



ASA Response to Productivity Commission's *Intellectual Property Arrangements Draft Report*

EXECUTIVE SUMMARY

The ASA opposes the Productivity Commission's draft recommendations relating to:

- the introduction of 'fair use'
- the repealing of parallel importation rules and
- lobbying for a reduction of the term of copyright.

These recommendations reflect a crippling erosion of the copyright position of creators and would be disastrous for our members; Australian writers and illustrators.

Our response to the Productivity Commission's *Intellectual Property Arrangements Draft Report* can be summarised:

- Copyright is the lynchpin of the creative economy. The Commission fails to adequately consider the broad economic, social and cultural impact of its draft recommendations.
- A radical reduction in copyright term would have a devastating effect on creators' long term income and, therefore, incentivisation of creation.
- Parallel importation rules support the Australian publishing industry and the creation of Australian content. The current system has sufficient safety nets to protect the consumer. The reasons offered for repealing parallel importation rules are over-stated.
- Fair use is not fair, particularly as the Commission's formulation is so far-reaching. It is uncertain and unfit for the Australian legislative context. The Commission's proposal undermines creators' reasonable rights of exploitation of their work.
- We are not opposed to reforming copyright laws; indeed we understand that that laws must move with the times. However, we believe that if the Commission's draft recommendations were implemented, a vibrant, unsubsidised creative industry would be decimated without any significant benefits to the Australian community.

1. INTRODUCTION

The ASA is the peak organisation representing Australian writers and illustrators. We are pleased to have the opportunity to respond to the Productivity Commission's *Intellectual Property Arrangements Draft Report* (the "**Report**"). The International Authors Forum (IAF) is an international membership body for 57 organisations representing authors all over the world. The IAF endorses the ASA's response to the Report and has written a letter in support of our submissions, which we **attach**.

Among other things, the Report recommends:

- the introduction of 'fair use',
- the removal of parallel importation rules on books;
- international lobbying for a radical reduction of the term of copyright;
- the extension of the safe harbour scheme.

Combined, these measures reflect a crippling erosion of the copyright position of creators and would result in the decimation of the Australian publishing industry. We are particularly concerned about:

- lower incomes for Australian creators
- less investment in Australian content
- greater legal risks and uncertainty for users and owners of copyright works
- increased litigation around copyright
- loss of jobs and skills in publishing.

It is our view that the Commission has arrived at its recommendations based on a framework which fundamentally undervalues creators and their contribution to "maximizing the wellbeing of all Australians"; the overarching objective of the IP system as stated by the Commission.

We are also concerned by the tone of the Report which is dismissive of Australian creators and the creative industries. For example, the heading "Copy(not)right" and the dismissal of a rationale justifying moral rights demonstrate a disturbing trivialisation of the contribution of creators.

We argue the principles adopted by the Commission (that the IP system should be *effective, efficient, adaptable, accountable*) overlaid with an economic analytical framework has not allowed for adequate consideration of the social and cultural benefits of a strong copyright system. Rather than a narrow economic analysis, we argue that the Commission should have undertaken an assessment of the economic, social and cultural impact of reforms in order to best "maximize the wellbeing of all Australians".

2. COPYRIGHT

2.1. Copyright is the lynchpin of the creative economy

“Art is a candle flame in the darkness: it urges us to imagine and inhabit lives other than our own, to be more thoughtful, to feel more deeply, to challenge what we think we already know.”

– Charlotte Wood, acceptance speech for the Stella Prize 2016 for *The Natural Way of Things*

Copyright is the lynchpin of the creative economy. It enables creators to benefit from their work and also facilitates the creation of and dissemination of our culture, for the benefit of all Australians.

The starting assumption of the Commission seems to be that copyright is an impediment to the consumer. In fact, the Commission appears to have formulated its framework with the consumer almost solely in mind, for example:

“As with other IP, the prime economic aim of the system is to create sufficiently strong property rights to ensure adequate incentives for the creation and dissemination of works, while not permitting the use of excessive market power through pricing. In both cases, the focus is on the consumer, not the producer.”¹

This makes no sense to us. While consumers of copyright works must be considered in any evaluation of the legal framework, we strongly argue the aim of the IP system should focus on the creator and on the benefits to the whole of society. It is for the *creator* that the rights are brought into existence. Intellectual property laws have evolved to grant economic rights to creators and innovators, in recognition of the impossibility of otherwise exploiting these intangible assets.

