SHAKESPEARE’S FORTUNE

How copyright has failed authors
and why it matters

A thesis submitted for the degree of Doctor of Philosophy
at the Australian National University

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December 2013
STATEMENT OF ORIGINALITY

This is my original work except where cited.

In chapters five and six I present results of a survey of screen producers. I chaired the group which designed the survey and I commissioned the online survey company Bergent Research to carry out the survey. Other members of the group were John Berenyi, Dr Allan Cameron, Simon Molloy and Professor Deb Verhoeven. A second iteration of the survey was led by Dr Mark Ryan at Queensland University of Technology.

In chapter five I also report findings from an experiment called Box Office Prophecy, which I conceived and carried out with Professor Charles Plott at California Institute of Technology and, in a later iteration, Dr Jordi McKenzie at University of Sydney.

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ABSTRACT

Shakespeare’s Fortune

How copyright has failed authors and why it matters

A key policy rationale for the system of copyright is to give authors an incentive to create new works. But what if actual financial returns to authors were very poor — so poor that no rational agent could be expected to respond to the incentive? In this thesis I present data from a large sample of Australian films showing that returns are consistently poor even for ‘hit’ films. Data from other countries confirms the finding and there is evidence that returns from other forms of copyright asset such as literary works are also poor.

The thesis explores how this situation can have persisted for so long without the system breaking down or eliciting strong protests from authors. Drawing on a survey of Australian film producers, I confirm anecdotal evidence that authors are driven by non-financial considerations as well as financial incentives. The Hollywood studios have evolved sophisticated business practices that take advantage of these non-financial motivations. In this they are following the example of London’s booksellers of the early 18th century.

Does it matter that authors earn low returns from their copyright assets? I identify two classes of author for whom poor returns present a real obstacle to authoring — authors whose work requires independence (such as dissidents) and authors who do not have access to patronage or other forms of subsidy to offset the poor returns from copyright (such as authors from the ‘third world’). Finally, I consider possible reforms to copyright that might improve returns to authors and examine the public policy case for pursuing these reforms.
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ACKNOWLEDGEMENTS

This thesis has been a long time in development and I have incurred many debts. I would like to thank in particular my supervisors Bruce Chapman, Peter Drahos, Don Lamberton, John Uhr and Glenn Withers. Their persistence encouraged mine. I have gained an education from them — ways of researching and thinking new to me — and I am profoundly grateful.

I worked with a number of people on specific lines of inquiry and research, among them John Berenyi, Barry Burgan, Allan Cameron, Stuart Cunningham, Michael Fraser, Gabiann Marin, Jordi McKenzie, Simon Molloy, Lyn Norfor, Charles Plott, George Raftopulos, Mark Ryan and Deb Verhoeven. I am very grateful for their help, advice and collaboration.

I am also grateful to Andrea Buck, Bob Connolly, Mary Gibson, Sandra Levy, Hazel Moir and Rae de Teliga, who gave me invaluable feedback on the draft text.

In the very early stages of my research, before it became a thesis, I received financial assistance from the Australia Council for the Arts, the Australian Film Commission (now Screen Australia) and the New South Wales Film & Television Office (now Screen NSW). I thank them for that early support.

I thank also the Australian Film Television & Radio School and in particular my graduate students there. Working with them proved to me the circular virtue of teaching what you research and researching what you teach.

Finally I thank my wife Nicole Mitchell and my daughters Agatha Court and Ellen Court for their love and patience.

David Court
December 2013
1. Introduction

You can make a killing in the theatre, but not a living.
— Robert Anderson¹ (c1954)

For surely it is time that the effect of discouragement upon the mind of the artist should be measured.
— Virginia Woolf (1928)

This thesis is about the economic status of creative work. It is an investigation of the viability of authorship in any medium but particularly writing and filmmaking and more particularly the work of authors who are dissident or independent. Because the viability of authorship rests on the set of rights called copyright, it is largely about the copyright system and the markets and practices that have co-evolved with that system. It is also about the social attitudes the system embodies.

There is not a lot written about copyright from the viewpoint of authors. Most people believe without reflection that copyright is good for authors. A frequent question in the copyright literature is whether it might be too good, too beneficent. My purpose here is to shake that belief — shake it hard — and having shaken it, bring into focus the implications of a copyright system that is not good for authors. These go right to the heart of the intellectual enterprise of authorship, not just the financial aspect. There is more at stake here than just money.

I bring to this study a long involvement in the film industry, an industry founded on copyright. In the mid-1980s I was appointed policy adviser at the Australian Film Commission and in that capacity was closely involved in the creation of the Australian Film Finance Corporation, a government-owned investment agency (discussed in chapter 2). Not long after I launched a newsletter, Entertainment Business Review, and became a director of a licensed dealer in film securities and later of a film investment company, Content Capital Ltd. In these capacities I was
involved in financing a number of films, among them John Weiley’s *Antarctica*, Baz Luhrmann’s *Strictly Ballroom*, Dean Cavell’s *The Wiggles Movie*, Jerzy Domaradski’s *Lilian’s Story*, Bruce Beresford’s *Sydney, Story of a City*, Robert Connolly’s *The Bank* and Don Featherstone’s *The One Percenters*. In 2005 I was appointed founding director of the Centre for Screen Business at the Australian Film Television & Radio School, a role in which I have combined teaching with research into the screen industries. More recently, with filmmaker Sir Peter Jackson, I undertook a review of the New Zealand Film Commission for the New Zealand Government. In all of these roles the viability of filmmaking has been a pressing concern.

To understand the copyright system, it is not enough to study the legislation and case law. We need economic data. I therefore begin this investigation with a profit-and-loss report on 158 Australian films produced between 1988 and 2002 — a rare window into the financial machinery of the film industry. From this data set (and drawing on other, comparable data from the UK and the US) I build a profile of the risks and rewards of copyright, considered as an asset class. With this empirical grounding we may then venture into the copyright literature and see how it squares with the lived reality of authorship.

Copyright is not a settled thing intellectually. There is no consensus about either its meaning or purpose, despite three centuries of statute and case law. It is a contested idea. At one extreme it has been described as ‘an obnoxious combination of medieval institutions’, without merit, fit only for scrapping (Boldrin & Levine 2008, p244). At the other it is a solution ‘protecting the rights of all who make something of value with their minds, their passion and their unique creative vision’ (Motion Picture Association of America 2011a). In between is every kind of opinion. The long shelves of commentary are crammed with disputes, many of them still hot. Is copyright a kind of property, as its membership of the genus
‘intellectual property’ implies? Or should it be viewed as a privilege, specially granted by the state? If it’s property then it sits with free markets and the rule of law, a bastion of capitalism, safe. If it’s privilege then perhaps its age counts against it — an anachronism in this digital era? The arguments swirl about.

The most basic questions remain in dispute. Is copyright really an author’s right? Certainly the official language of copyright would suggest so, with its recurrent references to authorship and the creative act. But some scholars say it is more like a publisher’s right in the way it works commercially and in its origins. One school of thought goes further and questions the very idea of authorship. Following French philosopher Michel Foucault they recast the author as ‘a certain functional principle… by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction’ (Foucault 1984, p119). On this view the author is ‘a cultural formation… inseparable from the commodification of literature’ (Rose 1993, p1). Authoring is thus an artifact of publishing, a fiction. Others have taken an opposite tack, investing authors with moral as well as economic rights, in particular the right to assert their authorship and fend off interference with their works. The two sides could not be further apart.

Yet all this intellectual ferment barely disturbs the institutions of copyright. With its law courts and thriving legal practices, its international conventions, its government agencies and collecting societies, the copyright system has the inertia of a freight train. It rolls on, heedless of its critics. It has been rolling for 300 years, always in the same direction — always expanding. Beginning in 1710 with just maps and literary texts, it has stretched over time to accommodate successive new technologies of photography, film, sound, radio and television, software and industrial design. Its duration has expanded too, from a maximum of 28 years in its first statutory expression to its current term of author’s life
plus 70 years. US law professor Lawrence Lessig has called this its ‘almost limitless bloating’, noting that Congress extended the term of copyright 11 times in the 40 years to 2001 (2001a, pp106-7).

One could be forgiven for believing that all this attention, all this expansion must be good for authors. After all, they are the intended beneficiaries. Even if copyright is more like a publisher’s right, it seems reasonable to assume that it works in authors’ interests too. That assumption sits just behind most thinking about copyright, as we will see.

The sheer size of the copyright system, its institutional heft, implies that it must be working, just as its longevity implies that authors (and others) consent to its workings. It is the state’s answer to the author’s existential question: how can I make a living doing this? Without copyright, writers would have only their manuscripts (filmmakers their negatives) and no defensible interest in copies made from them. Even if they could contract with the first publisher of their work, the economic interest so created would be dissipated as soon as a copy fell into the hands of a second publisher. Copyright was the state’s solution to this problem, the intervention that bottled the author’s interest.

Authors therefore find themselves tethered to the copyright system, its presumed beneficiaries, suitably grateful, though their thoughts may swim with doubts.

Copyright is after all the practical ground of the business of writing and filmmaking. It’s the core asset of the business and the asset class for the whole value-chain of authoring, publishing and distributing. To entertain doubts risks alienating those necessary allies, the publishers and distributors, who appear to entertain no doubts at all. And yet grounds for doubt are all too evident. There’s a niggling feeling of manipulation, of publishers speaking over the top of authors, purporting to represent them; there’s the slightly-too-flowery rhetoric (‘protecting the rights of all who make something of value with their minds, their passion and their unique
creative vision’, to quote the Motion Picture Association of America again). Among policymakers, there’s the apparent lack of interest in whether the copyright system actually delivers, from an author’s perspective — as though this didn’t matter. And there’s the simple fact that the great majority of authors live and work in poverty.

This thesis is an inquiry into the doubts. The focus throughout is on the copyright author — the writer or filmmaker. Later in the thesis the focus goes tighter still, on writers and filmmakers who are sources of dissent, of witness-bearing or critical inquiry. For these are the authors who more than any others stand in need of a viable copyright living and are therefore most at risk from copyright’s failure.

**HERE IN PREVIEW** are some of the ideas I will explore as we pursue this investigation:

1. *The returns earned by copyright assets are too small to compensate for the risks of investing in them.*

This is the fundamental finding of this inquiry, from which everything else follows. A copyright work in the hands of its creator is an unbankable, unfinanceable asset — junkier than a junk bond. The consequences of this unfinanceability ripple all the way through the copyright industries. Nothing else better describes the economic circumstances of the author. To invest your art and capability, to pile up all your work in an asset that no right-thinking investor would buy from you, except at discount — such is the prospect that copyright holds out to the author.

It will be objected that some authors earn tremendous incomes from their copyrights. And of course they are the ones who come most readily to mind: J K Rowling, Robert Ludlum or Charles Dickens, say. The difficulty here is of inferring too much from the experience of the very few. For copyright incomes are highly skewed. It is not just movies that
separate into a few extreme ‘hits’ and many ‘misses’: the skew is characteristic of markets in copyright works of all kinds. Martin Kretschmer and Philip Hardwick (2007) reviewed data on 25,000 British and German authors’ earnings and reported: ‘It appears that the more copyright related the income stream, the more extreme is the distribution of income... A small number of very high earners earn a disproportionate share of total income.’ When incomes are averaged the picture is one of very low incomes, with professional UK authors earning a median (‘typical’) income of about 64 percent of national gross median wage and German authors about 42 percent of national net median wage.

It will also be objected that publishers routinely invest in copyright assets, with no apparent ill effects. And it’s true, publishers do earn viable returns from copyright assets. But the comparison is apples with oranges. Publishers have earlier and safer access to the revenues of copyright works and they reserve to themselves the lion’s share. Where authors are paid royalties, they are typically just 10 cents in the retail dollar; where profits are shared, they are so contingent and delayed as to be vanishing. Stories are commonplace of movies earning hundreds of millions of dollars but, according to studio accounts, being still in the red — yielding no profits to the filmmakers — so much so that no one talks any longer of movie profits. Instead agents negotiate ‘participations’, shares that kick in when revenues hit defined points. Historically, publishers have also had the benefit of scale. Over time they have built big portfolios of rights with which to smooth the cashflows and cushion the risks of publishing. An individual author, by contrast, can produce at best a handful of works with no possibility of diversification.

This ability of publishers to levitate above authors when it comes to sharing the money and managing the risks means that their risk-reward ratios are very different. From the very same work the publisher can make a silk purse, while the author earns a sow’s ear.
2. The copyright system depends for its efficacy on an elaborate system of subsidies with which it has co-evolved.

Since copyright is a low quality asset producing a poor and uncertain income, authors need supplemental income to keep working. Even if they are successful, they will need help to cover the lean period before success arrives. But for most the need will be continuing, since they’ll never make enough to live by their work. Their choices then are to subsidise themselves, for example by taking a ‘day job’, or to induce others to subsidise them.

The institution of subsidy is older than copyright but more fluid and innovative. An early form was patronage, where the artist/author/ scientist entered the service of a wealthy patron. Shakespeare himself wore the king’s livery as a member of the King’s Men, London’s leading theatre company. Later authors sometimes syndicated their patronage, inviting wealthy readers to subscribe to their works ahead of publication. The career of Dr Johnson illustrates the variety of subsidy. He was supported early in his career by a well-to-do widow, ‘Tetty’ Porter, whom he married; famously railed against the Earl of Chesterfield for his dilatory and inadequate patronage of Johnson’s Dictionary, a nine-year project; but on publication the Dictionary attracted the attention of King George III, who granted Johnson a pension for life of £300.\(^8\) With time the system of subsidies has grown still more elaborate and intertwined with the copyright system. There are grants for travel, research, writing, workshops and read-throughs; there are production incentives, tax concessions, rebates, bounties, ‘soft’ investments and limited recourse loans. The number of subsidy-granting entities has multiplied too. As well as governments and their agencies, there are philanthropic foundations, academic institutions, public corporations, private trusts, and not to forget those three much put-upon backers, Family, Friends and Fools.

Although it is the formal programs of subsidy that claim our attention, the
most pervasive mechanism of subsidy may be the simple acceptance of poorly correlated risk and reward that is characteristic of creative work. It is the author (or investor) who accepts a level of risk they would reject in any other context, or a rate of return they would ordinarily consider too low for the risks entailed. Poor returns and outsize risks, accepting one and running the other — there it is, the engine of subsidy at work.

The copyright system works because it sits propped up on a system of subsidies that compensates for the poverty of the copyright asset. The two need to be seen in tandem, a twin-system. From this much follows.

3. The Hollywood studios have perfected a business model pioneered centuries ago by London’s book publishers and based on the willingness of authors and other participants to subsidise their own participation.

The Hollywood studios were not the first to see the possibilities of the self-subsidizing author (and star-struck investor). That distinction belongs to London’s publishers of the 18th century, who saw that the gentleman-author, disdaining money, might write for fame instead. But the studios have perfected the business model based on the insight. They are masters of the Dream. They have held the world’s gaze for nearly a century and made Hollywood the global epicentre of movies, glamour, stardom and therefore movie aspiration. It is a running gag that every waiter in Los Angeles is really an actor or writer. But then consider that the Writers Guild of America registers more than 40,000 screenplays each year, while the industry makes around 750 movies annually\(^9\), implying that 98 percent of screenplays are never made into films (MPDA 2011b). The great majority of these are ‘spec’ screenplays, developed at the writer’s or producer’s risk, without remuneration. Of course they are fully available to the studios — they are proffered to them, in the hope the studios will take them up. In effect, by holding out the possibility of a deal, a movie, a ‘hit’, the studios induce a vast, self-organizing factory of effort. They outsource nearly the entire troublesome business of generating new story
ideas and turning them into filmable screenplays, at the cost only of paying — handsomely — for some small fraction of them.

And it is not just stories and scripts. The movie studios have perfected a financing model that works on the same principle. Investors are recruited, like writers and actors, with the possibility of wild success, though with low, lottery-like prospects of winning it. The effect of the model is to leave most of the equity risk with these investors, while the studios keep most of the revenues. If this seems improbable — if it seems unlikely that sophisticated investors would embrace such a model — we need only review the long line of investors recruited by Hollywood over the years. A story in the *Los Angeles Times* listed some of them: ‘…old-line industrialists, Wall Street financiers, insurance conglomerates and corporate raiders, New Economy wunderkinds from this country, plus Dutch, Japanese, British, Italian and Israeli hopefuls’ (Kiger 2004). The story was headlined ‘Chew. Spit. Repeat.’

Why would industrialists, financiers, corporate raiders and wunderkinds invest their money on such ‘soft’ terms? The answer is that Hollywood offers them things they cannot find readily elsewhere, things they value highly although they are intangible. They include: fame (or close association with it), the chance to walk the red carpet, the opportunity to be part of something larger than ordinary life or to create something of lasting value — and the dinner party bragging rights. These are things that economists call ‘psychic income’, the subjective rewards of a job or undertaking beyond just money. Hollywood has made an art of deciphering and satisfying the psychic needs of its investors; the film industry is awash in psychic currencies. To earn them investors are willing to let down their financial guard and, like authors and filmmakers themselves, accept too-high risks and too-low returns. There is thus a deep economy of creation, where fame and glamour are fungible with money, an ‘economy of esteem’ (Brennan & Pettit 2004). So it comes
about that the movie business, despite its risks, attracts a class of imprudent capital prepared to subsidise the creation of its copyright assets.

4. *The poverty of copyright disables at least two classes of author whose silence is a direct and substantial loss to the cause of knowledge creation.*

Why should it matter that writers and filmmakers (and their star-struck investors) are paid out in psychic income as well as, or instead of, actual money? They are not coerced after all: they could make different choices. Certainly, if authors were all substitutable, there could be no real cause for concern if some responded to the copyright incentive and others did not. As long as the combination of copyright income and psychic income were sufficient to induce an adequate supply of works, we could be indifferent about who wrote them. The question of substitutability therefore is key. A reader with a stack of books by their bed or a pile of DVDs by their television might readily pick up one title rather than another and not make too much of it. Generalizing, we might argue that if the world is sufficiently stocked with copyright works then the absence of this or that author could not matter much (provided it were not Shakespeare or some other author deemed essential to the canon). A problem could only arise if the copyright system worked to deter or exclude whole classes of author.

Now we are at the nub of it. For the copyright system, with its poor incomes and dependence on compensating subsidies, is a deterrent and exclusionary mechanism for at least two important classes of author. The first is the class of author for whom independence is a necessary condition of work. The second (which overlaps with the first) is the class of authors for whom a viable money income is a necessary condition of work.

Independence is highly prized by authors and artists of all kinds. They prize it because intellectual advance so often requires breaking with past
practice or with established thinking. Originality is the fruit of independence. It is the same in science where, as Kuhn (1962) showed, scientific progress depends at times on non-conforming individuals able to effect paradigm change. But independence is not just an intellectual quality; it has an economic aspect too. Authors who cannot make a living from their work, reduced to dependence on subsidy, from whatever source, are in a difficult position intellectually. If the subsidy is from the state and they are opposed to state policy, then what will their position be? If it is from an institution controlled by their peers and they are at odds with their peers, what will they say? Conversely, if they are truly independent and therefore not in the swim of things politically, what chance do they have of subsidy?

Authors who decline subsidy in order to protect their independence find themselves in the second, wider class of authors disabled by copyright: those who need to make a living from their work. This is a class whose size can only be guessed at, although it is surely large. It is everyone who struggles to write in the cracks of a life already taken up with work (think of Franz Kafka, insurance worker); it is those who write for a living but not what they burn to write; it is those who give up early or mid-career and also those who never start. It is authors from the Third World, from among the impoverished, the disempowered, the very people with no resources to subsidise their work and no access to the first world’s institutions and privileges. But of course we don’t know them, they are an absence in the world of authoring, an hypothesis, a might-have-been.

This second class of ghost authors is an indictment of the copyright system, considered as a solution to the problem of authoring, of making a living by writing or filmmaking. Society pays a price for this failure, losing access to the work and innovations of the whole class.

5. The poverty of copyright is a failure of policy not a market failure. It could be remedied.
It is tempting to pin the failure of copyright on the asymmetries of power and information that publishers enjoy over authors. But the asymmetries are the symptom not the cause. The real failure is that of the policy rules shaping the market for creative works — the rules of copyright.

Copyright can be thought of as a system that resolves the competing interests of authors, publishers and readers. The challenge then is to re-imagine copyright in a way that improves the economic outcomes to authors without damaging the interests of readers. The path to this must lie through a re-balancing of the interests of authors and publishers. Their interests after all are not the same. They were divergent from the very start of publishing, long before the first copyright legislation was passed by the English parliament in 1710. At the heart of the divergence is publishers’ demand for exclusivity, the right to publish without competition. Copyright’s framing as a monopoly right serves this publisher interest. But exclusivity doesn’t serve the author’s interest. Authors would do better in a commodified publishing market where publishers competed to publish rival editions of their works. As English economist Sir Arnold Plant wrote in 1934: ‘The author’s interest… will be better served by a larger edition and lower selling price than will pay the publisher best… Only when the author becomes a joint entrepreneur and shares the net profits with the publisher… do their interests in monopoly restriction coincide.’

Plant went on to argue for a fundamental reform of copyright. His solution was to shrink the window of exclusivity to a five-year term available only to the first publisher of a work. Thereafter ‘any publisher might issue an edition of [the] work subject only to payment, during the term of the copyright period, of a percentage of the published price to the author or his assigns’ (1934). While Plant had in mind a fixed percentage, we could leave it to authors to set their own prices (that is, the price of the royalties to be paid to them). Some might set them at zero
(not needing the income); others might price to reflect the work they had done. As a further reform, we could require that the royalty paid to an author be disclosed as part of the price information at point-of-sale. That way readers could see for themselves how much of what they pay flows back to the author. Finally, it could be a requirement that the royalty be paid directly to the author, so that readers could be confident that it was actually paid to them.

With these conceptually simple reforms, authorship would be transformed. Authors could negotiate the necessary publishing inputs on competitive terms, set the price of a work and collect the money. These three functions are fundamental to good business. Applied here, they would give authors business control of their work and almost certainly improve their incomes. And while authors would have a continuing right of remuneration, the publishing monopoly would be much reduced.

Of course the opposition of the publishers would be cacophonous and the prospects of reform therefore must be judged distant, if not remote. But the thought experiment of reform demonstrates its possibilities. There is no substantive reason why copyright could not be made a more effective policy instrument, better answering the need of authors for viable incomes.

6. A possible, alternative conclusion is that poor returns to authors are an unacknowledged but tolerated, perhaps even intended outcome of copyright policy. What-you-see-is-what-is-meant.

How should we interpret the persistent gap between the rhetoric of copyright (protection-asset-incentive) and the reality (poor asset, low average income)? This is a question about the intentions of policymakers and the evidence they use to judge results. One possibility is that they simply haven’t paid much attention to outcomes. They may have relied on the positive evidence of books in bookstores and films playing in cinemas. Or they may have been swayed by the visible success of hits like
Oliver Twist and The Bourne Identity and Harry Potter. The evidence of absence — missing classes of author, their unknown works — is swamped by the evidence present to eyes and ears. Another possibility is that policymakers have observed copyright’s outcomes but not been moved to act upon them. Perhaps they recognised that authors’ incomes were inadequate but concluded that subsidy was the appropriate remedy and turned their efforts in that direction. It is also possible that copyright is after all a publisher’s right or has become one. Drahos and Braithwaite (2002) have described how big business ‘colonised’ copyright during the 20th century, lobbying for term extensions and other measures that served publishers’ interests. Perhaps authors’ interests simply receded from policymakers’ view.

Any or all of these conjectures might be true. But they don’t explain policymakers’ persistent lack of curiosity about the outcomes of their decisions. Google’s legal counsel, William Patry, has observed (2012, p51) that ‘policymakers have been operating in a evidence-free copyright policy zone for many decades’. In fact, the lack of curiosity goes back centuries. No questions, no surprises. For all the antsing about copyright’s term and application, the forensic interrogation of cases and dicta, there’s barely a flicker of interest in the actual, concrete outcomes to authors. Instead a blanket of complacency lies across the whole question.

Why? Perhaps after 300 years we are entitled to conclude that copyright’s outcomes are the ones policymakers intended. The words may say that copyright is a form of protection and an asset and an incentive to authors, but the outcomes say different. They say authorship is to be paid lip service and gently discouraged, while those who persist should be rounded quietly into dependence. The outcomes oblige us to question the intentions.

CELEBRATED ECONOMIST William Landes and jurist Richard
Pos ner in a discussion of how to think about copyright take the simplifying step of ‘generally ignor[ing] differences in costs or incentives between authors and publishers, instead using “author” or “creator” to mean both’ (2003, p38). It is a telling step. Nearly the whole of this thesis could fit inside that ellipsis. For the differences between publisher and author are fundamental. Publishers are gatekeepers, inhabiting a world whose social and economic odds are bent in their favour. Authors are aspirants, with the odds against them. When they reach the gate, authors have a great deal more at stake.

**THIS THESIS** is offered as a contribution to the literature on copyright. It is an author-centric contribution focusing on the relationship between authors (a term I have used throughout to encompass both writers and filmmakers) and publishers (encompassing book publishers, movie distributors and other intermediaries between author and audience). The specific contributions are these:

- **Highlighting the differences between author and publisher**: Lyman Ray Patterson called this one of the ‘forgotten ideas’ of copyright (1968, p228). In chapter seven I set out the differences in detail. Taking them seriously puts the problems of copyright in a very different light. Policymakers should pay attention.

- **Giving evidence of the returns to copyright assets**: Martin Kretschmer and Ruth Towse (2013) have made the case for wider use of empirical evidence in developing copyright policy. Evidence might be ‘qualitative, quantitative, experiential and even of the ‘story’ type’ (p10). In chapters three and four I present data from a large sample of films from Australia and other countries revealing a structural pattern of poor returns.

- **Exploring the motivations of creators**: Why do authors accept copyright’s poor returns? One reason is that they are not just ‘in it’ for the
money. In chapters five and six I present the results of a survey probing what drives film producers. Most producers say ‘satisfying my creative vision’ matters more than ‘making a lot of money’.

• Describing the Hollywood business model: The responsiveness of filmmakers to non-financial incentives has not escaped the Hollywood studios. In chapter five I show how they have used this insight to push many of the costs and risks of the filmmaking process onto filmmakers themselves and their investors — perfecting a business model used by London’s booksellers from the earliest days of the copyright system.

• Showing how copyright shapes the value chain: Copyright does more than define the contractual relationship between author and publisher — it has armed one against the other. Publishers have used copyright’s monopoly to build great libraries of works and thus acquire weight, cashflow and influence; authors have remained micro and weightless. In chapter eight I explore counterfactually how a different system of copyright might alter the balance of power between them.

Finally, there is a common perception of authors as people who are essentially unbusinesslike. But what if this too were an artifact of the copyright system? In a concluding chapter I profile William Shakespeare and his theatre company, the King’s Men. Operating in the very early days of copyright they offer a vision of the possibilities of authorship — in touch with their audiences, creative, profitable, businesslike. Modern authors should study them. There is much to learn.

A note about terms

In this thesis I use the term ‘author’ generically, to mean both writer and filmmaker. I occasionally use the term ‘creator’ in the same way. Similarly, I use the term ‘publisher’ as a catch-all description of the intermediaries who bring books and films to market — thus movie
studios, television broadcasters, book publishers and in eighteenth century
London, the booksellers who lobbied for the first copyright legislation. In
using these terms it is my intention to emphasise the common ground
between these different professions and industries. What they share is a
dependence on copyright and the business practices that have co-evolved
with copyright. There is nothing in the business experience of a writer
that would surprise a filmmaker, and vice versa; the territory is the same.

Similarly, I have used the terms ‘copyright’ and ‘copyright system’ to
describe the laws and institutions that govern authoring and publishing in
the West, with a particular focus on Australia, the UK and the US. While
there are notable differences between the copyright laws in these
countries, they bear a strong ‘family resemblance’ that reflects both their
shared historical antecedents and the harmonizing influence of the Berne
Convention and other international agreements to which the three
countries are signatories. It is the family characteristics that matter here.
PART ONE

EVIDENCE
2. Australia decides to have a film industry

Then, in 1972, something really odd happened: after 23 years of conservative government, someone my parents voted for actually got elected. It's Time, Gough Whitlam had said... The Australian diaspora began coming home, and suddenly we stopped cringing about our culture. We had our own films, our own books, our own voices on the radio and TV instead of the plummy pseudo-Pom accents that had once been de rigueur. Even our gardens got a makeover: out with the wilting hybrid tea roses, in with grevillea and callistemon.

— Geraldine Brooks (2011)

In the late 1960s some filmmakers, working in various alliances, began to make films together. They worked mostly in Melbourne and Sydney, unofficially, after work and on weekends. Some of them were students; quite a few were employed in advertising agencies or worked for the Australian Broadcasting Commission or the Commonwealth Film Unit. They shared the skills and equipment they had and ‘begged, borrowed or stole’ everything else they needed. They got some of their momentum from the student activism of those years and the rest from a bowerbird blend of influences. French new wave cinema, swinging London, California dreaming, the Sydney Push — all figured in the mix. People felt that new things were possible and that they were possible here, in Australia, without leaving the country. It was the beginning of the end of the Cringe.¹¹

And they were not alone. Among the postwar generation there was a growing confidence about Australia and being Australian. With Hector Crawford’s long running television series Homicide (1964-75), many had their first encounter with vernacular Australian drama in that validating medium. People were buoyed too by the construction of the Sydney Opera House, widely reported as a new wonder of the world despite financial troubles and the sacking of architect Jorn Utzon. And they were
bemused by the antics of underground magazine OZ and the obscenity trials it attracted in Sydney and then in London. It was one in the eye for the Law and a dig in the ribs for the Poms.

Film critics also found things to like in the early offerings of the new generation. Films like Brian Davies’ *The Pudding Thieves* (1967) and John Murray’s *The Naked Bunyip* (1970), for all their amateurism, looked like the start of something. There was talk of a rebirth of Australian cinema after a near 40-year fallow. For a country boxed between a British past and an American future, this was heavily freighted talk. At the Melbourne and Sydney Film Festivals audiences gave the filmmakers a home crowd welcome.

The new mood among the public was not lost on its politicians. They saw the raw political power of the new generation demonstrated on campuses around the country by the Vietnam moratorium movement. And they knew about the bulge in postwar births — the ‘pig in the python’ then reaching voting age. So where the Menzies government was content in 1962 to ignore the spindly film industry and its advocates, Menzies’ successor, Harold Holt, was far more attentive. In 1969 he gave his support to a three-pronged strategy designed to kick-start the infant production industry. The first prong was the setting up of an Experimental Film and Television Fund, worth $100,000. The Fund’s managers began making grants in 1970 and had soon seeded nearly 70 short films — ‘piggy bank handouts to starry-eyed amateurs’ as one churlish observer had it (Shirley and Adams, p236). The second prong was another $100,000 to begin work on a national film school (opened in 1974). The third prong was the Australian Film Development Corporation, formed in 1970. The Corporation was charged to ‘encourage the making of Australian Cinematographic and Television Films and encourage distribution of such films within and without Australia’. Its chairman, John Darling, a merchant banker, wanted to create an industry that could
survive on its own two feet. ‘The corporation will be commercially oriented,’ he said in an interview with the Sydney Morning Herald. ‘We have to create the conditions for the industry to grow and for investors to invest with confidence.’ (Shirley and Adams, p242)

This aspiration was very nearly realised with the Corporation’s first major investment, in Bruce Beresford’s The Adventures of Barry McKenzie. After the film’s commercial backers pulled out at the last minute the Corporation took their place (reluctantly, according to Dermody and Jacka), funded the entire film and earned back most of its $250,000 investment within three months of the film’s release. The following year the Corporation repeated the success with Alvin Purple, another ocker comedy, then made it a hat-trick with Stone, a biker film that built a long-lived cult following. Sequels to Barry McKenzie and Alvin Purple were also successful.

Despite the hat trick, the AFDC was considered a failure by the commercial cinema industry and by the filmmakers it funded: it pleased no one. Barely three years after its launch, the government commissioned a new inquiry by the Tariff Board, a key institution in the setting of industry policy. The presiding members were Richard Boyer and C H Grace. They invited public submissions and took evidence during two months of hearings at the end of 1972. The result was a searching examination of the cinema industry and the business conditions faced by local producers. It was not flattering to the commercial interests. There was ‘an unhelpful level of monopoly’ in cinema distribution and exhibition, Boyer and Grace reported. Australian films were discriminated against in their quest for cinema screens and were not looked after by distributors. A telling line of evidence led by the producers was the success achieved by Australian films outside the commercial system, in church halls and other unlicensed venues. It seemed the commercial industry was out of step with the public in its
attitude to these emerging filmmakers, finding faults that audiences were prepared to overlook.

The Tariff Board delivered a more aggressive plan than anything previously considered by the government. It proposed legislation to ‘adjust and regulate the ownership and control of cinemas’, with limits on the number of cinemas held by one person or company — limits that would require divestitures by the major chains. The AFDC would be replaced by a new statutory agency, the Australian Film Authority. This would have power to make investments as well as loans; it would take over the Commonwealth Film Unit; and it would have the power to intervene in the film distribution market on behalf of Australian producers.

