

**ADDRESS TO THE MELBOURNE PRESS CLUB  
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**“SAFEGUARDING AUSTRALIAN CREATIVITY – WHAT’S REALLY  
AT STAKE OVER COPYRIGHT REFORM”**

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We are gathered today on the ancestral lands of the Kulin nation and I would like to acknowledge them as the traditional owners. I pay my respects to Elders past and present and to the Elders of other indigenous communities in Australia. I also take this moment to acknowledge the diverse peoples and cultures who have been welcomed to this nation. Finally I recognise our shared freedoms and responsibilities, inherited from Magna Carta and on through the common law. All these three elements shape modern Australia and its creative possibilities.

As an Australian I value the opportunity to acknowledge country as a simple act of reconciliation. I also increasingly feel compelled to recognise the many peoples, ethnicities and faiths which comprise our nation, given the never ending assault on difference which too often permeates society today. The common rights we all enjoy at law also need to be recalled and defended relentlessly in providing bedrock to our future.

History matters. Symbols matter. Especially in a speech to colleagues and friends of media. A media which has a pivotal role to centrally important precepts of a transparent, just and civil society. One with a strong creative heart.

**Introduction – Copyright is a human right and an economic right**

I am here to talk about an important issue to creativity – copyright. Specifically I want to highlight the importance of the Productivity Commission’s final report into Intellectual Property Arrangements which will be published shortly.

If the draft report is a reliable guide to the Productivity Commission’s thinking, it will recommend a shakeup of copyright law in this country on a massive, unjustified, poorly researched and unprecedented scale. It won’t represent reform, it will be a vote for remote and disconnected economic ideology of unusually destructive force.

Taking the draft report as an indicator it will undo not just relatively recently-gained protections for rights holders, but protections based on international conventions that go back 130 years. The PC advocates that copyright needs to be radically rebalanced with a vast disparity between the current term of international copyright protection and that which it prefers. Further it advances use principles that can only be described as unsound and highly opinionated.

The Productivity Commission, has not lived up to its often noble history in this report. It treats copyright as an exclusive economic proposition rather than also as a quite fundamental human right. That evolution is seen from the Statute of Anne in 1710 through to Article 27 of the Universal Declaration of Human Rights.

I was further reminded of this duality in a discussion in 2014 with Chris Dodd - the former US Senator - of the specific inclusion of copyright in the US Constitution where there is provision from the 1787 draft with the following words *“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”*

That encapsulates both the economic argument and the proper rights of creators to control the terms and permissions for use of their work. After all, it is theirs and they deserve a fair return.

I cannot think of another recent report that so seriously misses the main drivers of its area of inquiry – namely intellectual property and the production of creative works. The incentives and innovation central to producing new work, and associated ownership and use protections, are central issues to the review.

Surprisingly and in a rather vainglorious way, the report treats Australian creative content and its production with a disdain bordering on contempt - which is concerning for any economic statement, let alone one from an independent central government agency. The summary and communication materials released by the Commission were also of an unprecedented nature – slanted against creators and misrepresenting copyright and its Australian operation.

The Productivity Commission makes draft recommendations which would have such a deeply detrimental impact on the ability of film and television makers, writers, artists and journalists to tell Australian stories and make a living doing so, as to be worthy of only one response – firm rejection.

The draft report claims our intellectual property and copyright settings inhibit investment and innovation.

We say really? Can they be serious?

I might add they provide no rationale or argument worthy even of a first year economics student. Most people who run businesses and invest money, know that what really drives innovation is a clear operating rules framework which enables the management of capital investment against risk parameters and operating market conditions.

The investment goes into the talent and skills of the people it employs allied with smart new ideas and technology to offer compelling products in a market where consumers determine relative performance success.

In the creative landscape, the bedrock of producing things such as books, film and television and allied production is intellectual property and copyright – the Copyright Act provides the framework for ensuring returns from creative production and the investment and innovation which drives it. I will return to the report and the reasons I would encourage all fair minded decision makers to reject it.

### **Copyright and the digital world**

Has anyone seen that marvellous film, *Steve Jobs*? It's directed by the magnificently talented Danny Boyle, written by Aaron Sorkin and stars Michael Fassbender as Jobs, Kate Winslet as Apple's marketing guru, Joanna Hoffman, and Seth Rogers as Steve Wozniak; Jobs rather long suffering friend and business partner.