3. COPYRIGHT TERM

3.1. An optimal term?

One of the most radical recommendations of the Commission is that the term of copyright should be closer to 15 to 25 years after creation. The Commission states:

“...an ‘optimal’ term is a period that, on average, creates reasonable incentives for creation, while avoiding the consumer losses associated with permanent exclusivity.”²

¹ p.100, Draft Report

² p. 113, Draft Report

A term of 15 to 25 years is optimal for no one: not creators who would suffer a devastating loss of income; and not copyright consumers who would be faced with a decimated creative industry in Australia.

3.2. Benefits of the current copyright term

We do not agree with the assertion by the Commission that “after a relatively short period of time, further returns make little or no difference to the incentives to create.”³ There are so many exceptions to this statement that it is overly simplistic. For example:

- Some authors may write ahead of their time and be “discovered” or rediscovered by a later generation. Elizabeth Harrower quietly published four novels between 1957 and 1966 but had a career revival after Text Publishing published her fifth novel in 2014. This generated interest in all her earlier works. Under a 15 – 25 year copyright term, she wouldn’t have received any income from her earlier works which resonated with a wide audience in a different generation.
- Some writers labour in relative obscurity, honing their skills, before achieving success. The income generated from that success needs to be great enough, and long enough, to incentivise not just that work but all the years of effort that preceded and led to that work. For example, while both Christos Tsiolkas and Markus Zusak enjoyed critical acclaim early in their writing careers, it wasn’t until the publication of *The Slap* and *The Book Thief* respectively that commercial success followed.
- There are those writers who compose a manifesto, a defining work which becomes a classic, for example *My Brilliant Career* by Miles Franklin, *Voss* by Patrick White, *True History of the Kelly Gang* by Peter Carey and *Schindler’s Ark* by Thomas Keneally. There are rare pieces of music or art or literature that strike a chord and are judged by society over time as of enduring relevance. It is galling to think of the years of income denied to authors of classic works under a 15 to 25 year copyright term.
- Most writers’ long term financial planning relies on lifetime copyright terms, at least. Writers are overwhelmingly not PAYG employees, contributing to compulsory superannuation schemes. Jackie French has said she relies on ongoing royalties to “continue to support my husband and myself into our old age”⁴ and raises the point that, faced with a shortened copyright term, she might have chosen to invest her time in investments likely to reap longer term returns (such as building houses).

³ p. 112, Draft Report

⁴ See Open Letter by Jackie French: <http://www.harpercollins.com.au/wp-content/uploads/2016/05/Open-Letter-from-Jackie-French.pdf>

- Royalties from earlier books allow writers to invest time in further writing and a change to a 15 year copyright term would undermine this even for writers with many years of writing ahead of them.
- Creators are entitled to exploit multiple revenue streams from their works. New audiences should rightly bring additional revenue. The incubation period for adapting literary works is lengthy; and sometimes far longer than 15 years. It would be devastating and unfair for an author to write a book that becomes the basis of a successful film or stage play or musical or television series, 20 or 30 years later, and to be denied any royalties. For example,
 - John Marsden's book, *Tomorrow, When the War Began* was first published in 1993. The film adaptation of this work was released 17 years later, in 2010. The television series was broadcast 23 years later, in 2016.
 - Nancy Cato's *All the Rivers Run* was published in 1958. The television mini-series adaptation was aired 25 years later, in 1983.
 - Tim Winton's *Cloudstreet* was published in 1991. A television adaptation of *Cloudstreet* was broadcast 20 years later, in 2011. An operatic version of *Cloudstreet* premiered in Adelaide in May 2016, 25 years later.
 - Helen Garner's *The Children's Bach* was published in 1984. Twenty four years later, in 2008, an opera adaptation of the work premiered in Melbourne.
 - *Puberty Blues* by Gabrielle Carey and Kathy Lette was published in 1979. Thirty three years later, it was the basis for an television drama series which was broadcast on Network Ten in 2012.
 - *The Harp in the South* by Ruth Park was published in 1948. Thirty eight years later, it was adapted into a television miniseries in 1986.
 - *The Dressmaker* by Rosalie Ham was published in 2000. Fifteen years later, a film adaptation was released in 2015.
- A shortened copyright term of 15 – 25 years would create an incentive for secondary producers to *wait for the copyright term to end* before embarking on an adaptation.
- A successful book, or successful adaptation of a book into another format, has a knock-on effect on authors' back lists. Such success can spotlight an author and lift the overall value of the author's catalogue of books, thereby increasing royalties for that author. If the term of copyright was shortened, this knock-on effect would be extremely curtailed or lost.

