OPINION: Law Reform Should Protect, Not Harm, Creators

In light of the recently released report into Australia's intellectual property arrangements by the Productivity Commission, Eli Fisher argues that copyright law reform should protect, not harm, creators.

The recently released report of the Productivity Commission into Australia's intellectual property arrangements[1] contains some of the most divisive policy recommendations ever made in respect of Australian copyright law. But the most unsettling thing about the report is the shallowness of its analysis. Copyright law is simply too important to Australia's economy, its international standing, and the lives of creators, for shallow analysis to guide any proposed reform.

In relation to copyright law reform, the Commission found that the current duration of copyright protection (for works, 70 years from the death of the author) is too long, and recommended that the Government amend the *Copyright Act 1968* (Cth) to make unenforceable any part of an agreement restricting or preventing a use permitted by a copyright exception; permit consumers to circumvent technological protection measures for legitimate uses of copyright material; clarify that circumventing geoblocking technology is not an infringement; repeal import restrictions for books; strengthen the governance and transparency arrangements for collecting societies; implement a Fair Use regime in Australia; and limit liability for the use of orphan works.

The recommendations uniformly are to weaken, as opposed to strengthen, copyright protection given to Australian creators. Some, to be sure, are not without justification. There are very few people who would oppose a reasonable provision that better facilitated the use of orphan works – those works whose owners cannot be identified after a diligent search.

But other recommendations, and the reasoning by which the Commission arrives at making them, are so misguided that they are liable to discredit the remainder of the Report. Taking two examples – the duration of copyright protection, and implementing a Fair Use defence – it becomes clear that the report reflects a bias that should not be present in serious discussions about copyright law reform.

The finding that the duration of copyright is too lengthy is made on the assumption that copyright protection is granted to an author only to incentivise her or him to create items of value to the public. For the Commission, copyright protection should be just enough to motivate the creator to create, and no more.

The premise is fundamentally questionable. Property rights, for example in a home or in a tennis ball, usually do not expire. You worked for it, you invested in owning it, therefore you can keep it, or bequeath it to your children and they to theirs in perpetuity, no matter what benefit the public might obtain in your property becoming its property. There are very few rights more essential to human dignity than this. As Mark Twain said in relation to a 1906 Copyright Bill: "I am quite unable to guess why there should be a limit at all to the possession of the product of a man's labor. There is no limit to real estate." That intellectual property has a limited term at all is a compromise that was already made in favour of consumers.

But the Commission constructs its argument that the copyright term is excessive on the basis that most works cease to have any real commercial value after a few years.

The Commission considers that the commercial value of songs lasts from between 2 and 5 years following release, between 3.3 and 6 years for movies, between 1.4 and 5 years for literary works, and for 2 years for visual art. The Commission argues that given there is little commercial value for creators in having protection beyond that period of time, there is little justification for the lengthy copyright term.

Anyone who thinks critically about the Commission's point here must surely ask: "if there is no-one wanting to listen to a song, or watch a movie, beyond a couple of years from release, then who cares whether copyright extends beyond that period?" That consumers do care tends to support the view that there is in fact a market for those works beyond that stated timeframe.

But the issue here is that which is often overlooked in copyright debates – and completely overlooked in the Report. Copyright law is not about preventing people from enjoying works. It is about designating who should pay, and who should be paid, when a work is enjoyed. For that minuscule fraction of works whose commercial relevance survives the duration of its copyright protection, entry into the public domain does not necessarily mean that the work becomes freely available. Various other suppliers – publishers, digital platforms – will still charge consumers to access what has essentially become "their" copy of someone else's works. And even if the works are made available free of charge to consumers, we are still observing a political decision about who should pay and who should be paid for the enjoyment of someone's

1 Productivity Commission, Intellectual Property Arrangements, 20 December 2016, accessible at http://www.pc.gov.au/inquiries/completed/intellectual-property/report.

work. Reformers should not be misled into believing that a significantly reduced term is only about promoting access and knowledge; it is largely about supporting the interests of the masses over those of creators. And that is a populist political decision about which a principled person is entitled to be concerned.