Before the report could be considered the Liberal government was swept out of office. The incoming Labor government, led by Gough Whitlam, had a reforming zeal fueled by 23 years on the opposition benches. Yet it stopped short of adopting the bolder elements of the Tariff Board’s plan. Yes to a new Australian Film Commission, replacing the AFDC; yes to the takeover of the Commonwealth Film Unit; but no to regulating the cinema market and no to giving its new agency power to intervene in the market. The industry’s young producers were angered by this unexpected fallback; the distributors were relieved but understood the writing on the wall. There had to be an engagement with this ambitious new wave. Ignoring it was not politically acceptable.

WHAT CAME NEXT was a kind of flowering that changed the way people thought about Australian films. A succession of films took the industry’s case directly to the public and the public voted, decisively, to support it. Among these films were Peter Weir’s Picnic At Hanging Rock (1975), Ken Hannam’s Sunday Too Far Away (1975), Donald Crombie’s Caddie (1976), Henri Safran’s Storm Boy (1976), Phil Noyce’s Newsfront
(1978), Gillian Armstrong’s *My Brilliant Career* (1979), Dr George Miller’s *Mad Max* (1979), Bruce Beresford’s *Breaker Morant* (1980) and Peter Weir’s *Gallipoli* (1981). They went beyond the sex romp and ocker comedy — those early beachheads. Here instead was an industry grasping and handling items from the country’s glass cabinet of history and self-definition. Of course the industry did not escape the hit-and-miss dynamic of the box office; failure was common and ordinary. But with these films it built a following among critics and cinemagoers, a rare unanimity.

The new kid on the block, the Australian Film Commission, was an investor in many of these films. It was joined by counterpart agencies in New South Wales, Tasmania, Victoria and South Australia (and eventually Queensland and Western Australia). There were rival funding models. For example, the South Australian Film Corporation saw itself as a production studio, actively developing and producing films, whereas the AFC was always more hands-off, an investor but never a producer. The rivalry was intense because it went beyond questions of management style. Should an agency like the Australian Film Commission act like a banker to the industry or be an entrepreneur in its own right? The question runs like a fault line through policy thinking about the film industry. The argument for banker says: decision-making happens in the market, so the agency role is purely facilitative. The argument for entrepreneur says: the market is too thin, so the agency must play a strategic role. The contest was never permanently resolved. One side would swing into fashion as the other swung out. The evidence, measured in terms of successful films produced under this or that regime, is not conclusive.

Faith in markets gave rise to another, deeper fracture in the policy thinking. In 1979, barely four years into the AFC’s incumbency, the film producers ran and won a political campaign to reduce the AFC’s influence by luring private investors into the market with tax
concessions. These private investors, so the argument went, would bring a commercial focus to film production. They would make better funding decisions than the funding agencies and bring the organising skills of the private sector to bear on the problems of the film producers. Over time the infant industry might be weaned from its dependence on government subsidies.

As it turned out, private investors were hard to find. The proffered tax concession was not competitive with other tax-driven possibilities then available to adventurous investors. There was no real interest from investors until the government, spurred on again by the producers, dramatically upped the stakes. In May 1981, guided by Treasurer John Howard, it passed legislation that gave film investors a write-off equal to 150 percent of their investments and a tax holiday on the income of the investment until they were 50 percent recouped. The new provision, called Division 10BA, transformed the industry. Film production doubled, in terms of numbers of films produced; in dollar terms, it doubled, then doubled again (see Figure 1 below). Intermediaries arose to manage the connections between producers and investors. Distributors stepped up their interest in the Australian film ‘renaissance’, buying rights to films and sometimes getting directly involved in production. Things moved so quickly and so far beyond the government’s original expectations that by 1984 the Labor government (back from another spell on the opposition benches) was forced to wind back the concession. It went from the very generous 150/50 structure to a more modest 133/33 structure. And when that didn’t work — production kept booming — they tightened it again, to 120/20. Slowly the runaway train wound down to a walk.

Among the films made during the 10BA period were Dr George Miller’s Mad Max 2 (1982), (a different) George Miller’s The Man From Snowy River (1982), Peter Faiman’s Crocodile Dundee (1985) and Yahoo
Serious’ *Young Einstein* (1988). These were four big hits, with *Crocodile Dundee* the second-highest grossing film in the world in 1986 (after *Top Gun*) and rated by US analyst Paul Kagan as one of the most successful independent films of all time. But as before, with the hits came the many misses. Many in the industry were skeptical about the tax concession, believing it subordinated creative and even commercial values to the pursuit of tax benefits. A story about a yacht purchased as part of a film investment scheme took hold in the industry with the tenacity of an urban myth. Film financier Peter Fox exited the industry in the fiery crash of his Ferrari (rumour said there were no skid marks). There were fears the US studios would bend the local content rules to get access to the concession.\(^{17}\) These fears seemed to be realised in the case of Philippe Mora’s *The Return Of Captain Invincible* (1983), whose eligibility for the concession was revoked by the Minister for Arts and then litigated in the Federal Court. The government lost. Among filmmakers there was a sense of fragility, of art being pitted against a much wilier commerce.

**Figure 1: Australian film production 1971-1990**

![Graph showing Australian film production 1971-1990](source: Screen Australia)
Almost as telling politically was the rising cost of the 10BA scheme. The Treasury released figures that showed the cost to government rising faster than production itself and far exceeding early estimates. The timing could hardly have been worse. Newspaper stories about so-called ‘bottom of the harbour’ tax schemes had shredded public confidence in the integrity of the tax system. In 1985 the government convened a Tax Summit to review the whole system. A consumption tax was on the agenda and so was the elimination of ‘tax expenditures’ like the 10BA scheme. The film industry studied the politics and concluded that some form of ‘cap’ was necessary. To this end a working group was formed and came up with a model where film financiers would be issued licences to raise specified amounts of tax-deductible capital. The method of allocating licences would be a ‘beauty parade’. The proposal got as far as Federal Cabinet before the thin alliance of industry interests sagged and broke. Cabinet, predictably, threw it out.

By 1986 the industry was at an impasse: bigger than it had ever been before, struggling to be commercial, but with an investment base built on a doomed tax concession. The solution — not a happy one for many in the industry — was the creation of a government-owned ‘film bank’. Its chief virtues, according to its advocate, the Australian Film Commission, were its fixed cost to government and the commercial orientation it would bring to bear as a market-led investor.18 About the fixed cost there was little doubt, although the cost was still substantial. The commercial orientation, however, was contested. Critics feared the new entity would be a kind of ‘Film Bulgaria’, a quasi film studio run by government bureaucrats. But these concerns did not prevail. After two years of negotiation, the industry and the Federal Treasury came to terms and the Film Finance Corporation Ltd was formed. Treasurer Paul Keating unveiled the plaque at its swank North Sydney offices.

The FFC quickly became the dominant player in film financing. Few
Australian films got up without its help, although there were stand-out exceptions, among them US studio-backed pictures like Chris Noonan’s *Babe* (1995), Baz Luhrmann’s *Moulin Rouge* (2001) and Dr George Miller’s *Happy Feet* (2006) as well as low budget independent films like Clayton Jacobson’s *Kenny* (2006). The FFC’s policy was to invest in films that had ‘marketplace attachments’ — typically a minimum guarantee posted by a distributor or sales agent. Following industry practice, the FFC allowed these participants to recoup in first position. They got back their costs plus any payments made in honour of their guarantees, plus their commissions, before any money was distributed to the FFC and other participants. Private investors who were not already in the film business got shorter shrift; they were expected to invest alongside the FFC and recoup on the same terms. Predictably, private investment dried up, leaving the field to the FFC.

With the creation of the FFC, the industry entered a long period of relative stability lasting nearly 20 years. There were no big shifts in government policy in this period; equally, there were no big increases in government investment. The FFC’s annual funding waxed and waned in the buttoned-down world of Ministerial portfolio budgeting. Certainly fewer films were produced each year than during the heyday of 10BA — less than half. Film budgets drifted out into a no-mans-land, too big to be independent, too small to warrant wide release. Still, there was the familiar smattering of hits: Baz Luhrman’s *Strictly Ballroom* (1992), P J Hogan’s *Muriel’s Wedding* (1994), Stephan Elliott’s *The Adventures Of Priscilla, Queen Of The Desert* (1994), Scott Hicks’ *Shine* (1996), Phil Noyce’s *The Rabbit Proof Fence* (2002). But the ratio of hits to misses seemed to fall in the 1990s and fall again in the 2000s. There was finger-pointing in the industry: ‘not enough good writers’ was one view; ‘too much safety in decision-making’ was another. That filmmakers had lost touch with audiences perhaps came closest to a consensus view, though why that should be and what might be done about it were not determined.
THERE WAS ANOTHER BIG TURN of the policy wheel in 2007. Once again it was a newly installed Labor government acting on the findings of a review begun by the previous Coalition government. The new turn of the wheel merged the Film Finance Corporation, the Australian Film Commission and Film Australia (remnant of the old Commonwealth Film Unit) into one ‘superagency’, Screen Australia. It also established a new funding instrument, the ‘Producer Offset’. The new instrument grants producers a lump sum payment worth 40 percent of a film’s eligible production costs, not as a loan or equity investment but as an outright grant, payable when the film is completed. Two things about the offset are worth remarking. The first is that the government has entered into an open-ended funding obligation (20 years of stasis have blunted fears of funding blow-outs). The second is that the scheme deliberately and explicitly rewards producers for commercial success by giving them a big equity stake in the films they produce, something they rarely achieved in the past.\(^9\) Rewarding success in this way amounts to a sea change in policy thinking.

This chapter has been a brief recounting of a 40 year history of government intervention in the film industry. The intervention has always been politically driven, not an administrative matter. An economist might want to put the whole thing down to rent-seeking by a privileged elite — and there is some truth in that. But successive governments in a mature, well-functioning democracy have been ready to pay the rent, year in, year out. When arguments have arisen they have been about the means, not the ends. Is a tax concession better than direct investment? Should any film made in Australia qualify for assistance? Or only those with ‘significant Australian content’. Questions like these have been grist to the mill of policy conflict. But there has been no serious questioning of the policy goal: a continuing capacity to make Australian films.

In the late 1960s the industry, tiny and aspiring, got on to the national
agenda. Its time had come. It was part of a larger, generational aspiration, perhaps emblematic of it. People cared about the fate of the film industry, even if they sometimes lost faith in its ability to return their interest. They went to the film festivals; they argued about the films; they got behind the industry. They saw their streets and car-makes and favourite actors on the big screen; they heard their accents and bands and even birdlife on the soundtracks. It was a tremendous legitimation. The enthusiasm this bred among audiences was at least as important as the passion of the filmmakers and the support they won from governments. All three together, working off each other, brought about the so-called Australian film renaissance.
3. How it all turned out

Profit is a dark secret in the movie business.

The currency of talk about the movie business is the box office dollar. Someone will say, this film has earned x million dollars at the box office. It's a measure of popularity and perhaps something more, a finger on the pulse of the zeitgeist. Because people talk about box office socially there can be an ‘information cascade’, where the very fact that a film is selling well at the box office induces still more people to buy tickets. Success breeds success and vice versa.\(^\text{20}\) If the film is a big film with major stars, the speculation will be about just how well it might do at the box office: enough perhaps to qualify as a ‘hit’, or even a ‘blockbuster’?\(^\text{21}\) If it’s a little film with unknown stars, success will make it a ‘breakout’ film, defying expectations. If it’s big but disappoints, it will be a ‘flop’. Stories about the movie business are spun around this compass of hit and flop, blockbuster and breakout.

It is surprising then how little information the box office conveys about the actual money outcomes to the filmmakers. They are not closely connected. There is a long chain of transactions between a cinemagoer handing over the price of a ticket and an accountant at a distribution company finally remitting funds to the filmmaker and the other owners of the film. The chain is not only long but contingent because at any point along the way the money flow may be exhausted by the claims made on it.

To begin with there are the claims of the exhibitors, who collect the ticket money from the public. These are usually negotiated as a sliding percentage of the box office takings, with the exhibitors’ share increasing over time so as to give them an incentive to keep playing the film. In the United States the exhibitors’ share averages out to about 50 percent of the
box office. In Australia, they keep a bigger share, between 60 and 70 percent of box office. The remainder is paid over to the film’s distributor and is called the Gross Rentals. So if we imagined a relatively successful film that took $10 million at the Australian box office, there would be $1 million paid to the government as Goods & Services Tax, the exhibitors would keep about $5.4 million and pay the balance, $3.6 million, to the distributor. (The cashflow analysis presented here is summarised in Table 1 below.) From this the distributor in turn would deduct the costs of prints and advertising. These are the costs of printing copies of the film to show in the cinemas, which might run to $500,000 for a 200 print release, plus the costs of an advertising campaign, which for a release of this size would be at least $1 million. Deducting these costs from the $3.6 million Gross Rentals leaves $2.1 million. Next the distributor recovers any advance paid to the film’s owners as part of the financing of the film; let’s allow a generous $500,000 in this case. That leaves $1.6 million. Then there’s the distributor’s commission, normally 35 percent of the Gross Rentals — so about $1.4 million in this case. After paying this we’re down to $200,000, the Net Rentals, which will be the amount remitted to the film’s owners.

Table 1 From Gross Box Office to Net Rentals

<table>
<thead>
<tr>
<th>Box Office</th>
<th>$10,000,000</th>
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<tbody>
<tr>
<td>Less GST</td>
<td>($1,000,000)</td>
</tr>
<tr>
<td>Less exhibitors’ share</td>
<td>($5,400,000)</td>
</tr>
<tr>
<td>Leaves Gross Rentals</td>
<td>$3,600,000</td>
</tr>
<tr>
<td>Less prints and advertising</td>
<td>($1,500,000)</td>
</tr>
<tr>
<td>Less advance</td>
<td>($500,000)</td>
</tr>
<tr>
<td>Less distributor’s commission</td>
<td>(1,400,000)</td>
</tr>
<tr>
<td>Leaves Net Rentals</td>
<td>$200,000</td>
</tr>
</tbody>
</table>
Only now do the equity investors who financed the film begin to recover their investment. This can be a very drawn out process and of course continues long after the cinema release has come to an end. The typical ‘life’ of a film in first release is three or four years and progresses from cinema release through the ancillary ‘windows’ of pay-per-view, home entertainment (DVD, downloads and streaming services), pay TV, free-to-air TV and so on all the way down the line to prisons and ships-at-sea. The sequence of windows is tightly controlled and each market sets its own terms — the DVD release, for example, typically offering a royalty of say 25 percent of the wholesale price, whereas the TV markets offer a straight license fee (though sometimes with an ‘escalator’ tied to ratings performance). The sequence is repeated in each overseas territory where the film is sold. Sometimes the rights and territories are bundled up in an ‘all rights’ deal and ‘cross-collateralised’ so that losses in one market can be set against profits in another.

But focusing now on the $200,000 Net Rentals generated by our film’s cinema release we may note that it will be applied first to repay any funds contributed by the film’s completion guarantor (an insurer who takes on the obligation to complete the film if the filmmakers should fall under a bus). Second, any funds borrowed to complete the film will be repaid with interest. Third, any party to the making of the film who deferred their fee will be repaid. Fourth, any funds contributed by a ‘priority’ investor will be fully (or perhaps partly) repaid. Fifth, the remaining ‘equity’ investors will recoup their investments. Then and only then will the filmmakers begin sharing in the proceeds, usually 50:50 with the equity investors. Of course in our case, since there was only $200,000 to share around, it’s very unlikely anything will drop out the bottom to the filmmakers.

An instructive example is David Yates’ *Harry Potter And The Order Of The Phoenix*, released in 2007. The film was a worldwide hit — a
blockbuster — grossing US$940 million. However, according to a ‘statement of participation’ issued by Warner Bros Entertainment Inc. in September 2009, the film had still to turn a profit — in fact, was still showing a substantial loss. Table 2 shows where the money went.

**Table 2 Harry Potter And The Order Of The Phoenix Statement of Participation**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worldwide box office*</td>
<td>$939,885,929</td>
</tr>
<tr>
<td>Yielding gross rentals#</td>
<td>$609,912,843</td>
</tr>
<tr>
<td>Less distribution fee</td>
<td>($211,800,286)</td>
</tr>
<tr>
<td>Less prints &amp; advertising</td>
<td>($160,338,011)</td>
</tr>
<tr>
<td>Less other distribution expenses</td>
<td>($31,543,197)</td>
</tr>
<tr>
<td>Leaves net receipts</td>
<td>$206,231,349</td>
</tr>
<tr>
<td>Less negative cost</td>
<td>($315,892,107)</td>
</tr>
<tr>
<td>Less interest</td>
<td>($57,637,019)</td>
</tr>
<tr>
<td>Leaves deficit</td>
<td>($167,297,777)</td>
</tr>
</tbody>
</table>

*Box offices figures from International Movie Database (IMDB) as at November 2011. #Gross rentals include proceeds from Pay TV, Video Cassette and Merchandising. All funds in USS. Source: Deadline.com (Fleming 2010)

What these numbers describe is a process that resembles that party trick where champagne glasses are stacked in a pyramid and the master of ceremonies produces a magnum of champagne and begins to pour it into the topmost glass. The glass quickly fills to the brim and then overflows to the tier below, which in turn fills to the brim and overflows to the next tier and so on until eventually — but not in this case — some champagne trickles down to the bottom tier. In this metaphor the bottom tier corresponds to the filmmaker, separated by a long, contingent sequence from the inflow of money, obliged to wait patiently for payment until every other participant has been paid in full.

Viewed from the bottom, a long way from the red carpet and the popping
champagne corks, the movie business looks very different. There is no media buzz down here. It is a dark place, barely known to the public. What happens here is a trade secret, kept secret by everyone in the business, for their different but compelling reasons. This is where the money trail ends and how it ends reveals a great deal about the business. We are in the accounting catacombs of the movie business, where the reckoning is done.

**THE DATA PRESENTED** in Figure 1 below comes from the Film Finance Corporation, the 20-year veteran of the Australian film industry described in the previous chapter. With investments in a 20-year total of 1,165 projects with a combined production value of $2.9 billion, the Corporation knew more about the industry than anyone. But it kept the knowledge to itself, citing the need to keep confidential the commercial interests of the filmmakers it supported and of the distributors and sales agents it did business with. Very little meaningful data got past this prohibition and the little that did was carefully masked and presented in ways that shut off analysis. Once, when as publisher of a business newsletter I pressed the Corporation’s chief executive to be freer with its data, he told me the data could not be published because publication would damage the industry. Later, speaking to a different executive, with a more modest request, a chink opened up in this wall of confidential silence. Through that chink has come the data in Figure 2 (below).

What the data shows is the returns to the FFC from its investments in the 158 feature films it backed between 1988 and 2002. The films are not individually identified but include such hits as Baz Luhrmann’s *Strictly Ballroom*, P J Harvey’s *Muriel’s Wedding*, Stephan Elliott’s *The Adventures Of Priscilla, Queen Of The Desert*, Scott Hicks’ *Shine*, Phillip Noyce’s *Rabbit Proof Fence* and Peter Weir’s *Green Card*. The results are shown in descending order, with the return expressed as the
percentage of the FFC’s investment that it had recouped up until 2007.

In the best case, the FFC recouped 285 percent of its investment, in the worst case zero. Although some of the better performing films will have long lives in release, most of the films were economically exhausted by 2007 and even the better performers had peaked by that time. The data therefore is near-complete. The story it tells will not change with the passage of time. So what story does the data tell?

**Figure 2 FFC Recoupment — Australian Films — 1988/2002**

The first thing to say is that the FFC was a risk-taking equity investor. It did not invest by way of loans, it charged no interest and it had no recourse to the other assets of the producers and distributors of the films it backed if the investments failed. It took the risks of the films on to its balance sheet. As an equity investor it ranked behind the films’ distributors, who sat at least one tier above the FFC in the recoupment hierarchy. In effect, the FFC was backing the producers of the films and investing in their copyrights. In fact, it stood directly in their place, investing on their behalf and absorbing their risks. The data therefore provides an extraordinary window into the copyright system, showing the
level of risk incurred in creating these 158 copyright works and the level of returns they generated. Other copyright investors recruited by the producers sat in the same place with the FFC and recouped alongside it \textit{pro rata} and \textit{pari passu} (that is, proportionally and simultaneously).

The second thing to say is what ‘recoupment’ means. A film that recoups 50 percent of its cost has not earned a 50 percent return. It has recovered half its cost, 50 cents in the dollar — or put another way has lost half the money invested in it. So in its best case, when it recouped 285 percent of its investment, the FFC made $2.85 for each $1 it invested, a profit of $1.85 and a rate of return (if we assumed a smooth five year life of the investment) of about 23 percent annually.

Now we are ready to start making sense of the data. Visually what stands out is the asymmetry of the rankings, with just a handful of films in the profitable peak on the left hand side of the graph but a long, loss-making tail to the right. In fact just nine films show a profit to the FFC compared to 149 showing a loss, including 16 where the FFC recouped nothing at all. This kind of ‘skewness’ is characteristic of the movie business. Economist Arthur De Vany (2004) writes: ‘Work, revenue and money are distributed like the movies are a third world country — the princes get almost everything and the paupers almost nothing.’ Although he’s describing the American industry the description holds good for the Australian industry and for the FFC’s investments too.\textsuperscript{25}

But skewness is the least of it. The fundamental message of the data is that the FFC was almost completely underwater on its investments. You can see this if you think of the 100 percent recoupment mark as the waterline — bare recovery of costs. There should be much more dark ink on the page. By volume the area under the 100 percent mark measures 15,800 percent (158 films by 100 percent) but the area of recoupment, from head to tail, measures just 4,310 percent, or just over a quarter of the level that would be required just to lap the waterline and get back the
money the FFC invested. If the FFC were a stock market, this would be a Great Crash; if it were your pension fund, it would be a scandal.

Of course just lapping the waterline is hardly enough to whet the interest of investors. Nobody invests just to get their money back; they invest to make a return on their money. So to see how far short the FFC fell in the investments it made, we need to consider the kinds of return that were available elsewhere to investors. Figure 3 below provides a comparison, mapping the FFC’s returns from its investments in Australian films against the returns available from the Australian share market. It’s a telling comparison.

**Figure 3 Australian Stock Exchange* v Film Finance Corporation**

![Graph showing ranked returns for companies in the ASX 200 and FFC](image)

*The ASX 200 is Australia’s primary share market index. The figure shows ranked returns for companies in the index in the indicated periods. Returns are based on share price movements and dividends paid across the period. FFC returns are as for Figure 1. See endnote 26.*

The returns to the FFC are a creek in drought compared to the river of returns to investors in the Australian share market. The figure shows two sets of ranked share market returns, one for the period 1998-2002 (the blue line) and the other for 2002-2006 (the green line), comparing them to the ranked returns to the FFC (the red line, familiar from Figure 1).26 The
earlier period covers the dotcom boom and bust and the turmoil following 9/11. The later period shows the share market in recovery. Plainly the share market outperforms the FFC even when it is tanking; in recovery it swamps it. Not only did the market deliver higher returns across the board in both periods, it was more transparent, more informed and more liquid. Investors could trade in and out of ASX companies at will relying on multiple sources of information, public and private; the FFC by comparison had little liquidity and few sources of information beyond what its own investigations revealed. Furthermore the best performing shares easily outperformed the few hit films in the FFC’s portfolio.

There is really no comparison. Investors in the share market put their capital at risk (and sometimes lost money) but earned dividends and capital gains that compensated for the risks they took, often handsomely. The FFC, by contrast, lost nearly all its capital yet earned no premium for its risks. Its handful of hits did not compensate for the many misses; they did not come close. There was no truth for it in the common assumption that ‘it is the few big winners that pay for the many losers’ (Vogel 2004, p142). Rather, its mandated support for Australian films led it ever further into the red.

**HOW DOES IT LOOK** for the other participants in these films, the distributors and the filmmakers themselves? The data doesn’t answer directly but we can infer the different outcomes from what we know of the FFC’s investment practices.

For the film distributors, recouping ahead of the FFC, the risks were fewer and the returns quicker, surer, better. Broadly, the flow of any funds *at all* to the FFC implies that the distributor has fully recovered its costs and pocketed its commissions, since what flows to the FFC is the remainder. On this assumption the distributors would have been in profit on 142 of 158 films, roughly 90 percent of cases, although the profits may
have been thin in many of those cases. For the best performing films the profits would have been substantial. Table 3 below shows the Australian and US box office results for the FFC’s top 10 films (with an estimate of production costs as a way of benchmarking these results).

**Table 3 Top 10 FFC Films — Australian and US Box Office**

<table>
<thead>
<tr>
<th>Film</th>
<th>Production Cost (AUD)</th>
<th>Australian Box Office (AUD)</th>
<th>US Box Office (US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adventures of Priscilla</td>
<td>3,000,000</td>
<td>16,459,245</td>
<td>11,220,670</td>
</tr>
<tr>
<td>Crackerjack</td>
<td>7,800,000</td>
<td>8,618,107</td>
<td>n/a</td>
</tr>
<tr>
<td>Green Card</td>
<td>13,000,000</td>
<td>10,585,960</td>
<td>29,888,235</td>
</tr>
<tr>
<td>Muriel’s Wedding</td>
<td>8,900,000</td>
<td>15,765,571</td>
<td>15,119,639</td>
</tr>
<tr>
<td>Napoleon</td>
<td>4,500,000</td>
<td>2,051,855</td>
<td>193,720</td>
</tr>
<tr>
<td>Rabbit Proof Fence</td>
<td>8,700,000</td>
<td>7,562,439</td>
<td>6,177,030</td>
</tr>
<tr>
<td>Shine</td>
<td>5,200,000</td>
<td>10,167,416</td>
<td>35,892,330</td>
</tr>
<tr>
<td>Sirens</td>
<td>5,800,000</td>
<td>2,780,639</td>
<td>7,770,731</td>
</tr>
<tr>
<td>Strictly Ballroom</td>
<td>3,400,000</td>
<td>21,760,400</td>
<td>11,738,022</td>
</tr>
<tr>
<td>Wog Boy</td>
<td>7,000,000</td>
<td>11,449,799</td>
<td>n/a</td>
</tr>
</tbody>
</table>

Australian box office data from IMDB. US box office data from Screen Australia. Production costs are estimates only.

Without knowing exactly what deals were done for these 10 films it is hard to guess the distributors’ profits but they are likely to have been many multiples of the money the distributors had at risk and much greater than the FFC’s profits in relative terms. These films were happy events for the distributors, showering profits and awards (including two Oscars.
and four Best Film awards from the Australian Film Institute). For the executives concerned they must have boosted career prospects; for the companies, they boosted not just profits and balance sheet but also market charisma, so essential to staring down the competition for the next hot prospect. Success is often cumulative in the movie business, a winning streak, a hot hand.\(^{28}\) That said, considering the whole 158 films — the hits with the misses — the results were certainly not spectacular. There was no gold rush. But for the distributors there was enough success to entice new entrants and to keep hope alive among the veterans through periods of drought.

What about the filmmakers? How did they fare relative to the FFC and the distributors? Here the story takes a twist. Although it was the filmmakers who brought the films into being, they did not have much say in the deals that funded them. That was the FFC’s prerogative as chief investor and it took a highly shaping role, deciding who had a seat at the table and on what terms. Its Production and Investment Agreement became the legal bedrock of every film it backed. It sometimes took over negotiations about financing and distribution, leaving filmmakers with not even a fig leaf of independence. There was, however, a core of softness in its deals. The softness was its willingness to stand almost literally in the shoes of the filmmaker. Just as the industry uses stunt doubles to stand in for actors, so the FFC became the economic double of the filmmaker. It supplied the capital and assumed the risks of the filmmaking role. Thus it took upon itself the poor returns and the big losses tallied in Figure 1. These outcomes would otherwise have been the lot of the filmmakers. Instead the FFC took a bullet for them.

The filmmakers, displaced (or perhaps rescued) in this way by the FFC, became economic bystanders at their own event. Since few if any of them had anything like the capital required to make their films without outside assistance, they had little choice. What they got instead of the equity
position taken up by the FFC was wages and a share of profits, should any eventuate. The wages were paid from the funds contributed to the financing of the films and in effect were determined by the FFC, which approved them. For writers, director and producers, the rate was usually a set percentage of the film’s budget; for actors and crew, a market rate. Being paid in this way was essential for most of the recipients. They could not have worked on the films or continued working on them without money coming in to pay their bills and to live on.29

Most filmmakers accepted the situation without demur. They may have viewed it as personally beneficial or in any event benign. But in accepting the FFC’s shilling they placed themselves on a different, dependent footing. Their livelihood depended now on the grace and favour of the FFC, their patron. This is a topic to which we will return.

THE STORY THE DATA TELLS is of a no-go zone for ordinary investors. This is a class of assets, the copyrights of Australian films, in which no prudent investor should consider investing unless 1. they have privileged access to the revenues of the films, like a film distributor, or 2. they are prepared to accept money losses in pursuit of some non-money aim, like the FFC. For the filmmakers themselves, present and future, the story is salutary. The reward for their investment of work, time and creativity will almost always be zero (149 times out of 158) unless they can find an economic double, like the FFC, prepared to stand in their shoes. In that fortunate case they may earn a wage but lose control of their work. And for that opportunity they must dance a supplicant’s jig, in a bruising competition with their peers, all likewise dancing. For there is no prospect that they can recruit investors in the ordinary way, with a tempting reward for risk, because for this class of asset risk and reward are permanently and fundamentally out of whack.
4. What is going on here?

The Australian industry as a whole, with its present structure, could not be profitable.
— Susan Dermody & Elizabeth Jacka (1987)

A person can drown in a river of an average depth of six inches.
— Harold L Vogel (2004)

How are we to interpret the dismal performance of the film copyrights in which the Film Finance Corporation invested? Was it a purely local failure, something to do with the FFC and the way it chose its investments, or does it point to something larger, more systemic? Questions like these get a lot of attention in the film industry; people know there’s a problem. They may be asked in a slightly different way, for example, as a question about Australian films’ share of the box office. ‘It’s only 3 percent,’ a report might say, ‘It should be 10 percent!’30 And so will begin an analysis of why the films fall short, especially when benchmarked against Hollywood.

In this chapter I will explore three kinds of answer commonly offered. The first pins the problem squarely on the agency (the FFC or its predecessor, the Australian Film Commission, or its successor, Screen Australia). Failure is seen as a consequence of the agency’s funding policy, or its performance of the policy, or both. The second kind of answer takes a wider view: it’s a problem of just making Australian films, or put another way, of specializing in films with too small a market. One version of this argument holds that filmmakers should make films that are more ‘international’ in their subject matter and casting; another holds that only India and the US have domestic markets big enough to sustain a film industry. The third kind of answer rejects the argument from size, holding
instead that financial failure is a problem for filmmakers everywhere, regardless of market size — that it’s in the nature of the film business.

The evidence for one answer over another is not open-and-shut. As we will see, there is some truth in all three. Getting to the bottom of things will take a little sleuthing.

A GOVERNMENT-OWNED INVESTMENT AGENCY is a magnet for criticism. The FFC attracted its fair share, although filmmakers themselves were sometimes reluctant to bite the hand that fed them. The criticisms that concern us here are ones that relate to the FFC’s decision-making process rather than criticisms of particular decisions. We are looking for sources of systematic error, biases that might have pointed it away from good investments, or led its executives towards bad ones.

There are several candidates. A common claim was that the FFC was not sufficiently market-oriented in its decision-making. There is some intuitive force to this claim. The FFC clearly was not as closely connected to the market as a film distributor, the most common commercial source of funds for filmmaking. Nor was it subject to the same market discipline as a distributor. It could — and did — wear losses that would destroy a conventional business, since its source of funds was government, which was more or less indifferent to the losses. However, the FFC did regard itself as market-focused. It talked regularly to film distributors and often required producers to secure ‘marketplace attachments’ as a step towards financing. These attachments were essentially pre-commitments by a film distributor, usually part-paid on signature of contract with the balance on delivery of the film. For the FFC a marketplace attachment was not just a contribution to financing but a signal from the market that there was actual demand for a film.

A review of the 158 films in our sample shows that 116 had marketplace attachments used in the financing of the films. These ranged from 1 to 57
percent of the films’ production costs. The average attachment contributed 14 percent of production costs. Interestingly, there was no correlation between marketplace attachment and eventual success of a film. In fact, the correlation runs the other way, as Table 4 shows.

Table 4 Who else backed the FFC’s film investments?

<table>
<thead>
<tr>
<th>FFC slate</th>
<th>Films backed by distributors</th>
<th>Films backed by private equity investors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top 20 films</td>
<td>6</td>
<td>18</td>
</tr>
<tr>
<td>Bottom 20 films</td>
<td>19</td>
<td>13</td>
</tr>
</tbody>
</table>

Of the top 20 films backed by the FFC, only six had marketplace attachments, compared to 19 of the bottom 20 films. Put another way, the market contributed an average of just 4 percent of the production costs of the top 20 films, but gave 18 percent to the bottom 20. These figures tell a rather different story from the one the FFC was telling. They imply that a pre-commitment from a film distributor was not a reliable signal of market demand (as measured by returns to the FFC and other copyright owners). In fact, a better strategy for the FFC would have been to pay closer attention to private equity investors.31 This class of financial participant contributed rather more than film distributors, investing an average 18 percent of the production costs of our 158 films, compared with film distributors’ 14 percent. More importantly, their investments were a better predictor of success. Private equity investors backed 18 of the top 20 films, contributing an average 30 percent of their costs, but backed only 13 of the bottom 20 films, contributing just 9 percent of their costs.

