

This Submission is in response to the Productivity Commission's Draft Report 29 April 2016, A Public Inquiry into Intellectual Property Arrangements.

The authors of this submission are an Independent Expert Copyright Group (IECG) that endorses the response from the Australian Publishers Association, providing we add further arguments for the retention of the present copyright environment in Australia.

Members of the IECG

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Apart from the internal workings of the IECG, we have held meetings with interested parties – in particular with members of the Australian Publishers Association (APA), The Australian Society of Authors (ASA) and the Copyright Agency, as well as with other vitally involved individuals in the Australian book industry.

Background to the formation of the IECG

The IECG was convened by Reinvent Australia¹ to take a look at the proposals for copyright reform in Australia outlined in the Issues Paper of October 2015 and endorsed by the Productivity Commission's Draft Report of April 29 2016

The challenge the group set itself was to explore ways in which the concerns prompting the initiation of the process in 2013 might be mitigated without the abandoning of PIR, the adopting of fair use and the changing of the term of copyright.

We propose to address this opportunity in a strategic context that recognises the underlying drivers that are changing the global

¹ <http://www.reinventaustralia.net.au>

The members of the group, other than Oliver Freeman, are not members of Reinvent Australia

publishing market and within which Australia's copyright policy needs to be addressed.

For this purpose we would like to draw the attention of the Commission to the Book Industry Strategy Group research that was based on a series of workshops with every distinct stakeholder group in the book industry supply chain.²

The research identified these six key dynamic influences changing the environment in which the Australian book industry operates:

1. Culture
2. Globalisation
3. Copyright
4. Generational change
5. Digital technology
6. Competition

These 'drivers' provide a critical context within which the Productivity Commission's proposals need to be reviewed. If this context is ignored then we may make significant policy mistakes that will disadvantage Australia in both the global and the local context.

The Group confirms the following salient facts from the Australian Publisher's Association submission.

- Australia has the 14th largest publishing industry in the world.
- More than 7,000 new titles are published annually and the industry generates \$2 billion in revenue.
- More than 1,000 businesses in Australia are engaged in the publishing industry, employing over 4,000 people. Many are small businesses.
- More than 20,000 employed in the broader book industry, which includes booksellers and printers.
- Australia has the largest independent bookseller sector in the English-Language market.
- The publishing industry does not depend on government subsidies. It is not protected by government tariffs.

The questions we wish to address in our submission are as follows:

1. Some Concerns with the Draft Report Draft Report
How well has the Commission understood the nature of copyright in the Australian context?
2. Tackling the Pricing of Imports
Can we manage this real problem without throwing the copyright baby out with the bath water?

² <http://www.futureshouse.com/downloads/workshopsreport.pdf>

3. Damage to Independent Publishers
What would the impact be of the proposed changes on one of our most precious cultural industries, the independent publishers who have established their market position at their own cost over the last 30 years?
4. Fair Use
Is the doctrine of Fair Use appropriate for Australia?
5. Term of Copyright
Can Australia act independently from other signatories to the Berne Convention and other international multilateral copyright treaties?

1 Some Concerns with the Draft Report

We note the Draft Report does not focus on the rights of the creator, concentrating instead on the benefits to the community of a loosening of copyright protection. This focus limits the credibility of the recommendations by ignoring the cultural and economic impact of the proposed changes on creators and their allies. Prominent Australian authors, many of whom are ambassadors promoting the virtues of Australia overseas, have spoken out on this aspect of the proposed changes, and we commend their viewpoint to the Commission.

A careful reading of the draft report reveals that the Commission has not grasped the realities of copyright. Anyone with an understanding of copyright law and practice will discount this draft; anyone responsible for formulating copyright policy must ignore it.

For a start, the draft is transparently partial to the anti-copyright agenda. An example of this is the summary of earlier policy work on parallel importation (PIRs). The draft states:

- “PIRs have been reviewed many times in the last 20 years and most have recommended their removal”.

In fact, the draft lists reviews going back more than 20 years – to 1989. This cut off point ignores the work of the Commonwealth Attorney-General’s Copyright Law Review Committee (CLRC) which reported in 1988. The CLRC studied the issue for five years, held many public meetings and was by far the most comprehensive review of the subject ever conducted in Australia. Perhaps the Commission does not mention the CLRC because the CLRC did not recommend the repeal of PIRs.