- In other fields of business, a successful product or service which continues to be purchased by consumers years after its release, generates income for the business owner for as long as the product is valued by the market.

Along with the entire book industry, we defend the right of authors to build a secure financial future for themselves and their families, by retaining ownership of the intellectual property that they have created, in the same way that they would retain ownership of any other business that they had built.

3.3. International landscape

Therefore, we vehemently do not agree that Australia should lobby for change to international treaties on the term of copyright. The Productivity Commission acknowledges that its suggestion of a reduced term of copyright is radically inconsistent with Australia's obligations under international treaties. If Australia were to lobby for such a change, it would expose our government to international ridicule, and position our country as culturally bereft, hostile to creativity and innovation. We advocate for just the opposite: a proud positioning of Australia as creative and clever, taking our place on the world stage of artistic endeavour.

3.4. A note on incentives

The Commission's Report states that IP arrangements should provide the minimum incentives necessary to encourage investment in creation. The Commission's focus on "minimum incentives" is inappropriate in our view.

We argue that creators' economic rights should be able to be exploited to the degree the market will bear, as with all other business ventures. We understand that the Commission is using economic theory to argue for an efficiency in incentivisation. We are not convinced this works in a field of endeavor which has *intangible* benefits for society and for creators. And we remind the Commission of the reality: with average author incomes at only \$13,000 per annum, how much lower could incentives get? While the Commission acknowledged that many artists struggle, need supplementary jobs and require the financial assistance of family members, it refrained from addressing head-on the likely effect of its recommendations on the income of creators.

In addition, we point out to the Commission that incentives for different creators are broad and varied. Some creators toil for years for the privilege and status of being published and having their efforts recognised by peers; some for a steady income; some to add to society's cultural expression or for a combination of these and other factors.

Rather than a "minimum incentive", the better measure is that creators have value returned to them so that they can lead a "dignified economic existence", as maintained by WIPO.

4. PARALLEL IMPORTATION RULES

“Allowing parallel importations benefits foreign corporations to the detriment of the Australian publishing industry, and would seriously jeopardise Australian literature. If parallel importation restrictions were removed I would most likely lose my Australian publishers: my books would come to my Australian readers filtered through American publishers with Australian language and themes removed.”

- Jaclyn Moriarty, author

The Commission recommends that the Government should repeal parallel import rules (**PIRs**) for books. We oppose this recommendation. We believe that the current system has sufficient safety nets in place to protect the interests of the consumer, while still allowing authors to retain control of their rights and income.

The publishing industry has faced many challenges since the beginning of the digital age. Despite technological change, the publishing industry continues to support Australian creators in making and disseminating their work locally and exporting it globally. Our publishing industry is one of Australia’s success stories with more than 7,000 new titles published annually and Australian writers enjoying a positive reputation overseas. The Australian book industry makes \$2 billion in revenue per year. More than 1,000 businesses in Australia are directly engaged in the publishing industry, employing over 4,000 people with more than 20,000 employed across the broader industry. Australia has the 14th largest publishing industry in the world, showing we “punch above our weight” given our population size. We do not support recommendations made by the Commission which threaten Australian publishing.