So if anything the FFC was perhaps too market-oriented — or should have sought some other proxy for market interest than the willingness of a film distributor to put up an advance or minimum guarantee.
Another claim about the FFC was that its decision-making was too cautious and rule-bound. On this view it may have missed opportunities to invest in successful films. Indeed there were at least five or six successful Australian films made in the period we are considering in which the FFC was not an investor. They include Rob Sitch’s *The Castle* and *The Dish*, Chris Noonan’s *Babe*, Baz Luhrman’s *Moulin Rouge* and Jane Campion’s *The Piano*.32 For the last three, there may have been issues about their qualification as Australian films (a precondition of investment by the FFC) but at least in principle such issues could have been resolved by changes to the proposed cast or other elements of the production. It is possible that the films were offered to the FFC and declined. A more likely scenario is that they were never offered, or discussions did not proceed very far, perhaps because the producers did not wish to conform to the FFC’s rules or process. Whatever the case, it does seem likely that a more flexible, opportunistic FFC could have secured some or all of these films — and perhaps others too, that somehow slipped through the net of possibility and were not made.

A third claim about the FFC was that its policy goals as a government agency sometimes clouded its investment decisions. This was difficult territory for the FFC. On the one hand, it wanted to invest in a commercially focused way. On the other, it was burdened with expectations about the level of film production it should support and also about the kinds of film it should support, with a bias towards the ‘quality’ films that justify public funding. Certainly these were dimensions of its performance about which the FFC regularly reported.33 Pressures such as these probably led the FFC to invest in films that would not have survived a more purely commercial selection process.

Taking these claims together — that the FFC was too distant from the market, too cautious, and too clouded by policy expectations — we may safely conclude that its performance as an investor was compromised.
Specifically, it may have missed the opportunity to invest in a half dozen or more successful films and, in other cases, may have relaxed its commercial guard and backed films that did not really merit investment.

Now imagine that we could wave a magic wand and retrospectively repair these deficiencies in the FFC’s performance. How would things have come out? To picture this scenario, let’s suppose the FFC could have doubled its hit rate, so that instead of nine profitable investments (the thin peak of the graph in Figure 1) it made 18 successful investments.\textsuperscript{34} Next, let’s suppose that the FFC was able to avoid the worst performing investments it made — the lower half of its portfolio — leaving it with just the best performing 79 films in Figure 1. The result would be Figure 4 below.

**Figure 4 FFC with enhanced performance**

This is generous magic. A marvelously wise agency has replaced the harried executives of the former FFC. There are now no zero-returning films. No hit film has been turned down or overlooked — they have all been scooped up. The median recoupment has climbed from 10 percent (10 cents in the dollar) to 40 percent, while the average rate of recoupment has climbed to 65 percent, from 27 percent. Yet we are still a
long way short of success in the normal commercial sense of profitability. $100 invested equally in the 88 films in this much-improved portfolio of films — hit-enriched and miss-depleted — would still return just $65. This remains a loss-making business, all risk and no reward.

Now we can answer those who believe the FFC’s poor performance was all its own doing: they are wrong. Even on the generous assumptions we have used here, it is not possible to boost the money outcomes to anything approaching commercial normality. We must turn our attention instead to the second, wider possibility, that the FFC’s poor performance simply reflects its policy mandate to invest (only) in Australian films.

THE IDEA OF AN AUSTRALIAN FILM INDUSTRY has always struck some as policy quixotism. Not because Australians shouldn’t be making films. Rather, they shouldn’t be making ‘Australian films’. On this view, with a population of 22 million, Australia is just too small to sustain a film industry focused on domestic audiences. Instead it should be making films addressed to international audiences — films that ‘travel’.

The issue is not black-and-white. Although films backed by the FFC had to pass a test of ‘significant Australian content’, the test was about the nationality of the people in key creative roles not the subject matter of the film. It was mainly designed to keep out foreign films masquerading as Australian films in order to seek FFC investment. It was thus a defensive policy rather than a culturally prescriptive one. Of course beyond the fence line of policy, there was the FFC’s interpretation, which was a little more highbrow than popular and perhaps more inward looking than outward. But none of this added up to a veto of films that sought an international audience.
If we look again at the FFC’s top 10 investments and how they played at the box office, this time adding data for the UK and Germany, we can see that overseas markets contributed significantly to their success.

Table 5 The FFC’s top 10 films — Australian, UK, German and US box office

<table>
<thead>
<tr>
<th>Film</th>
<th>Australia (AUD)</th>
<th>UK (£)</th>
<th>Germany (Euro)</th>
<th>US (US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adventures of Priscilla</td>
<td>16,459,245</td>
<td>1,544,183</td>
<td>705,871</td>
<td>11,220,670</td>
</tr>
<tr>
<td>Crackerjack</td>
<td>8,618,107</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Green Card</td>
<td>10,585,960</td>
<td>5,030,887</td>
<td>12,271,505</td>
<td>29,888,235</td>
</tr>
<tr>
<td>Muriel’s Wedding</td>
<td>15,765,571</td>
<td>8,005,616</td>
<td>2,784,175</td>
<td>15,199,639</td>
</tr>
<tr>
<td>Napoleon</td>
<td>2,051,855</td>
<td>1,667,302</td>
<td>193,720</td>
<td>193,720</td>
</tr>
<tr>
<td>Rabbit Proof Fence</td>
<td>7,562,439</td>
<td>1,745,070</td>
<td>1,291,950</td>
<td>6,177,030</td>
</tr>
<tr>
<td>Shine</td>
<td>10,167,416</td>
<td>4,415,599</td>
<td>2,943,406</td>
<td>35,892,330</td>
</tr>
<tr>
<td>Sirens</td>
<td>2,780,639</td>
<td>2,640,396</td>
<td>-</td>
<td>7,770,731</td>
</tr>
<tr>
<td>Strictly Ballroom</td>
<td>21,760,400</td>
<td>3,028,000</td>
<td>1,880,295</td>
<td>11,738,022</td>
</tr>
<tr>
<td>Wog Boy</td>
<td>11,449,799</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Australian box office data from IMDB. UK, German and US box office data from Screen Australia.

Only two films, *Crackerjack* and *Wog Boy*, failed to do significant business overseas, having cracked the Australian box office. The other eight films did as much or more business overseas than they did domestically. One, *Green Card*, was a co-production with France, set in the US, directed by Australian Peter Weir and starring French actor Gerard Depardieu. The others were clearly Australian in content but no less international for that. Indeed it could be argued that one of the things
international audiences have responded to in Australian films is their Australian-ness.

Still, for most films and most film industries, the domestic market is key, not just for its revenues but also for the signal it sends foreign buyers. A domestic hit will be swarmed at international marketplaces like the Toronto International Film Festival, whereas a film ignored in its home market generally makes few foreign sales. The question therefore remains whether there is such a thing as a too-small domestic market — too small a revenue base, too weak a signal. To resolve this question let’s consider a bigger market, one big enough to leapfrog Australian concerns about size: the UK. With a domestic population of 62 million, nearly three times the size of Australia’s, the UK film industry presumably would be much nearer viability even though its films, like Australia’s, depend on government backing.

As it happens a window on this question was opened in the UK Parliament in July 2011. Penny Mordaunt, Conservative member for Portsmouth North, asked the Secretary of State for Culture, Olympics, Media and Sport how much was invested in films by the UK Film Council (an agency similar to the FFC) in the previous five years and how much received in revenue. The answer recorded in Hansard (UK House of Commons 2011) gave data for 33 films backed by the Council over the period. They included Tom Hooper’s *The King’s Speech* (a co-production between UK producer Iain Canning and Australian producer Emile Sherman), Sam Taylor-Wood’s *Nowhere Boy* and Jane Campion’s *Bright Star*. Figure 5 below summarises the results.

First a caveat. Some of the films had not completed their release cycle at the time these results were reported. The most notable on that count was *The King’s Speech*, released in 2010, which became a worldwide hit and won four Oscars including Best Picture at the 2011 Academy Awards. According to the report in Hansard, the UK Film Council’s £1m
investment in *The King’s Speech* was 95 percent recouped as at March 2011; clearly it will go into profit as the film works its way through the cycle. The same may be true, though to a lesser extent, for *Nowhere Boy* (87 percent recouped) and *Bright Star* (81 percent recouped), both released in 2009, and possibly for James Marsh’s *Man On Wire*, released in 2008, and Oliver Parker and Barnaby Thompson’s *St Trinian’s*, released in 2007. These last two films were the Council’s best performing investments, each recouping 101 percent. Excluded from the list were films that had not received any income as at March 2011; if we extrapolate from the example of the FFC, there were probably several films in this category.\(^{36}\)

**Figure 5 UK Film Council investments 2006-2011**

![Figure 5](image)

Source: Hansard, UK House of Commons 2011

Plainly, the UK Film Council is bogged in the same muddy field as the Film Finance Corporation. Its results are marginally better, with an average rate of recoupment of 31 percent versus the FFC’s 27 percent and median recoupment of 20 percent, compared to the FFC’s 10 percent
(though if we included a few non-returning films, the Council’s median would drop to 11 or 12 percent). But looking at Figure 5 we see the same sagging recoupment line, a little thicker through the tail but unmistakably loss-making. A domestic population three times greater has made no difference. 31 of 33 films are underwater. The Council has lost its shirt.

Interestingly, if we now take the example of a smaller domestic market — New Zealand’s — we find much the same result. The New Zealand Film Commission was formed in 1978 with a brief very similar to the FFC’s and the UK Film Council’s: ‘to encourage and also to participate and assist in the making, promotion, distribution and exhibition of [NZ] films’. Between 1993 and 2006 it invested $66 million in 58 films, from which it recouped just under $13 million, a recoupment rate of 19 percent (Jackson & Court 2010). This falls short of the FFC’s and the Film Council’s performance but not by much.37

It begins to seem that this kind of performance is an industrial benchmark for unprivileged equity investment in films: the loss of somewhere between two-thirds and four-fifths of the capital deployed.

**WHAT ABOUT HOLLYWOOD** then? With a domestic population nearly five times the size of the UK’s, 14 times Australia’s and 70 times New Zealand’s, surely Hollywood turns a profit on its movie assets?

Answering this question is surprisingly difficult. On the one hand, Hollywood is practically a synonym for wealth — for fast, heady money and ostentatious excess. On the other, there are the swirling rumours of losses. We have seen what happened with *Harry Potter And The Order Of The Phoenix*. Despite worldwide ticket sales of US$940 million the film was US$167 million in the red two years after release. Such stories come to light periodically, often as a result of litigation or the threat of it. One such case was Robert Zemeckis’ *Forrest Gump*. Released in 1994,
the film was a huge hit for Paramount, grossing more than US$660 million worldwide, making it the third highest-grossing release to that time, behind Steven Spielberg’s *E.T. The Extra-Terrestrial* and *Jurassic Park.* But when Winston Groom — who wrote the novel on which the film was based and had a three percent share of net profits — received a year-end statement from Paramount, he discovered the film was still US$62 million in the red. Only the threat of legal action won him a US$250,000 payment described as an ‘advance against future profits’. Paramount expressed itself surprised by all the fuss: ‘*Forrest Gump* is an extremely successful film by any measure and we are trying to do the right thing for everyone involved, including Winston Groom.’ (Weintraub 1995) Another, earlier example is Ridley Scott’s *Alien.* Released in May 1979 with the memorable tagline ‘In space no one can hear you scream’, the film grossed more than US$100 million. By the end of the year distributor Twentieth-Century Fox had collected gross rentals (ie wholesale revenues) of more than US$48 million. From this it paid itself distribution fees of US$15 million and expenses of US$21 million, leaving net receipts of US$12 million. Deducting the film’s production cost (US$11 million), plus interest (US$2 million), the result was a loss of US$2 million. (Pirie 1981)

How credible are these reports of losses from films that were clearly hits? Here, as elsewhere, we need to pay close attention to the money flow. A film that loses money for investors can still make a lot of money for its distributor. To see how, let’s look more closely at *Harry Potter And The Order Of The Phoenix.* The breakdown in Table 2 showed multiple payments from the film’s proceeds to the film’s distributor, Warner Bros. First was a distribution fee of US$212 million. Next the recovery of Warner Bros’ distribution expenditure on prints and advertising, US$160 million (including a 10 percent ‘override’ paid to Warner Bros), plus its other distribution expenses, another US$32 million. Then it pocketed the net receipts, US$206 million, in partial repayment of its production costs.
Thus, while the film was showing a loss of US$167 million, Warner Bros had received revenues of US$610 million, booked earnings of at least US$237 million (its distribution fee plus its 10 percent override on prints and advertising) and had a carried interest of US$167 million (the unrecovered production costs), plus the unknown future value of the copyright assets (not just the movie itself but also the soundtrack and merchandising).

Of course we are talking here of the privileged position of Warner Bros as distributor of the film, not the position of a simple owner of copyright. We need to turn our attention once again to that simple owner, with an unprivileged equity share in the proceeds of the film — our focus in this investigation. And on that point Warner Bros’ own evidence is that the film was down US$167 million on its reported US$316 million cost. Or in the terms we are familiar with from the examples of the FFC, the UK Film Council and the New Zealand Film Commission: the film had recouped just 47 percent of its cost. Ditto for Twentieth-Century Fox’s Alien, with a US$2 million loss on a US$13 million cost: 85 percent recouped. And for Paramount’s Forrest Gump, with a US$62 million loss on a US$55 million cost: a zero return. It seems we are back once more at that same muddy field.

It may be objected that these are artificial losses, the result of creative accounting, dummied up to deprive profit ‘participants’ of their fair share of the bonanza. And so they may be. But true or false they are the actual losses reported to those participants. They are the money truth even if they are not a true accounting.

Hollywood is notoriously opaque in its financial reporting. The results for individual movies are buried inside studio accounts which in turn are buried inside the accounts of the much larger businesses that own the studios (Warner Bros inside Time-Warner, Paramount inside Viacom, Twentieth-Century Fox inside News Corporation). So it is not possible to
derive a picture of the studios’ movie investments and their results like the picture we have for the FFC, the UK Film Council and the New Zealand Film Commission. Instead we are thrown back on heuristic methods, such as the rule-of-thumb that 1-in-10 movies makes money, widely cited by people in the movie business.\textsuperscript{40} There are several variants of this rule, offering more or less favourable odds but all telling essentially the same story, that most films lose money (though who is losing money is left unspoken; nor does the rubric acknowledge the unfair distribution of losses). Entertainment industry analyst Harold Vogel, who has analyzed the Hollywood data as closely as anyone\textsuperscript{41}, concludes (2004):

‘There emerges a profile suggesting that, in a statistical sense, most major-distributed films do no better than to financially break-even — with deviations from this mean extreme in both directions… The existence of profitable studio enterprises in the face of apparent losses for the “average” picture can be reconciled only when it is realised that the heart of a studio's business is distribution and financing and that, therefore, the brunt of marketing and production-cost risk is often deflected and/or transferred to… outside investors and producers.’

Exactly so.

\textbf{WE HAVE THREADED A PATHWAY} through the data and it has brought us out into the open. It is not the FFC’s fault that it lost so much money investing in Australian films. It may have made some bad decisions but not making those decisions wouldn’t have fixed the problem. It would not have done better even in a much bigger market. The truth is, whatever it did, short of actually becoming a movie distributor, it was always going to lose money.
This fact was not lost on the FFC’s founder, the Australian government. It knew there would be losses. In modeling undertaken by the Australian Film Commission before the FFC was established, it was assumed that it would recoup just 60 cents in the dollar from its film investments — a too-sunny assumption as it turned out. In its discussion paper arguing the case for establishing the FFC, the Commission reasoned (1986, p.xi):

‘The probability of economic loss is uniformly high at the production level. In this sense, making films is... on balance, an uneconomic activity. The reason is not lack of demand. Rather it has to do with the high cost of taking the product to market, the market power of retailers and the bargaining power of distributors. The reason films are made at all is the reinforcement of demand by hidden or direct forms of subsidy. Retailers and distributors are obliged to finance and, in effect, cross-subsidise production in order to guarantee supply. In a few cases, the subsidy lies in filmmakers’ acceptance of deferrals, or in arrangements involving third parties obtaining indirect benefits. In other cases the subsidy is paid, directly or indirectly, by governments.’

The FFC’s failure was neither a local anomaly nor unexpected. It was the unsurprising fate of the ordinary copyright investor and it was business as usual in the movie industry.
5. The Hollywood model

*If you look around Hollywood, there's no end of white smiles and six-packs. Long lines of beautiful people lining up to be incredible on film. Lots of people who want this part.*

— Actor Tom Hardy (Fisher 2010)

*There are so many ways to screw this up. You start out with a great script, the director screws it up, an actor gives a bad performance, the editor screws up, the music sucks, the release date sucks, the ad campaign sucks. There’s a million ways to fuck this up. So to me, when it works, it’s a miracle... It is controlled luck.*

— Actor, producer, director George Clooney (Couturié 2006)

*If I were in this business only for the business, I wouldn’t be in this business.*

— Attributed to Hollywood producer Samuel Goldwyn (1879-1975)

One way to think about Hollywood is as a machine for solving the difficult equations of a business based on art and talent and intractable uncertainty. The machine has been solving these equations for a century and its business ingenuity has been extraordinary. It invented the studio system and the movie star. It re-invented glamour. It has been a canny innovator in project financing and the commercialization of intellectual property. It is a master of the art of marketing. To its international competitors, it is at once a marvel and a monster. Even as it lures away another generation of their homegrown talent, they take pride in its predation.

Hollywood insider F Scott Fitzgerald (1941) said there were not half a dozen men who had been able to keep ‘the whole equation’ of Hollywood in their heads; we will settle here for trying to understand the business
model. We will see that what lies at its heart is a deep, operational understanding of the creative process and its practitioners.

**PERHAPS THE HARDEST PROBLEM** filmmakers have to solve is how to go forward in the face of uncertainty. Every decision to develop an idea, commission a writer, cast an actor, greenlight a film, is haunted by doubt. Luck, intuition and Monte Carlo forecasting models are all embraced to try and still the doubt. But uncertainty only increases as a project clears the hurdles of development, financing and production and heads towards release. How will audiences respond? So extreme is the problem that it has given rise to a mythology of unknowability. ‘NOBODY KNOWS ANYTHING’, wrote celebrated screenwriter William Goldman (1983), describing this as the single most important fact of the entire movie industry: ‘Because nobody, nobody — not now, not ever — knows the least goddam thing about what is or isn’t going to work at the box office.’ Goldman’s insight has become a Hollywood mantra, ritually invoked by filmmakers puzzling over the audience’s rebuff.

More formally, economist Arthur De Vany (2004) has confirmed: ‘Motion pictures are among the most risky of products... There is no natural scale or average to which movie revenues converge... Revenue forecasts have zero precision, which is just a formal way of saying “anything can happen”.’ (p71) De Vany takes this idea and runs with it, developing the ‘outside view’ he offers as a counter-weight to the ‘inside thinking’ typical of the movie business. Inside thinking, he says, is characterised by a ‘pervasive optimistic bias...based on (1) unrealistically positive self-evaluations; (2) unrealistic optimism about future events and plans; (3) an illusion of control’. (p269) In contrast, the outside view is heavily statistical and much less optimistic. In this view the broad features of the business are defined by ‘self-similarity, infinite variance,
volatility, skew, non-linear dynamics, kurtosis and inequality’, features
that resist management and cast a pall of uncertainty over the business
that never lifts. (p267) In perhaps its strongest form De Vany claims:

‘Anyone who claims to forecast anything about a movie before it is
released is a fraud or doesn’t know what he is doing. The margin of error
is infinite. That does not mean that he won’t ever get it right, only that he
seldom will and only because of sheer luck.’ (p275)

This is hard core unknowability. It denies the agency of studio executive
and film producer or at best radically limits the scope of their
effectiveness. Yet interestingly, it is a view embraced by the film
community — not just by those at the periphery but those at the very
centre. Here is veteran producer and studio executive Peter Guber (Rain
Man, Batman, The Color Purple, Midnight Express): ‘Flickering images,
held together in the magic of filmmaking. At the end of the day, nobody
knows.’ (Couturié 2006). And here is Guber’s contemporary Sherry
Lansing, who as head of Paramount presided over such hits as Forrest
Gump, Braveheart and Titanic: ‘No matter what you do, you need luck.
And sometimes the Movie God shines on you and sometimes it doesn’t.’
(Couturié 2006). This is a strange kind of ‘aw shucks’ modesty, coming
from people of formidable skills and uncommon achievement.

Even those who want to qualify Goldman’s insight concede its essential
truth. Thus filmmaker Sydney Pollack (Tootsie, Out Of Africa, Cold
Mountain):

‘Nobody knows anything in a definitive way, that could teach you. You
learn over a lifetime certain things — you always learn — and people do
know certain things. But there is no such thing as an expert in motion
pictures, just doesn’t exist. There’s no such thing as a formula, no such
thing as a rule that always works, unless it’s a rule that there is no rule.’
(Couturié 2006)
To understand what is happening here, we need to take a step closer. When Goldman says NOBODY KNOWS ANYTHING he is conjuring a darker fear than just not knowing. He is talking, obliquely, about failure. For failure is the most frequent outcome of the decision to develop or make a movie — the most probable result. According to De Vany’s estimate (p247), based on a study of 2,015 films released in North America in the 13 years to 1996, just 6.3 percent of films earned 80 percent of Hollywood’s total profits in that period. That means 93.7 percent of films struggled over the remaining 20 percent. Failure is pervasive. Goldman was invoking the secret fear that dogs the business at every turn, tormenting even its most successful practitioners. Failure is the weight in the cosh of the words ‘nobody knows anything’.

We have seen that only about one in 18 Australian films goes into profit. That’s a 94 percent failure rate, similar to De Vany’s estimate for the proportion of films struggling over the last 20 percent of Hollywood’s profits. The industry rule-of-thumb is one in 10, a 90 percent failure rate. With rates like these, plainly failure is the expected result, statistically and managerially: it comes as no surprise. But emotionally and creatively, failure is always unexpected. People do not commit time, money and credibility to a creative project they believe will fail. Their confidence may falter, they may entertain doubts — they may hold their breath — but if they continue it is because they believe the difficulties can be overcome, the risks dealt with and, if there is some remaining rump of risk, that it is worth taking. Therefore failure when it arrives is a personal defeat. It is the end of an ambition, the snuffing out of the hope that lit the project.

A film begins as an idea. It may be carried around for a long time before it is written down. Some writers go straight to a draft script; others write a treatment first. At some point the idea or treatment or script is pitched to a producer. If it’s a ‘spec’ script that point will come quite late in the
process. The producer once on board will push the script through multiple drafts — three is common, five or six well within the normal range. A script editor may be brought in, perhaps someone to work on the dialogue. Sometimes a director will be attached and take over development. If an impasse is reached, the writer may be replaced, or the producer may pass and let it go to another producer. Or the project may simply stall and sit waiting for some new pulse of interest. But if it keeps going then possibly it will begin to acquire momentum. Someone with the power to help may hear about it. An actor may express interest. There may be a buzz. Then a budget will get drawn up. Someone will be sent to scout locations. The producer will start work on a financing plan. There will be conversations with sales agents, distributors, people who might put up money. Everybody will be looking at everybody else. Is it happening?

Anywhere along this path the project may come to an end, its possibilities exhausted. Very commonly the end is not sudden, it is a slow letting go. Producers talk of projects going onto the back burner or into a bottom drawer. The rate of failure — failure in the strict sense that the project did not make it into production — appears to lie somewhere between 95 and 99 percent. The Writers Guild of America West reports that it registers more than 70,000 new ‘pieces of material’ each year, while its sister organization, the Writers Guild of America East, registers ‘approximately 10,000’. These are media works voluntarily entered into the Guild’s ‘official script and screenplay registration service’ by writers willing to pay a small fee to confirm publicly their authorship of a work. Although no breakdown of the categories is provided by the Guild, industry guesstimates suggest that at least half the registered works are screenplays. That implies there are 40,000 new screenplays a year (not counting those writers who choose not to register their works, or don’t know about the service). Against that, we have the Motion Picture

If we take this figure as a proxy for the production prospects of the screenplays registered by WGA West, then we can project that about 98 out of 100 registered screenplays will fail to achieve production — a 98 percent failure rate, or two percent chance of success. Put another way, only about one in 50 registered screenplays will become a produced film. But of course becoming a produced film is the only the first step to becoming a successful film. To calculate those odds, we have to multiply 1-in-50 by the 1-in-10 rule-of-thumb for the proportion of films that are profitable. That gives us 1-in-500 odds of turning a registered screenplay into a successful film — implying a 99.8 percent failure rate, or 0.2 percent chance of success. This is far beyond anything experienced in other industries.

**WHAT IS EXTRAORDINARY** about this rate of failure is not just the rate itself but the willingness of writers and producers to accept it. For a project to reach a ‘registerable’ stage requires weeks, months, even years of work, nearly all of it carried on speculatively, when almost any alternative work would have a higher expected value — that is, considering the odds, would pay more. Yet every weekday another 300 projects are registered by the Guild — 300 new boats launched into the flood. What are we to make of this?

There are four possible explanations:

1. *Reckless gamble:* Writers and producers do not comprehend the odds they face.
2. *Confident gamble:* They overestimate their individual prospects.
3. *Future payoff:* They view their present work as an investment whose payoff will come somewhere in the future.
4. *Different payoff*: The payoff comes in some other form, beyond the framework of the gamble.

As we will see, all four explanations figure in the mix. Writers can be forgiven for just not understanding how hard it is to get from script to film, especially if they are new to the business. It’s an easy mistake to make when success is so visible and failure so invisible in media coverage of the industry. There is also an element of simple human foible: people have a hard time getting to grips with statistics. Daniel Kahneman’s complaint (2011, p174) about the difficulty of teaching students about psychology rings true here too: ‘There is a deep gap between our thinking about statistics and our thinking about individual cases.’

Even if they understand the odds, people may overestimate their own or other people’s prospects. In a 2008 survey by Bergent Research and the Australian Film Television & Radio School, film producers were asked about the probability that they would produce a ‘big hit’ in the next three years. They were also asked about the probability their peers would produce a big hit in the same period. The results, summarised below in Table 6, are instructive.

**Table 6 Chances of a big hit**

<table>
<thead>
<tr>
<th>Australian film producers</th>
<th>Very low</th>
<th>Low</th>
<th>Average</th>
<th>High</th>
<th>Very high</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chance of big hit in next 3 years (%)</td>
<td>15</td>
<td>24</td>
<td>31</td>
<td>24</td>
<td>7</td>
</tr>
<tr>
<td>Chance of big hit from other producers in next 3 years (%)</td>
<td>20</td>
<td>35</td>
<td>31</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Like estimating like* (%)</td>
<td>50</td>
<td>46</td>
<td>47</td>
<td>15</td>
<td>50</td>
</tr>
</tbody>
</table>

*Producers’ estimates of the proportion of other producers who have the same chance of producing a big hit as them.*

Very low=0-20% chance; low=21-40% chance; average=41-60% chance; high=61-80% chance; very high=81-100% chance.
The first thing to note is the optimism. Nearly a third of producers thought they had a high or very high chance of producing a hit in the next three years. Plainly many of them were mistaken, given the 1-in-18 (six percent) odds of producing a profitable film that we saw in the FFC data. Only 15 percent assessed the odds realistically — that is, gave themselves a very low chance. What also stands out is the way producers projected onto others their own expectations (the ‘like estimating like’ row). Thus the 15 percent who gave themselves a very low chance of a hit thought that 50 percent of other producers shared the same very low odds. Similarly, the 31 percent who gave themselves an average chance thought 47 percent of their peers were in the same boat. At the other end of the scale, the seven percent who gave themselves a very high chance of a hit also thought that 50 percent of other producers would have a hit — an amazingly sunny and generous view!

Kahneman, writing about optimists and entrepreneurial delusion, notes (2011, p256):

‘An optimistic bias plays a role… whenever individuals or institutions voluntarily take on significant risks. More often than not, risk takers underestimate the odds they face… Because they misread the risks, optimistic entrepreneurs often believe they are prudent, even when they are not. Their confidence in their future success sustains a positive mood that helps them obtain resources from others, raise the morale of their employees and enhance their prospects of prevailing. When action is needed, optimism, even of the mildly delusional variety, may be a good thing.’

Kahneman goes on to discuss how decision-making can part company with rational weighing of probabilities, concluding (p312) ‘the decision weights that people assign to outcomes are not identical to the probabilities of these outcomes’. Citing a study he conducted with Amos Tversky, Kahneman shows how people give insufficient weight to high
probability events and undue weight to low probability events. Thus an
event with a one percent probability received a decision weight of 5.5; an
event with a two percent probability received a decision weight of 8.1;
and a five percent probability received a decision weight of 13.2 (p315).
Kahneman calls this the ‘possibility effect’ and it is clearly at work in the
film industry.

The third possibility on our list was that writers and producers might
accept the poor odds they are offered because they view their present
work as an investment whose payoff lies in the future. Thus a writer
might commit to a project with no thought of it becoming a hit, just to
gain the experience. Investing in this way probably appeals mostly to
younger writers and producers, who have more to learn and less
experience with the bruising arithmetic of hits. There may also be a
lottery-like appeal in the otherwise daunting odds: the chance of winning
big and decisively changing one’s life circumstances. Canadian
economist Reuven Brenner (2008) has written about the logic of lotteries
and their special appeal to those who are relatively old or poor. Following
Brenner’s logic, it could be that older and wiser heads in the business
persist in seeking a hit because they see having a big hit as their best
chance of making good.

So far then we have a story about human foible, about excessive though
possibly useful optimism, with an element of investing in the future and
perhaps of lottery-like gambling. How far does this carry us? It certainly
doesn’t account for the 39 percent of producers who reported their odds
of producing a hit as low or very low. And we have still to explain why
any of these producers persist in a business where risk and reward are so
fundamentally mismatched. We need something more.

**PSYCHIC INCOME** is the term of art used by economists to describe
the subjective value of non-monetary satisfaction gained from an
activity.’ It is a form of value that you carry around in your head rather than in your pocket. People in many different walks of life earn psychic income but filmmakers earn more than most. They get it from the art, the process, the other people they work with, the finished work itself. The love of the work lifts it above mere labour and creates a second stream of value, in parallel with and sometimes in place of the money stream. We can see this at work in Table 7 below. The data is drawn from a follow-up survey of Australian screen producers conducted in 2011.

‘Satisfying my creative vision’ dominates the agenda of these film producers, with 75 percent reporting that it ‘drives them a lot’. Next comes ‘contributing to the art form’, nominated by 56 percent of respondents, followed by ‘helping others achieve their creative vision’, with 48 percent. Other strong motivations reported by producers included ‘winning respect of peers’ (31 percent), ‘influencing public opinion’ (21 percent), ‘winning awards’ (13 percent) and ‘being well known to the public’ (10 percent). All of these constitute forms of non-monetary satisfaction, of psychic income. But what confirms most strikingly the reality and the importance of psychic income is the reported gap between ‘having a big hit’ and ‘making a lot of money’. These two are strongly correlated in the real world — people who produce big hits tend to make a lot of money — yet in the minds of these producers the correlation is weak: 43 percent said they very driven by having a big hit but only 10 percent said they were very driven by making a lot of money. There, in that gap, is the reason why film producers knowingly accept the poor odds they are offered and the basic financial mismatch between risk and reward. The gap is the hope of other rewards and of vindication on a different scale of achievement.

The survey posed a further question of producers: ‘With your current qualifications, skills and experience, what is the highest annual income
Table 7 What drives film producers

<table>
<thead>
<tr>
<th>Motivation</th>
<th>‘Drives me a lot’</th>
<th>‘Drives me a bit’</th>
<th>‘Neutral’</th>
<th>‘Doesn’t drive me’</th>
<th>‘Doesn’t drive me at all’</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Satisfying my creative vision’</td>
<td>75</td>
<td>17</td>
<td>6</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>‘Contributing to the art form’</td>
<td>56</td>
<td>27</td>
<td>10</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>‘Helping others to realise their creative vision’</td>
<td>48</td>
<td>27</td>
<td>13</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>‘Having a big hit’</td>
<td>43</td>
<td>26</td>
<td>24</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>‘Winning respect of peers’</td>
<td>31</td>
<td>37</td>
<td>27</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>‘Influencing public opinion’</td>
<td>21</td>
<td>48</td>
<td>21</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>‘Winning awards’</td>
<td>13</td>
<td>40</td>
<td>27</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>‘Being well known to the public’</td>
<td>10</td>
<td>3</td>
<td>36</td>
<td>28</td>
<td>22</td>
</tr>
<tr>
<td>‘Making a lot of money’</td>
<td>10</td>
<td>21</td>
<td>34</td>
<td>22</td>
<td>12</td>
</tr>
</tbody>
</table>

Source: Survey of Australian Screen Content Producers Wave 2 (2011)

you would be likely to earn if you chose another occupation outside of being a producer?’ Overwhelmingly, producers said they could earn substantially more in an alternative occupation. They projected a median average alternative income of $118,890, compared to median actual income of just $62,050. That’s a 92 percent pay jump — $56,840
— if they would just give up producing! Of course there is an element of exaggeration in these projections, perhaps of defensiveness too. But producers as a class are entrepreneurial, well educated and play a role that requires creative, business and interpersonal skills of a high order. This set of skills is much in demand in the wider business world. It therefore seems plausible that they could parlay those skills into the executive-level incomes they project.