If we take the draft at its word, it seems that the Commission has accepted some of the more ill-informed and irresponsible anti-copyright claims; for example:

- “the commercial life of most works is less than 5 years” – a statement that would be greeted in amazement by our leading authors, composers and filmmakers;
- the only purpose of copyright is to preserve “the economic incentives to create and disseminate works”. What can this mean? - as if works created for other reasons are not worthy of protection;
- “resources used in the production of creative goods and services could be more efficiently allocated elsewhere in the economy” – does that mean farming would be a more “effective” and “efficient” way for people who write books to spend their time;
- “By lowering the upfront costs incurred in creating works, the returns required to recoup those costs is also lower and, therefore, commensurately the required strength of copyright protection” – why? And since when was production cost the only measure of value; and
- “The increase in copyright-protected works available to consumers increases the substitution possibilities between individual works” – is the Commission seriously suggesting that readers of crime fiction would readily switch to books about nursing.

These comments are troubling enough, until you read this:

- **“copyright protects works that would likely be created in the absence of protection ... non-commercial works [such as] ... emails, social media posts and photos taken on smartphones ...”**

The thinking behind this comment exposes the draft’s true mischief: the Commission is advocating both measures that cannot be implemented and solutions to problems that do not exist.

It follows that the basis on which the Commission has made its recommendation is deeply flawed.

2 Tackling the Pricing of Imports

In 1999 the Government of Canada introduced the Book Importation Regulations³ to operate under their Copyright Act. The main purpose of the Regulations is to extend their Act’s protection of copyright holders to exclusive distributors of foreign-published books in case of “parallel importation,” provided that certain requirements have been met.

These regulations require the exclusive distributors of imported books to do the following:

- Give advance “notice of exclusive distributor” to retailers;

³<http://laws-lois.justice.gc.ca/eng/regulations/sor-99-324/index.html>

- Make shipments to retailers within a certain number of days after an order has been placed; and
- Set a suggested retail price (SRP) for an imported book that is no more than a certain percentage higher than the SRP in the book's country of origin (10% if the country of origin is the US; 15% if it is in Europe). This puts a "ceiling" on the SRP of imported books. A mark-up is allowed because distribution costs in Canada are greater, but the ceiling is designed to protect retailers—and, indirectly, their customers—from unfairly higher pricing in Canada.

If a Canadian retailer parallel imports copies of a book when the distributor has met these requirements, the importation constitutes an infringement of copyright and the exclusive distributor has access to all the remedies in the Copyright Act, with the exception of statutory damages and criminal penalties.

It is our view that these Regulations could be used as a model to be appropriately amended for the Australian market by the book industry as a whole. We consider the following amendments could be made:

- Australian editions of foreign book-published books should not be exempt. A Recommended Retail Price (RRP) would be set for an imported book or an Australian edition of a foreign book (on the basis that there are no material additions for the Australian market) that is not more than a certain percentage higher than the RRP in that book's country of origin (after currency conversion).
- Consideration should be given for fluctuating currency, particularly with respect to backlist titles that have been warehoused for extended periods of time.

The objective of such adoption is that Australian publishers and authors would retain the protection offered by PIR and unfair pricing would not disadvantage Australian consumers.

This proposal alone eliminates the need to abandon PIR, delivering a win-win for everyone involved.

3 Damage to Independent Publishers

In the debate about the impact of PIR on the pricing of imported books in Australia and the impact on the interests of the consumer, publishers too often become faceless 'copyright cartels'

But more than 1,000 businesses in Australia are engaged in the book publishing industry, employing over 4,000 people. Many are small

businesses, and some are larger, such as Allen and Unwin in Sydney - a major investor in Australian talent.

It is important to note that the publishing industry does not depend on government subsidies and is not protected by government tariffs.

Three of Australia's culturally significant small to medium-sized book publishers are Black Inc., Scribe Publishers and Text Publishing.

Each of these publishers currently invests in emerging authors, secure in the knowledge that their production, editorial, marketing, and publicity investments are protected by copyright law.

They invest knowing that if they hold the rights to publish a title in Australia, and make the title available in Australia soon after its release anywhere in the world, the Act (Section 37) restricts the importation of commercial quantities of books without the copyright holder's permission.

The current restrictions provide a safety net that allows risk – an essential factor required for building a publishing list.

- If they publish a title and export it – sell the territorial rights to another publisher overseas – they need to know that they will not be undercut by having their own title dumped back on the Australian market. Their major markets are usually the English speaking countries such as the US, Canada and the UK- territories well protected by PIR.
- If these companies and dozens like them buy the rights to a title published by an overseas publisher, they frequently print the titles here in Australia incurring production, editorial, marketing, and publicity investment. They need to know that having established the title on the Australian market, they won't be undercut by cheap imports. This is just one important economic argument for the continuation of PIR.
- There is also a strong cultural argument. Active, innovative publisher such as the three companies we are presenting as examples are noted for their success in discovering and fostering Australian writers, and in so doing, presenting Australian readers with powerful stories of our own land.
- Current copyright protection allows the kind of investment and innovation that has enabled Text Publishing to invest heavily in local titles, such as Clare Wright's award winning *The Forgotten Rebels of Eureka* and in her next book, which she is in the process of researching. These invaluable and important stories and histories about our culture, our history, and our future will simply cease to be published in any meaningful way following the changes to copyright proposed by the Productivity Commission.

