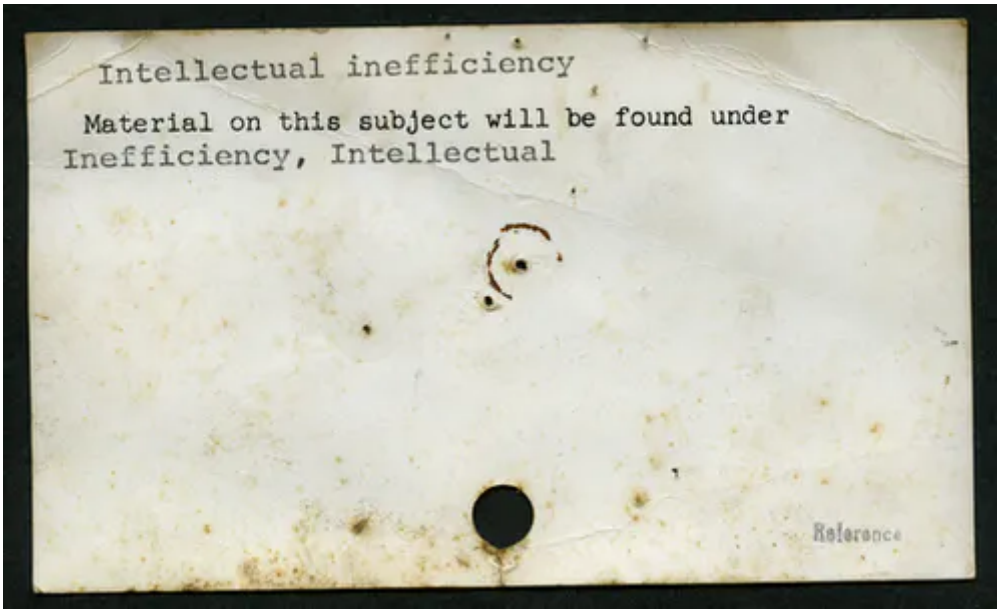
THE CONVERSATION

Academic rigour, journalistic flair



Recommendations on intellectual property are likely to be filed away. Flickr/Ross, CC BY

Productivity Commission's recommendations on IP reform likely to be lost in election haze

April 29, 2016 11.49am AEST

Author

Bruce Baer Arnold
Assistant Professor, School of Law, University of Canberra

The Productivity Commission aspires to act as the Government's economic conscience, providing advice that from a neoliberal mindset is rational, but may be politically inconvenient. The Commission has called for a fundamental reworking of Australia's intellectual property (IP) regime in its 601 page draft *Intellectual Property Arrangements* report.

The draft is sure to delight some readers, dismay others, remind us of identical recommendations over the past decade and allow the Government to defer hard decisions until well after the election. It features arguments and recommendations of direct relevance to scholars and university administrators. It should provoke a considered response from anyone interested in economic sovereignty, social justice and industry development. Salient recommendations, alas, are likely to be still-born.

Where does it come from?

The draft was commissioned by former Treasurer Joe Hockey. It's the latest in a cascade of reports by about problems with copyright, patents, designs, plant breeders rights and trade marks. It highlights fundamental imbalances between IP rights holders and users. That imbalance inhibits creativity and

does not appropriately foster the innovation that is recurrently rediscovered in “clever country” statements by the Coalition and ALP.

The imbalance has an international dimension, because Australia is an IP colony and has continued to sleepwalk into bilateral/multilateral trade agreements that unduly privilege partners such as the United States. It has a substantive cost to individuals and to taxpayers, through for example burdens attributable to over-protection of patents for medications that feature in the essential Pharmaceutical Benefits Scheme.

What does Australia need to do?

The draft report echoes past Productivity Commission reports in questioning the conceptual framework for much of Australia’s IP regime. It notes the impact of the imbalance on Australian households, on artists and new media developers, and on universities. It also notes administrative inefficiencies or omissions in some of the Australian legislation, much of which can be readily fixed for greater coherence.

The draft offers a range of recommendations, which on close reading are less radical than the Commission’s brisk critique of patents and copyright.

The most salient and sensible recommendation is for changes to the Copyright Act. Those changes centre on establishment of a broad principles-based fair use exception, akin to what is in place in the US. The Commission calls for that change on economic rather than human rights or social justice grounds. It emphasises that a fairer, more balanced copyright system will both foster creativity and reduce copyright infringement. Rebalancing, rather than stronger penalties and exhaustive policing, will benefit Australian copyright creators and consumers alike. It will also benefit creative industry stakeholders such as libraries, archives and scholars.

Other recommendations include not extending the period of protection for registered designs, fine-tuning the trade marks and plant breeders statutes, belatedly including an Objects clause in the Patents Act, rethinking the controversial ‘innovation’ patents arrangements and bringing intellectual property transactions under Australian competition law. Efforts to streamline the regime will involve substantial investment in the Patents Office and dysfunctional Therapeutic Goods Agency. We can expect patent practitioners to savage the Commission’s stance on what it regards as trivial patents, alongside its call to deny business patents and software patents. ‘Big Pharma’ will again damn calls to wind back practices such as evergreening, extended periods of protection for pharmaceuticals and undue protection for test data.

The recommendations are consistent with suggestions by the Australian Law Reform Commission, the Pharmaceutical Patents Review, the Harper Inquiry into competition policy and the Advisory Council on Intellectual Property – all bodies that consulted widely, thought hard - and were ignored by the relevant Minister. The recommendations are also consistent with developments in Canada, New Zealand and the United Kingdom. Importantly, they would place Australian consumers in the same position as their US peers.

The Commission again calls for caution about signing up to “free trade” agreements and geoblocking restrictions, echoing scholars such as Deborah Gleeson and Matthew Rimmer who have cogently highlighted that the benefits of those agreements are strongly weighted against Australia.

The Commission has aptly expressed concern about the fundamental lack of transparency in trade negotiations, a secrecy that has been endorsed by both the Coalition and ALP when in government. Its response is unfortunately a damp squib: Australia is to work harder in international fora. On occasion even the conscience mumbles.

No, Minister!

What’s going to happen? In *Yes Minister* poor Jim Hacker is warned about bold brave initiatives. The draft report is bold and rationality is alas not a recipe for success.

The Commission’s recommendations as a whole are thus very unlikely to be embraced by Prime Minister Malcolm Turnbull, by his colleagues or by Bill Shorten. The Commission states that “Australia’s intellectual property system has lost sight of users”. We should ensure that the Government does not lose sight of the report.

Intellectual property **Productivity Commission** **Creative industries** **Copyright** **Free trade agreement**