One way to think about this extra money producers believe they could make in a different job is as a proxy valuation for the psychic income they’re making in the job they do. In effect they are trading one kind of income for the other. On this view, the money income that producers forgo approximates the value of the psychic income they pick up. If that’s true, then it should be possible to quantify the role of psychic income in the film industry. I explored this possibility in a paper written with economist Simon Molloy (Molloy & Court 2012). Taking into account the number of people working in the sector and allowing for their different creative roles, we estimated the aggregate value of psychic income in the Australian screen content sector at $150–295 million annually. However, only a portion of this figure relates to film production specifically; I estimate $25–67 million. Speculatively then, we might put the value of psychic income in Australian feature film production at somewhere between 11 and 30 percent of the average $225 million spent annually on film production in the four years to 2010/11 (Screen Australia 2011).

Of course this was not an approved contribution to the films’ financing, nor did it give rise to a right to share in the films’ revenues. It was a set of transactions in the shadow world of creative engagement that sits just beyond the frame of the money world.

Something similar may be happening with the 40,000 new screenplays the Writers Guild of America registers each year (our earlier estimate).
The WGA publishes a Schedule of Minimums (2011) governing payments to member writers. In 2012 these ranged from US$2,804 for a comedy sketch in non-prime time television to US$34,936 for a non-original screenplay for a movie budgeted at less than US$5 million, and on up to US$122,054 for an original screenplay and treatment for a movie budgeted at US$5 million or more. If we adopt this schedule and apply the figure for a non-original screenplay as an approximation of average value, we arrive at an aggregate development investment of US$1,397 million by independent writers and producers. Of course in many cases there is no money actually invested. Rather it is speculative investment of time and effort by hopeful writers and producers — nearly all of it unrewarded and much of it barely noticed by the studios at which it is aimed. Whether these suitors derive an equivalent amount of psychic income is unclear. Writers have only a small part in the collaborative process of filmmaking which so motivated the producers in our survey: they mostly work alone. So it may be they are more driven than producers by the possibility of a hit and the money a hit might bring.

Returning to our question about why writers and producers accept the crazy odds they are offered, we have explored: 1. the possibility that they simply don’t understand the odds; or 2. that they overestimate their individual prospects; and 3. that in some cases they may be investing in the future or ‘buying tickets in a lottery’, knowing the odds are poor; and now 4. the possibility that they are driven by psychic factors that go beyond calculations of money and risk. We have seen that this last factor has particular explanatory power for producers and filmmakers. But for any individual, all four explanations may carry some weight. It is hard to make sense of very long odds and easy to talk up your chances, especially when you love the work.
THERE MUST HAVE BEEN A EUREKA MOMENT in the early days of Hollywood, when the properties of movie stardom first became apparent. It may have been the moment in 1910 when Carl Laemmle, soon-to-be co-founder of Universal Studios, revealed that ‘The Biograph Girl’ — a widely-recognised but unnamed actress who was believed to have been killed in a streetcar accident — was alive and well and signed up to his company and that her name was Florence Lawrence. If it was not then, it was surely not long after. For Hollywood had discovered the ‘machinery of glory’ that ‘uncoupled fame from greatness and achievement’ (Flagg 1999) and simply conferred it on Hollywood’s chosen.

The properties of movie stardom are remarkable. It is like a spotlight, playing slowly across the ranks of would-be stars: wherever the spotlight falls, a star is revealed. The spotlight seeks out talent and beauty and by its falling confers the further qualities of stardom: fame, glamour, desirability. Not the least of its properties is its extraordinary appeal to actors themselves. It is hard to think of an incentive more exquisitely tuned to the anxieties of creative performance — the performer’s insecurity, fear of failure and unshedable awareness of the fickleness of success. Stardom is a balm for these anxieties. Yet its conferring in no way reduces the stock of movie stardom. If anything the stock is increased, since each new star adds lustre to the rest. In this respect stardom could be considered a form of capital that increases in value as it is invested. Or in the terms we are now familiar with, it is a form of psychic currency, denominated in units of fame and glamour and accepted throughout the movie economy. Hollywood has a licence to print this currency.

We can begin now to see how the Hollywood model works. Although the studios complain about the extravagant compensation they are forced to pay movie stars, the industrial truth is: movie stars are a bargain. They
are a bargain because movie stardom — just the possibility of it — is the motive force for every actor waiting tables in Los Angeles and for every hopeful trying out as an actor somewhere else in the world and nursing the dream of making it in Hollywood. There are not very many movie stars but there are a great many actors and a never-ending stream of movie hopefuls and it is from the stream of hopefuls that the next generation of actors and movie stars will be drawn. Furthermore it is not just actors who respond to stardom and the ‘magic’ of the movie business. Filmmakers and investors are equally susceptible. Stardom is a currency they all accept.

The ability to call forth so much ambition and to induce such extraordinary risk-taking by people ‘wishing upon a star’ contributes directly to Hollywood’s financial success. Every ‘dollar’ of psychic income ‘earned’ by a filmmaker in lieu of a money dollar reduces the studios’ cost structure. And whereas a money dollar saved in this way might be regarded as a ‘deferral’ which the filmmaker was entitled to recover when the film was financed or made some money — a dollar of psychic income is never redeemed financially. It disappears out of the accounting. It is an unintended subsidy, which passes to the studio first as a reduction in costs, then as boost to profits (since it makes no claim on them). It is as though the studios were waving about the modern equivalent of Mark Twain’s ‘Million Pound Bank Note’. In Twain’s story the penniless protagonist (played by Gregory Peck in the 1954 film version) is given a £1,000,000 note by two elderly brothers betting whether he will starve or thrive, encumbered with such an enormous, untransactable sum. To cut a short story shorter, he makes his fortune and even marries the daughter of one of the brothers, all without ever cashing the note. At the end, with the note hanging framed on his wall, he boasts: ‘Yes, it’s a million-pounder, as you see; but it never made but one purchase in its life and then got the article (ie his wife) for only about a tenth part of its value.’
Hollywood could make a very similar boast: how the movie business has lured generations of filmmakers to Hollywood with the promise of stardom though it rarely pays out on the promise.

**THERE IS ONE MORE STEP** in the Hollywood model: solving the problem of search. How do the studios choose which movies to make? This is a much harder problem than it might appear. To understand the scale of the problem, consider how many possible movies there are at any given time, that is, movies that could be assembled from the array of available movie-making talent. Even if you limit the search to known stars, directors, writers and producers — this director with that star in this screenplay under that producer — the number of combinatory options is staggeringly large. The number grows even larger when location and financing options are added to the mix of possibilities. We can think of this as a ‘possibility space’ that must be searched, systematically and efficiently, bearing in mind that *search* in this context means more than simply assembling a list: there must be a process of generating and thinking freshly about combinations that initially may seem far-fetched.

‘Arnold Schwarzenegger, Danny De Vito: Twins’ is perhaps the paradigmatic example.

In Hollywood the problem of search is distributed among hundreds, even thousands of industry participants, each of whom is powerfully motivated to seek solutions — possible movies — among the other participants they are able to influence, with the resources they control. Thus agents seek ‘vehicles’ for the movie stars they represent; producers seek movies they can make ‘stand up’; studio executives seek to fill the studio’s ‘pipeline’; and all of them beat the bushes for possibilities unseen by others.

The grid of seekers reaches around the world. Promising actors and directors are scouted at film festivals and on YouTube and wherever else they may turn up. Script ideas are pitched, weighed — and mostly
rejected. Projects that have one or two elements in place (this script with that producer) flash through other possible elements. This director? That actor? The permutations ramify. Adding one new element may mean rethinking another: we can’t cast him with her. Changes in the wider environment also ripple through the possibility space. Thus a low-cost new camera technology may make possible a slew of movies that were not feasible before. Equally, a credit squeeze may close the possibilities off again. Contingency randomly intervenes: a hole unexpectedly opens up in a wished-for actor’s schedule. The seekers comb the possibilities, then comb them again in case they fall out differently. What gives the search its reach are the many differences between the searchers. An independent producer moves in different circles to a studio executive. A budding actor has more appetite for risk than a proven star. A director aiming at the Cannes Film Festival searches differently to one seeking vindication at the box office. An outsider sees things that sit beyond the sightlines of an insider. All of this variation casts the net of the search wider. The financial rewards are structured differently too. For a filmmaker it’s a lottery with a big payout for a hit. For an agent it’s 10 percent of what the client makes. For a studio executive it’s more like a game of snakes-and-ladders. Each therefore performs a different calculus even when they consider the same movies.

Criss-crossing the possibility space, the army of searchers misses little. People like to tell stories about how Star Wars or Lord Of The Rings was turned down by studio after studio, but the point surely is that they did find backing — Star Wars by Twentieth Century Fox and Lord Of The Rings by New Line Cinema.58

Of course locating a possible movie is only the beginning of the process that leads to the movie being ‘greenlit’. To get the process underway, the person who locates the possible movie must recommend it to the next person in a prospective chain of recommendations. The chain might run
something like this: writer → producer → director → actor’s agent → actor → sales agent → studio executive → studio boss. There are many possible pathways but few shorter than the seven-link chain described here. Each link in the chain is a personal recommendation and thus an investment of reputation. Indeed the process of greenlighting can be thought of as the gathering of recommendations made out in the form of reputational chits. It is rarely quick. People may spend a long time weighing the possibilities before they reach a decision. They may demand more work on the script or make their commitment conditional on some other party also committing to the project. Or they may elect simply to keep their options open, neither passing nor committing. Producers call the process ‘development hell’.

What makes it hellish is that producers are at cross purposes with greenlighters. Putting together a possible movie is essentially a constructive process, a coming together of people and possibilities. The greenlight process is exactly the opposite. It is the destruction of possibilities, the industrialization of saying no. Those involved in the process may be polite and solicitous in their engagement with producers but the process is a relentless search for the 1-in-100 combination. It is a great threshing machine that shakes and winnows the possibilities till the stalks and husks of half-formed movies fly out — rejected — leaving just the precious grain, greenlit. Thus do 40,000 screenplays become 750 movies.

**WHEN HOLLYWOOD DISCOVERED** that it could transfer most of its development risks to writers and producers it wasn’t innovating. London’s booksellers were doing much the same thing to English authors at least 200 years earlier. But Hollywood took it further — much further. Where the booksellers left it to authors to discover in themselves the reasons, beyond money, that they should write, Hollywood put a sign on a
hill, visible around the world. The sign said, in effect, here is the epicentre of the movie business. Fame, glamour, money, all are possible here. No surprise then that the world should beat a path to Hollywood’s door. Even those filmmakers who decide that Hollywood is not their destiny must first consider it — and many try it before deciding. There is no data to prove it but probably most movie ideas get a hearing in Hollywood, even if only as a possible ‘acquisition’. It is this capacity simultaneously to lure and reject so many movie ideas — to induce 100 pitches while backing only one or two — that displays the power of the Hollywood model. It is a kind of business genius. But there is no genius inventor to whom we might give credit; the genius is in the system.

We are left now with a question: how to reconcile Hollywood’s mastery of the possibility space with its ritual invocation of Goldman’s dictum, nobody knows anything? For if Goldman and his academic counterpart De Vany are right and correctly forecasting anything about a movie before it is released is a matter of ‘sheer luck’, then how can we have any confidence in the greenlight process? And how can Hollywood have built a viable, 100-year-old business based on picking movies that perform well at the box office?

Discussions about the movie business often focus on how the studios are able to mitigate risk by casting big stars or spending more on special effects, or by making sequels and building big portfolios of movies. Yet these are all strategies which De Vany and his collaborator David Walls have shown do not meaningfully reduce the uncertainty of movie-making (De Vany 2004). We need to stay focused here on the greenlight process itself. Whatever Hollywood may do to manage the risks of making movies, there is no avoiding the necessity of choosing which movies to make. And if it is true that performance at the box office is irreducibly unpredictable, then the process of choosing which movies to make cannot be more than a kind of theatre of wishing and make-believe. We would
have to look elsewhere for an explanation of Hollywood’s century-long dominance of the movie business.

One way to approach the problem is to reverse the arrow of inference. Empirically, Hollywood dominates the movie business. Although it produces its fair share of flops, it also produces most of the world’s movie hits. That it has done so in a sustained way for nearly a century argues against ‘sheer luck’ and in favour of some form of predictability. It is evidence that somebody knows something about which films will work at the box office. Notice that we do not need to suppose that any one individual knows what is going to happen at the box office. It may be, as Fitzgerald said, that very few people can keep ‘the whole equation’ in their heads. Rather, we are supposing that a group of decision-makers, acting independently but with knowledge of each other’s decisions, between them might know enough about the prospects of a movie to lift the veil of uncertainty. Earlier we saw that a typical greenlight sequence involved at least seven decision-makers — beginning, in our example, with a writer proposing a movie to a producer and ending with the studio boss deciding to fund the movie. We can see too that the process involves the aggregating of information. Each party knows something about the movie and its prospects and conveys that information, or the gist of it, by their decision to back the movie or not. The aggregated information yields the collective ‘yes’ or ‘no’.

That a small number of people sharing information in this way can accurately predict box office performance has been demonstrated in an experiment called Box Office Prophecy. The experiment was designed by economist Charles Plott at the California Institute of Technology and carried out in association with the Australian Film Television & Radio School. In the experiment, students at the School and people from the film industry were invited to participate in a weekly online market where they could win money by accurately predicting how an unreleased film
would perform at the Australian box office. Predictions were made by placing ‘bets’ in ‘buckets’ corresponding to possible box office outcomes. The mechanism is similar to a pari-mutuel betting market. We also used a simple guessing game where participants were invited to guess what other participants would predict. Both mechanisms worked remarkably well. In a summary of the early results Plott (2007) wrote:

‘The data show that amazingly accurate predictions can be made. Ten or so participants between them often have enough information to accurately assign probabilities to each box office 'bucket' or possible outcome. The results leave no doubt that while no single participant has generally reliable information, participants as a group possess solid information about potential box offices and that this information can be captured by a properly designed process. In part this accuracy is derived from the fact that the predictions are in the form of probabilities rather than a single number.’

There is an echo here of the phenomenon known as the ‘wisdom of crowds’. James Surowiecki (2004, p10) summarised the conditions necessary for ‘wise crowds’ thus:

‘Diversity of opinion (each person should have some private information, even if it’s just an eccentric interpretation of the known facts), independence (people’s opinions are not determined by the opinions of those around them), decentralization (people are able to specialise and draw on local knowledge) and aggregation (some mechanism exists for turning private judgments into a collective decision).’

These conditions are met by the greenlight process. Diversity is achieved because the greenlight decision is distributed among parties who perform very different functions in the movie world. Independence flows from the fact that each party is empowered and motivated to say ‘no’ unless they privately believe the movie will succeed. Decentralization comes about because each party moves in different circles with access to specific
information about the elements of the movie they control. Aggregation is achieved by the greenlight process itself: the sequential gathering and disclosure of commitments leading to the funding decision. We can therefore say the greenlight process is ‘wise’. A small crowd, seven or eight people as a minimum, joined together in a wise process can know something useful about the prospects of a movie. They can know enough, on average, to achieve the ratio of hits to misses that has characterised Hollywood’s dominance of the movie business.

But we are not yet out of the explanatory woods. If we have confidence now in the greenlight process, then what we are to make of Goldman’s insistence that nobody knows anything? Why would people who are themselves deeply involved in the greenlight process throw cold water on it? Why does Goldman’s dictum hold such sway in the movie business?

We are back where we started. There is no simple answer. The thing to recognise is that we are right up close to the creative process. Here, in conclusion, are some possible explanations.

1. **It fits the alchemy model of creation.** For many people involved in creative work, it is best not to say too much about it. Talking about it jinxes the process. Creativity is alchemy, in this way of thinking, with mystery at its heart. ‘Nobody knows’ is a way of saying this and turning away discussion.

2. **Ex ante it is permissive of failure.** We have seen that failure is the expected case, the normal outcome of creative endeavor, especially in the movie business. ‘Nobody knows’ is an apology offered in advance. It wards off judgment.

3. **Ex post it justifies the failure.** We did everything right but still it turned out wrong. ‘Nobody knows’.

4. **It’s a Keep Out sign.** To ‘suits’ and other outsiders who come prying, ‘nobody knows’ says you have no competence here. Keep out.
5. *It cultivates the mystique.* It is in the interests of Hollywood and creative people everywhere to close the curtain. You can’t go backstage.

6. *Some of the time, it’s true.* Nobody knows.

**THE HOLLYWOOD MODEL** is a very successful elaboration of the model pioneered by London’s booksellers three hundred years ago. Hollywood’s version itself is the product of a century of innovation and rests on a profound understanding of creative people. The spectacular rate of failure in the movie development process that we observed at the beginning of this chapter is *not* the industry blundering about, not knowing which pictures to make. It is Hollywood exploring the possibility space. It is Hollywood persuading talent everywhere to try out for the chance to make a movie, to be a star, to be the author of a hit. It is Hollywood outsourcing the risk and paying participants in the currency of glamour. And it is Hollywood pocketing the money and keeping the business to itself — a secret. It is an extraordinary model.
6. The view from the ground

*If independence exists, it exists partly because people have nerve, because they will not be swayed by rejection, nor by ill fortune or bad timing. They must stay unswerving and it's a curious sensation to find oneself, however fearful of consequences, simply having to walk that road where the only catastrophe is stopping.*

— Al Clark (2010)

*We are the 99%.*

— Political slogan used by the Occupy movement

We have been floating above the fray, looking down on the movie business, trying to see it as a whole. But now we must come closer. We need to see it as someone trying to make a film sees it — up close, without benefit of distance or dispassion. And we need to see it as an ordinary filmmaker sees it, who does not have the power of stardom.

**The difficulty of financing**

We saw in chapter three that risk and reward are fundamentally mismatched in the film industry. Investors who contribute equity funds to a film are unlikely to recover them unless the film is a hit and even then the reward will not be adequate to compensate for the risks of the investment. This fundamental mismatch is enough to turn most investors away. Unless they are able to negotiate a privileged position in the flow of funds or they expect to derive some further, non-financial benefit — such as helping a relative or getting to walk the red carpet — investing in films is a folly. No rational investor in possession of the facts would go ahead with it. For filmmakers, this translates on the ground to unusual difficulty in financing. Investors are hard to find and those who can be found are hard to bring to the table. There are many conversations but few closings.
The long wait for cash

With very few exceptions the making of a film is funded as a one-off project rather than a continuing business. That means there is no working capital to fund early development or push the project through the cycle. Instead the funds are released in stages, conditionally, beginning with development, then pre-production, production, post-production and release. Profits, if any, lie at the very end of the cycle. For the filmmaker this means the money is always dangling somewhere in the future, just out of reach. For an equity investor deciding to back the filmmaker, it means their money will be ‘first in, last out’. Cash is always short.

Capitulation on terms

Film distributors are famous for writing contracts that purport to hold good not just in this world but in all media throughout the universe including media yet to be discovered. It is an imperious demand that shows very clearly where the power lies. Few filmmakers are able to influence the contracts they enter in any meaningful way. There is little room to negotiate. The distributors award themselves the rights they need in the film and priority over its revenues, while leaving the risks and obligations of production with the filmmakers and their investors. The filmmakers sign where they are told.

The slide into dependency

Because professional investors stay away from films, the search for backing must be conducted among the byways of the investor class. Filmmakers must locate the very small subset of investors willing to overlook the dismal economics of the film industry because they have more than money on their mind. We may think of these investors as contemporary exemplars of the patronage tradition. For the filmmakers we considered in chapter three the patronage investor was the FFC, a government-backed agency charged with investing in ‘qualifying
Australian films’. The filmmakers must engage with the mission of these unusual investors and accept the terms they are offered. Having few if any alternatives, they begin a slide into dependency from which they are unlikely to escape. Beggars can’t be choosers and they must be flatterers.

**Failure internalised**

We have seen that the development process is a high-cost, high-wastage search for possible movies. It is like a threshing machine churning through the possibilities. Hollywood’s particular genius has been to induce filmmakers to bear the costs of the process. Thus development has become a kind of personal tryout — as though filmmakers, no matter their seniority, were auditioning for the business and not already part of it. And because the outcome in 98 cases out of 100 is rejection, the normal experience of the process is of personal failure. Hope gives way to disappointment; the costs in time and cash and self-esteem must be privately absorbed; the failure is internalised.

**Low and uncertain incomes**

Unsurprisingly, producers earn low incomes from producing and therefore must seek supplementary incomes whether from other work, family sources, government subsidies, or welfare transfers. Table 8 below shows Australian film producers’ incomes from producing as well as their total incomes from all sources. More than half (52 percent) earned less than $25,000 from producing. The average was $43,090.63 Only 10 percent reported incomes from producing greater than $100,000. Income from other sources raised the average to $76,190 (total personal income from all sources). To this pressure of low incomes, we must add the further tension of uncertainty. Producing is not normally a salaried job. Payments come, as we have seen, in fits and starts, without much predictability.
### Table 8 Film producers’ incomes

<table>
<thead>
<tr>
<th>AUD</th>
<th>Producing income (% of producers)</th>
<th>All income (% of producers)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–24,999</td>
<td>52</td>
<td>12</td>
</tr>
<tr>
<td>25,000–49,999</td>
<td>17</td>
<td>23</td>
</tr>
<tr>
<td>50,000–74,999</td>
<td>11</td>
<td>26</td>
</tr>
<tr>
<td>75,000–99,999</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>100,000–149,999</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>150,000–199,999</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>200,000–249,999</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>250,000+</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Don’t know/not sure</td>
<td>7</td>
<td>6</td>
</tr>
</tbody>
</table>

Source: Survey of Australian Screen Content Producers Wave 2 (2011)

In our sample, the film industry delivers only about half the income of the average film producer. Table 9 below shows the breakdown. Forty-one percent comes from their main producing job, 6 percent from other production work and 3.5 percent in the form of royalties from past work. To make ends meet, most producers take another job (56 percent) or draw on private income (26 percent), family support (17 percent), or government transfers (10 percent).
Table 9 Film producers’ sources of income

<table>
<thead>
<tr>
<th>% total income</th>
<th>Production (main) job</th>
<th>Other production</th>
<th>Royalties</th>
<th>Other job</th>
<th>Private</th>
<th>Family</th>
<th>Gov’t transfer</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>24</td>
<td>81</td>
<td>73</td>
<td>44</td>
<td>74</td>
<td>83</td>
<td>90</td>
<td>95</td>
</tr>
<tr>
<td>1-20</td>
<td>25</td>
<td>11</td>
<td>23</td>
<td>14</td>
<td>15</td>
<td>10</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>21-40</td>
<td>10</td>
<td>4</td>
<td>4</td>
<td>7</td>
<td>4</td>
<td>5</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>41-60</td>
<td>7</td>
<td>3</td>
<td>1</td>
<td>12</td>
<td>5</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>61-80</td>
<td>16</td>
<td>1</td>
<td>0</td>
<td>12</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>81-100</td>
<td>21</td>
<td>1</td>
<td>0</td>
<td>15</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Mean</td>
<td>41.1</td>
<td>6</td>
<td>3.5</td>
<td>31.4</td>
<td>8.6</td>
<td>5.7</td>
<td>2.2</td>
<td>1.5</td>
</tr>
<tr>
<td>Std Dev</td>
<td>38</td>
<td>16</td>
<td>8.2</td>
<td>36.2</td>
<td>20.2</td>
<td>17.7</td>
<td>9.9</td>
<td>8.4</td>
</tr>
</tbody>
</table>

Source: Survey of Australian Screen Content Producers Wave 2 (2011)

Taken all together the picture that emerges is a daunting one. Difficulty in getting films off the ground is combined with personal financial difficulty. Problems of cashflow can be pressing and recurrent. Many projects are begun and carried forward but very few come to fruition. The losses must be absorbed. Over time these may come to be felt as a measure of personal failure. A low income may serve to confirm the sense of failure.

Consolation for most filmmakers lies in the creative process. We saw in chapter five that ambitions like ‘satisfying my creative vision’ and ‘helping others realise their creative vision’ ranked much higher than ‘making a lot of money’ or ‘being well known to the public’. Table 10
below records how often film producers in the 2011 survey actually achieved these ambitions. The results show that many were successful in their creative goals. Two thirds (67 percent) were able to satisfy their creative vision all or most of the time, while slightly more (69 percent) were able to help others realise their vision all or most of the time. A majority (55 percent) believed they were able to contribute to the art form they practiced all or most of the time. But fame and fortune were elusive. A majority (59 percent) said they had never or not very often been ‘well known to the public’. Most (79 percent) reported that they had never or not very often been able to ‘make a lot of money’.

**Table 10 How often film producers achieve their ambitions**

<table>
<thead>
<tr>
<th>Motivation</th>
<th>All the time</th>
<th>Most of the time</th>
<th>Sometimes</th>
<th>Not very often</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Satisfying my creative vision’</td>
<td>16</td>
<td>51</td>
<td>29</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>‘Contributing to the art form’</td>
<td>16</td>
<td>39</td>
<td>37</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>‘Helping others to realise their creative vision’</td>
<td>18</td>
<td>51</td>
<td>24</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>‘Having a big hit’</td>
<td>0</td>
<td>0</td>
<td>36</td>
<td>29</td>
<td>34</td>
</tr>
<tr>
<td>‘Winning awards’</td>
<td>4</td>
<td>16</td>
<td>57</td>
<td>16</td>
<td>8</td>
</tr>
<tr>
<td>‘Being well known to the public’</td>
<td>0</td>
<td>7</td>
<td>34</td>
<td>26</td>
<td>33</td>
</tr>
<tr>
<td>‘Making a lot of money’</td>
<td>0</td>
<td>0</td>
<td>21</td>
<td>34</td>
<td>45</td>
</tr>
</tbody>
</table>

Source: Survey of Australian Screen Content Producers Wave 2 (2011)
We must keep our gaze fixed on the low horizon of the ordinary producer, working without privilege or recognition. With a median income of $27,720, the ordinary producer was living just above the poverty line, if single, and somewhat below the line if supporting a partner or family. Since the resources to make films, both human and financial, are concentrated in the major cities, particularly the inner city, producers cannot withdraw to the outer suburbs or regions where living costs are lower — or must pay a steep professional price if they do. A fortunate minority was able to fall back on private means or family help, and a few qualified for welfare transfers. But for our ordinary producer, the choice becomes one of persisting in face of near or actual poverty, or else stepping back from the full-time pursuit of filmmaking, finding a ‘day job’ and eking out their ambition in their spare time. The already drawn-out process of developing a film to the point of production becomes more attenuated, its fruition more distant, more improbable. Backers become harder to acquire as they perceive the reduced odds. Momentum flags.

Of course there is always a further possibility: give up filmmaking. Some might view this as the only rational choice. Almost certainly it is a choice that many make. Our survey shed no light on those who leave the industry, since the population surveyed was of working producers exclusively. But we may draw a few tentative conclusions. First, the producers most likely to leave are those with the least financial means — those who have no private wealth or family support or access to welfare transfers. Second, there will be early departures among those producers who are unwilling or unable to find backing from the patronage investors described above. Third, the same economic conditions that induce some producers to leave the industry must discourage other, prospective producers from entering it in the first place. Their number is unknown.
IN THESE FIRST CHAPTERS I have described an industry that is very tough on those who work at the creative level, making films. The toughness is partly a sorting mechanism that helps the industry sift through the many competing film ideas and judge the merits of their proponents. It is easy to rationalise being tough in this way. But the toughness is also a persistent economic condition of the work itself. It is like a tax on creation levied by some unknown despot. People who want to make films have to pay this tax. There is no choice about it, except not to make films. The tax falls most heavily on those who need to make money from the work they do. For them the work becomes very hard. Sheer bloody-minded persistence begins to matter more than any other personal quality, while its absence becomes a marker for failure. And so we enter the realm of the obsessive and driven filmmaker.

A story like this provokes the question: Are the conditions described here simply in the nature of creative work and its commercial exploitation? Are they somehow fundamental? Or can we imagine an industry and a market where the outcomes were more favourable to creators? These are questions about the copyright system — how it works and what it enables. It is to this system that we must now turn our attention.
PART TWO

POLICY
7. Big, old, robust and bent — the copyright system

The modern concept of copyright is difficult, complex, and on the whole, unsatisfactory.
— Lyman Ray Patterson (1968)

There seems (said he) to be in authors a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual; but the consent of nations is against it...
— James Boswell (1791)

There is a radical polarity around authorship. Authors believe they have a deep and unbreakable connection to their work. The rest of the world begs to differ. Authors think that a book they have written or a film they have made is theirs, in some fundamental sense. They believe they have the right to be recognised as author of the work and to stop others wrongfully claiming authorship. They believe they have an economic interest in any copies that are made, including versions made for a different medium. They consider they have the right to close down usages that are unauthorised. They expect others to defer to their wishes in how the work is presented. Essentially, they see themselves as owners of the work and believe others should recognise their rights as authors.65

In Millar v. Taylor, one of the great English copyright cases dating from 1769, Lord Mansfield, Chief Justice of the King’s Bench, captured exactly the author’s perspective when he said:

‘It is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or
whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions...’ (English Reports 98:252)

This language of what is ‘fit’ and ‘just’ speaks directly to authors. The passage reads, in fact, almost like a *cri de coeur*. Nor was Mansfield alone in his support of authors. His fellow judge Justice Aston observed in the same case:

‘I do not know, nor can I comprehend any property more emphatically a man’s own, nay, more incapable of being mistaken, than his literary works.’ (English Reports 98:224)

Yet this conception of authoring, right as it seemed to Mansfield and Aston, has found no answering echo in the wider world. And while a body of law has grown up to protect the interests of authors, the idea of an author’s right based in justice has long since fallen away. Contemporary theories of authors’ rights make smaller claims. If authors have rights now it is because it is expedient for society to grant them — justice doesn’t come into it. Other interests must be weighed too and they may trump the author’s interest. In fact, the very idea of authorship has become controversial. James Boyle, one of the founders of Creative Commons, has observed: ‘The author vision blinds us to the importance of the commons — to the importance of the raw material from which information products are constructed’. (Boyle, pxiv) Others go further: ‘Copyright is… an institution built on intellectual quicksand: the essentially religious idea of originality, the notion that certain extraordinary beings called authors conjure works out of thin air.’ (Rose, p142) On this view authorship itself is a kind of fiction ‘inseparable from the commodification of literature’ (Rose, p1).
More immediately, there is the threat of plagiarism. For flesh-and-blood authors, there is probably no more visceral challenge to their identity. The threat is magnified by the internet with its capacity to scour the world in an eye blink and assemble words and images out-of-context and de-authored, ready for re-assembly. Choosing the time and the manner of publication are distant possibilities in this scenario, lost to view. There can be no thought of deciding ‘to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions’. All such controls are permanently at risk in the online world. There is also the threat of unauthorised copying of authors’ works. Filmmakers watch with dismay the runaway file-sharing of their works, the scale of it sometimes dwarfing the legal uses. What flows away in the torrent is not just potential income but recognition of the filmmaker as someone who has a right to make a living from the work they do.

There is, finally, the evidence of the money flow. As we have seen, what begins as a broad stream at the box office is reduced to a trickle by the time it reaches the filmmaker — and in this respect the filmmaker is no different to any other author. The trickle of money is confirmation, if such were needed, that the world takes a lesser view of authors’ rights than authors’ sense of them.

THE STORY OF COPYRIGHT goes back about 500 years. There are several possible starting points. Copyright scholar Lyman Ray Patterson (1968, p28) cites the ‘focal point’ of May 4, 1557, when England’s Queen Mary granted the Company of Stationers a royal charter. The charter’s preamble sets the scene:

‘Know ye that we, considering and manifestly perceiving that certain seditious and heretical books rhymes and treatises are daily published and printed by divers scandalous malicious schismatical and heretical
persons… moving our subjects and lieges to sedition and disobedience against us, our crown and dignity… and wishing to provide a suitable remedy in this behalf…” (Arber 1875, 1:xxviii)

The remedy was a newly empowered Stationers Company, granted by Mary a national monopoly of printing along with powers of enforcement that included the right to search:

‘in any place, shop, house, chamber, or building of any printer, binder or bookseller whatever… for any books or things printed, or to be printed, and to seize, take, hold, burn… those books and things which are or shall be printed contrary to the form of any statute, act or proclamation…’

(Arber 1875, 1:xxxi)

This was a deal, a *quid pro quo*, that gave the Company control of the book trade in return for its members’ help in suppressing political and religious dissent. Historian John Feather records that they did their job well: the stationers ‘so impressed the authorities with their orthodoxy and efficiency that they [were] officially accepted as an integral and essential element in the regulation of the output of the book trade’. (Feather 1988, p34)

In this early precursor of the modern copyright system, there is nothing at all about authors’ rights. It is strictly a deal between the Crown and the Stationers Company (representing interests we would describe today as publishers’ interests.) Authors appear only as potential sources of dissent and therefore targets for suppression. It would be another 150 years before anyone thought to cast authorship in a positive light and join it to the aims of copyright.