Appropriately much of the film revolves around the launch of the iMac, with all the drama of Jobs' personal and professional life woven around the launch of a product that would change the world. It almost perfectly captures Job's brilliant, visionary and hyper-charged personality.

As you would expect from a Sorkin screenplay the dialogue is wonderful – snappy, insightful and funny – evoking well the grandiosity with which Jobs viewed his mission and work.

Sorkin has Jobs saying by way of explaining why people will like him, regardless of the fact he's an arsehole to others, so long as he creates something wonderful; "God sent His only son on a suicide mission but we like him anyway, cause He made trees".

Towards the end of the film there is touching semi-rapprochement between Jobs and his estranged daughter Lisa on the top story of a car park. Jobs looks at his daughter's Walkman and says,

*"I am gonna put music in your pocket"*

"What?" Lisa asks.

He replies: *"A hundred songs. A thousand songs. Five hundred songs. Somewhere between five hundred and a thousand songs. Right in your pocket. Because I can't stand looking at that inexplicable Walkman anymore. You are carrying round a brick, playing a cassette tape. We are not savages. So I'm gonna put a thousand songs in your pocket."*

The film was a disappointment at the box office – attributed mainly to the fact that Fassbender is not a big enough star to attract movie viewers, although he gave a genuinely great performance.

I loved the picture. The script was crisp and pungent. The direction assured. The acting simply wonderful. It brought insight and depth to each of the characters and their relationships. The depiction of Silicon Valley in the 1980s and 90s perfectly rendered. And the tension between new business and old business styles was made clear.

But I liked it for other reasons also. I liked it because it brought together two things that have been important to me for a very long time – copyright and digital technology.

You will be surprised to hear the movie reviews did not pick up on this key angle!

The media and entertainment products that Apple offers customers are based on a respect for artists and creators. Yes people are not always happy with Apple's terms of trade. And yes creators rightly want to ensure fair payment for their work.

But fundamentally Apple respects copyright. In setting up iTunes they spoke with producers, they licenced their content, they sold it to consumers. Their model has ensured the flow of money to companies that create content ensuring that these companies can continue to create, empowering diverse artists to make new work.

And they can continue to invest in new products and continue to innovate with new productions and approaches. They also happily continue to employ people.

This is a positive story of digital technology and creativity with a copyright foundation.

But when you look around today the notion of copyright is under attack on multiple fronts – by some tech companies, some woefully disconnected academics and some economic think tanks, who really should know better.

My purpose today is to reassert the centrality of copyright to the rights of creators to a fair return for their work and to the orderly functioning of creative production in a modern IP driven world.

Copyright has always been important. That's why it's been around for centuries. But it's never been as central to our economic future as now.

In other, less momentous times, copyright was something that was probably of most interest to lawyers. You know the sort of thing. A tussle over who first wrote that guitar riff to '*Stairway*'. Important to those involved, most certainly; but not an issue that was front and centre of debate, despite its importance.

But not now.

In the digital world there's so much more at stake, for everyone. Protecting copyright is absolutely central to the very things that are driving our future prosperity: creativity, invention and productivity.

We are really only just embarking on this digital journey. None of us really know where it will take us. Given the pace of change in the digital realm especially, it's likely that many of the innovations that we'll be talking about in 2026 are still unknown.

I can tell you this, though: without strong copyright laws those future innovations won't take place securely here, in Australia. And that is a fact.

It's a big economic issue, but it's about a lot more than economics. It has massive implications for our society also. Because as you all know creativity isn't just an economic need; it's a human need.

In a world in which as much as 40 per cent on some estimates, of existing jobs – even knowledge jobs – will be replaced by technology in the coming decades, we have a unique chance to expand the opportunities for millions of ordinary people to use their time creatively instead of in passive and sometimes personally and socially destructive ways.

We are on the cusp of a time in which culture, art, technology and entertainment will flourish, democratically, as never before.

With a reasoned, evidence-based debate about copyright – something sadly in profoundly short supply in recent times – we can get this right and achieve good outcomes.

And yet, there are big risks. There is a more dystopian view where some digital businesses see copyright as an inhibitor to their model. Something to be watered down, to help reduce input costs.