4.1. Australian Content

The Report identifies that to the extent income is generated by creativity, a significant portion of those funds are claimed by intermediaries, in a way which reflects the risks borne in bringing works to market. In the publishing context, intermediaries are necessary to fund the often prohibitive up-front costs of publishing, to take risks on unknown and emerging authors. The business model of publishers (as recognised in the Report) is to publish many titles and sustain their businesses on the success of a few. As with other risk/return business models, 20% of the product generates 80% of the profits.

The effect of repealing PIRs will be to lower the possible returns from copyright, thereby lowering the capacity of Australian publishers to invest in new works. We don’t believe it will significantly lower book prices (which have already fallen⁵) but we do believe that repealing PIRs will lower the ability of Australian

⁵ Average selling price has reduced by 25% between 2008 and 2015. Source: Nielsen BookScan (after adjustment for CPI)

publishers to manage their risk and support the creation of new Australian stories.

It is crucial for Australia to have a thriving publishing industry which fosters local creativity:

- To provide opportunities for Australian writers and illustrators
- To celebrate our indigenous culture
- To enjoy a culturally rich and diverse country, of which all Australians can be proud
- To tell our national stories and reflect our unique cultural identity
- To shape a national pride
- To provide points of identification and resonance for Australian children and students
- To provide an example to which the next generation can aspire
- To see reflected in the culture we consume local humour, local issues and history and locally relevant subject matter.

The Commission argues that: “PIRs impose a private, implicit tax on Australian consumers that largely subsidises foreign copyright holders.”⁶ And: “Most of the additional income from higher book prices goes to overseas authors and publishers whose works are released in Australia.”⁷

While it is true that foreign authors who are successful in Australia will, of course, receive royalties as they ought, their Australian licensed publisher is able to take a portion of the profits of bestsellers to plough back into Australian publications.

The Commission purports to address the concerns of authors:

“by ensuring that direct subsidies aimed at encouraging Australian writing – literary prizes, support from the Australia Council, and funding from the Education and Public Lending Rights schemes – continue to target the cultural value of Australian books.”⁸

This is out of step with reality. Literary prizes are won by a select few. Funding to Australia Council has been drastically reduced. In any event, we are not asking to be a subsidised industry. It is far more productive to ensure a legal framework which allows an industry to fund itself, as it does now.

4.2. Access to competitively priced books

The Commission expressed concern that PIRs enable rights holders to engage in geographic price discrimination. This concern is hugely undermined by the fact

⁶ p. 130, Draft Report

⁷ p. 130, Draft Report

⁸ p. 132, Draft Report

that consumers are already shopping in a global market. Under the current rules, anyone can legally buy any book, at any time, from anywhere in the world for their own use. There are even sites such as www.booko.com.au which allow consumers to quickly search for the cheapest price on the international market for a book, including shipping and delivery times.

We object to the Commission's statement: "...there are few foundations for a law that users can easily evade." Individuals who purchase books for their own use from overseas retailers are not evading the law; this practice is permitted by law.

Price is not an issue anymore. Between 2008 and 2015, the average selling price of books has reduced by 25%.⁹ Markets that have removed their territorial copyright, for example, New Zealand and Hong Kong, almost invariably have more expensive equivalent books than Australia.¹⁰

Equally, availability is not an issue. If a publisher fails to make a new book available to a bookseller within 14 days¹¹ of its publication anywhere in the world, by industry agreement that publisher loses its exclusive right and the bookseller is legally entitled to purchase stock from anywhere in the world. In addition, booksellers are also permitted to purchase books which would be PIR-protected in order to supply books to a library.

We have a fair balance between author and consumer interests and a flourishing book industry. There is no benefit to changing PIRs and every reason not to.

4.3. Repealing PIRs will send more Australian money overseas

"[Removing PIRs would mean that authors will be] giving up a sovereign intellectual property right without gaining any reciprocal right with the world's largest book-producing nations, the USA and the UK. Rather than producing a level playing field, it would dig a very big hole for Australian authors, publishers and printers."

– Garth Nix, author

As the Commission repeats, "Australia is a net importer of IP." Why would we adopt legislation that will send even more revenue overseas?