The circumstances of that recasting are worth retelling. In the years following England’s Glorious Revolution of 1688, a reform-minded Parliament allowed the Printing Act of 1662 to lapse. This Act had extended the publishers’ long-standing control of the book trade, limiting
the numbers of presses and requiring ‘copies’ (ie new works) to be entered in a register maintained by the Stationers Company. By allowing the Act to lapse, Parliament left the publishers twisting in the wind. Over the next six years the Stationers Company made repeated efforts to renew the Act, without success. Parliament had lost patience with both the Crown’s censorship and the Company’s monopoly and was in no mood to revive either of them. Forced to cast about for a new approach, the publishers hit upon the stratagem of proposing a ‘literary property’ arising from authorship. This new author’s right would supply the legal underpinning for their system of copyright registration.

To advance their case, they drew on the advocacy of Daniel Defoe, author of *Robinson Crusoe*, who not long before had called on Parliament to give authors a ‘right of property’ in their works, arguing:

‘Why have we Laws against House-breakers, High-way Robbers, Pick-Pockets, Ravishers of Women, and all Kinds of open Violence [and yet no protection for the author]? When in this Case a Man has his Goods stolen, his Pocket pick’d, his Estate ruin’d, his Prospect of Advantage ravish’d from him, after infinite Labour, Study, and Expence.’ (Defoe, 1709, quoted in Rose 2002, p37)

In effect, the publishers sought to deflect Parliament’s attention from their own ambitions and focus it instead on authors and their campaign for literary property. It was the Author as Human Shield — with the publishers crouching behind hoping they might pass unnoticed. And the stratagem worked: a Bill was brought forward and quickly passed, with the title *An Act for the Encouragement of Learning, by vesting the copies of printed books in Authors, or Purchasers, of such Copies, during the Times therein mentioned*. Called the Statute of Anne, the new Act was the first legislative instrument to expressly acknowledge the author’s interest.

The publishers’ conscription of the Author was a clever gambit that disarmed their parliamentary critics. Parliament embraced the idea of an
author’s right with an enthusiasm it had never displayed for the old Stationers Company and the publisher interests it represented. The author became the acceptable face of the copyright system and later the justification for its expansion. But the move introduced a doubleness into the system. For behind the author stood the publisher. The author, pushed to the front, was the public face, while the publisher, standing behind, was the private force. It’s there in the very title of the Act, vesting copyright in ‘Authors, or Purchasers’. The purchasers are of course the publishers, named here in the act of acquiring the author’s ‘copies’ (ie copyright).

The doubleness persisted in the years following the Statute of Anne, in the publishers’ long fight to make copyright perpetual. Called the Battle of the Booksellers, the fight was carried on mainly in the courts, where the publishers sought to prove the existence of a perpetual copyright in the common law. Once again they invoked the Author, grounding the supposed common law copyright in the ‘natural right’ of the author. *Millar v. Taylor*, described earlier in this chapter, was a test case brought by one bookseller against another with the aim of proving the existence of this supposed right. The case supplied a brief victory but was swept away in 1774 by *Donaldson v. Beckett*, another case carefully prepared by the booksellers, which went as far as the House of Lords. Attorney General Edward Thurlow as counsel for Donaldson noted that the booksellers ‘had not, till lately, ever concerned themselves about authors… nor would they [have] introduced the authors as parties in their claims to the common law right of exclusively multiplying copies, had not they found it necessary to give a colourable face to their monopoly’ (Cobbett’s *Parliamentary History of England*, Vol XVII, quoted in Tallmo, forthcoming). The Lords determined, finally, that there was no common law author’s right. That ended the Battle of the Booksellers but not the publishers’ campaign for a longer lasting copyright — it is still running.
The doubleness was there too in the copyright act passed by the First Congress of the United States in 1790. Echoing the Statute of Anne, it was called *An act for the encouragement of learning, by securing the copies, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned*. ‘Proprietors’ here meant publishers, once again twinned with authors. The pattern has been repeated whenever publishers have sought to extend the term or reach of copyright. As technology has enlarged the realm of media they have joined themselves, successively, to photographers, composers, filmmakers and software developers. Crouched behind the shield of the Author, they have brought about an enlargement of copyright beyond anything contemplated by its original legislators. 71

**LONDON’S FRUSTRATED BOOKSELLERS** turned out to be very successful policy innovators. Their invention of author’s copyright made possible the vast enterprise called the ‘creative industries’ in the form we know it. At the heart of the enterprise are the so-called ‘core copyright industries’. These are ‘press and literature’, ‘music, theatrical productions, operas’, ‘motion picture and video’, ‘radio and television’, ‘photography’, ‘software and databases’, ‘visual and graphic arts’ and ‘advertising services’ (PwC 2012, p17). 72 According to Pricewaterhouse-Coopers these industries contributed AUD67.6 billion to the Australian economy in 2011 and employed 612,664 people. Adding the ‘interdependent’, ‘partial’ and ‘non-dedicated’ copyright industries 73 gives a total economic contribution of AUD93.2 billion and employment of 906,591 people. On these figures the ‘core’ copyright industries drove 4.8 percent of Australia’s GDP while the ‘total’ copyright industries drove 6.6 percent of GDP and 8 percent of employment (PwC 2012, p15-16, p23-24). In the UK, Professor Hargreaves has calculated that the creative sector ‘invests over £20 billion every year in creating intangible assets
protected by copyright…[and] accounts for 5.6 percent of UK gross value added’ (Hargreaves 2011, p27). In the US, using the same framework as PwC, Stephen Siwek reported that the core copyright industries contributed $931.8 billion to the economy in 2010, equal to 6.3 percent of American GDP, while the total copyright industries contributed $1,626.9 billion, or 11.1 percent of GDP (Siwek 2011, p4).

How much of this activity can truly be attributed to copyright is uncertain. The estimators may be drawing a long bow. William Patry (2012) has argued that attempts to quantify the creative industries have often been ‘an exercise in the manipulation of data’, while economist and former opera singer Ruth Towse (2001), slightly more generously, has described them as ‘data-as-advocacy’.74 Nevertheless they are enormous numbers, even if we shorten the bow. They speak of a set of industries that have grown old, established, wealthy, interconnected and highly concentrated. They are the Copyright Beltway, a fan of industries lineally descended from the Company of Stationers.

We can see this looking just at the cinema industry. Australian cinemas came in at number 8 globally in 2011, with US$1.1 billion in box office revenues. The Asia Pacific region of which Australia is a part generated US$9 billion, behind North America at US$10.2 billion and ‘Europe, Middle East and Africa’ at US$10.8 billion. Worldwide there were box office revenues of US$32.6 billion (MPAA 2012). Characteristically, just six companies — the ‘big six’ US movie studios — accounted for two-thirds of these revenues, including a record US$13.6 billion ‘foreign box office’ (Segers 2011).

The six studios, big as they are, sit nestled inside six much bigger entities. Thus Paramount Pictures sits inside Viacom, Warner Bros Pictures inside Time Warner, Columbia Pictures inside Sony, Walt Disney Pictures inside The Walt Disney Company, Universal Pictures inside Comcast/General Electric, and Twentieth Century Fox inside 21st Century Fox.
Cinema itself is just one platform in a much bigger media ‘universe’. The major companies have used it as a stepping stone, parlaying their vast movie libraries into shares in each new platform: TV, home video, the internet. Author and policy advocate Tim Wu has called this pattern of colonization ‘the Cycle’:

‘History shows a typical progression of information technologies: from somebody’s hobby to somebody’s industry; from jury-rigged contraption to slick production marvel; from a freely accessible channel to one strictly controlled by a single corporation or cartel — from open to closed system.’ (Wu 2010, p6)

Copyright plays a critical part in the Cycle though not in the way the legislators intended, as an incentive to creation. Instead it buttresses the bargaining power of the big companies. Their control of the supply of content deals them into any new system of distribution. It is control that matters. Copyright makes them a force that must be reckoned with.

William St Clair, a British Treasury official turned copyright scholar, in his landmark study The Reading Nation in the Romantic Period described a group of early 19th century English publishers in the following terms:

‘Constable, Robinson, Tegg, Lackington, Whittaker… were known for their ostentatious lifestyle which contrasted sharply with that of most of their authors… As owner/managers in a booming industry, they were media moguls, inclined to pay themselves large salaries, to borrow heavily, to understate their net profits, to distribute cash surpluses immediately to themselves, and to complain that trade was bad.’ (2004, p171)

It is easy to imagine such modern-sounding figures surveying the present state of copyright and expressing themselves well satisfied — by the length of it (author’s life plus 70 years), the scope (from books to software), its expansion to every corner of the globe, the institutional heft
of it, its legislative weight, the case law, thick with *dicta* and precedent, the treaties and conventions, the depth of expertise surrounding it, the business practices, the firms and agencies and government departments specialised in its abstractions, the sheer *inertia* of it.

The ghosts of Constable, Robinson, Tegg, Lackington and Whittaker might even allow that trade was good.

**SHOULD WE COME RIGHT OUT** and say that copyright is really a publisher’s right? Patry comes close, arguing that ‘copyright is a commodity business in which authors’ interests are secondary’ (2012, p29) and that authors ‘are put forth as the basis for and beneficiaries of rights that are in truth owned by publishers and other corporations who regard authors as a negative item on balance sheets to be reduced as much as possible’ (2009, p76). Towse argues that ‘copyright inevitably distorts markets by strengthening publishers (firms) more than it protects authors (artists)’ (2001, p138). Patterson records the irony that ‘although copyright began as a publisher’s right, consideration of the publisher’s interest in copyright… disappeared altogether after copyright came to be considered an author’s right’. He argues copyright was concerned with ‘three major interests, those of the author, the publisher, and the public’ and it was important that lawmakers did not ‘treat a three-dimensional problem in a two-dimensional context’ (p216-217).

As we have seen, the publisher is a shadow participant in copyright law. He is the ‘purchaser’ or ‘proprietor’ standing behind the author in the early legislation. In later accounts of copyright he is sometimes given a more prominent role as the ‘distributor’ or ‘disseminator’ responsible for making sure creative works reach the hands of the public. In such accounts, copyright provides incentives not only for authors but for publishers too — they are its twin beneficiaries.⁷⁵
Probably most people, if they think about copyright at all, imagine there is not much distance between author and publisher. The author receives the grant of copyright. He contracts with the publisher and thus transfers copyright to the publisher. They share the benefits. Probably most people envisage a partnership, working towards a common goal. The successful release of a new work raises both their boats, just as they fall together if it fails. Their economic destinies are tied. People may call to mind exemplars like celebrated publisher Robert Gottlieb, who has steered author Robert Caro though his monumental biography of Lyndon Johnson, still unfinished after 39 years but judged by Gottlieb to meet the test of ages: ‘These books will live forever. We all know that.’\textsuperscript{76} Or a showman like former Paramount boss Robert Evans, who backed Francis Ford Coppola’s \textit{The Godfather} when nobody else would: ‘I’ve always had the same principle, always. Know what it is? Takin’ a chance. You don’t take a chance, stay still, you stay still, you only get older.’ (Couturié 2006)

Authors want to believe in the publisher-as-partner. It matters to them more than anyone else. The publisher-as-partner is their best bet in the shrill economy of possible books and possible movies. A Robert Gottlieb or Robert Evans prepared to back you is as good as it gets. It is part of the lore of writing and filmmaking, the heart of the Dream, to be discovered and backed by a Gentleman Publisher or a Legendary Showman, someone who can cut through all the layers of uncertainty and chance like Alexander through the Gordian Knot.

Yet there is a gulf between author and publisher that defies the Dream. The gulf does not affect their emotional bonds — they can be tightly bound together in the making of a film or a book. It is an economic gulf and reflects the differences in the economic stakes they have in the copyright asset that is the fruit of their work together. The gulf is the long run consequence of the doubleness in copyright and the sustained effort
by publishers to bend copyright to their own purposes. It is the legacy of their duplicity.

The size of the gulf is well understood by those working inside the business. It is so well understood that it has become part of the furniture, rarely remarked upon. There’s no point saying anything, the thinking goes, because nothing can be done about it.

The gulf is imprinted in their legal personalities. The author is a flesh-and-blood human being, a ‘natural person’; the publisher is a corporation, a ‘legal person’. When they come to the table it is a very unequal negotiation. Typically the author is focused on a single work with everything at stake — reputation, income, future — while the publisher has a portfolio of works to which the present work is merely an addition. They are like the fox chasing the hare: one is running for his life, the other for his dinner. Their understanding of what they are doing together is divergent. For the author the point of it all is creative; for the publisher it is in the end about business. They may be united by the work but they are doing it for different reasons. Australian scholars Peter Drahos and John Braithwaite, writing about Hollywood, labeled the publisher’s interest ‘financier’s copyright’ to distinguish it from ordinary author’s copyright (2002, p176). The characteristics of financier’s copyright — so financiers wish — are that it should last forever and belong from the beginning to the financier, without the messy entanglement of actual authors and the contingency of their lifecycles.77

We should turn now to the general principles of copyright law in the English-speaking world and measure the gulf between authors and publishers they reveal.

1. Exclusivity

There is no more valuable part of copyright than the exclusivity it confers on owners. Armed with the copyright in a work, a publisher has no rival.
Copyright is the sole right to exploit the work. Uses must be licensed by the owner or they cannot lawfully proceed. The copyright in a work is thus a monopoly, or as economists Michele Boldrin and David Levine term it (2008), an ‘intellectual monopoly’.

Patry describes this as the ‘central element in copyright ideology’ (2012, p177).

The copyright monopoly comes into being at the point of creation and belongs at that point to the author. The publisher acquires it by contract and then enjoys the monopoly in full. The process of publication does not dilute it. No matter how many copies the publisher makes and distributes, the monopoly continues undiminished until its statutory expiration 70 years after the death of the author.

It is the monopoly character of copyright that has given most offence to copyright’s critics. Here for example is English historian and politician Thomas Babington Macaulay speaking against a bill to extend the term of copyright before the House of Commons in February 1841:

‘It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.’

Macaulay believed that publishers, more than authors, were responsible for the ‘evil’ of copyright. He discussed the case of poet John Milton’s granddaughter, left destitute while his publisher prospered:

‘Milton's works are the property of a single publisher. Everybody who wants them must buy them at Tonson's shop, and at Tonson's price. Whoever attempts to undersell Tonson is harassed with legal proceedings… And what, in the meantime, is the situation of the only person for whom we can suppose that the author, protected at such a cost to the public, was at all interested? She is reduced to utter destitution.'
Milton's works are under a monopoly. Milton's granddaughter is starving. The reader is pillaged; but the writer's family is not enriched.’ (Macaulay 1841)

Macaulay, however, did not draw the conclusion that is there to be drawn: *that monopoly may not be in authors’ best interests after all.* Since this is a crucial point, let me repeat: *the exclusivity conferred by copyright may not be in the best interests of authors.*

Here it is important to recognise that the benefit of copyright arises when a work is published — that is, when it reaches the hands of the publisher. There is no benefit while it remains unpublished. The question then is whether the publisher is likely to appropriate the benefit for himself or share it with the author. And the answer to that question must be that publishers, if they can, will exhaust the benefit in reducing their own risks and enhancing their returns. They will only share the benefit in the unusual circumstance that an author has sufficient bargaining power to set aside the standard contract (reluctant sharing) or if they overestimate the value of a work and pay an excessive advance (inadvertent sharing).

In short, we should not expect that the benefit of the copyright monopoly will trickle down from publisher to author. On the contrary we should assume, as a matter of ordinary business logic, that it will not.80

Not only does the benefit not trickle down — copyright actually magnifies the power imbalance between the two. Publishers over time acquire great libraries of copyright assets in the form of exclusive rights in tens, hundreds and eventually thousands of works. Copyright is an asset that really only makes economic sense when accumulated in this way. The resulting revenues help iron out publishers’ cashflows and give weight and stability to their companies. These in turn help them gain access to capital markets and thus capacity to fund their growth and corporate ambitions. In due course they win a seat at the table where copyright policy is made — and the circle is complete. Authors, by
contrast, have a backend share in the proceeds of their few works, poor cashflows, no balance sheet to speak of. There is little access to capital. Publishers speak for them in policy forums. They are the poor cousins of the copyright family.

How publishers have bent copyright to their own purposes is nowhere better demonstrated than by the ongoing elongation of the copyright term. Macaulay was complaining of this in 1841. He argued that the extension then being sought, to 60 years beyond the author’s death, was for authors ‘a mere nullity’, without practical effect.\textsuperscript{81} Noting that Dr Johnson had died 56 years earlier, Macaulay speculated whether the proposed extension would have made any difference to him:

‘Now, would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? …I firmly believe not. I firmly believe that a hundred years ago… he would very much rather have had twopence to buy a plate of shin of beef at a cook's shop underground. Considered as a reward to him, the difference between a twenty years' and sixty years' term of posthumous copyright would have been nothing or next to nothing.’ (Macaulay 1841)

But for publishers with libraries of works by dead authors, the extension mattered a great deal. For them it offered real and immediate value by renewing their exclusive hold over works that would otherwise tumble into the public domain — where anyone might publish them. More than 150 years later the same logic drove Disney and the Hollywood studios to lobby for the so-called Sonny Bono Copyright Term Extension Act, which extended the term to author’s life plus 70 years. Critics called this the Mickey Mouse Protection Act (Lessig 2001b) because the famous cartoon character, about to go out of copyright, gained another 20 years’ protection. The Act was passed by the United States Congress in 1998.
We will return to the question of exclusivity in the following chapter, when we explore the idea of a copyright based not on exclusivity but on a right to compensation.

2. Pricing

The English economist Sir Arnold Plant nearly 80 years ago drew attention to the differing interests of authors and publishers in the pricing of books:\(^{82}\):

‘It is not to be supposed that both parties are necessarily best served by a price which restricts the supply of a book to the point of maximum net profit to the publisher. The author’s interest will depend rather on the terms of his contract with the publisher, and generally he will be better served by a larger edition and lower selling price than will pay the publisher best.’ (1934, p184-5)

Plant went on to consider the various possible arrangements between author and publisher, from payment of a fixed sum per copy to the author, to a percentage of the published price, to more entrepreneurial arrangements involving the author taking some or all of the risk of the publishing venture.\(^{83}\) Plant concluded:

‘The author is therefore usually interested in securing a price and output nearer to the competitive figures than those which pay the publisher best. Only when the author becomes a joint entrepreneur, and shares the net profits with the publisher after the deduction of costs, do their interests in monopoly restriction coincide; and only in the case in which the author takes the whole risk and pays the publisher a commission based on costs or gross receipts is the author concerned to issue a smaller edition at a higher price than the publisher would wish for.’

In other words, only if the author took the publisher’s position would he also take a publisher’s view of the pricing.\(^ {84}\)
This divergence of interest between author and publisher goes beyond pricing. It is deep-seated and goes to almost every aspect of the work they do together. Even within the question of optimal pricing there is a deeper divergence which has to do with the way the author’s economic interest is represented to the public. Probably very few people have an accurate sense of the author’s share of the final price — the retail value — of their work. They might be surprised to discover how small it is and how contingent. That it is buried deep inside the cost structure of the work and hard to calculate serves the publisher’s interest because it allows the public to imagine authors are better paid than they are. It allows prospective authors — those not yet in the know — to think the same thing.

Lack of transparency is a bulwark in the publishers’ dominance of the business.

3. Copying

Who owns the words an author speaks? Copyright law answers this question in a very specific way: the author holds copyright in the expression — the particular assembly of words — but not the ideas they express. What rights then do other people have to use those same words? On this question, author and publisher part company.

For authors, creative work takes place within a tradition: no one starts from scratch. The tradition provides context, objects, themes and continuities linking the generations. Even those who reject the tradition must begin with it. Copyright scholar Neil Weinstock Netanel captures this well in a discussion of free speech and its debt to earlier speech (2008, p43):

‘Our speech does not arise from a tabula rasa. Rather, we are born into an expressive universe brimming with texts, songs, and images that others have created. We cannot make sense of our world, find our own voice,
communicate to others, or seek to affect others’ perceptions and understandings without appropriating, recoding, referring to, and imparting the expressive works that constitute our common language.’

One implication is that copyright can be a cost as well as a benefit to authors.85 To the extent that they wish to consume or license ‘texts, songs, and images that others have created’ — and that are in copyright — authors’ costs will be higher than they would otherwise be. The costs may be trivial (eg the few dollars’ difference between a book that is in copyright and one that is out of copyright) or they may be substantial (the many thousands of dollars it costs to license a song for use in a movie). Publishers generally do not contribute to these costs or contribute only fractionally. We saw in the case of films backed by the Film Finance Corporation that distributors left most of the costs of production (including the cost of licensing songs used in a soundtrack) with the FFC and other investors. So authors have a conflicted view of copyright, while publishers see little conflict or none at all.

The difference begins here but goes further. In the end it is about the nature of the economy they inhabit. Publishers live unabashedly in a market economy where things are bought and sold. Authors live ambivalently, one foot in the market economy, the other in a ‘gift economy’ where things are shared. The element of the gift comes from belonging to a tradition, taking from it (the gift of those who go before) and giving back to it (the gift to those who come after). Author Lewis Hyde explored this idea in his classic work The Gift: Creativity and the Artist in the Modern World:

‘The true commerce of art is a gift exchange, and where that commerce can proceed on its own terms we shall be heirs to the fruits of gift exchange: in this case to a creative spirit whose fertility is not exhausted in use, to the sense of plenitude which is the mark of all erotic exchange, to a storehouse of works that can serve as agents of transformation, and to
a sense of an inhabitable world — an awareness, that is, of our solidarity with whatever we take to be the source of our gifts, be it the community or the race, nature, or the gods. But none of these fruits will come to us where we have converted our arts to pure commercial enterprises.’ (2007, p205-6)

This is not to say that authors are uncommercial or have no interest in selling their works for profit. It is to acknowledge the press of other concerns. Writers and filmmakers are highly conscious of the claims of tradition: they reference their predecessors, borrow from them, riff on them, sometimes pay homage to them — and locate themselves in the same tradition, recognizing that their successors will have the same right to reference, borrow, riff and perhaps pay homage to them.

Authors’ awareness of tradition and their place in it tempers their perception of copyright. They know they should support it but still they hesitate. I see this in my teaching role at the Australian Film Television & Radio School. Each year I invite the new students to imagine that they hold a policy lever which when moved to the left makes copyright weaker and moved to the right makes it stronger. Where do they want to move it? The answer, almost uniformly, is to the left: weaker. These are people who make their living inside the copyright industries and most have at least five years’ experience in the business. Their ambivalence about copyright is a practitioner’s wariness, not a student’s uncertainty. Copyright makes them uneasy.

Publishers see it differently and without ambivalence. They would move the lever to the right.

There is an argument that copyright law rests on a Romantic notion of the author as an heroic figure who must break with tradition to create original works. Copyright scholars Martha Woodmansee and Peter Jaszi have argued that the legal profession itself subscribes to this Romantic perspective, noting that:
‘…the causes and consequences of the persistent, overdetermined power of the author construct — with their immediate significance for law — have gone largely unattended by theorists of copyright law, to say nothing of practitioners or, most critically, judges and legislators.’ (1994, p9)

This may be true of the legal profession and may once have been true of the authoring profession. But it is unlikely to reflect the perspective of most working writers and filmmakers. For them the Romantic author is an historical figure, not a contemporary exemplar. There are certainly individuals who break with tradition — and there is such a thing as originality — but the break is typically an interruption rather than an abandonment. Tradition is the jumping off point and the place to which the author, often enough, returns. In this respect authors closely resemble academics. Just as scholars are expected to locate their work in the ‘literature’ to which they are adding and also to make an original contribution, so too writers and filmmakers must understand their place in the tradition and then add to it by saying something new or saying things in a new way.

Authors and academics thus share an interest in a model of copyright that is committed to originality but relaxed and open to copying (with the exception of plagiarism). Publishers by contrast prefer a model that is closed. For them, copying is leakage and a loss of potential revenues. The difference leaves an unresolved tension in the copyright system.

4. Control

Arguably copyright is best understood as a mechanism of control rather than as a class of asset or even system of incentives. Certainly it is evolving in this direction. In the US the passage of the Digital Millennium Copyright Act (DMCA) in 1998 made it illegal to circumvent technology used to control access to copyright works. This effectively created a right of controlling access to works (Netanel 2008, p68, Patry 2009, p161). The proposed Stop Online Piracy Act, now postponed after a
vigorous protest campaign, would have gone further, extending the
burden of enforcing copyright to internet service providers, search
engines, online payment services and advertising networks.

Netanel has called this a ‘paracopyright’ regime, noting that technological
controls, the DMCA and mass-market adhesion contracts ‘unless
tempered by further legal developments… will effectively give content
providers perpetual, proprietary control over all access and use of
expressive content they make available in digital form’ (2008, p71). Patry
argues that the world view of copyright owners (and he means publishers)
is ‘one of control: control over those who create works, control over the
distribution of those works, and control over prices and consumption by
the public. Any breach in this system of control is viewed as an existential
threat to making money.’ (2012, p163)

The mechanisms of control go beyond technology locks and adhesion
contracts. Over time the copyright system has evolved an armoury of
legal, commercial and procedural mechanisms. Real control comes from
their strategic deployment. Copyright’s critics view this prospect with
almost as much concern as the copyright monopoly itself — as a clear
and present danger to free speech.88 Netanel once again:

‘Copyright’s speech-chilling effect arises from a complex interplay of
bloated copyright holder entitlements, forbidding litigation costs,
copyright holder overclaiming, media’s clearance culture, speech
intermediaries’ overdeterrence, and widespread uncertainty about just
how expansive are copyright holder rights at the intersection of fair use,
the idea/expression dichotomy, de minimis uses, substantial similarity,
and a host of other nebulous doctrines that may or may not circumscribe
copyright in any given instance.’ (2010, p115)

It hardly needs saying that authors sit uncomfortably within a system
straining towards control of speech. Control is a publisher’s business
strategy that cuts across the grain of authors’ creative interests.
5. Money

We have seen how poorly copyright rewards its creators and the equity investors who back them. The example of the few winners is not enough to cancel out the economic hard-truth, that copyright is a poverty trap for authors. It is a poverty trap in the literal sense that someone who invests repeatedly in creating copyright works should expect to become poorer and poorer over time. Only extravagant luck, a ‘day job’, or a generous patron can save them from descent into poverty.

Poor returns are the wedge that divides authors from publishers. Because of the wedge their interests are not the same: their boats do not rise together. Copyright is a system designed by and for publishers, first and foremost, and authors only secondarily, partially and inadequately. They are two different tribes on opposite shores with little in common.

In summary, there is a conflict of interest between authors and publishers that goes to the most fundamental aspects of the copyright system: the right to copy, the pricing of works, the exercise of control, the right of exclusivity and the way the money is shared.

For 300 years, publishers have purported to speak for authors; they have aggressively advanced a set of interests which they invariably describe as authors’ interests; and they have led people to believe that the copyright system is carried on for the benefit of authors. On all of these counts they have misrepresented the truth: they do not speak for authors; the interests they have advanced are their own; and the system plainly is carried on for the benefit of publishers.

Perhaps the most surprising thing about copyright is the almost total lack of curiosity about its actual economic outcomes among the many people professionally concerned with it.
If copyright’s purpose is to encourage authorship, then it is important to know just how encouraging (or discouraging) it actually is. Yet the great majority of people working in or close to the copyright industries show very little interest in the question. Presumably some of them know the answer and are satisfied with it — or if they are unsatisfied, can see no purpose served in taking the question further. Others perhaps are willing to accept the simple evidence of books being published and films being made as proof of copyright’s efficacy. Still others are persuaded by the evidence of superstar profits that authors as a class must be doing well.

The lack of curiosity extends even into the academic literature. It is a voluminous field pre-occupied with high theory — for example, with economic models of the copyright trade-off (monopoly grant for social benefit), competing theories of copyright’s policy status (property or privilege?), the economics of copying, policy alternatives to copyright and so on. The author is a bit player in these considerations, typically bundled with the publisher, or simply assumed away. The only close attention authors have received is the line of inquiry, begun by Foucault, that questions the possibility of originality and thus of authorship. Theory trumps the living author.

There is not much about authors and not much evidence either. It is an analytical literature, rather short on data. Ian Hargreaves, in his review of the ‘intellectual property framework’ for the UK Government, noted:

‘Much of the data needed to develop empirical evidence on copyright… is privately held. It enters the public domain chiefly in the form of “evidence” supporting the arguments of lobbyists (“lobbyonomics”) rather than as independently verified research conclusions.’ (2011, p18)

A survey of the economic literature on copyright by Ruth Towse, Christian Handke and Paul Stepan (2008) found that ‘empirical progress’ was lagging behind ‘theoretical progress’. Thus:
‘We know very little still about what motivates creativity, how much artists and other creators earn from copyright and other sources, how much they would need to earn to continue to be creative, how they respond to and use the copyright incentive, whether a shorter or a longer term of copyright protection would be in their interests, how important moral rights are to creators and many other points connected with the creative process as contrasted to the role of copyright in history.’ (p18-9)

That said, the empirical work that has been done confirms the pattern of poor returns to authors. Australian economist David Throsby has led a series of five studies of professional artists stretching over nearly 30 years. The titles signal the findings: The artist in Australia today (1983), When are you going to get a real job? An economic study of Australian artists (1989), But what do you do for a living? A new economic study of Australian artists (1994), Don’t give up your day job: an economic study of professional artists in Australia (2003) and Do you really expect to get paid? An economic study of professional artists in Australia (2010). In the latest study Throsby found the average income of Australian professional artists was ‘substantially less than managerial and professional earnings. Indeed their total incomes on average are lower than those of all occupational groups, including non-professional and blue-collar occupations’ (Throsby & Zednik 2010, p9). Looking at longer terms trends, Throsby reported that ‘artists have not shared in the rising trend in real (inflation-adjusted) incomes that have been experienced across the workforce at large’ since the mid 1980s (p12).

Throsby’s artists include writers and composers but not filmmakers. Some earn copyright income but the numbers are not broken out — understanding copyright’s impact was not the primary objective of the study.

For that we must look elsewhere. Martin Kretschmer, then Director of the Centre for Intellectual Property Policy & Management at Bournemouth
University, with economist Philip Hardwick published a survey of 25,000 British and German writers in 2007. The study was the largest of its kind and one of the first to systematically compare authors’ earnings with earnings of other professions. Among the findings (p5-6):

- Professional UK authors (devoting more than 50 percent of their time to writing) earned a median wage of £12,330, or 64 percent of the national gross median wage. German authors earned an average £8,280 (42 percent of national median wage).

- The distribution of incomes was highly unequal. In the UK the top 10 percent of authors earned 60 percent of total income, while the bottom 50 percent earned just 8 percent of total income. This translates to a Gini Co-efficient (a measure of inequality) of 0.63, compared to a co-efficient of 0.33 for all employees in the UK. For German authors the co-efficient was 0.52.91

- ‘Only 20 percent of UK authors earned all their income from writing. 60 percent of professional writers needed another job to survive, both in Germany and the UK.’

- The internet has not translated into increased earnings. Less than 15 percent of UK writers and 10 percent of German writers had received payment for internet uses. ‘Typical earnings of authors have deteriorated since 2000.’ (The study data are for 2004/05.)

Kretschmer and Hardwick offered no policy prescriptions. But they concluded, starkly enough: ‘After this study, copyright policy cannot remain the same.’ (p4)

It is easy to understand their consternation. If a public policy designed to give encouragement to authors requires them to accept economic risks that no ordinary, rational person, informed of the risks, would accept, what are we to make of that policy? And if the industrial system built on that policy has routinely visited poverty upon its putative beneficiaries,
how should we judge the system’s performance of the policy? Surely both policy and performance must be viewed as failures. Yet their supporters continue, without curiosity, barely looking back, in blithe incumbency, unchallenged, proposing — if anything — to expand their domain.

It is time now to consider the alternatives.
8. A copyright counterfactual: authorship without exclusivity

Many of what are now called the creative industries developed with copyright protection from the very start. What we do not know is what historians call the counter-factual: what would they look like without copyright?


Intellectual property has existed for so long that it is difficult to imagine a world without it, but it is not intrinsic to authorship, books, or reading as such.


We shall now proceed to state the outlines [of a copyright law], but without the forlornest hope of ever seeing it tried... Let an author be empowered to sell the copyright of his work to a particular publisher, for the space of five years only; a term, at the end of which, nine-tenths of the works now published are completely forgotten. Let it then become public property, in the same way that a play, on being published, becomes public property since Mr Bulwer's act. As a manager now has the right to act any play he chooses, on paying a certain sum to the author, for each night of representation, so let any printer have the right to print any work on paying a certain sum to the author, for each copy he issues... The great recommendation, of course, would be, that of every work of reputation we should have cheap and elegant editions; ... and that the works of living authors would be much more extensively diffused than they are, while their interests would, it is hoped, be advanced in an equal proportion to their fame.

— Thomas Watts (1837)

Thomas Watts was 26 and held a minor post at the British Museum when he penned this note to the Mechanic's Magazine proposing a new form of
He correctly perceived that the proposal had only the ‘forlornest’ hope of ever being tried. Watts’ idea was to transform copyright from a publisher’s right of exclusivity to an author's right of compensation — a royalty scheme. His object was to bring down the prices of books for the benefit of readers; he hoped authors might also benefit.

Watts’ idea made no splash at the time but the ripples travelled a long way. In 1875 British Prime Minister Benjamin D’Israeli appointed a Royal Commission to inquire into ‘Home, Colonial and International Copyright’. There were 15 Royal Commissioners, among them the celebrated novelist Anthony Trollope. During hearings that continued over three years, the commissioners heard evidence from a who’s who of the publishing world. Literary scholar Paul Saint-Amour has described the Commission as ‘a serious attempt from within the government to abolish copyright law or at the very least to rethink its immanent ideology and economics from a free trade perspective’ (2003, p55).

The Commission actively explored the idea of a royalty system as an alternative to the prevailing copyright system. The idea was led in evidence by Robert Andrew Macfie, a Liverpool sugar trader and prominent free trade advocate. Macfie’s version of the idea shortened the exclusive term granted to the first publisher of a work from the five years proposed by Watts to just one year. He also stipulated a five percent royalty to the author. But beyond these changes it was just as Watts proposed: a radical reduction of the publisher’s monopoly. Macfie’s evidence was amplified by two key witnesses, Sir Charles Trevelyan, former Assistant Secretary to the Treasury, and Thomas Farrer, Secretary of the Board of Trade. Trevelyan viewed the publishing monopoly as a ‘great public evil’ and the royalty system as a saving reform that would advance the interests of authors as well as readers:
‘The difference between the position of authors and that of publishers underlies the whole subject [of copyright], and it is better to have it out at once. It is for the interest of the author that his work should be sold anywhere and by anybody. It matters not to him who the publishers are, and whether there is one or are one hundred; in fact for him the more the better: the greater the competition among publishers, the better for the author.’ (Minutes of evidence, p98, 8 May 1876)

Trevelyan believed that under a royalty system ‘authors would, in a manner, be in partnership with the public for the sale of their works, instead of holding a monopoly against them’ (p99). However, Trevelyan was a cautious reformer who believed the system should be tried out in the colonies before being ‘gradually brought about in England likewise’.

Farrer was similarly supportive but cautious:

‘The plan of a royalty to the author might possibly have avoided many of the difficulties which now beset this question, and might have given to the author a larger market, and to the public cheaper literature. It will be remembered that the charter of copyright, the Act of Anne, never contemplated unrestricted monopoly. But the present practice of mankind is different, and whatever advantages a system of royalty might have, it would require new machinery of an elaborate kind, and it would disturb existing arrangements, and be opposed by existing interests.’ (Minutes of evidence, p306, 31 January 1877)

Pragmatism and existing interests won the day. The Commission in its final report considered and dismissed the royalty system in a single page — although there was a dissenting report by one of the commissioners, Sir Louis Mallet.94

Still, the ripples of Watts’ idea kept spreading. In 1934, almost a century after Watts penned his piece to the Mechanic’s Magazine, the idea was taken up by Sir Arnold Plant. Plant was a practical economist who had
enrolled at the London School of Economics after a brief but successful stint in business. His paper on copyright in books (1934) followed one on patents for inventions. The two papers have been described by Nobel laureate Ronald Coase as having ‘opened up the subject and… raised questions which still have not been answered satisfactorily’ (Coase 1994, p155).

Plant, like Watts, Macfie, Trevelyan, Farrer and Mallet, was disturbed by the copyright monopoly — the publisher’s monopoly in particular — and saw in the royalty system a practical solution. He reverted to Watts’ proposal of a five-year term of copyright for the first publisher of a work, with the field thereafter open to any publisher. The author’s royalty, he suggested, should be 10 percent. For Plant what made the system practical was that it fit the commercial practice of publishers, who generally issued a cheap edition of their successful books ‘very promptly’ after the first expensive edition. A five-year window of exclusivity would preserve their security against competition ‘until their first editions were either disposed of or “remaindered”… and the public would no longer have to wait more than five years for cheap copies of the books they wish to buy’ (Plant 1934, p193).

Plant also had a precedent. Some 20 years earlier the British Parliament had passed a new Copyright Act (1911) to give effect to its obligations under the revised International Copyright Convention signed in Berlin in 1908. The new Act lengthened the term of copyright to author’s life plus 50 years, abolished the need for registration of works and extended protection to sound recordings. It also applied a royalty system to the last 25 years of an author’s copyright (ie the period between 26 and 50 years after the author’s death). During that period anyone could republish a book subject only to payment of a 10 percent royalty to the author’s assignee. There was also provision for ‘compulsory licensing’ of musical works whereby any record company could make a new recording of any
previously recorded work on payment of a 5 percent royalty to the composer. While these measures fell a long way short of the system proposed by Watts, they were a precedent that Plant could hang his hat on.

Plant published his paper in the London School of Economics journal *Economica* where, as Coase said, he opened up the subject to a new generation of economists. But in the policy sphere he got no further than Macfie or Watts before him. It seems the idea of a ‘royalty system’ has not yet encroached far enough in the public mind to match the power of the interests vested in the copyright system.°

**IN WHAT FOLLOWS** I propose to strip Watts’ idea down to its chassis and rebuild it. It is a very simple idea at bottom: just break the circuit joining author and publisher so that the copyright monopoly can’t pass from one to the other (except, briefly, to the first publisher). Sir Louis Mallet put it this way:

‘The profits of authorship are one thing, and the profits of publication another; and even if some form of monopoly is necessary to protect the first, it is equally desirable, in the interest of the author and in that of the public, that the profits of publication, which are purely of a commercial character, should be regulated and controlled by the ordinary laws of trade.’ (Royal Commissioners’ Report 1878, p50-1)

Watt’s idea homes in on the weak link in the copyright system, the link between author and publisher. It throws into question the quintessential copyright transaction, the transfer of copyright from author to publisher. And it quarrels with the assumption — assumed in traditional copyright thinking — that what is good for the publisher must also be good for the author. This is a simple idea whose implications reach a long way.
We can rebuild Watts’ idea using the same categories we used to analyse copyright in the previous chapter: exclusivity, pricing, copying, control, money — plus one more, registration.

1. *Exclusivity in a royalty system*

Watts’ idea does not abolish exclusivity but drastically shrinks it. Most affected are publishers, whose period of exclusivity shrinks from author’s life plus 70 years — perhaps a century on average — to a short window available only to the first publisher of a work. Watts set the window at five years, reckoning that ‘nine tenths’ of works are ‘completely forgotten’ by the end of that time. Macfie set it at one year. Plant moved it back to five years, quoting philosopher David Hume, who wrote in a letter to his publisher: ‘I have heard you frequently say, that no bookseller would find profit in making an edition which would take more than three years in selling’.

The purpose of the window is to reward the first publisher for the risk of being first — or put another way, to prevent subsequent publishers from free-riding on the risk-taking of the first publisher. Where it should be set is an empirical question: how long is required, on average, for a work to generate sufficient sales to reward the financial risk of first publication? Publishers will say a century but the truth is probably closer to Watts’ guess, five years, at least for books. For more capital-intensive works, notably films, it may be longer. For ‘nine tenths’ of films, probably 10 years would suffice. But in calculating terms we should bear in mind that there are many ways to protect a product in the market beyond simple monopoly. The most important is probably branding (as a guarantee of quality or authenticity) but other strategies include retail positioning, pricing, customer engagement: the whole art and science of selling. Therefore we should lean towards a shorter rather than a longer window. Indeed there may be many works which, if offered *without any window at all*, would still be taken up by publishers prepared to rely for
their profits on the ordinary arts of business. This too is an empirical question.

Looking more closely at the financial risks of first publication, we can define them as the costs incurred by the first publisher which are not also incurred by the second and subsequent publishers. These may be itemised as 1. the costs of authoring the work (to the extent these are borne by the publisher) and 2. the once-only costs of bringing it to publication (e.g., the costs of editing a book but not the ordinary costs of publishing also borne by the second and subsequent publishers). Note, however, that the costs of authoring are precisely those rewarded by the author’s royalty. If they are incurred by the publisher, by way of an advance to the author, then the normal practice is to recover the advance by diverting any royalty payments due to the author to the publisher instead, until the advance is recouped. So the authoring costs are met by the royalty and we are left with just the one-off costs of publishing. These may be zero (in the case of a work brought complete to the publisher) or they may be substantial (as for example have been the costs of Robert Gottlieb’s marathon editing of Caro’s biography of Lyndon Johnson).

Ideally then we need an adjustable window of exclusivity that lasts long enough to reward the publisher for the actual costs incurred in bringing a work to publication, and no longer. However, for practical convenience we might wish to determine a few fixed settings. For the sake of argument then, I propose three years for works that are substantially text or audio and seven years for works that are substantially audiovisual.

Thus the publisher’s window of exclusivity is significantly shrunk by the royalty system. What is not shrunk is the author’s window, which remains at the statutory length. When Watts proposed the royalty system, it was 14 years renewable for a further 14 years if the author still lived when the first 14 years expired. When Macfie took up the proposal, it was 42 years or author’s life plus 7 years, whichever was the longer. When Plant wrote,
it was author’s life plus 50 years. The length now is author’s life plus 70 years. If this seems too long, one option would be to return to the original Queen Anne model and require renewal after 14 years, or perhaps at regular points such as the five-year renewable terms proposed by Professor Lessig (2001a). For many works, one or two five-year terms might well be enough to exhaust the commercial value of a work and it could then, at the author’s option, be released to the public domain.

In considering the term allowed to the author, we should bear in mind that the author’s monopoly is a very poor one. Historically, it has commanded just 10 cents in the retail dollar and produced the sort of results we reviewed in chapters three and four. Separated from the publisher’s monopoly and with its controlling rights much reduced, an author’s ownership of his work arguably would be not much different to a worker’s ownership of her labour.

2. Pricing the author’s royalty

How to price the author’s royalty is an open question in Watts’ proposal — he says only that authors should be paid a ‘certain sum’ for each copy of a work that is published. Macfie thought it should be set at five percent. Plant said 10 percent but he was simply following the example of the royalty scheme in the 1911 Copyright Act.

We should pause here to ask, why set a rate at all? Why not leave it instead to authors themselves to determine, case by case, just as sellers everywhere set a price for their goods and services? After all the market for creative works is deep and competition is strong. There are few works for which there are not many viable substitutes. And historically we have not found it necessary to regulate the prices set by publishers, who exercise a more complete monopoly than the one contemplated here.

Very likely, prices would soon settle around a few fixed points — this much for a blockbuster movie, that much for a slim book of poetry — but
points more widely spaced than the narrow band around the prevailing 10 percent royalty benchmark. The new points would reflect the demand for particular works and also, in some degree, the effort involved in creating them. For in a system where royalties were publicly quoted the market would work more effectively, not just to signal demand but also to call forth supply. By contrast, the present system of copyright obscures the prices paid to authors. They are a mystery to consumers and thus a very poor medium for transmitting market signals.

3. Copying in a royalty system

In this proposal, after the first three or seven years (the window granted to the first publisher), it is open to anyone to copy a work. There are no permissions involved. The whole idea of the royalty system is to throw open the copying of works. The only question is whether making a copy gives rise to an obligation to pay the author’s royalty. If the copy is made by a publisher, the answer is yes, the royalty must be paid. If it is made by a consumer, the answer depends on the purpose. If it is made in the ordinary course of the consumer’s enjoyment of the work, for personal consumption, then no royalty is due (beyond the royalty paid to buy the work in the first place). If however, the copy is made for another person, whether as a gift or for sale, then making the copy is an act of publishing and a royalty should be paid.

Copying for purposes that qualify as ‘fair use’ or ‘fair dealing’ under present copyright rules would continue to qualify under the royalty system. Fair use purposes include teaching, reporting, research, commentary and criticism. If anything, Watts’ idea is consistent with an enlargement of such ‘exceptions’. It is pro-copying, pro-fair use, pro the diffusion of knowledge.

4. Control in a royalty system
Control is the ethos of the traditional copyright system but not of the royalty system. With the shrinking of the publisher’s monopoly, control shrinks too. Once the first publisher’s monopoly ends, works would enter an open market where anyone may publish them. This shift would redefine the relationship between author and publisher. In the traditional system, the relationship is contractual, exclusive and continuing. In the royalty system, there would be a contract with the first publisher but not with the second and subsequent publishers and they would have no obligations except to pay the author and respect his moral rights. Business would be brisker in this world.

5. Dividing the money
Watts’ idea reduces the power of the publisher, permanently and systematically. It brings the author out from behind the publisher. The change would be reflected in the economics of the business and the way the money is divided. It would be good for authors. We will explore this in more detail below but first we must take a further step in our rebuilding of Watts’ idea — reintroducing the system of copyright registration abandoned in Berlin just over a century ago.

6. Registering copyright
The system of copyright grew out of the register kept by London’s Company of Stationers since the 16th century. Ownership of a work was established by entering it in the register. Registration remained a feature of the copyright system until 1911 in the UK, 1912 in Australia and 1978 in the US. In the language lawyers use, registration was a ‘formality’ that authors had to observe. It remains a legislated option in the US, where authors can choose to register their works as a way of making an official record of their authorship. The process involves lodging one or more copies of the work and paying a fee.
The decision to do away with ‘formalities’ was made by the members of the Berne Convention for the Protection of Literary and Artistic Works at a meeting in Berlin in 1908: ‘The enjoyment and the exercise of these [authors’] rights shall not be subject to any formality.’ According to Dutch scholar Stef van Gompel this was a pragmatic decision, reflecting ‘a strong desire to relieve authors from the multitude of formalities with which they needed to comply in order to secure protection in different states’ (Gompel 2010, p158). Another factor was the increasing perception of copyright as something that arose automatically from an author’s act of creation and therefore did not require registration.

Times have changed and the case for now restoring the ‘formality’ of registration is strong. Several commentators have proposed this in recent years. Copyright advocate and law professor Michael Fraser and I summarised the case like this in a recent paper:

‘…the world’s economies have been transformed by digital communications. Authors’ and artists’ creative works are migrating to the digital domain. Consumers, intermediaries and creators are connecting online. Transaction costs are falling towards zero. Registering assets has become a routine step in the chain of commerce and consumption in many markets. In fact, not registering copyrights is now an active impediment to the work and livelihood of authors — a stick in the wheel of commerce. Works, unregistered, slide into orphanage. Licensing works, which ought to be easy, is made tricky, inconsistent and time-consuming. Piracy thrives.’ (Fraser & Court 2013, p4)

An online copyright register would help people locate works they want to view, read or reference. It would allow the serendipitous discovery of works not known to the searcher. By joining up authors and customers it would create a more efficient market with lower transaction costs. It would create for authors a space where they could display their works in exactly the form they wished them to be released. Registration would also
publicly confirm their authorship — an option whose value to authors is demonstrated by registers like the one maintained by the Writers Guild of America, East and West (which as we saw registered about 80,000 new screenplays and treatments in 2011).

What’s more, registration would fit hand-in-glove with a royalty system. Authors would ‘post’ their works on the registry site; publishers could go searching there for publishable works; and customers could go window shopping.

In summary then, Watts’ bold proposal, restored here, looks like this:

• Authors have a right of compensation from any publication of their work payable in the form of a royalty set by the author.

• The term of the author’s right is the author’s life plus 70 years but authors must renew the right at five yearly intervals or lose it.

• Works must be registered in a copyright registry maintained as an online service by the government.

• The first publisher of a work is granted a three year window of exclusivity if the work is substantially text or audio, seven years if the work is substantially audiovisual.

• Any publisher may publish a work after the first publisher’s window of exclusivity has expired.

• A customer may copy a work without payment of the author’s royalty if the copy is for personal use but must pay the royalty if the copy is for sale or given as a gift.

Now, in a counterfactual scenario, we can explore what Watts’ proposal, if implemented, might cause.
THE CHALLENGE OF THE COUNTERFACTUAL is to look upon familiar conditions and not see them as the ordained state of affairs but make room instead for an alternative scenario to play out in the imagination. In this case we are trying to understand how copyright itself has shaped the industries it regulates and how those shapes can come to look like natural features of the landscape — immutable — though small changes in the original conditions of copyright might sweep them away.

In the copyright industries, people have become accustomed to thinking of publishers as substantial enterprises — in their simplest incarnation as publishing houses or movie studios and often in much larger and more complex structures, as media groups or even empires. But of course they were much smaller to begin with. They started out as shops or little one-man firms or maybe husband-and-wife teams — as micro businesses, just like authors. Among the questions we are exploring here is how publishers grew substantial and rich while authors stayed micro and poor and how copyright contributed to this divergence.

If we go back far enough, we can actually see the process at work. London’s booksellers were still micro businesses in the 17th century: they were shops selling books to London’s wealthy elite. But behind the counter they were already trading copyright assets and collecting them in large portfolios. The most valuable of these portfolios was the ‘English stock’, which included the Bible (for which the stationers held a patent). There was also the ‘Latin stock’, an import monopoly over medical, scientific and scholarly books brought from Europe, and the ‘Irish stock’, an export monopoly over books sent to Ireland. Only members of the Stationers’ Company could share in these stocks. St Clair reports that the profits of the English stock were used to finance the collective activities of the stationers, including their political lobbying. The stock also paid dividends, which reached a very handsome 12.5 percent by the end of the century. As St Clair observes:
'The industry had created, in effect, a high-yielding, fixed-price, and fixed-interest bond, available only to be bought by members of the Stationers’ Company in amounts calculated in accordance with their changing share of the industry and which could always be rapidly liquidated without loss. When a member of the industry died or went out of business, or if a widow wished to liquidate her shares, the company or its members bought the most valuable properties to be added to the various portfolios and partnerships as part of an ongoing process of ever more closely held ownership of texts.’ (p59-60)

The booksellers thus assembled what amounted to a publisher’s backlist, collectively held, and used it to stabilise their cashflows, create liquidity and control entry and exit from the industry.101 Later they perfected the approach with the creation of so-called ‘congers’. (The term derives from a ‘conjure’ or sworn agreement.) These were partnerships between leading booksellers formed to acquire valuable texts and to publish new ones. The practice spread in the 1700s and congers swallowed up congers like ‘giant eels’ swallowing smaller eels.102 They would divide up the copyright in books, down to shares as small as 1/64th. Only members could participate and shares could only be disposed of to other members. The arrangements spread the risks of new works, bound the members closely together and deterred outsiders. St Clair makes the case that ‘the London book industry was as perfect a private monopoly as economic history can show’. The former Treasury official continues:

‘Examples of every restrictive trade practice known to modern regulators can be found, including cartel, conspiracy, price-fixing, predatory pricing, rent seeking, repetitive and baseless litigation, entry barriers, market division, credit-fixing, collective refusal to deal, exclusionary joint ventures, resale price restrictions, tying, and vertical non-price constraints. Commercial practices aimed at restricting output and raising prices which nowadays attract heavy criminal penalties including prison,
were not only openly practiced but were built into the day-to-day operating structures of the industry. And all these practices rested upon the perfect monopoly of perpetual intellectual property.’ (p101)\textsuperscript{103}

Copyright then did not just help the booksellers secure their interest in particular works; it raised them up to a different level of business altogether, as precursors of the modern media corporation.\textsuperscript{104} They acquired weight, cashflow and influence and began to move in different circles, closer to money and power. Authors, in comparison, fell behind, grew smaller, flimsier, weightless in negotiation.

The power of the backlist, if anything, has increased over time. When modern media corporations are bought and sold, the copyright assets they own or control figure large in the valuations. They are valued not just for their future cashflows but for the new copyright assets to which they may give rise — the continuation of the ‘franchise’ (such as \textit{Star Wars} and \textit{Indiana Jones} in the 2012 acquisition of Lucasfilm by the Walt Disney Company), the movie spinoffs (the same company’s 2009 acquisition of Marvel Entertainment). They are valued also for their strategic utility.

There is nothing about these transactions that would surprise a member of an 18th century conger, except the wondrous new media.

It remains only to observe that the \textit{backlist} is precisely the target of Watts’ bold reform. Shrinking the publishers’ exclusive window to three or seven years means that long-lived works will spend most of their active life in the public domain rather than on a publisher’s backlist. The royalty system thus brings an end to the idea of publishing as a business built on large holdings of copyright assets. Publishing in Watts’ world is a business of fast, competitive jostling in the marketplace. It is a commodified business. Profits turn on price and value, and exclusivity disappears from the equation.

Publishers may not like it but authors might thrive.
A BACKLIST WASN’T THE ONLY ADVANTAGE publishers had over authors. Technology was another. Beginning with the printing press itself, technology has driven the business forward. The history of media is one of restless innovation, like a tide driving waves further and further up the beach. Innovations in printing brought speed and automation to the process and moved it from the workshop to the factory floor. Innovations in paper manufacturing turned paper from a high-priced gentleman’s luxury to an affordable middle-class good. Innovations in publishing led in turn to the first modern magazine, *The Gentleman’s Magazine*, in 1731, the first edition of *Encyclopedia Britannica* in 1771, the first American daily newspaper, the *Pennsylvania Evening Post* in 1793, the first paperback books circa 1845 and the first movie magazine, *Photoplay* in 1912.

We should not imagine that publishers were always in favour of innovation — far from it. But they were its beneficiaries in the long run. Speed gave them currency in the marketplace, new efficiencies brought lower prices and new formats drew new readers. The whole effect was not just to greatly enlarge the audience for printed works but to engage them more deeply in the experience of media. Technology strengthened the publisher’s business arm.

By the early 20th century, the enlargement of audiences had a name: *mass media*. It was an accelerating process. After the long run of print innovations came a quick run of new recording media, beginning with the player piano (first demonstrated in 1876) and the gramophone disc (released commercially in 1889). Cinema developed soon after, with the first public projection of a motion picture in 1896, the first feature film (Charles Tait’s *The Story of the Kelly Gang*) in 1906 and the first feature length ‘talkie’ (Warner Bros’ *The Jazz Singer*) in 1927. Alongside cinema came the invention of ‘broadcasting’ — a term adapted from the farming practice of sowing seeds in all directions. Inventor Charles Herrold
claimed to have made the first radio broadcast in San Jose, California in 1909; the first licensed radio broadcaster, KDKA, went to air in Pittsburgh in 1920, while in the UK the British Broadcasting Corporation went to air in 1922. Not far behind was television. The BBC began transmitting a regular television service in 1936. Regular commercial services commenced in the US in 1948 and began their long expansion: by 2007 the average US home received 118.6 TV channels, had 2.8 television sets and 2.5 people (Nielsen 2008). Still to come were digital media: the first two nodes of the Arpanet, forerunner of the Internet, were connected in 1969; the first handheld mobile phone call was placed in 1973; the World Wide Web debuted in 1991; the first Blackberry was sold in 1997; the first downloadable content — ringtones — in 1998; and the first iPad in 2010. In 2011 Apple CEO Tim Cook reported that consumers had downloaded more than 16 billion songs from its iTunes service, launched eight years earlier (Rao 2011).

Yet if we think about media using the common metaphor of a pipe, down which the content travels, then the dominant characteristic of media is that the pipe, historically, has been thin and couldn’t carry much content. So instead of rivers of content there was a trickle and the passage of the trickle was controlled by the owners of media — the publishers. Thus, before Amazon, a typical bookstore with its limited shelf space might have carried 50-100,000 titles (whereas Amazon with no such limit carries 14,000,000106). Similarly, before pay television and the advent of superstations like Home Box Office (launched in 1972) and National Geographic (1997), television was dominated in the US by just three networks — ABC, CBS and NBC — or four if public broadcaster PBS is counted. In the UK, before BSkyB (1990), there were just two services, BBC and ITV. In Australia, before Foxtel (1995), there were Nine, Ten and Seven plus the ABC and later SBS. It was the same story everywhere: a handful of incumbents commanding a thin media pipeline tightly
controlled what people could watch, read and listen to. Mass media was a business of the very few broadcasting to the many.

Technology thus delivered to the publishers a mechanism of control that supplemented the controls enabled by the copyright system. The two together, copyright plus technology, simultaneously defined the market and confirmed the publishers’ control of it. Within this twin framework, they were practically invincible.

For authors, the loss of control was manifested in their growing distance from audiences. An 18th century author could expect to encounter his readers socially; he knew their tastes and expectations. But a writer or filmmaker of the 20th century had no such easy acquaintance. Their audiences were remote, almost abstract, and the connection to them thickly mediated. They had no way of knowing how people responded to a work except, in the case of a filmmaker, by standing at the back of the cinema and watching the audience file out at the end of the film, guessing at their emotions; or for someone working in television, trying to interpret the statistical ebb and flow of the viewing sampled in the ratings data delivered next morning to the station’s executives. This estrangement from audiences left authors uncertain of their effects — there was no roar of the crowd to guide them — and dependent instead on the judgments of publishers, the new arbiters of popular taste.

In the past 20 years, however, technology has swung back towards the authors. In what amounts to a revolution, the thin pipes that defined the old media are being replaced by the ‘fat pipes’ of new media. Bandwidth, which used to be scarce, is becoming abundant. Control of the business based solely on command of the medium — whether shelf space or spectrum — is fast losing ground.

Visions of the digital revolution have driven some observers to predict the death of the middlemen. If authors can reach right through to audiences and transact with them directly, why pay an intermediary? Of course,
such predictions underestimate the resilience of the middlemen and their
capacity to redefine their role. It is a fluid situation. In an interview with
*The New York Times,* Amazon executive Russell Grandinetti picked his
way through it like this: ‘The only really necessary people in the
publishing process now are the writer and the reader. Everyone who
stands between those two has risk and opportunity.’ (Streitfeld 2011)

There is no need here to spin an elaborate story about how things will pan
out from here. We can see plainly enough that publishers are being
pressed to find a new place in the value chain and that authors have a new
place too. Their new place is much closer to audiences and more level
with the publishers. The power imbalance is reduced. It is almost as
though they had returned to the 18th century and the author-bookseller
and author-reader relations of that time. It seems we have entered a period
in the media’s evolution where it is more feasible than ever before —
technically and commercially — for authors to carry out some part of the
publisher’s role, even all of it, and build a direct connection with their
audiences. In short, the trend of technology has passed by the publishers
and now favours the authors.

The times may yet suit Mr Watts’ proposal.

**THERE IS ONE MORE FACTOR** we need to weigh and that is how
authors themselves view the economic possibilities of the work they do.
There is a long tradition in the arts that makes this a delicate question. In
this tradition, the author/artist is disconnected from the crass, material
world and has little or no interest in money or business. In strong versions
of the tradition, the lack of interest is not just incidental to the author’s
character but essential: the author cannot serve both Art and Mammon.
The tradition of course is the Romantic tradition of the Artist as Genius.
We have met it already in the claims made for originality as the signature
quality of authorship — and in the attack on these claims by critics of
copyright, for whom the Romantic myth of original genius is just publishers’ boosterism.

The Romantic tradition is closely associated with the English poets of the early 19th century, among them Keats, Shelley, Coleridge, Wordsworth and Blake. Here is Wordsworth describing the artist’s calling in a poem addressed to the painter William Haydon (quoted in Williams 1983, p43):

‘High is our calling, Friend! — Creative Art
(Whether the instrument of words she use
Or pencil pregnant with ethereal hues)
Demands the service of a mind and heart
Though sensitive, yet in their weakest part
Heroically fashioned — to infuse
Faith in the whispers of the lonely Muse
While the whole world seems adverse to desert.’

The tradition survived well into the 20th century as a kind of generalised understanding of the artistic temperament, absorbed by generations of undergraduates throughout the Western world as part of a liberal arts education. It turns up in various formulations in very diverse locations. Here for example is economist John Maynard Keynes speaking in a radio broadcast in 1945 (quoted in Skidelsky 2000, p294):

‘...everyone, I fancy, recognises that the work of the artist in all its aspects is, of its nature, individual and free, undisciplined, unregimented, uncontrolled. The artist walks where the breath of the spirit blows him. He cannot be told his direction; he does not know it himself.’

The consequences of this picture of the author as someone distracted by the Muse, undisciplined, unregimented and uncontrolled were not benign. In their formative years, authors were immersed in an expectation of their future business incompetence. If later they displayed any commercial ambition, they were automatically relegated to the second or third rank.
Indifference to considerations of profit was a badge of true artistry. Actual poverty was proof.

It is not hard to see how this played to the interests of publishers. Authors, their essential suppliers, were conditioned to pay no attention to business matters. They did not form themselves into corporations, sought no leverage in negotiations beyond personal charm and rarely litigated. They took pride in their unworldliness. They were a pushover.

How much truth is there in the caricature among contemporary authors? There is some, of course. We have seen that ‘making a lot of money’ was not much of a driver for film producers (roughly a third said it drove them, a third said it didn’t and a third were neutral). They were driven by other things — realizing their creative vision, helping others achieve their vision, having a big hit. But probably most entrepreneurs, asked the same question, would reply in much the same terms. Producers may be further along the scale in their preparedness to do things for reasons other than money but they are not off the scale.

The further truth is, the Romantic vision has faded. Few writers or filmmakers would put their hands up now to attest a faith in ‘the whispers of the lonely Muse’, or would choose to characterise their work as ‘undisciplined, unregimented, uncontrolled’. These are values — perceptions — from a different time. The idea of undisciplined work, in particular, seems wrong and out-of-date (and arguably has never characterised the practice of professional authors). Among the writers and filmmakers I have encountered during the past 30 years, I would say normal practice is almost the reverse of the Romantic vision. Discipline is a given, expected of all; failure of discipline is considered unprofessional and a reason not to work with someone again (a career limiting outcome in a freelance business). Collaboration is common and good collaborators are prized. Originality is highly valued but known to take place in the context of tradition, of what has gone before. Considerations of business
are tolerated and given due weight. These are the values of early 21st
century content creators.

**WITH THESE THINGS SAID**, what can we conclude about the
probable outcomes if Watts’ proposal for a royalty system were
implemented now?

I project these four outcomes:

1. *Publishing would become more competitive.*

2. *Authoring would become more profitable* (off a low base).

3. *Piracy would be much reduced.*

4. *Audiences would be more engaged.*

That *publishing would become more competitive* seems axiomatic, given
Watts’ proposal to shrink the publishers’ monopoly. Yet the publishers,
whenever their monopoly is challenged, say the industry will be ruined,
using arguments they have been rehearsing since the 17th century. If
that were true and publishers went bankrupt or left the business, then
competition might be reduced, not increased. But how likely is that
scenario? Or can we trust to the power of demand and the capacity of
entrepreneurs to find new ways to serve it?

I submit there are good reasons to trust in the capacities of entrepreneurs.
Barriers to entry are being bulldozed by digital technologies. Costs of
physically distributing works, in particular costs of retailing, are falling
rapidly away. Underlying demand for works is multiplying — people are
consuming more content than ever before and their absolute numbers are
increasing as the new technologies diffuse around the world. What
seems more likely than the demise of publishing is the demise of
publishing as we know it now. What may emerge instead is a more
fractured business, where many of the functions performed by traditional
publishers (sales, distribution, finance, accounting) are stripped out and performed by specialised service companies, while branding and editorial — the heart of the business — are contested by a throng of new entrants, drawn by the value-adding possibilities. Thus the conglomerate, vertically-organised model of publishing may break down over time. The names of the players may change and they may be smaller, nimbler and less padded. But the business will roll on undiminished.

Publisher Jason Epstein, inventor of the trade paperback format and co-founder of the New York Review of Books, has described the future of book publishing in very similar terms:

‘The cost of entry for future publishers will be minimal, requiring only the upkeep of the editorial group and its immediate support services but without the expense of traditional distribution facilities and multilayered management. Small publishers already rely as needed upon such external services as business management, legal, accounting, design, copyediting, publicity and so on, while the Internet will supply viral publicity opportunities of which YouTube and Facebook are forerunners. Funding for authors’ advances may be provided by external investors hoping for a profit, as is done for films and plays. The devolution from complex, centralised management to semi-autonomous editorial units is already evident within the conglomerates… a tendency that will strengthen as the parent companies fade.’ (Epstein 2010)

That authoring would become more profitable follows from the opening of publishing to a more competitive field. Watts’ system is a leveler that evens up the encounter between author and publisher. We should expect a corresponding improvement in average returns to authors. They could also take matters in their own hands. We might see them bring within the sphere of authoring parts of the value chain that currently belong to publishing. The process is already underway. Amazon reports that about a quarter of its top selling titles in 2012 were self-published by their
authors. There are also reports that literary agents are offering publishing services to their clients (Kaufmann 2013). Elements of design, editing and promotion are obvious candidates which authors or their associates could readily take on — and although they may not be highly profitable activities, we should bear in mind that every function now performed by publishers is more profitable than authoring and therefore would improve authors’ average profitability, if they performed it.

The further possibility is that authors might engage directly with audiences, rather than indirectly, through intermediaries. Technology already grants them this choice. It is open to them to create businesses founded on direct transactions with ‘end users’ — the sale of their own works but also other works and other kinds of products that make sense to sell under the same banner. Some writers and filmmakers already are moving in this direction; Watts’ system would speed the move. As traditional publishers lose sway in the business, we can expect authors, among others, to step up in their place and earn ‘publishing’ profits.

To be clear, Watts’ scheme cannot make profitable what is inherently unprofitable, a book or film with a too-small audience. But it can help shift the boundary line, making viable what was marginal, more profitable what was barely profitable and nearly viable what was plainly not.