Henry Rosenbloom, Founder and Publisher of Scribe Publications has said of the proposal to remove Parallel Import Restrictions:

‘Everything is to be sacrificed to the workings of the free market -- especially writers, independent booksellers, independent publishers, and the nation’s cultural integrity. Parallel imports are banned in the US and the UK, and the UK often publishes books several months after they come out in the US. Our peculiar problem is that we are a small English-language market, exposed by the above factors in an economy that can never produce the economies of scale enjoyed by our larger global competitors.’

Chris Feik, Publisher at Black Inc. Books feels strongly that changes to copyright will give our overseas competitors many advantages over Australian businesses that are already dealing with many challenging issues. And Kevin Chapman, former Managing Director of Hachette New Zealand states: ‘The open market does away with your local market and does not lower book prices.’

The hard-won strengths of independent publishers in Australia need to be protected.

4 Fair Use

An example of a problem that does not exist is the need for Australia to adopt “fair use” provisions. This issue has been the subject of a number of reviews but, as here, the analysis focuses on the Australian context. A more complete analysis would examine what is taking place in the country where fair use originated – the United States.

In October last year, Jon Baumgarten came to Sydney to tell us about developments in fair use in the US. He gave the keynote address at the Biennial Copyright Law and Practice Symposium, Australia’s premier copyright event. Mr Baumgarten was formerly a General Counsel of the US Copyright Office and a leading US attorney. He is widely recognised as a copyright expert and a foremost authority on the development of copyright jurisprudence in the US. His paper was called Beware What You Ask For; You Just Might Get It.

Mr Baumgarten spoke about the dramatic “even revolutionary, changes that have emerged in the fair use doctrine in the United States”. His comments included the following:

“... [case law now] trends fundamentally away from what I believe essential to a healthy copyright environment for individual creativity, entrepreneurial investment, technologic innovation, and public benefit. The trend is, in my view, quite contrary to the ends sought by your ALRC.”

“... decisions have introduced systemic change into the very core and therefor potentially every application of American fair use; and ... that the change is an unhealthy one.”

“... [the development] ignores copyright law’s inherent focus on encouraging original creative expression.”

“... recent cases appear to give considerable favourable significance and exculpatory weight to the social utility of the defendant’s actions. This is unwarranted for at least two related reasons. First, the new emphasis is outside of the contours of traditional fair use; second, it undermines due reward for the labour, effort, investment, commitment and talent of authors and both commercial and non-profit publishers and other producers of copyrighted works, who themselves innovate, create and disseminate educational, technical, medical, scientific, scholarly, professional and like works, both in conventional and increasingly innovative ways.”

“So, should Australia adopt or follow the new flavour of US fair use doctrine? My answer to that is “no” ... It is precisely in the context of the new digital economy where authors, other copyright owners, technology innovators, and public interest must be designed to coincide under a vital, thriving and robust copyright law that the new doctrine undermines.”

The Commission should re-examine the developing US jurisprudence on fair use.

5 Term of Copyright

An example of something that can never be implemented is to suggest, as the draft appears to do, that the term of copyright should be shorter. Australia belongs to the Berne Convention for the Protection of Literary and Artistic Works (since April 1928) and the Universal Copyright Convention (since May 1969), as well as trade agreements dealing with copyright (such as TRIPS).

These international agreements set minimum standards of copyright protection with which Australia presently complies. If Australia were to shorten the term of copyright it would breach its treaty obligations and be open to retaliation under its trade-related agreements.

The Commission must know that without completely overhauling Australia’s international intellectual property arrangements, any call to reduce the copyright term is pointless.

6 Conclusions

Our submission takes into account the importance of publishing for Australian culture, our membership of a global copyright community, the needs of Australian consumers for fair play, the role of digital technology in a changing world and the need for our local publishing businesses to be competitive.

The Productivity Commission needs more fully to understand how much damage abolishing territorial copyright will do.

Its report can't hide it.

Our industry will shrink. There will be fewer printers with fewer books printed in Australia, and fewer books published. There will be fewer writers published. Those who are published will earn less money. There will be fewer editors to work with them, fewer independent publishers and fewer foreign rights sales. There will be fewer booksellers to help a new Tim Winton or Kate Grenville find their readers. And let it be understood: it's the taxpayer, who will have to pay for this damage, rightly described by ex-Premier of Victoria John Brumby as 'economic and cultural vandalism'.

*Independent Copyright Expert Group
Sydney & Melbourne 2 June 2016*