We do not agree with the Commission's statement:

"Whether foreign markets retain PIRs is irrelevant in determining Australia's policy settings – as with trade barriers in other industries, the costs to Australia of retaining PIRs does not depend on whether other countries also have protected markets."¹²

⁹ Source: Nielsen BookScan (after adjustment for CPI).

¹⁰ See submissions made by Australian Publishers' Association.

¹¹ The time frames quoted by the Commission in its Report do not reflect industry practice.

¹² p.130, Draft Report

This ignores the fact that Australian publishers also sell into foreign markets. If an Australian publisher sells into a market which has retained PIRs, while at the same time not enjoying PIRs at home, it will be at a competitive disadvantage.

4.4. Public Support for PIRs

When surveyed, more Australian consumers oppose the repealing of PIRs than support it.¹³

The ASA's petition against the repeal of PIRs has attracted over 12,100 signatures (and growing) demonstrating widespread community support for our position. One example of the hundreds of comments our petition has attracted:

"Australia is a relatively small market which means print runs are smaller and unit costs per book higher. If we are to keep a level playing field and give publishers and emerging writers a fair chance to compete we need the parallel importation laws to remain in force." – Andy Griffiths, author

5. FAIR USE EXCEPTION

"The 'fair use' changes would not only affect educational writers' ability to earn a living, but also the quality and relevance of educational resources available to our children. It is, patently, financially unsustainable for me to devote 10 months virtually full time writing a series of books for which I would receive very little payment. The effect of this, of course, would be that I would stop writing text books. If all Australian educational writers did this, schools would simply not have the resources to support the Australian curriculum.

Overseas producers will not fill the void, as they have neither the means nor interest to produce work that supports the Australian Curriculum."
– John Barwick, author

The Commission's general view is that copyright protection is excessive because the scope is wide, the protection is automatic and the term is long. The Commission has looked for opportunities, where it is not restricted by international treaties, to scale back what it perceives as the overreach of copyright, most significantly by introducing a 'fair use' exception.

The ASA is opposed to the introduction of a US-style 'fair use' exception to copyright infringement. We wholly endorse the submissions made by the Australian Copyright Council and Copyright Agency Limited on fair use.

¹³ 44% of consumers are opposed to removing PIRs; only 30% support it according to a Factuality Report commissioned by the Australian Publishing Association in March 2016, surveying 755 Australian consumers.

5.1. Summary of ASA position on 'fair use'

In summary, our position is as follows.

- (a) To encourage public access to copyright works, licensing solutions are preferable to introducing vague exceptions to infringement.
- (b) 'Fair use' is too uncertain. It is a moving target. Once it is introduced, it can be interpreted in an ever broader way.
- (c) The government's terms of reference specified the Commission should provide *greater certainty* to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others. Rather than provide greater certainty, the Commission's proposal on 'fair use' would make our laws on infringement far more vague.
- (d) Fair use will require expensive litigation to develop guidance from the courts as to what constitutes fair use. Copyright litigation is beyond the means of the vast majority of writers.
- (e) In practical terms, this gives vast power to users as most authors will shy away from litigation given the uncertainty of a 'fair use' defence. We do not accept that a list of "illustrative purposes" will offset the uncertainty.
- (f) Fair use tips the balance too heavily in favour of users over creators.
 - We point out that the Commission has acknowledged that technological advancements have lowered the cost of reproduction of copyright works and made quick dissemination possible all over the world. Practical difficulties in IP policing and enforcement mean instances of infringement already go unchecked. It is a very challenging environment in which creators currently try to exercise control over reproduction of their works. We argue that 'fair use' will shift community attitudes to increasing permissiveness, rather than to increasing acceptance of licensing models.
 - The Commission acknowledges that the *benefits* of fair use will be enjoyed by *consumers* and that the *costs* of fair use will be incurred by *rights holders*. Accordingly, we question whether rights holders as a general group are well placed to bear this further cost given their already poor remuneration, and whether there is any need for additional benefits for users in a technological landscape which already advantages them.
- (g) 'Fair use' is not suited to Australia. We endorse the submissions of Australian Copyright Council and Copyright Agency Limited on why it is inappropriate to transplant a US-style fair use exception —developed in a different legislative framework — to Australia.