If we allow their view to take root, we shall all still work in a digital economy, but it will be a digital economy of a far different sort. One with far less creativity, far fewer opportunities, far shallower intellectual and artistic depth, and far lower rewards for those who create new work. One in which our web designers, app designers, novelists, poets, playwrights, film makers, composers, musicians, visual artists, photographers and, yes, journalists, have to bash away at the digital coalface for ever-diminishing status and reward.

A future in which creators are forced to give up creative dreams where they have all the appeal and legal status of daggy second hand goods.

It's already a tough world for creatives. For example the annual average income of writers is currently estimated at just \$13,000 a year. We can't afford to make it even tougher.

Everyone here who has seen the chairs in their newsrooms removed one by one, seen their hourly rate for freelancing decline, and found their prose or photographs or documentaries placed without permission on websites or in video uploads without consent and absent royalties, is alarmed.

You know what I am saying is close to home and that creators often feel powerless. The only reliable bulwark against it is the preservation of the concept of enforceable copyright, which is now under threat.

### **Productivity Commission proposals – the danger is imminent**

So what is the Productivity Commission proposing?

In an unusually slanted, lopsided report, there are two major inevitably damaging changes for copyright with many other significant proposals on IP generally and with a raft of decidedly odd commentary. The first copyright change is to introduce a U.S.-style 'fair use' exception to copyright protection. 'Fair use' is an unfair American legal principle which would allow large enterprises to use copyright material for free, which, under Australian law they currently have to pay for. PwC recently estimated that introducing fair use in Australia could result in a loss of GDP of over \$1 billion.

The massive legal uncertainty surrounding the interpretation of 'fair use' would create a lawyers' feast, raise enforcement of copyright costs and potentially make enforcement in a small more financially constrained jurisdiction such as Australia, all but impossible.

This would almost certainly lead to the situation – already prevalent – where copyright infringers would make calculated incursions into copyright-protected material and effectively challenge the ability of rights owners to seek a 'fair use' judgement in court. This is a legal definition fraught with judicial disagreement. How many artists or small publishing houses can afford to litigate against big players in this way? 'Fair use' adds up to an almost non-existent legal protection when Australia already has 'Fair Dealing'. And it works. It enables excerpts to be used within defined limits.

In America, where 'fair use' rules apply, copyright litigation is five times higher than in Britain, which has copyright laws similar to ours. Those laws have recently been confirmed in the UK.

The PwC estimate of the loss of \$1 billion would include a massive reduction in Australian produced content. All the available evidence – and there are vast swathes of it - suggests 'fair use' is unfair and the wrong way to go.

Not only that, but it would also undermine the effective and fit-for-purpose licencing system that has evolved here in Australia. It is one of the best licensing regimes in the world and enables teachers and students to share and copy from almost every book, magazine, image or journal published in the world for less than the cost of a single book each year.

The second major concept floated in the report was to reduce the period of copyright protection of a work to as little as 15 or 25 years after creation. This was the Commission's so called 'preferred position' and not a recommendation as it blatantly disregards the inconvenience of international treaties which commit Australia to current copyright terms of 70 years after the death of the creator.

I ask you to think about what the PC's preference would mean.

It means that any work published as recently as 2001 would be free for any other person to appropriate and commercially exploit it with no benefit to the person who wrote it or sang it or filmed it.

Stasiland – nothing from 2017 onwards for the brilliant Anna Funder. It's still selling strongly thanks to being on school reading lists. It's how she makes part of her living. Under this proposal, it could be making someone else a living.

Gallipoli – nothing anymore for David Williamson and Peter Weir.

Want to make a movie of Richard Flanagan's *Narrow Road to the Deep North*? It's yours for free just a short dozen years from now.

A back catalogue of protected work is a creative person's superannuation. Removing that income stream after just 15 or 25 years is like confiscating the capital growth of their superannuation accounts when they reach the age of 50. Most would call that a form of theft, wouldn't they?

Not only is it unfair but it makes it much harder to support and nurture the next generation of stars and Aussie icons - the Jimmy Barnes's, Peter Sculthorpe's, Patrick White's and Mad Max's of the future.

### **Evidence based measures**

The Productivity Commission claims its position is evidence based, but if it truly wants to be 'evidence based', it should examine the evidence of what has happened when similar changes have been introduced elsewhere.

The adoption of U.S.-style 'fair use' exceptions by Canada has slashed the payment of licencing fees by educational institutions by 98 per cent. That's right 98%! It has done profound damage to that country's publishing industry, causing big-name university publishers like Oxford University Press to flee the jurisdiction, making fewer Canadian educational materials available to Canadian schools and universities.

Here is some other real evidence. Australia's copyright system enables teachers to copy and share content more extensively than anywhere else in the developed world. Indeed, the US Copyright Office has suggested US Congress consider similar licensing approaches to facilitate access to digital content.

We were therefore perplexed by Commissioner Karen Chester's comment on ABC Radio National at the time of the release of the draft report:

*"You only need to see what schools have to go through to get access to copyright material."*

While it is certainly true that some in the education sector would like to reduce the amount of compensation they are currently paying Australian writers, journalists and artists as well as publishers (which is based on determinations by the Copyright Tribunal), the level of access to content enabled by the Australian system is world-leading.

It includes any content from anywhere in the world, from any source and in any format. The uses allowed include printing, scanning, emailing, inclusion in course-packs, publishing on learning management systems and recontextualising.

It is professionally unacceptable that this is not reflected in the draft report's analysis and findings. The evident bias is plain for all to see.

### **A better way to update copyright laws**

There is a better way when it comes to copyright reform.

Copyright laws should never be carved in stone. We all know that. Common sense requires it to be regularly updated as technology and business practices evolve – as it was when the invention of the long playing record, the photocopy machine and the Internet made intellectual product accessible in new ways, and as we did through the creation of education licenses.

Rights holders, libraries and education institutions are already advancing positively on the promise by Attorney-General Brandis to review our Copyright Act. The cooperation has been unprecedented – with agreement to simplify statutory licensing schemes and bring unpublished works in alignment with published works.

This is the direction copyright should go. Progressive, sensible and responsive evolution to meet changing needs, driven by the principle of ‘first do no harm’ and second ‘respect our creators’. Surely this approach is preferential to unleashing ferocious ideology that, like all untested ideology, invariably results in unintended consequences with more harm than good.

### **Copyright – the foundation of investment certainty in the digital age**

As someone who is both a lover of art and creativity and the former head of entertainment businesses, here’s what I think this copyright debate is essentially about.

It is a fight between sound business principles and ideology.

A fight between copyright laws that provide effective and long accepted framework for protection of creators’ rights to confidently manage the use of their work and a dishonest ideology that has been manufactured by monopolists to legalize what is essentially property theft fuelled by new fashioned clever self-serving arguments that creative production should all somehow be free for all.

It is a fight between creators who need copyright protection to flourish and rent seekers who need to eliminate copyright because it stops them from getting unfair use of other people’s hard crafted work.

I find it almost unbelievable that the Productivity Commission looks set to come down on the wrong side of these arguments.

### **The ideology of ‘copyleft’**

Let’s be clear about what underpins the Productivity Commission’s determination to dilute copyright and compromise it with notions of fair use as against already existing provisions of fair dealing. It is not free market thinking. It is an ideology. An ideology manufactured to benefit the large corporations who stand to gain by squeezing rights holders into the workhouse.

These manufactured arguments will be all too familiar to all.

'Content should be free.' 'Big Content is the new Big Brother. "Copyright holders are vested interests.' 'Copyright holders are freeloaders.' 'Copyright is theft.'

And so on – these arguments are often referred to as the Copyleft.

The squeezers have been creating these trendy, up-beat, sometimes even anarchic arguments against copyright protection for ages now. They are setting up groovy campuses and think tanks, funding university programs, hiring lobbyists, impressing on people that it's all about knowledge and opportunity – when it's all really about more money for them.

They've managed to make the impoverishment of the creative community sound 'cool', when it's the opposite.

And to see the measure of the success of this strategy you only need to look at the way that the Productivity Commission treated some of the academic proponents of the big tech position at its public hearings. They were treated as disinterested parties, experts at law, when in fact they are part of a lobby group funded by the tech companies. And highly partisan. It was frankly an outrageous display of bias – and a long way from the behaviour you'd expect from an impartial inquiry.

For a long period from the 1980s Australia navigated rapid and large scale economic change well. Arguably better than any other country. Yes, there were losers from the big economic reforms of the late twentieth century. And yes, not everyone prospered equally from the mining boom or suffered equally from the Global Financial Crisis. But how much better has our society come out of that era than in others?

