



Unfair disadvantages could flow from 'fair use' proposal

Advice from the US: our copyright rules won't suit Australia

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Whether it's crash test dummies, chocolate chip cookies or the internet, there are a lot of great US inventions worth exporting around the world.

But looking on from where I am in Washington, there's something perplexing about the obsession of Australia's Productivity Commission with US copyright laws.

With the words "innovation" and "agility" being bandied around a lot since the federal election last year, the Australian government's reaction to the commission's report on intellectual property and copyright, published just before Christmas, will be an early test of your country's future creative enterprise.

Historically, Australia has been a world leader when it comes to intellectual property legislation and is one of a small group of nations that has effective incentives for creativity in place that provide legal certainty to innovators investing in Australian stories, content and information in the marketplace.

It is a balance that mobilises the creative talents of the population while serving local and global consumers in the provision of high-quality content and entertainment. That's why the recommendations of the commission's report are both puzzling and alarming to me and to many other international observers.

At a time when the earnings of creators have been in a downward spiral, the report is peppered with assertions that Australia's copyright system favours creators at the expense of consumers and insists that Australia's position as a

net importer of creative content means it should further dilute the existing incentives for local creators and industries.

So the report seems to say that because a lot of American and British content is imported into the country, why not go the whole way and just forget about Australian content altogether?

I'm not sure the community, either in Australia or the US, would agree. When you're producing music hits like Sia's *Chandelier* and Gotye's *Somebody That I Used to Know* and the film *Lion* — we all want more of that, not less.

That's one reason why Australia now ranks 12th in the most recent International IP Index from the US Chamber of Commerce. As a nation Australia may be, statistically speaking, a "net importer" of IP-intensive goods and services. But it would be economically and culturally harmful if it fell into the trap of believing that its national self-interest lies in policies that devalue local intellectual property rights in order to further cheapen access to Australian content and products.

The commission's recommendation that Australia adopt a US-style "fair use exception" to copyright is particularly disquieting. It suggests this will be an improvement, but in our view it will freely allow the expropriation of creative works of authors and artists and deprive them of fair payment.

We at the US Chamber of Commerce support appropriate "exceptions" that allow the use of copyright material without permission under certain circumstances and which Australia's Copyright Act already permits.

However, a major false premise of the commission's report is that "fair use" offers users of copyrighted works some degree of certainty.

In fact, "fair use" is a famously ambiguous doctrine, its metes and bounds circumscribed in the US not only by statutory language but by more than a century of judicial interpretation.

While it is not impossible for "fair use" to be implemented in an appropriate way in other jurisdictions around the world, it is not the sole route to evolving effective copyright systems.

As well as Australia, jurisdictions such as the EU and Japan have modern copyright systems that provide exceptions those governments find appropriate without implementing so-called "fair use".

The commission gives short shrift to legitimate concerns from Australian authors, publishers, musicians and filmmakers that adopting "fair use" has the potential to undermine the incentive and ability of Australian creators

to practise their craft and earn a living from it. The commission also dangerously dismisses the fact that other countries have considered and rejected "fair use", which misses the key point: those countries have found ways to achieve and maintain exceptions outside the context of "fair use".

Australia should continue to be a leading player in the advancement of a global innovation economy, where all of the world's citizens are empowered both to produce and benefit from new technologies, inventions and creative content.

But a decision on whether to adopt "fair use" in Australia should not be based on faulty premises. Nor should the likely disturbances to the existing marketplace, and the rights of Australian creators, be ignored.

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A still from Gotye's *Somebody That I Used to Know* video