As regards the defences in the copyright law, the current system permits activities that would otherwise be a copyright infringement if they are done for one of a number of specific purposes, including for research, study, criticism, review, parody, satire, reporting news, or giving professional advice. There are numerous other protections in the legislation that give preferential treatment to bodies that are deemed to warrant it: for example, educational institutions and libraries.

Again, keep in mind that the current law already reflects a compromise. Property rights usually do not have carve-outs for even the worthiest of causes. Trespass is trespass, even if you want to host a charity for sick puppies in a stranger's private living room.

The Commission's proposal is to replace the current scheme with one that is not limited to specific purposes. A use is defensible if it is "fair". When people dispute who owes what to whom, and the guidance given by the law is uncertain by design, those people are quickly to head to Court.

And that point brings us to the most troubling claim made by the Commission and those who lobbied for the findings of the Report. The recommendations made are purported to promote innovation, even though they may well achieve the opposite. A pretty good way to stifle innovation and repel investors is to have unclear and ambiguous terms governing the creation of new works, and tying up new products in years of litigation.

Peter Martin reports that the Commission's recommended changes would "[allow] Australia to innovate as quickly as competitors in Israel, South Korea and the United States."[2] But that claim just does not seem plausible. Is it really believable that a more specific scheme of defences to copyright law is what is holding Australia back from innovating as quickly as those countries? It would rather seem that the abilities of those countries to innovate quickly might be more connected to the way those countries treat education, or calibrate their tax laws, or promote a culture of innovation. For example, it is probably more relevant that South Korea spends a higher proportion of GDP on R&D than any other country on the planet, having in the last few years overtaken Israel (now in second place) and the United States (in fourth place).[3]

The far more sensible inquiry into the UK's intellectual property arrangements, the Hargreaves Report of 2011, addressed this very point. When that Review visited Silicon Valley prior to finalising its report, they met with companies such as Google, Facebook and Yahoo, as well as with investors, bankers, lawyers and academics. There, they learned of some of the benefits that Fair Use had in the American innovation scene. The Review wrote: "Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law."[4]

That isn't to say that copyright law cannot be reformed to promote innovation; it can. It also isn't to say that Fair Use won't provide some benefit to tech companies who may be exploring exciting new technologies; it might. The fundamental question here, though, is: *who should be making the money from consumers enjoying someone's work?* People will disagree, but the society I want to live in designates consumers as responsible for compensating those who work to create that which they enjoy.

What does that mean in real terms? It means precisely the opposite of every recommendation the Commission has made: that copyright law should be designed to promote commercialising creative works through licensing. Licensing, that is compensating creators, may be an obstacle to innovating quickly and cheaply, but it is a reasonable one.

What's more is that the Commission was given the task of evaluating Australia's copyright laws, and in an environment where authors, musicians and artists are struggling to make a dignified income due to the impact of piracy on their businesses, the Commission did not see it fit to make even one recommendation that protected creators.

Exciting tech companies are dominating the global economy, and technological innovation must still be further promoted. But there are more effective tools that can be used to promote innovation, and which would have a less devastating impact on Australia's creators – and those tools are not being used. At this time, when creators around the world are suffering from the evisceration of their businesses by said exciting new technologies – those exciting new ways of making it easier to reproduce and distribute content illegally, and with no compensation to creators or their investors – reformers of copyright law would do better to devise methods of protecting, rather than weakening, Australia's creative community.

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2 Peter Martin, 'Intellectual Property: Copyright Rules Make Us Break the Law 80 Times a Day, says Productivity Commission' *The Age* (20 December 2016), accessible at http://www.theage.com.au/federal-politics/political-news/intellectual-property-copyright-rules-make-us-break-the-law-80-times-a-day-says-productivity-commission-20161220-gtf6io.html.

3 OECD Science, Technology and Industry Scoreboard 2015: Innovation for Growth and Society, accessible at http://www.oecd-ilibrary.org/science-and-technology/oecd-science-technology-and-industry-scoreboard-2015_sti_scoreboard-2015-en#.

4 Ian Hargreaves, 'Digital Opportunity: review of intellectual property and growth'; accessible at https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth.