books **do not sell very many copies** and do not make much money for anyone. While it is not really possible to talk about average books (despite the Productivity Commission's apparent desire to reduce them all to being identical cans of beans) it is a rule of thumb most years that of a publisher's list, around five out of ten books will lose some money, four will break even, and one will make a small profit. If that proportion basically works, a publisher can stay in business.

Bestsellers are very visible, but they are actually relatively unusual, perhaps one in every five hundred books published by any given company. And a publishing house might go for fifty years (or forever) and never have a really big bestseller. The phenomenal Harry Potters, Hunger Games etc are not usual business, they are incredibly lucky and rare strikes.

Publishing is not a lucrative business. The typical annual return on investment for a publishing company is less than 10 per cent. This relatively paltry return is only achieved because a very few books make up for the money lost on the others.

Publishers need the sellers and the bestsellers to be able to continue publishing, and revenue from bestsellers (if there are any) is nearly always ploughed back into more publishing.

So let's take a look at an Australian publisher that publishes a surprise bestseller. A young Australian author writes a brilliant but difficult novel and submits to one of the few, struggling but still just holding on Australian publishers. The Australian publisher takes a chance on it, as does a US publisher, though no UK publisher will come up to scratch. The Australian publisher does a great job of marketing in the pre-publication months. Word starts to spread. The film rights are sold. Famous authors start talking about it. A UK publisher suddenly makes a big offer, those rights are sold.

And come publication day, we're back to Case Study One. The US and UK flood the Australian market with their editions. The Australian publisher, which has found and invested in a potential bestseller, is killed by its own good efforts in marketing the book. Bereft of the income it needs from that one bestseller to support the other non-profitable books, it goes out of business.

The young Australian author, one of the 0.001% who has a big international hit, seems OK. But she has no Australian edition of her work, and is **no longer published in her own country**. Her best friend who has written a great novel now has no Australian publishers to send it to, and since American and British editors and agents say it is “too Australian”, he can find no publisher at all. He self-publishes an ebook, but it is lost among the hundreds of thousands of other self-published books.

We all lose out.

Conclusion

Copyright is an international system and foundation of commerce, and Australia cannot and should not make changes as if we were somehow a separate test tube for neoliberal experiments free of real consequences.

Parallel importation restrictions, which are an inherent part of a copyright territory, should not be abolished. The sole supposed benefit put forward is that books will be cheaper, but that is debateable at best, given up-to-date price data, the long-term prognosis for the Australian dollar and the evidence from New Zealand.

Even if it were true, it ignores the **cost** of such a change. A cost in jobs and opportunities and our unique Australian culture.

Following: An Open Letter to the PM. This forms part of my submission.

Appendix One

An Open Letter to the Prime Minister, Malcolm Turnbull

1st June 2016

Dear Prime Minister (you're also my Local Member)

I am writing in defence of something your government apparently now plans to give away, something that up until the point you surrender it, has been an inalienable right of every Australian citizen who has written or will write a book: to be published in our own country.

The Productivity Commission in its April 2016 draft report into Intellectual Property Arrangements has recommending allowing the “parallel importation” of books, framing this suggestion in a way that suggests it is simply a market adjustment that will allow Australian consumers access to more books at a cheaper price.

It is not a simple market adjustment. It is not a small change. It is a very big one, with enormous ramifications and unintended consequences that have not been properly considered or addressed in the draft report.

First of all, there is little evidence to support the contention that books would become cheaper, particularly if we look at our neighbours in New Zealand, who surrendered their copyright territory in 1998. In any case, individual Australians right now can buy books online from wherever they want, and they do. If it is only a matter of price they can already buy from wherever is cheapest. Though if price really is the only concern then removing the GST on books would be a useful and dare I say, innovative move.

The Productivity Commission's recommendation for this fundamental change to Australian copyright looks only at the supposed price benefit on the retail side, totally ignoring the enormous **cost** of the change. It appears to have emerged from a purely ideological view that demonstrates surprising ignorance about international copyright and the reality of how publishing actually works worldwide.

The USA and the UK are by far the biggest English-language publishing countries in the world, and they are **maintaining their copyright territories**, there is no possibility of them opening up. No Australian-published book can be exported to either the USA or the UK, while under the proposed introduction of parallel importation, any American or British edition could come into Australia, even if there is already an Australian-published edition of that same book.

Allowing parallel importation would not make Australia a true open market for books as it is sometimes described (and it seems fondly imagined in the Productivity Commission's ideological corridors) because our market is only a

small segment of a much larger market dominated by the US and UK, which will remain closed.

The only way for an Australian author to ensure their Australian editions would not be undercut by dumped American, British or other English-language editions (out of any country where English-language publishing is conducted) would be to not sell those rights. Yes, international success could only come at the cost of eroding or even destroying success in Australia. This is an enormous disadvantage when compared with American or British authors.

It defies common sense that our government would put Australian creators at such a disadvantage with **no reciprocity whatsoever**. The proposal to allow parallel importation is in effect a one-way Free Trade deal where Australia is the only party actually giving anything away, the only country opening up. Would this kind of unilateral market surrender be done for anything else we produce or make here?

When I have discussed the potential change to Australian copyright with my publishers in New York or London, their immediate reaction has been one of stunned disbelief that our government could be so foolish. Unfortunately this has always been quickly followed by the calculation of how many more of their own US or British editions of my books they could sell in Australia, sales that would erode those of my independent, Australian-owned publisher, Allen & Unwin.

After more than twenty-five years of hard work and good fortune, I am well-established in overseas markets. But allowing parallel importation would put me in the position of competing with myself. The likely outcome, due to my American and British publishers having the security of their own territorial copyright as well as greater economies of scale, is that my Australian-published editions would be unable to compete. I could well end up as an Australian author who is not published in his own country.

But much more importantly, what of the **new Australian writer**? With Australian publishers staked down in the mud on the sidelines of the playing field where British and American publishers are allowed to run free, where would new Australian authors get their start?

If parallel importation is introduced, Australian publishers, forbidden to compete on the world stage because every significant market is closed to their editions and will remain so, would have to compete here at home against the might of the British and American publishing industries (totally secure in **their** home territories). Australian publishers would consequently have reduced revenues, lower profit and be far less able to invest in new authors.

Beginning authors would have to look overseas for publication. But what if they write something distinctly Australian that isn't attractive in London or New York? Those books, and whatever cultural, economic or intellectual impact they might have had for Australia and Australians would likely never be published at

all, or at best face the great struggle to be noticed amid the enormous flood of the self-published.

You're an author yourself, Prime Minister. Would your own *Spycatcher Trial* have been published if there were no Australian publisher with the economic resources to publish it? What would have happened if Peter Wright had to submit *Spycatcher* to publishers in London? It would never have seen the light of day. Without that book, and the subsequent trial, perhaps your own brilliant career would never have got started and I would not be writing to you as Prime Minister, or even as the Member for Wentworth.

All the most successful and productive nations in the world are maintaining their copyright territories, not giving them away. These countries recognise the value of creating intellectual property, not just consuming IP created elsewhere.

I hope and trust that you will personally intervene to preserve Australian copyright and disallow the innocuous-sounding "parallel importation" which is in fact the unilateral surrender of our Australian copyright territory: an intangible but nevertheless very real and enormously valuable region of culture, commerce, innovation and potential.

Yours sincerely

Garth Nix