(h) 'Fair use' is inconsistent with the 3 step test outlined in Berne Convention¹⁴.

- It is not confined to clear, narrowly defined "special" cases but is instead deliberately broad.
- The Commission states:

"At its heart, Australia's exception for fair use should allow all uses of copyright material that do not materially reduce a rights holder's commercial exploitation of their work *at the time of use*."¹⁵

We object to this formulation of fair use. This is placing a huge onus on the rights holder – show a court why the alleged infringement is undermining your commercial returns, *right now*. This is not allowing for any assessment of the potential or future market for the work and how the use might interfere with that market. What if a proposed use is in a segment of the market in which the rights holder is not yet commercially exploiting her work but one day might wish to?

The Commission is also not allowing for the fact a copyright owner may withhold their material from the market for many legitimate reasons. For example, it is valid for a rights holder to object to her/his intellectual property being associated with a project which s/he finds abhorrent (as envisaged by moral rights afforded to copyright owners).

- We note the Commission does not provide any analysis of whether its proposal complies with the Berne Convention's three step test.

5.2. Is fair use really fair?

The Commission proposes fair use to address an imbalance between creators and consumers.¹⁶ The Report calls for: "A new system of **user rights**, including the introduction of a broad, principles-based fair use exception, is needed to help address this **imbalance**."¹⁷ (our emphasis)

So, is there an imbalance? Are creators so favoured by copyright laws that reform is required to protect consumers?

In the context of writers and illustrators:

¹⁴ Article 9(2) of Berne Convention provides: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of [copyright] works *in certain special cases*, provided that such reproduction does not conflict with a *normal exploitation of the work* and does not unreasonably prejudice the legitimate interests of the author." (our emphasis)

¹⁵ p.160, Draft Report

¹⁶ For example: "...there are questions about whether the balance has shifted too far in favour of rights holders." p. 6, Draft Report. "The limited exceptions to the exclusive rights granted to creators under Australia's copyright law do little to restore the balance." p.17, Draft Report.

¹⁷ p.2, Draft Report

- Prices for books have never been more competitive. Australian books are now similar in price to comparable markets. Prices have fallen by a third in real terms in the last decade.
- There has never been more choice for consumers, a fact acknowledged by the Report. Copyright works exist in a crowded, global, digital marketplace. Enormous competition determines price. Book retailers have to contend with huge companies like Amazon with a deliberate strategy of pricing books at below-cost to achieve its target of market domination.
- Technological advancements have resulted in low cost copying and dissemination.
- In the online environment, it is difficult to identify and locate infringers.¹⁸
- The cost of suing infringers is exacerbated by the high volume/low value sorts of infringements commonly facing creators.
- Creators have never had so little control over their works.
- In Australia, writers and illustrators remain low-income earners¹⁹, other than a minuscule few.

Therefore, we strongly disagree with the Commission's view that Australia's current copyright system is unbalanced and favours rights holders. It is our submission that the current copyright system benefits the whole of society.

5.3. Consumer wellbeing

The Commission states:

“Fair use does not replace payment for copyright works that are commercially available to users, but reinforces the consumer interests that should ultimately lie at the heart of Australia's copyright system.”²⁰

We disagree. Consumer interests might lie at the heart of *competition* law. Copyright exists to benefit society *as a whole*, it is for the common good.

5.4. Orphan Works

We do not believe the difficulties posed by orphan works require the introduction of 'fair use'. There are better ways of dealing with orphan works, for example by bringing them under the fair dealing exceptions with prescribed search requirements, or by way of a statutory licensing scheme.

5.5. Unpublished Works

¹⁸ As recognised in Draft Report, at section 18.4.

¹⁹ Average annual income of just under \$13,000.

²⁰ p.160, Draft Report

We note the complex arguments around unpublished works and accessibility as canvassed in submissions relating to the *Copyright Amendment (Disability Access & Other Measures) Bill*.

As a membership organisation representing writers, we respect the right of the author to choose if and how a work is first published; which includes the right to decide not to publish.