We did so because we have been blessed with level-headed policy makers who displayed the right combination of intellectual foresight and pragmatism. People who could see through the ideology of vested interests. And this allowed us to devise practical, measured reforms that allowed the gains to flow to just about all pockets of our society. Extreme ideology has usually been held well in check.

The questions for our nation are:

Can we do it again?

Can we create the right sort of public policy framework for the digital age?

Or will we be taken for fools, privilege one group of interests over the majority, harm creators and end up regretting it when all the damage is done?

In recent decades Australia has faced up intelligently to several copyright challenges.

In 1968 our copyright legislation was amended to protect copyright over films, television and sound broadcasts.

In the 1970s and 1980s it extended to the related public lending right and to remuneration for copying by the education sector – which led to the creation of the organisation I now chair – the Copyright Agency, which protects the rights of many tens of thousands of talented Australians.

In 2000 copyright extended to intangibles accessed over the Internet.

Our writers today benefit from a world-leading system of distribution of rights payments from copying and lending by public libraries and educational institutions – very welcome annual cheques.



And all of these changes to copyright protection were balanced by new exceptions to copyright to protect educational use and specifically enable parody, satire and private use. Put all these changes together and they add up to a successful functioning regime which pragmatically negotiates copyright issues raised by technology and users while defending the inalienable rights of Australia's creative talent.

Given the modest incomes of Australia's writers, it's not only hard but I would suggest impossible to sustain the case that all this has unduly benefited copyright holders.

And yet, the Productivity Commission believes this evolution of copyright law has expanded copyright protection too far. That it is has become too expensive to maintain. And that radical measures are needed to wind it back in the interests of consumers.

Frankly this is fantasy – nothing short of patent nonsense. The Commission has erred mightily in many of its assertions in the draft report. There is no evidence whatsoever that rights holders have advanced at the expense of consumers. And no evidence that costs are higher here than elsewhere. In fact, because litigation levels are so low here compared to elsewhere, the opposite is true, as is widely acknowledged internationally.

Their central notion that copyright laws are holding back innovation is a complete fallacy and profoundly offensive to home grown digital operators and their production.

What I am advocating is about ensuring a creatively focussed policy agenda which this country very much needs. One which can actually succeed. Legal protections enshrined in the Copyright Act are definitely not anti-business.

On the contrary, the US Chamber of Commerce put the case well for our copyright system. It said: - *'Historically, Australia has been a world leader when it comes to IP legislation. Australia's legal framework makes it one of a small group of nations that not only enshrines effective incentives to create IP in law, but critically, provides legal certainty to innovators in the marketplace. It is a balance that mobilises the innovative and creative talents of its population while also serving consumers in the marketplace...'*

Only a disconnected academic interpretation of copyright law could overlook the fundamental importance of strong copyright laws to creators' rights and to investment decisions in their work.

### **Conclusion**

I want to make just one further point, and in doing so put this issue of ensuring the integrity of Australia's copyright laws in its full perspective.

You don't have to be a genius to see that right now economic reform and innovation are in serious trouble. There's a backlash. Whether it's the Brexit, or the rise of populists like Donald Trump and Marine Le Pen, or even the result of our own recent federal election, too many people are saying that innovation and economic change are creating too many losers and too few winners.

Undermining copyright will perhaps prove such critics correct. By stopping so many self-employed creative people from gaining adequately from their work, it will create a potential new source of backlash. By damaging publishing houses it will create a potential new source of unemployment.

If the thousands of young people coming out of our universities each year hoping for a job in the creative sectors of the economy are robbed of any hope of making a living from their talents, how easy do you think the innovation agenda will get? How easy do you think

economic reform will get? And then there is the whole array of digital invention and intellectual property attaching to it.

To follow this ill-considered poorly argued report which is so disrespectful of intellectual production, would be a disaster for our nation. It would represent surrender of our creative assets to hostile forces.

If we are to be all that we can be in the digital world, we need to back creativity and invention, as the Prime Minister himself is determined to do. It's a task that can't be achieved by parroting simplistic theories; it's one that needs a wider and deeper view, informed by reasoned argument and real evidence.

I encourage the Productivity Commission to think again.

If it isn't able to do this, on behalf of Australia's creators and those who back them, I urge the Australian Government and the Parliament to ignore the recommendations of the forthcoming Productivity Commission Intellectual Property Arrangements Report because Australia deserves better outcomes.

KW  
17 August, 2016