There is also scope to improve the business itself, fundamentally. The copyright system has always been a leaky bucket, from which potential revenues have trickled away, uncollected. Enforcement is the big hole in the bucket — the simple difficulty of policing copyright laws and collecting the money. According to the copyright industries, the lost revenues are enormous. For example, the Texas-based Institute for Policy Innovation, in a report quoted approvingly by the Recording Industry Association of America, estimated the ‘true costs of sound recording piracy’ at US$12.5 billion in ‘total output’ annually (Siwek 2007). The
same author in an earlier study estimated the lost output from global piracy of motion pictures at US$20.5 billion (Siwek 2006).

Watts’ system, though it cannot repair the hole, would slow the leak. It would do so by making it easy and relatively inexpensive for pirates (that is, unauthorised publishers) to comply with the law. After the brief window granted to the first publisher of a work, anyone — including any pirate — would be free to copy the work, in any quantity, without license or approval and subject only to payment of the author’s royalty. For the pirate the change yields a compelling equation: pay the royalty (typically a low fraction of the retail price) and avoid the potential costs of detection and prosecution. By paying the royalty, a pirate business becomes a lawful one and its owners, legitimate business people. Many would find that an attractive choice.

Here we should take note that all of the royalties paid by all of the publishers of a work (and they may be many) would flow directly to the author, without passing through the first publisher’s accounting system, where, as we have seen, all manner of deductions are likely to thin the flow or even stop it. Watts’ system reduces the scope for publishers’ ‘creative accounting’ — and this too should add to authors’ profitability.

But getting some transparency into the system is just reversing a negative. The positive force of Watts’ proposal comes from its active recruitment of pirates to the cause of publishing. This involves a big shift in mindset. The very term pirate casts the unauthorised publisher as a criminal interloper on a par with ‘the enemy of all’, the predator of the sea. It is a gross miscasting, yet if wide acceptance is the measure then the casting has achieved its aim. Indeed the use of the term has spread so far that even unorganised copying by college students now counts as piracy and shares in the opprobrium.

Watts’ proposal invites us to take a step back and consider what capacities the pirates might bring to the table. They are not simply
marauders. The long history of piracy is one of daring, innovation and discovery as well as theft and appropriation. Thus the American publishers who invented the transatlantic reprint business in the early 19th century were bareknuckle competitors whose contest helped drive the development of publishing in the US. The contest was the race to reprint British titles as copies came off the boats. They called it ‘the Game’ and seized on every advance in papermaking, printing and distribution to try and gain an edge over their competitors; they developed new formats (serializing Dickens on the back of railway timetables) and with them new audiences among readers who could never have afforded expensive British imports; and they achieved extraordinary efficiencies in the race to market — Adrian Johns gives the example of a publisher printing Byron’s *Don Juan* at 30 different presses in just 36 hours (2009, p298). Yet they were pirates who published the British works without license or royalty, consenting only to ‘ex gratia’ payments that were bare fractions of the payments they made to American authors. Charles Dickens, who received a paltry £50 from the American publishers of *Pickwick Papers* despite enormous sales, took up the issue and campaigned for transatlantic copyright protection; the issue was one of the factors that prompted Disraeli to call the 1876-78 Royal Commission.

In our own time, Napster, the pioneering peer-to-peer file-sharing service and perhaps the most vilified ‘pirate’ of the past quarter-century, had an insight about how people wanted to consume music that had eluded the record companies as they tried to come to grips with the Internet. And it took another outsider, Apple, to build a legal distribution system around the insight and bring it to market, as iTunes.

Watts’ system holds the door open to the pirates, inviting them in, with all their ideas and energies. It is an open system, receptive to innovation, where the copyright system is closed and defensive. This openness is in authors’ and audiences’ interests.
As things turned out, Napster’s insight was the tip of the iceberg. Audiences wanted more than just music downloads; they wanted a different kind of relationship with ‘content’ and the people who create it. This may well be the greatest insight yielded by the new media: people want engagement. It is in polar opposition to the passive consumption model perfected by the mass media of the 20th century. In that model, the consumer was pictured as someone coming home from work and slumping in front of the television, not wanting to make a lot of choices and not having much, if anything, to say about the programs offered up. It was the consumer as couch potato. And of course it’s true — sometimes people do want to slump in front of the television. But it’s not the whole truth: they also want to sit forward, ask questions, give their opinions and share with others at least some of the time. This was the revelation of the new media.

One measure of audiences’ desire for engagement is the preparedness of some audience members to ‘crowd fund’ films, music, books and other content they want to see made. The phenomenon emerged on sites like IndieGoGo, Kickstarter and Pozible in the late 2000s. Backers pledge mainly small amounts to help fund works proposed by creators on the host site. For their contributions the backers are offered thanks, copies of works, merchandise and other rewards depending on the project and the amount of the contribution. They also receive the sense of being part of the process of creating a work and making a contribution. Kickstarter has reported that some three million people have pledged more than $450 million to 35,000 projects since the site was launched in 2009 (Kickstarter 2013). 13,726 were film or video projects, 8,822 were music projects, 6,520 were publishing projects, 3,931 were art projects and 2,667 were games. Most had budgets in the $1,000-10,000 range.

The practice of crowd funding recalls the subscription proposals used by some authors and publishers in the 17th and 18th centuries to pre-sell
literary works. But subscribers in those days were wealthy patrons, members of the elite; Kickstarter’s and Pozible’s backers are ordinary members of the audience, stepping up from passive consumption to active support of the authors and artists they like.

The crowd funding phenomenon is evidence of a hidden well of support for authors among audiences. The traditional copyright system can’t tap the well because audiences know they are paying publishers first and authors last. But a system like Watts’, which pays authors directly, could tap the well. Direct payment closes the loop between author and audience, making a virtuous circle of work and payment, gift and receipt. This is the market at work without the signal distortion of intermediation.

Counterfactually then, we have the prospect of a royalty system that meshes with the trend of technology to dethrone the publishers, elevate authors, enlist the pirates and reward audiences.

Factually, we have a copyright system trying to strip the cogs off technology, perennially at war with the pirates and sometimes audiences too and with authors held hostage — and the whole contraption massively entrenched.

How do we get from one to the other?

**FROM A DISTANCE** copyright as an institution looks impregnable. It is hard to imagine, gazing upon it, how change might be brought about. Its critics have fired cannonballs that have kicked up little puffs of dust and pocked its walls but not much more. Its defenders scarcely trouble to return their fire.

Yet there is a fault line running through the whole institution. We saw it in chapter seven. It is the doubleness we observed — the way the interests of authors were brought forward to mask the interests of publishers. The institution rests on this deception. For if the interests of authors and
publishers are not closely aligned — as any careful examination will show — then the founding of publishers’ rights on authors’ copyright was a false step. It was a legal maneuver dressed up as public policy.

This is not to argue that publishers should not have rights. They should. There is a need, in particular, to protect the first publisher of a work from free-riding by other publishers taking advantage of the first publisher’s investment in bringing the work to the point of publication. That is why Watts proposed a specific right of first publishing, an exclusive right like copyright but of much shorter duration (three or seven years in our rebuilt version). But this is a different kind of need to an author’s need for compensation. It is a short term need for a period of exclusivity to allow recoupment of the publisher’s risk capital. It should never have been confused with the author’s need of compensation, which does not require exclusivity. It was only the political opportunism of the Stationers Company that ran the two together — for the stationers saw, with their usual acuity, that an author’s copyright would play better on the floor of Parliament than a publishers’ monopoly.

Given the will to reform copyright, the way forward would be simply to split the rights: authors to one side, with a right of compensation; publishers to the other, with a right of exclusivity. Conceptually, legally and politically, this is the crucial first step. Split the rights, separate the parties and consider their needs in isolation. Then, over time, discover the length of time necessary to give authors incentive to create their works and publishers incentive to invest in them. I have proposed a three or seven year window to the first publisher of a work, which might prove too short. The law concedes life plus 70 years to the author which might prove too long. They are both empirical questions, open to solution.

Splitting the rights would make the different rights clear and let them float free of each other to their proper durations. It would undo the old deception. Authors would be raised up and publishers brought down a peg
or two to a playing field more level than any they have played on in the past 300 years.
9. Copyright’s walking stick: the subsidy system

...The role of copyright in providing incentives and rewards to creativity must be considered side by side with subsidy.
— Ruth Towse (2001)

The means of subsistence passes out of their hands and they face having to become more or less permanently dependent clients whose security is contingent on their relations with those who have the resources to help them.
— James C Scott (1976)

We’re tired of paying for the studios’ movies, our employers paying for the studios’ movies, and foreign taxpayers paying for the studios’ movies. It’s the greatest con of the entertainment industry.
— Dave Rand (Yamato 2013)

Publishers rally to defend the copyright system with the practiced drill of firemen called out to a fire. Faced with the prospect of reform of the system — a fire — they warn that authors will be put at risk. A common version of this defense warns that, if the reform goes ahead, the publishers’ profits will be reduced and they will no longer be able to support the less popular authors. This casts the publisher as patron of the author, using the profits of successful films or books to subsidise the unsuccessful ones. Publishers want to be seen this way; it seems genuinely to be part of their self-image. A recent example is the campaign run by Australian book publishers to head off a recommendation by the Productivity Commission for the abolition of parallel import restrictions. The move would have allowed Australian booksellers to import foreign editions of books already published in Australia by a local publisher. Proponents believed the move would lead to cheaper books; opponents thought it would undermine local publishing. Much of the argument was
framed around authors’ interests. Thus University of Queensland Press urged:

‘Once cheap foreign editions of books are widely available in Australia, it may encourage readers to buy these books rather than support Australian titles. This will have an immediate and direct impact on the viability of publishing emerging Australian authors… [W]e would have to reduce the number of books we published each year or else shift our publishing philosophy to only publish more commercial and fewer literary books.’ (University of Queensland Press 2009, p1-2)

Random House Australia put it this way:

‘Reducing publishers’ profits by allowing bestselling international titles to be imported directly would significantly reduce our ability and incentive to bear the inherent risks involved in discovering, fostering and maintaining new Australian authors… Many new Australian authors may never be published in the first place.’ (Random House Australia 2009, p5)

The Publishers Association argued that Australia would be culturally impoverished as a result:

‘To unwind the current territorial copyright provisions would be to admit that Australia accepts a view of itself as a passive consumer of the leftovers of overseas cultural producers, rather than a vibrant creator of its own stories.’ (Australian Publishers Association 2009, p50)

In short, unless granted the safe harbor of a protected market, the publishers would not be able to afford their patronage investment in Australian authors and Australia would have to lower its cultural sights.115

This is a rather freighted message whose meaning we should pause to unpack a little. The first part of the message is that there is a class of authors whom publishers think they should publish but whose work is not
viable in the ordinary terms of the copyright system (broadly, ‘literary’ Australian authors). A second message is that publishers believe cross-subsidizing these authors is part of the justification for the copyright system and their role in it. Put another way, they see a need for a system of subsidy running alongside the copyright system. A third message, implied but not expressed, is that publishers are the right people to allocate the subsidies.\(^{116}\)

In fact, there have been subsidies since the beginning of publishing. Before the invention of printing, a book could scarcely come into being without a wealthy reader prepared to fund its laborious production. As historian John Feather writes (1988, p26):

‘The medieval author worked for himself, for God or for a patron, or indeed for all three. The role of the patron was to provide material support for the author as he might have done for any other servant. This might take the form of appointing him to an office in the patron’s gift, or direct financial reward, or some combination of the two. Whatever form patronage took, it was a means of paying the author for his book…’

With the coming of the printing press, authors found a wider readership but did not escape the need of patronage. William Shakespeare sought the support of the Earl of Southampton, dedicating *The Rape of Lucrece* and *Venus and Adonis* to him. It is unclear whether he was successful.\(^{117}\) Nearly 150 years later, Samuel Johnson famously sought the patronage of Lord Chesterfield, and was moved to remonstrate with him when it was too late coming.\(^{118}\) He had better luck with King George III, who granted him a life pension. Among later generations, William Wordsworth was appointed to the office of Distributor of Stamps in Westmorland, a sinecure worth about £200 a year after expenses, a very comfortable living.\(^{119}\) Even Karl Marx, through his long years’ labour in the Reading Room of the British Museum, depended on the capital of Friedrich Engels.
Though the incidence of patronage has receded, many authors still depend on grants and prizes, as well as private philanthropy.\textsuperscript{120} Consider, for example, the Royal Literary Fund formed in 1790 by the Rev David Williams to relieve ‘authors in distress’ and still operating today. A former President of the Fund, Janet Adam Smith, has described how ‘the Fund has enabled many in the full tide of their career to overcome a temporary set-back; and has given many others an easier old age, when royalties have dwindled and creative energies waned’.\textsuperscript{121} The mechanism of the Fund she describes as follows:

‘The storm signal that an author is in distress is often run up by a fellow-writer. The secretary then collects information from the applicant, and presents his or her case to the Committee whose members — authors, publishers, journalists, literary agents — represent a wide spectrum of literary life. At each of their monthly meetings they consider the applications; there were about 215 in the year 2003/04. The first hurdle applicants have to surmount is that of literary merit, which is assessed on the basis of reports by members who have studied samples of the writer’s work and considered their careers. The Committee then scrutinises a statement of the applicant’s financial position, backed by letters from friends and colleagues. In 2003/04, 211 applicants and dependents were given grants and pensions.’ (Smith 2005)

Past beneficiaries of the Fund include Joseph Conrad, D H Lawrence, James Joyce, and Mervyn Peake.\textsuperscript{122}

In the world of filmmaking, subsidy is ubiquitous. The Australian Film Commission in its 1986 discussion paper proposing the Film Finance Corporation noted: ‘Governments so commonly intervene in the business of making, distributing and retailing motion pictures — and the instruments they employ are so various — that it is hard to find a common thread. A government’s dealings with film producers may involve a combination of regulations, concessions, subsidies, services,
facilities, exemptions, discounts, preferences, quotas, taxes, levies, credits, write-offs, loans or guarantees. The permutations defy exhaustive description.’ (AFC 1986, p24)

Filmmakers themselves contribute a great deal. We saw in chapter five that filmmakers often forgo money income to work in the film industry and that income foregone in this way was equivalent to somewhere between 11 and 30 percent of the total value of Australian feature film production. While not a direct money contribution, this was clearly a form of subsidy. By foregoing income, filmmakers reduced the cost of the films they made and thus improved returns to the films’ investors, without any return to themselves beyond the ‘psychic income’ of the work itself. It is as though they were patrons of their own work. Since many filmmakers hold second jobs, we might also compare them to the book publishers, cross-subsidizing one book with the profits of another, or in this case, cross-subsidizing the work they do for ‘love’ with the wages of their ‘day’ jobs.

In chapters three and four we had a close look at the investment program of the Film Finance Corporation in the period 1988-2002. We saw that it invested on behalf of filmmakers, taking high-risk equity positions and losing most of its capital as a result. We also looked briefly at the UK Film Council and the New Zealand Film Commission, both of which had similar mandates from their governments and got much the same result. We concluded, tentatively, that ‘soft’ equity investors in films lose somewhere between two-thirds and four-fifths of the capital they deploy. Losses of this order are subsidy on an industrial scale.

We saw too that there were private investors in many of the films the FFC backed (102 of 158 films). Some of them may have invested in the wide-eyed hope of profits but others no doubt made a realistic assessment of the prospects. If they went ahead, it was because they wanted to see the film made and, to that end, were prepared to accept levels of risk they
would find unacceptable in any other context, except perhaps a day at the races. Such investors became, in effect, providers of subsidy.

So pervasive has it become that subsidy — ‘soft’ money, as the industry terms it — can decide even the location of a film. Thus Clint Eastwood’s *Gran Torino*, a story set among Minnesota’s Hmong community, was transplanted 500 miles to Michigan, where the state government offered a rebate of up to 42 percent of production costs. According to a report by *The Economist* magazine, 43 of America’s 50 states offered incentives designed to lure productions to those states (*The Economist* 2009). In Australia, the Federal Government intervened to secure the production in Sydney of James Mangold’s *The Wolverine*, offering a ‘one-off payment’ of AUD12.8 million to the film’s producers, Hugh Jackman and Marvel Entertainment. The payment was in addition to an existing ‘location offset’ worth 16.5 percent of the film’s local expenditure. It was widely viewed among producers as a precedent for future productions (Quinn 2012).

That writers and filmmakers should need to be enrolled with the disadvantaged and the needy as recipients of public funding and of private philanthropy speaks to the poor returns of the copyright system. Writers and filmmakers may be the engine of the system but the royalties it pays are too little, too late and too uncertain to sustain them. They are therefore compelled to rely on remedial sources of income: patronage, philanthropy, subsidy. This reliance is so common and so persistent that we may regard it as a fixed characteristic of the copyright system. Subsidy is the walking stick on which the copyright system leans.

We might even regard them as twin systems, copyright on one side, subsidy on the other, yoked together in a long-running but unacknowledged policy experiment.
THE ISSUE OF SUBSIDY was spotlighted at the 2013 Academy Awards ceremony, when some 500 visual effects artists staged a demonstration outside the Dolby Theatre, where the Awards were about to be presented. The protest was sparked by the just-announced bankruptcy of visual effects firm Rhythm & Hues. Inside the ceremony, things came to a head when the Rhythm & Hues team won Best Visual Effects Oscar for its work on Ang Lee’s *Life Of Pi*. Accepting the Award, effects supervisor Bill Westenhofer tried to speak out but was cut off by the Awards orchestra, which launched into the theme from *Jaws*. The protesters took to Twitter and Facebook to continue their campaign (Pulver 2013, Fera 2013). Phillip Broste, a lead compositor at Zoic Studios, summed up the industry’s concerns in an open letter to Ang Lee:

‘Mr Lee, I do believe that you are a thoughtful and brilliant man. And a gifted filmmaker. But I also believe that you and everyone in your tier of our business is fabulously ignorant to the pain and turmoil you are putting artists through. Our employers scramble to chase illegal film subsidies across the globe at the behest of the film studios. Those same subsidies raise overhead, distort the market and cause wage stagnation in what are already trying economic times. Your VFX are already cheaper than they should be. It is disheartening to see how blissfully unaware of this fact you truly are.’ (Quoted in Fera 2013)

People who give subsidies give them with good intentions. They are given with the intention of assisting the beneficiaries in the work they are trying to do. From the giver’s perspective, there is a genuine sense of alignment with the beneficiaries. But Broste is drawing attention to the negative consequences for those outside the circle of the gift. He is pointing to a fundamental problem of subsidy to which we must now pay attention. The problem is that subsidies can give rise to a circular causality where they are not only the solution to a problem but also — bizarrely enough — the cause. Broste’s complaint about visual effects
subsidies is an example. Companies around the world compete for visual effects work, and governments in some of those countries have intervened to assist local companies.\textsuperscript{124} The intervention allows those companies to bid prices down. Unsubsidised companies, like the bankrupt Rhythm & Hues, must then match the lower prices or lose the business. To match prices, they must find their own sources of subsidy. Thus the problem is not just perpetuated but spreads like a contagion from one company to another.

We can see a similar process at work in the history of the Division 10BA tax concession granted to Australian films in the 1980s, which we examined briefly in chapter two. Introduced by the Fraser government in 1981, it was so successful that the incoming Hawke government took action to wind it back, first in 1983, and again in 1985. The winding-back reduced the effective subsidy rate from 90 percent (90 cents per dollar of investment) in 1981 to 80 percent in 1983 and 60 percent in 1985 (Australian Film Commission 1986, p4). What was striking about the reduction was the way the market responded. It simply shifted the expected level of market ‘presales’ from 10 to 20 to 40 percent — directly compensating investors for the reduction in the subsidy rate.\textsuperscript{125} In other words, the rate of subsidy and the level of presales moved in inverse lockstep. As one fell, the other rose. We could say that the subsidy was ‘crowding out’ the market — not crowding it out altogether but displacing it, proportionately.

In the global market for Australian films, the effect was to crystallise a benchmark value that was a long way short of the actual costs of producing a film. In 1985, that value stabilised at 40 percent of production costs and signaled to buyers that they need pay, in aggregate, no more than 40 percent of a film’s budgeted cost to trigger its production. Thus the 10BA subsidy became embedded in the market price of Australian film copyrights — the gift became a given.
In the medical world, interventions that have adverse (usually inadvertent) consequences are termed ‘iatrogenic’. The noun, iatrogenesis, derives from the Greek *iatros*, and means ‘brought forth by a healer’. Examples of iatrogenic effects are the hair loss and nausea induced by chemotherapy, antibiotic resistance in bacteria, side-effects caused by drug interactions and, in an historical example, puerperal or childbed fever in 19th maternity institutions — called ‘the doctors’ plague’ (Nuland 2003) and caused by doctors not washing their hands between procedures. In recent years, the concept has been extended to ‘iatrogenic poverty’, meaning impoverishment resulting from medical care (Meessen et al 2003).

As the film examples show, the iatrogenic consequences of subsidy schemes affect not just the immediate recipient but ripple out to the wider community of filmmakers, through the mechanism of price expectations. In the case of Australian film producers of the 1980s, buyers quickly came to expect that they would be able to purchase rights in a film for a fraction of its actual production cost. Even producers whose films were ineligible for the concession were affected — they too faced an expectation of fractional prices. Whether they sought the subsidy or not, every Australian film producer therefore came to need it. If they were ineligible for the concession or chose not to apply for it, they had to find another way to meet buyers’ price expectations and compete with their subsidised peers.

It is this destruction of the business viability of the ineligible or non-conforming producer that most concerns us here. For them, the impact of the subsidy system is not merely neutral; it is actually destructive of their interests. They become worse-off than if there were no subsidies at all. For now the familiar low returns sink lower still as buyers drop their prices.
OUT OF THE FRYING PAN into the fire. In a subsidised market, filmmakers must make the decision whether to seek subsidy or not. If they choose not to, they face an uphill struggle to finance their films. For all but a few filmmakers, this is probably an unrealistic path, too difficult to attempt and too unlikely to succeed. The history of the Film Finance Corporation confirms this assessment; we saw in chapter four that very few films were financed without its support. Filmmakers therefore find themselves drawn or driven towards the subsidy institution. Whatever doubts they may have, it becomes something they must engage with.

For the filmmaker, the engagement is like learning the steps of a complicated new dance. There are rules, standards and a process. Some of this may be explicit, embodied in formal guidelines and policy statements, but much will be unspoken. The filmmaker must draw closer and observe the institution. What kinds of films does it favour? What method of production? Learning the steps draws the filmmaker into alignment with the institution.

Next the filmmaker begins an internal process of accommodation. This may involve rethinking particular plans and projects, dropping or deferring those that don’t fit the new scenario. Creatively, some degree of self-censorship may become necessary. The opacity of the institution invites second-guessing about its thinking. How will it react? How to get and hold its attention?

Depending on the subsidy model, the relationship between filmmaker and institution may resemble a ‘beauty contest’, where the filmmaker is the contestant and the institution the judging panel. Elements of subjectivity in the judging process may make it difficult to predict. Even when an application is successful, the grounds for success may be difficult to determine and therefore to repeat. Over time, the filmmaker may cease to meet the judging criteria, for example, if they favour ‘emerging’ filmmakers. The key determinant of the filmmaker’s future —
access to capital — may then enter a realm of unpredictability that vitiates business planning. Luck, in the form of ‘beauty’, may turn against the filmmaker.

At all stages in the relationship, the filmmaker must tread gingerly around the institution. Criticism, if it cannot be avoided, must be carefully worded and not made public. No offence should be given. On occasion, it may be necessary to defend the institution without believing in the defence.

A recent review of the New Zealand Film Commission shed light on the difficult relationship between filmmaker and institution (Jackson & Court 2010). Filmmakers viewed the Commission as distant, unapproachable and hostile to its (filmmaker) critics. As one producer put it: ‘Most organisations have natural predators — the Film Commission doesn’t. People are afraid to voice criticism.’ (pp15-16) There was an ‘us-and-them’ attitude that made filmmakers feel almost ‘as though we were in the way’ (p9). The Commission wanted to ‘put things in boxes, but every film is different, there are no boxes’ (p13). Filmmakers also reported a lack of trust, complicated by ‘Byzantine’ politics and ‘incomprehensible’ decision-making (p11). The report noted that there was ‘a well of pent-up anger and frustration’ (p16).

Former BBC executive Tom Archer has described the power imbalance between BBC commissioners and independent producers in similar terms: ‘Producers just have to put up with it. Protest? You’re difficult. Argue about the program? You don’t get it. Complain? Do you want another commission?’ Archer continues:

‘When you have commissioning power, or the appearance of commissioning power, life can feel good. Meetings don’t start until you turn up. You’re the centre of attention. Earnest note-taking accompanies your every half-arsed comment. People bring you cups of tea. They’re
nice to you. And best of all they laugh at all — and I mean all — of your jokes.’ (Archer 2013)

This is a description of dependency. Having chosen the subsidy path, the filmmaker is tied to an institution whose favour — granted or withheld — determines the filmmaker’s future. The filmmaker is now vulnerable to the shifts and swings of institutional policy and even of personal politics within the institution. There is a corresponding loss of autonomy and agency. Anthropologist James C Scott, writing about peasant farmers in southeast Asia in the mid twentieth century, noted that ‘we may learn more about the politics of peasants by asking not merely how poor they are but also how precarious their livelihood is’ (Scott 1976, p34). By analogy, the same may be said of filmmakers who choose the subsidy path.

For most people, to be dependent on subsidy is a deeply unsatisfactory condition. Psychologically, it is akin to defeat. Whatever relief or validation there may be in being chosen to receive the subsidy, there is the deeper shame of needing it. If what is being subsidised is a profession, as in this case, then there is an unavoidable implication of failure — of personal inadequacy. It is at once disabling and demoralizing to carry on a profession under such a cloud.\textsuperscript{130}

But for authors the further and deeper consequence of subsidy is the loss of artistic independence. This is a value that lies close to the core of authors’ identity as authors. Documentary filmmaker Bob Connolly, who with Robin Anderson was nominated for an Academy Award for their film \textit{First Contact}, has described independence as the most important element in the creation of a memorable documentary:

‘I'm talking about the freedom of the individual filmmaker to follow his or her own star, make the film he or she wants to make. I'm talking about the absence of all those usual restrictions which impinge upon that freedom, whether editorial, creative, bureaucratic or methodological. It
can be as basic as the freedom to shoot and to edit for as long as necessary, regardless of what anyone else says; the freedom from constant and/or oppressive editorial interference; freedom from the burden of conflicting demands from multiple broadcaster investors…

Independence is the ability to go your own way, to make the film you want to make, are driven to make, to the very best of your ability. It is the freedom that conveys with it the privilege of being able to say at the end of the whole tortuous, exhausting, exhilarating, debilitating business: that is as good as I can do, I have no excuses.’ (Connolly 2013)

**WHAT IS TO BE DONE?** Some would argue that subsidies should simply be abolished, yet a unilateral decision to abolish subsidies in a particular jurisdiction would not solve the problem. It would merely intensify the difficulties faced by authors in that jurisdiction. Although they would be spared the problem of dependency, they would still face the full deflationary impact of the subsidies offered in other jurisdictions.

Subsidies are a global phenomenon and therefore elude local counter-measures. As with agricultural subsidies, the pathway to a solution is the long, slow one of international negotiations leading to coordinated action. There must be international consensus and remedies must be multilateral. Even then, it would not be possible to squeeze all of the subsidies out of the system. Self-subsidization by writers and filmmakers themselves can probably never be eradicated. Nor will their friends and families be deterred from backing them. Some level of subsidy will always be present, and so there will always be an underlying level of price deflation.

We should not lose sight of the place we started from: the copyright system and its failure to properly reward the risks of authoring. If authors earned more money, they would have less need of subsidy. In this sense, it is the copyright system that has called the subsidy system into being.
The problem that subsidy institutions are trying to address is real and pressing, and it will not go away until copyright itself is reformed.
PART THREE

ARGUMENT
10. Some fault in our commonwealth: the case for reform

*To ask how things are going and whether they can be improved is a constant and inescapable part of the pursuit of justice.*

— Amartya Sen (2009)

*Works of genius will emerge from parts of the world where books have barely penetrated before, as such works after Gutenberg emerged unbidden from the dark and silent corners of Europe.*

— Jason Epstein (2010)

*The Constitution’s framers had it right. Soviet-style repression is not necessary to diminish authors’ output and influence. Just devalue their copyrights.*

— Scott Turow (2013)

The argument of this thesis is that copyright is actually a disincentive to those writers and filmmakers who need to make money from their work. The argument of this chapter is that society pays a high price for turning these authors away. The reason the framers of the US Constitution championed copyright was ‘to promote the Sciences and useful Arts’. They also wanted to underwrite the political freedoms of the new Republic and to avoid the ‘corruptive, censorial influence of government and elite patronage’. The copyright system would provide ‘the financial wherewithal for authors and publishers to create and disseminate expression, information, and opinion without having to curry favor from ministers and nobles’ (Netanel, p89) — or so they hoped.

In this chapter I want to make plain what is at stake, socially, politically, culturally, intellectually, in the difference between a copyright system that rewards authors fairly and one that does not. Although copyright serves some authors well, there are two classes of author whose work is
made either difficult or impossible by copyright’s poor returns. The first is the class of authors whose work by its nature requires to be carried on independently — without patronage, approval, or direction of others. Particularly at risk are authors whose work takes a long time or requires a lot of capital to produce. I will show that this is a large and important class. The second is the class of authors and would-be authors who really do need to make a living from their work, if they are to pursue it. These are people of the Third World for whom making a living is an immediate, pressing concern; they are also the non-elite of the First World. They are outsiders, having no access to the elite institutions that might patronise their work, no family wealth to fall back on and limited capacity to self-subsidise. The size of this class can only be guessed at but plainly is very large.

You may ask: why look to copyright for the solution to a problem caused by copyright in the first place? Why not look elsewhere? The answer is that copyright creates an asset and gives rise to a market in creative works. The asset may be impaired and the market imperfect but there is at least the possibility that a work, and its author, will have an active economic life, finding buyers and audiences without having first to enlist a patron, solicit the approval of a funding agency or create the work under external direction. Copyright is therefore the promising bedrock of a solution.

THE WRITERS AND FILMMAKERS whose viability we are discussing here are not particularly focused on moneymaking. Their works are generally not hits or bestsellers. Although some have large followings, they are unlikely to reach a ‘mass audience’ unless their work is catapulted there by the zeitgeist or Oprah Winfrey. Of course, it doesn’t follow that they are indifferent to audiences — on the contrary they may be quite mindful of their reception. But having taken up a subject they
will continue to pursue it even though they can see perfectly well that a different subject or a different treatment of the same subject might win them a larger audience. This persistence with a subject for its own sake, sometimes through many years, is characteristic of the authors in focus here. They choose their subject matter primarily by reference to internal considerations — things they find compelling, to which they find themselves drawn. Some would say that the subject matter chooses them. They interpret their own interest as evidence that others will be interested too, or if the subject is obscure, they hope to engage an audience and win it over.

Persistence is a necessary characteristic. Anthropologist Sherry Ortner, in a study of independent filmmaking in the US, observed Barbara Boyle, a senior academic at UCLA, asking a class what was the most important characteristic of a film producer. For answer Boyle, a former business partner of legendary independent producer Roger Corman, wrote on the blackboard in large capital letters, ‘PERSEVERANCE’ (Ortner 2013, p158). Perseverance because getting a film ‘up’ is very difficult, for all the reasons we have seen. But perseverance also because the ambition of any filmmaker — of any author — goes beyond the immediate project. It is to create a body of work that explores, in a cumulative way, the subject matter they have chosen. For these authors, the economic challenge is not just to find the means to create the next work, but to build a platform on which they can continue to work indefinitely.

They must also persevere long enough to win public acceptance of their work. For a film or book to enter the public sphere, it cannot be left on the doorstep, like a foundling, but must be championed. Having created the work, the author must take it up, speak for it, engage and hold an audience. The poet Robert Frost wrote his most famous poem, ‘Stopping by Woods on a Snowy Evening’, in a few minutes one morning in 1922. The poem ends —
‘The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.’

— And thus describes its author, for Frost himself went many miles, crisscrossing America, giving readings of his work at schools and colleges, for 40 years. His long persistence built a national audience and led him in January 1961 to the inauguration of President John Kennedy, where in the bright sunlight he recited another much-loved poem, ‘The Gift Outright’. The poet Alan Ginsberg said in tribute:

‘A few poets may have travelled the country and read their poems aloud, but Frost was relentless, and professional. He created an audience for poetry readings, and a role for the poet, that hadn’t been there before. It was easier for those who came after him. He was the first voyager, a kind of pioneer, the original entrepreneur of poetry.’ (Parini 1999, p319)

For poets, writers, and filmmakers, as for other entrepreneurs, recognition generally comes late in the cycle, if it comes at all. Awards, prizes — invitations to speak at the inauguration of presidents — are tokens of a success already achieved. Before they arrive the only tangible reward of the author is the money paid through the copyright system. Throughout the critical period when the author is struggling for recognition and to keep working, copyright, for better or worse, is all there is.