6. MORAL RIGHTS

As we represent creators, it is disturbing to us that the Commission does not see a basis for the introduction of moral rights²¹ and only resists seeking to amend them now because few cases have been brought in the courts.

The Commission: “The rationale for these new rights is weak, but having now been established the evidence these rights have adverse effects is not strong. To be sure, cases have been brought in Australia and the United Kingdom against creators who remix and build on existing works on the basis that these new works allegedly ‘debase’ the original (Rimmer 2005). But a few examples are not enough to either revoke the current arrangements or to amend them as they stand.”²²

If many creators had asserted their moral rights in the courts, would that be a justification for repealing them now? Or, rather an indication of their utility and necessity? We see this as a further example of the Commission framing the rights of copyright owners as an impediment to users.

7. EXTENSION OF SAFE HARBOUR SCHEME

The Commission acknowledges that “the Internet provides many avenues for the low cost dissemination of unlawfully obtained material”²³. The Commission further acknowledges the difficulty of identifying and contacting online infringers. However, the Commission is silent as to what action should be taken to address these issues and makes no comment about the failed Industry Code for Online Infringement beyond noting it has been abandoned.

We are not in a position to comment on the efficacy of the current take down notice scheme, and refer to the submissions of the Arts Law Centre in this regard.

Anecdotally, we are receiving an increasing number of calls from writers who have found their copyright works available as a “free download” from various websites. Our members report it is time consuming, difficult, frustrating and expensive to pursue these infringements which nevertheless represent lost

²¹ “Moral rights and performers’ rights were introduced despite little evidence of a policy problem.” p.107, Draft Report.

²² p.107, Draft Report

²³ p.109, Draft Report

revenue opportunities. Moreover, in addition to the potential loss of income, writers feel these websites tarnish the status of their books as they are being embarrassingly presented as unprofessional and cheap (to the point of being given away freely).

We are not against the safe harbour scheme per se but do not believe it is operating as originally intended where limited liability for ISPs was granted with the expectation that efficient cooperation of ISPs could be relied upon by creators, supported by an industry code.

8. WHAT'S MISSING?

Reading the Commission's Report, we were struck by how little space is given to any consideration of ensuring the survival and further development of the creative industries in Australia or developing the export potential of Australian IP. Instead, the Commission seems content to observe that Australia is a net importer of IP. Creative content is not substitutable by overseas product in the way, say, appliances might be.

We argue that no government would wish to reform laws on the basis of such complacency – relegating our highly educated country to an importer, rather than a country which itself creates, a country with a legal framework best placed to support creation and exploitation of intellectual property.

“This proposal contradicts everything the current government is saying about innovation, agility and cultural aspiration. If implemented, it'll make Australian authors like me very agile, because we'll probably have to move to the northern hemisphere.” – Morris Gleitzman, author

9. CONCLUSION

In its inquiry, the Commission came to the view that “ the IP system's overarching objective should be to maximise the wellbeing of all Australians.”²⁴ We do not consider the Commission's draft recommendations achieve this objective. No one wants to see fewer Australian works published or a creative culture which is reliant on, and shaped by, overseas texts. This would be an enormous backward step for writing culture in Australia. We do not want to return to the days of Australian as a colonial outpost, where our authors had to seek publication overseas, where the cultural cringe stifled our sense of credibility.

“The consequences will be job losses, public revenue loss as profits are transferred overseas, and a brutal reduction in the range of Australian books publishers will be able to publish. Australia will become, as it was in the 1960s, a dumping ground for American and English books, and we will risk becoming – as we once were – a colony of the minds of others... The

²⁴ p.54, Draft Report

book industry is not a protected industry. We are not asking for money, or for a subsidy. We are asking for the same rules and intellectual property rights that prevail for writers and book publishing in the USA, in Britain, in Europe.”

-Peter Carey, Thomas Keneally, Richard Flanagan

The ASA believes the draft recommendations of the Productivity Commission would be devastating for Australian writers and do not strike the balance necessary to maximize the wellbeing of all Australians.

Juliet Rogers
CEO