AUTHORS PRIZE INDEPENDENCE with good reason. An author whose work offends or questions or simply fails to interest the powers-that-be must seek safe ground on which to carry out the work. The safe ground, the essential ground, is independence and it must be financial as well as intellectual. The author must have the means to persist in the work without approval or patronage — must be able to connect with an
audience who will back the work by buying it — and must earn a viable share of the proceeds.

We can distinguish four basic types of work that require the safe, essential ground of independence:

• *Dissenting*: Works that directly criticise and offer resistance to an established group, policy or institution.

• *Breakaway*: Works that propose departing from an established group, policy or institution and heading in a new direction.

• *Original*: Works that start in a new place or from a new premise without debt or allegiance to an established group, policy or institution.

• *Truth-telling*: Works that present evidence concerning the wrongful actions or damaging consequences of an established group, policy or institution.

Below I explore these four cases, showing why independence matters profoundly to authors who produce works of these kinds.

1. *Dissenting works*

> A legal system that is committed to free speech forbids government from silencing dissenters. This is an extraordinary accomplishment, but it is not nearly enough.

— Cass Sunstein, *Why societies need dissent*, p110

On a Friday night in December 1961 Alexander Tvardovsky, poet, Candidate Member of the Soviet Central Committee and chief editor of literary magazine *Novy Mir*, sat up all night reading a text just submitted to him, *Shch-854*. He was overcome with excitement and next morning rushed into the deserted offices of the magazine. He contacted friends: ‘A new genius is born! Viktor, go for a bottle!’. They spent the morning drinking. Tvardovsky committed himself to getting the story into print, though he had no idea how he could do so. He summoned the author to
Moscow. Alexandr Solzhenitsyn, working as a schoolteacher after eight years’ imprisonment in the Gulag, received the summons with great anxiety. Was this the right time? Soviet premier Nikita Khrushchev had given a speech at the Party Congress in October calling for investigation of abuses of power in all their aspects. Solzhenitsyn later recalled: ‘I read and re-read those speeches, and the walls of my secret world swayed like curtains in the theatre, wavered, expanded, and carried me queasily with them: had it arrived then, the long-awaited moment of terrible joy, the moment when my head must break water?’

Solzhenitsyn met with Tvardovsky. They agreed to rename the story *One Day in the Life of Ivan Denisovich* and that the story’s hero, Ivan Denisovich Shukhov, prisoner Shch-854, should still have hope of living one day in freedom. Tvardovsky made copies and began soliciting testimonials from Moscow’s literary elite. Armed with these, he submitted the story to Vladimir Lebedev, an assistant to Khrushchev. Lebedev, who possessed a private library of banned books, suggested various changes: the camp slang should be toned down, the camp officers should not be called ‘vermin’ — and the story should finger Stalin.

Finally, an opportunity came. Khrushchev had just met with Robert Frost at Khrushchev’s dacha on the Black Sea coast; the American poet, then 88 years old, was touring the Soviet Union. As Frost left the dacha, Lebedev began discussing *Ivan Denisovich* with another official. ‘What’s that?’, said Khrushchev, ‘What are you hiding from me?’ He demanded to see the manuscript and when Lebedev couldn’t produce it, dispatched him by plane to Moscow to fetch it. On his return, Lebedev read from a section where Shukhov is laying bricks in the Siberian winter. Khrushchev was moved by the careful way the prisoner husbanded his mortar. He wiped away tears and demanded to know why Tvardovsky hadn’t published the story.
Khrushchev’s interest was the spur to action. Overnight, 23 copies were printed for the members of the Central Committee. When they met, there were reservations and strategic silences. Khrushchev had to push them: ‘There’s a Stalinist in each of you. There’s even some of the Stalinist in me. We must root out this evil.’ So it came about that Ivan Denisovich was published. One hundred thousand copies of Novy Mir sold out immediately and foreign translations appeared within a month. Solzhenitsyn was catapulted to world fame and the Gulag was made infamous.138

What is extraordinary about this story is the apparatus of control it reveals. We see, in reverse, in a benign display, the moving parts of a machine built to crush dissent. The movement travels up the hierarchy to the very top, the Premier stoops to lift the frightened writer and former zek, to raise him up, and every part of the mechanism, without missing a beat, performs the very opposite of its normal function. It is like the popular European conceit of a ‘world turned upside down’, where mice eat cats, the cart pulls the horse, the poor man gives alms to the rich man, the king on foot leads a peasant on horseback, and fish fly in the air.139 In this case, the same system that delivered Solzhenitsyn to the Gulag now brushes him down and presents him to the world as a hero of the Soviet Union.

Such mistakes are rare. Authors who criticise a system and offer resistance to it — who dissent — normally can expect a hostile response. It may be little things at first, the beginnings of being frozen out such as questioning of the dissenter’s motives, disparagement to peers and others, belittlement of the dissenter’s judgment, standards, evidence, associates. Access to benefits of compliance such as grants, awards, promotions, processes of decision-making, even simple information, may wither away. Soon the dissenter will begin to suffer real damage: reputational, economic, physical. Their employment may be jeopardised through loss
of opportunities, demotion, failure to renew a contract or actual sacking. There may be adverse reviews, public criticism, censorship or refusal to publish — and things may escalate beyond this, depending on the resources and powers of the system, to the level of active harm, beginning with accusation, investigation, prosecution, conviction, continuing, possibly, all the way to imprisonment, exile, beating — even execution.

Along this continuum of consequences, prison and death are plainly the sanctions most to be feared but imposing them can have consequences too — their very harshness draws attention. For those wishing to deter dissent it may be better to put on the velvet gloves of economic sanction. And for most dissenters, while threats of prosecution may turn up the heat, it is the practical grind of running a campaign in face of daily economic hardship that is most telling. If we picture the author/dissenter, embroiled in dispute, being rapidly propelled to the outside of the system or institution or society to which they once belonged and beginning to experience the economic distress that will dog them now for as long as they persist — then we can see why viable independence matters and how this implicates the copyright system.

For the dissenter, authoring is the process by which private doubt becomes public dissent. It is an act which sweeps away their past connection to the institutions (or state) from which they are dissenting and with it (quite possibly) their job, their prospects and their income. Authoring therefore is not only the means by which they express their dissent but, necessarily, their new job, their bridge to an audience and the source of their future income — perhaps the only source.

Solzhenitsyn was lucky: the state lifted him up, praised him and published him (though it soon reversed itself). He remained very aware of his exceptionalism. In 1970, in his Nobel Prize acceptance speech, he paid homage to the many unknown authors who did not have the luck to find a Tvardovsky:
‘Those who fell into that abyss already bearing a literary name are at least known, but how many were never recognised, never once mentioned in public? And virtually no one managed to return. A whole national literature remained there, cast into oblivion not only without a grave, but without even underclothes, naked, with a number tagged on to its toe.’ (Solzhenitsyn 1970)

The managers of the Gulag missed their chance with Solzhenitsyn: they had him but they released him. Returned to the living, he launched a devastating campaign of dissent, which in time helped topple the Soviet regime. We do well to pay attention to the enabling conditions of dissent, not least its economic grounds. Freedom of speech is not nearly enough.

2. Breakaway works

Consider... the men who called Copernicus mad because he proclaimed that the earth moved. They were not either just wrong or quite wrong. Part of what they meant by ‘earth’ was fixed position. Their earth, at least, could not be moved. Correspondingly, Copernicus’ innovation was not simply to move the earth. Rather, it was a whole new way of regarding the problems of physics and astronomy, one that necessarily changed the meaning of both ‘earth’ and ‘motion’. Without those changes the concept of a moving earth was mad.

— Thomas Kuhn, *The Structure of Scientific Revolutions*, p149-50

Copernicus published *De Revolutionibus Orbium Coelestium* at the very end of his life, in 1543, and with it overturned the Ptolemaic system, which had dominated astronomy for 1,300 years. Ptolemy had theorised that the earth was the centre of the universe and that the sun moved around it; Copernicus proposed that the earth and other planets revolved around the sun. Although the Ptolemaic system was useful — and according to Kuhn it remained in use as ‘an engineering approximation’ even in the 1960s — by Copernicus’ time, it had become a monster. With the efforts of astronomers to accommodate new data, there were many
discrepancies and the system’s ‘complexity was increasing far more rapidly than its accuracy’ (Kuhn, p68). In Kuhn’s terms, the system was a failed ‘paradigm’.

Kuhn’s description of how science progresses was itself a minor revolution when published in 1962. Kuhn argued that science did not progress smoothly but in cycles of ‘normal science’ punctuated by revolutionary change — ‘paradigm shifts’. Copernicus putting the sun at the centre was one such shift; another was Einstein conceiving of space as curved. As the fame of these examples shows, such shifts are rare. What most scientists do most of the time is work within a paradigm, typically the one they encountered in their training. ‘Normal-scientific research is directed to the articulation of those phenomena and theories that the paradigm already supplies,’ Kuhn writes (p24). Normal scientists are thus invested in the paradigm they know. Their careers, hopes and reputations all rest on its continuance. But over time anomalies show up — things that don’t fit the paradigm. When these anomalies prove stubborn, a sense of crisis begins to form, signaling a breakdown in the discipline. Such was the state of astronomy before Copernicus and of theoretical physics before Einstein (Kuhn, p83-4). Faced with crisis, the defenders of the status quo ‘devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict’ (p78). Such defences, however, merely postpone the reckoning.

When it comes, the paradigm shift is a sudden and unstructured event ‘like the gestalt switch’.

‘Scientists then often speak of the “scales falling from the eyes” or of the “lightning flash” that “inundates” a previously obscure puzzle, enabling its components to be seen in a new way that for the first time permits its solution. On other occasions the relevant illumination comes in sleep.’ (Kuhn, p122-23)
Although it arrives in a flash the shift is permanent, involving a profound change in the scientist’s world view that in turn precipitates a thousand little shifts — in ‘theory, methods, and standards together’ (Kuhn, p109). Everything changes: ‘we may want to say that after a revolution scientists are responding to a different world’ (p111).

For the revolutionary scientist who first achieves the gestalt switch, the challenge becomes one of persuasion. How can their peers be brought to the same change in worldview? Kuhn notes that very often they cannot. ‘Copernicanism made few converts for almost a century after Copernicus’ death. Newton’s work was not generally accepted, particularly on the Continent, for more than half a century after the Principia appeared’ (p150-51). But Kuhn sees the process as inevitable: ‘scientific communities have again and again been converted to new paradigms… Conversions will occur a few at a time until, after the last holdouts have died, the whole profession will again be practicing under a single, but now a different, paradigm’ (p52).

Kuhn’s confidence in the conversion process rests on a belief that scientists are all ‘reasonable men’ who ultimately will be persuaded by ‘one or another argument’ (p158) to adopt the new paradigm. This is surely too rosy a view. A generation of scientists whose careers and reputations rest on the old paradigm will not readily accede to the new. On the contrary, they will oppose it with all the resources and authority they possess. Until quite late in the conversion process, they will far outnumber the revolutionary vanguard and they will have the force of incumbency. They will chair the committees that control the award of grants and promotions — the prestige of the profession. They will govern its institutions. There will be no incentive to give any of this up.

Revolutionary scientists therefore meet with opposition every bit as determined as that encountered by dissidents (though without the threat of death or prison). For them too, independence may become their new and
necessary condition and authorship their necessary source of income, if they are to pursue the paradigm shift whose truth has appeared to them like a lightning bolt and thrown over their old way of working.

Kuhn noted in a 1969 postscript to The Structure of Scientific Revolutions that the idea of paradigm shifts was long familiar in other fields — literature, music, the arts and politics — and what was original in his work was applying the idea to the sciences, ‘which had been widely thought to develop in a different way’ (p208). The revolutionary scientist thus shares the fate of breakaway authors everywhere: under-resourced, vigorously opposed and barely viable.

3. Original works

Cinema is a specificity of vision. It's an approach in which everything matters. It's the polar opposite of generic or arbitrary and the result is as unique as a signature or a fingerprint. It isn't made by a committee, and it isn't made by a company, and it isn't made by the audience. It means that if this filmmaker didn't do it, it either wouldn't exist at all, or it wouldn't exist in anything like this form.

— Steven Soderbergh, speech at the opening of the 56th San Francisco Film Festival (2013)

In this speech filmmaker Steven Soderbergh made a distinction between movies and cinema. The first was a product, he said, while the second was a process: ‘a movie is something you see, and cinema is something that’s made’. Thus a commercial or a film you saw on YouTube could qualify as cinema, though a ‘perfectly solid, successful and acclaimed movie’ might not. The speech was an indictment of the major US studios which, Soderbergh said, had no interest in making cinema — it was not on their radar — and increasingly were run by executives who didn’t know movies and didn’t watch them for pleasure.
The speech drew a lot of attention, coming from a filmmaker who has worked successfully within the studio system (*Ocean’s Eleven*) and outside it (*sex, lies, and videotape*). It tapped into a widely shared concern that the Hollywood industry has become too cautious, as evidenced by its focus on sequels, remakes and the creation of movie ‘franchises’. In Soderbergh’s account, the sheer scale of the business worked against creative risk-taking, with costs of producing and marketing a single film now running into hundreds of millions of dollars. Cinema was ‘not a word you would ever want to use in a meeting’ with studio executives.

Specificity, the idea of a film being as unique as a fingerprint — these are terms that return us to the questions raised by Foucault (1984) and Rose (1993) about the nature of authorship and originality. Is there really such a thing as originality or does all authorship necessarily exist in a continuum of borrowings? Soderbergh is insisting on the possibility of originality, such that a film could only be the work of the author and no other. He is also insisting on the primacy of the director as author of the film, as against a committee or a company or the audience. These are strong claims, although he does not go as far as saying that there is no borrowing. What Soderbergh is describing is the subjective experience of authoring — the author’s sense of it. It is a long way removed from Foucault’s and Rose’s critique. Where Rose argues that authors ‘do not really create in any literal sense’ (p8), Soderbergh describes creating as an act which has within it the possibility of bringing into being ‘something ambitious, something beautiful, something memorable’, which didn’t exist before. Not only does he assert the reality of authorship, for him authoring at its best has nothing to do with ‘the commodification of literature’ — Rose’s view. On the contrary, for Soderbergh, as an author’s work becomes more personal, more like a fingerprint, it also becomes more marginal — ‘too special’ — and therefore less likely to attract the backing of a major studio. Originality is the enemy of commodification, not its enabler.
Soderbergh is not alone. It is the complaint of authors everywhere that they are rewarded and even feted for work that is conventional, but rejected or simply ignored when they venture down new paths.

This should not surprise us. That creative work which is different, ‘special’, strange, challenging — in a word original — should meet with resistance is entirely consistent with the response to innovation in other fields, with the frequency of failure where novelty is attempted, and with the slow S-curve of adoption even where it is eventually accepted. An original work by definition has no track record to guide potential backers, no proof of its maker’s claims. It is bathed in risk. For a filmmaker like Soderbergh, this probably means the work must be made independently, outside the studio system, with some small percentage (as little as two or three percent) of the resources available to a studio film. In the Australian context, it probably means making a film without the backing of a government funding agency (again with fewer resources). These are difficult pathways to production, where the dubious viability of the copyright asset comes sharply into focus.

This is not to suggest that highly original works never gain the backing of the major studios or funding agencies. Of course they do. But the uncertainty and risks of originality put enormous pressure on the work. Very often, if it does not lead to outright rejection of the work, the pressure will lead instead to creative compromises and, possibly, the transfer of additional risk to the filmmakers, for example by requiring them to reduce or defer their fees or stand further back in the recoupment chain (or all of these).

Like dissent and paradigm change, originality has few backers. In the crucial early days, the author must find an audience and build a following for their work. Copyright is the business model — and it is broken.
4. Truth-telling works

_Slowly the people will forget. There will only be this — books and films. And that’s it._

— Branko Lustig in Topaz Adizes’ *Branko: Return to Auschwitz* (2013)

Branko Lustig is a Croatian filmmaker who has won two Academy Awards (for Steven Spielberg’s *Schindler’s List* and Ridley Scott’s *Gladiator*) and made many films as a producer, production manager and actor. In 2011 he celebrated his bar mitzvah at Auschwitz, in front of barrack No. 24a, where he was a prisoner for three years during World War II. New York-based filmmaker Topaz Adizes made a film of this return which was published by The New York Times as an Op-Doc (Adizes 2013). Adizes’ film is less than 10 minutes long, in black and white, quite beautifully shot. Lustig speaks for himself; other voices are peripheral. In the opening sequence we see him accepting the Academy Award for *Schindler’s List*. He says to the Academy audience: ‘People died in front of me in the camps. Their last words were, “Be a witness of my murder. Tell to the world how I died. Remember.” Together with Gerry [Gerald Molen, Lustig’s co-producer], by helping Steven to make this movie, I hope I fulfill my obligations to the innocent victims of the Holocaust.’

Lustig is a reluctant witness. Later in the film, speaking to camera he says, ‘People [are] telling me to write a book. They want to know. But I don’t want to remember.’ Nor does he mention his involvement in the vast Shoah Foundation project, initiated by Spielberg in 1994 in the wake of *Schindler’s List*. Over a five-year period, the Foundation collected more than 50,000 video testimonies of survivors and witnesses of the Holocaust. Lustig and Molen were founding members of the Foundation’s advisory committee.

The Shoah Foundation is an extraordinary demonstration of the power of philanthropy. But projects of bearing witness and truth-telling rarely find
friends as galvanizing as Steven Spielberg. Two decades before
*Schindler’s List*, French filmmaker Claude Lanzmann came away empty-
handed from a meeting with a group of American Jewish moguls whom
he asked to back his film *Shoah* (Schatz 2012). They wanted to know
what the message of the film was; Lanzmann said there was no message.
The film took 12 years to complete, seven years of research and filming
followed by five years of editing. Even the Israeli government, an early
backer, lost patience. Lanzmann described it as an hallucinatory voyage
and himself as ‘spellbound, in thrall to the truth being revealed to me’
(Lanzmann 2012, p475). When finally released in 1985, the nine-and-a-
half hour film was widely recognised as a masterpiece, though a
controversial one. Critic Roger Ebert said:
‘There is no proper response to this film. It is an enormous fact, a 550-
minute howl of pain and anger in the face of genocide. It is one of the
noblest films ever made… It is not a documentary, not journalism, not
propaganda, not political. It is an act of witness.’ (Ebert 1985)
Yet as Schatz notes, ‘*Shoah* is an austere, anti-spectacular film, without
archival footage, newsreels or a single corpse. Lanzmann “showed
nothing at all”, Godard complained’. Instead the film is based entirely on
the testimony of survivors, bystanders and perpetrators — ‘often heard
over slow, spectral tracking shots of trains and forests in the killing fields
of Poland’ (Schatz 2012).
In Lanzmann’s behaviour while making the film we see reflected both the
difficulty of the task and the degree of bloody-mindedness required to
bring it off. He cajoled, tricked, flattered and sometimes secretly filmed
his subjects. He persuaded a former SS guard to perform for the camera
the ‘eerily cheerful’ Treblinka anthem that Jews were forced to sing when
entering the camp. In Tel Aviv he rented a barbershop and insisted a
former inmate go through the motions he performed as a barber at
Treblinka. ‘Don’t make me go on please,’ the man begged. ‘Please, we
must go on,’ Lanzmann insisted. With similar sangfroid, he accepted the demands of the Israeli government — which wanted the film to run no more than two hours and to be finished within 18 months — but then simply ignored them (Schatz 2102). The film would take as long it would take, both to make and to show. Lanzmann was uncompromising in his pursuit of the truth as he saw it, believing it was his duty ‘to obey the categorical imperative of the search for and the transmission of truth’ (2012, p435).

Truth-telling, bearing witness, giving testimony: these are tasks that require standing to the side of history so as to observe its sweep. With the long duration of the work and the need to resist compromise, the money to do the work is hard to find. But the poverty of the copyright asset makes it doubly hard. A fairer, better copyright system would help, not hinder, the truth-teller.

**WHAT MATTERS ABOUT THESE AUTHORS** is that they write from outside the charmed circle of the people in charge. They are outsiders, whether by choice or circumstance; theirs is an outsider literature. It is precisely this positioning which gives force and meaning to their work. If they were inside the circle, dependent on its money or say-so, their value would be diminished, perhaps lost — they probably could not pursue the same work. Society gains from this outsider literature in the same way that markets benefit from competition. Outsiders bring alternatives and make new things possible. They are prepared to explore and to say things that insiders might prefer were left unexplored and unsaid. They make connections that no one previously has thought to make. They are entrepreneurs of the economy of ideas.

By speaking up when others choose silence, dissident authors hold to account those who might otherwise escape an accounting. Speaking up legitimises the practice of criticism and returns it to the public as a tool
they can use for themselves. It gives courage to other voices. If sufficient voices join the criticism they can become a chorus that checks authority in its exercise of power. Just the possibility of public criticism can be a check on power. Speaking up is thus the moment of truth for political (and intellectual) freedom — and the speaker is the lightning rod. In threatened communities, people hold their breath when the speaker steps forward. American economist Cass Sunstein has noted ‘the countless number of people who benefit from the courage, or foolhardiness, of those who dissent. When someone blows the whistle on government fraud or deceit, the real winners are members of the public, not the whistleblower.’ (Sunstein 2005, p98)

Breakaway authors perform a different service. When progress grinds to a halt in a discipline or institution they are the pathfinders who set it on a new path. Their contribution as authors is the set of insights that guide others to the new path; it is also their willingness to risk stepping off the old path and begin searching for the new. In Kuhn’s terms, they are revolutionaries who solve crises through paradigm change. While those invested in the status quo may condemn the revolution, for those who follow the revolutionary appears as founder — the visionary who found the new pathway. They are beneficiaries of the founder’s intellectual risk-taking. Eventually the whole discipline or institution may accept the new pathway. The asymmetry of the risk-taking is characteristic of the knowledge economy: the downside risks are borne entirely by the breakaway founder but if the pathway proves viable, the benefits are shared by all.

Originality, too, may be viewed as an offering to the author’s community or to society at large. If we lay aside postmodern doubts about the possibility of originality, we can see that much of art and some of science is a parade of novelties, departures, and transformations. Think of Shakespeare’s introduction of psychological complexity to Elizabethan drama or Orson Welles’ use of flashback and multiple narrators in Citizen
Kane. Society is invited to try out new ways of doing and seeing things. Similarly, in academic research the most highly valued outcome is to make an original contribution to a body of knowledge. Every single brick in the long wall of human knowledge was, in its time, original. What we expect of ‘true writing’, says author Silas House, is that it ‘show the unexpected, the secret, the profound in a way that it has never been shown before’ (House 2013).

Truth-telling is another kind of offering. By a resolute adherence to the truth, the author hopes to secure justice in a cause. To bring about justice is inherently a social good — even the attempt is socially constructive, because to see justice pursued gives comfort to all who depend on it. If justice is not possible, then what matters is bearing witness: ‘Tell to the world how I died’, as Branko Lustig reports. The purpose in this case is to bring attention to the injustice with the goal of avoiding its repetition. It is a message to the future, a gift of knowledge to the unborn, freighted with terrible urgency from the present.

All of these authors are reaching past the powers-that-be to a wider audience. Only that audience can sustain them and the work they do. Copyright is the mechanism but it is failing them and by failing them, failing us — all of us — authors and audiences alike.

THERE IS ANOTHER CLASS OF AUTHORS we must now pay attention to. Like those we have just met, they have a pressing and continuing need to make money from the work they do. They are the writers and filmmakers of the third world and the margins of the first world. Since they are not wealthy, without tenure and have no patrons, the work they do must pay the bills or they will not be able to sustain it. If the scale or complexity of the work is such that it requires capital to complete, then the work must also pay enough to attract investors. The
size of this class of authors is unknown but surely very large. We will now investigate its membership.

Nearly a century ago, in his inaugural lectures as the new King Edward VII Professor of English Literature at Cambridge University, the writer Sir Arthur Quiller-Couch must have startled his privileged students when he said — and I quote him here at length:

‘What are the great poetical names of the last hundred years or so? Coleridge, Wordsworth, Byron, Shelley, Landor, Keats, Tennyson, Browning, Arnold, Morris, Rossetti, Swinburne — we may stop there. Of these all but Keats, Browning, Rossetti were University men; and of these three Keats, who died young, cut off in his prime, was the only one not fairly well-to-do. It may seem a brutal thing to say, and it is a sad thing to say: but, as a matter of hard fact, the theory that poetical genius bloweth where it listeth, and equally in poor and rich, holds little truth… It is — however dishonouring to us as a nation — certain that, by some fault in our commonwealth, the poor poet has not in these days, nor has had for two hundred years, a dog’s chance. Believe me — and I have spent a great part of the last ten years in watching some 320 Elementary Schools — we may prate of democracy, but actually a poor child in England has little more hope than had the son of an Athenian slave to be emancipated into that intellectual freedom of which great writings are born.’ (Quiller-Couch 1916)

A dozen years later the writer Virginia Woolf addressed another privileged Cambridge audience, of the young women of Newnham and Girton Colleges. She quoted the passage from Quiller-Couch and summed up: ‘That is it. Intellectual freedom depends upon material things. Poetry depends upon intellectual freedom.’ (Woolf 2009/1928, p106) Woolf’s concern, like Quiller-Couch’s and ours here, was with those voices excluded from the profession of writing by poverty. Her particular concern was the excluded voices of women. She continued: ‘And women
have always been poor, not for two hundred years merely, but from the beginning of time. Women have had less intellectual freedom than the sons of Athenian slaves. Women, then, have not had a dog’s chance of writing poetry.’

To prosecute her case Woolf conjures an imaginary ‘Judith Shakespeare’, a sixteenth century genius like her brother William but kept at home rather than being sent to school (as Woolf herself was kept at home while her brothers went to school). Uneducated, isolated and unable to present herself to the theatre world as a writer for fear of scandal, she might have ended up ‘in some lonely cottage outside the village, half witch, half wizard, feared and mocked at’ (p51). Indeed Woolf concludes of this imaginary bard that ‘she died young — alas she never wrote a word [and] lies buried where the omnibuses now stop, opposite the Elephant and Castle’ (p111).

If we searched among the poor in contemporary Britain we would no doubt discover many ‘Judith Shakespeares’ — potential authors whose potential has come to nothing, who have something to say and the talent to say it but not the means to carry on the work in the absence of a viable income from it. And they would be just some small fraction of the excluded. If we fanned out from England, widening the search, the circle of the excluded would grow ever larger. We could search among the shantytowns of Buenos Aires, in Mumbai’s slums and Florida’s trailer parks, through Melbourne’s high rises and Boston’s projects, or among the people working the paddy fields of Guangxi or Tamil Nadu. The circle would keep growing until it dwarfed the charmed circle of authors whose potential is matched by their means — a Jupiter of talent circled by a tiny moon of means.

Woolf’s famous solution to the problem, pitched to her audience of elite young women, was that ‘a woman must have money and a room of her own’. Specifically she must have £500 a year and the room must have a
lock on the door. And here Woolf relates the story of her own good fortune in having an aunt who, ‘for no other reason than that I share her name’, left her £500 a year.\(^{146}\) She describes how before the legacy she seemed ‘always to be doing work that one did not wish to do’ and how this became ‘like a rust eating away the bloom of the spring’:

‘However, as I say, my aunt died; and whenever I change a ten-shilling note a little of that rust and corrosion is rubbed off; fear and bitterness go. Indeed, I thought, slipping the silver into my purse, it is remarkable, remembering the bitterness of those days, what a change of temper a fixed income will bring about.’ (p39)

It is difficult now to compute the value of £500 a year in 1928. However, relying on the work of economists Lawrence Officer and Samuel Williamson, we can arrive at a range of estimates that convey a sense of its value in present day terms. The range is set out in Table 11 below.

**Table 11 Value of £500 a year in 1928 translated to 2011**

<table>
<thead>
<tr>
<th>Value</th>
<th>1928</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historic standard of living</td>
<td>£500</td>
<td>£24,720</td>
</tr>
<tr>
<td>Economic status</td>
<td>£500</td>
<td>£118,300</td>
</tr>
<tr>
<td>Economic power</td>
<td>£500</td>
<td>£163,900</td>
</tr>
</tbody>
</table>

Source: MeasuringWorth

*Historic standard of living* is a measure of income against the cost of a fixed bundle of consumer goods and services. *Economic status* measures income relative to wage or other income, ‘such as the wage rate of workers in manufacturing or per-capita GDP’. *Economic power* measures income against the total output of the economy (Officer & Williamson 2010, p3).\(^{147}\) By any of these measures, £500 a year was a sizeable endowment in 1928, an upper class income. Woolf herself thought there were ‘at this moment two thousand women capable of earning five
hundred a year in one way or another’ (p111) — probably many of them seated in front of her as she delivered her lectures at Newnham and Girton Colleges.

Although Woolf is a little vague about how the prospective author is to come into £500 a year — whether it is to be earned or unearned income — she is clearly placing little or no reliance on copyright. She is saying authors must have another source of income and it must be large enough to avoid the ‘rust and corrosion’ of dependence.

In 1928, within the hallowed halls of Cambridge, Woolf’s solution was bold, workable, even prescient. There probably were two thousand women capable of finding a way to become an author. In her own Bloomsbury circle the model most definitely worked: Bloomsbury, underpinned by inherited wealth, was prolific, extravagantly creative and highly influential. Yet viewed from a longer perspective — from Jupiter — the idea that authorship must remain the province of the wealthy is an astonishing exclusion. Who, seriously, would wish to advance a case for a model of knowledge creation that cut off four-fifths of humanity? In fairness to Woolf, she was making a case for women as authors and focusing on the nearest, most likely source: the educated English upper class. It was probably not her intention to exclude the lower classes or the women of other countries or even, necessarily, the men. But the Bloomsbury model does not solve the systemic problem identified by Sir Arthur Quiller-Couch — it merely raises up a second, privileged group of women to join the privileged men.

A system of incentives that deters whole classes of potential authors leaves too many voices unheard. Since they are of different classes and places worlds away from the published elite, they are not interchangeable with them. The elite cannot speak for them. Their local knowledges therefore are unknown to us, their experiences uncaptured, their ways of seeing and thinking unshared, unlearned. The consequence is a loss of
arts and sciences of unknown dimensions. The further consequence is a
disempowerment not only of those potential authors but of their potential
audiences too. Legal scholar Madhavi Sunder has argued that ‘freedom to
participate in cultural life stands at the very core of liberty’ and that there
has been too much focus by intellectual property scholars on ‘efficiency’
at the expense of the plural values of critical thinking, creativity, sharing
and sociability, economic development, mutual recognition and mutual
understanding (Sunder 2012, pp11-12). She quotes author Salman
Rushdie:
‘Those who do not have power over the story that dominates their lives,
power to retell it, rethink it, deconstruct it, joke about it, and change it as
times change, truly are powerless, because they cannot think new
thoughts.’ (Rushdie 1991)
Quiller-Couch’s ‘poor poet’ and Woolf’s ‘Judith Shakespeare’ faced
many barriers to authorship but arguably there is no more telling barrier
than the inability to earn a money return equal to the risk of the work.
This simple failure sets in train the whole scenario unfolded in this thesis
of poor returns, self-subsidy, the need of patronage, the slide into
dependency, the discouragements and the turning away. Although there is
not one word anywhere in copyright policy to say so, the effect is to
privilege the privileged — those with access to £500 a year and a room of
their own — and discourage the poor. They may not be authors except by
luck or patronage. They must join the voiceless, the Judiths that never
writ.
The fault in our commonwealth is unrepaired.
11. ‘Society knew what it was about’: the case for copyright as it is

Writing is a sweet and wonderful reward, but for what? In the night it became clear to me, as clear as a child's visual instruction, that it is the reward for serving the devil. This descent to the dark powers, this unshackling of spirits bound by nature, these dubious embraces and whatever else may take place down below, which is unknown to those up above, writing their stories in the sunlight. Perhaps there are other forms of writing, but I know only this kind; at night, when fear prevents me from sleeping I know only this kind.
— Franz Kafka (quoted in Jackson 2013)

The reason Milton wrote in fetters when he wrote of Angels & God, and at liberty when of Devils & Hell, is because he was a true Poet, and of the Devil's party without knowing it.
— William Blake (1793)

In the unconscious recesses of its being Society knew what it was about.
— John Maynard Keynes (1919)

In the opening pages of his famous polemic, The Economic Consequences of the Peace, John Maynard Keynes paints an extraordinary picture of European life before the Great War. He describes how:

‘The inhabitant of London could order by telephone, sipping his morning tea in bed, the various products of the whole earth, in such quantity as he might see fit, and reasonably expect their early delivery upon his doorstep... He could secure forthwith, if he wished it, cheap and comfortable means of transport to any country or climate without passport or other formality, could dispatch his servant to the neighbouring office of a bank for such supply of the precious metals as might seem convenient, and then proceed abroad to foreign quarters, without knowledge of their
religion, language, or customs, bearing coined wealth upon his person, and would consider himself greatly aggrieved and much surprised at the least interference… Most important of all, he regarded this state of affairs as normal, certain, and permanent, except in the direction of further improvement…” (Keynes 2009/1919, p20)

Keynes goes on to describe the psychology of the times. There was, he says, a ‘double bluff or deception’ that enabled an immense accumulation of capital across Europe. On the one hand ‘the laboring classes’ somehow came to accept that they ‘could call their own very little of the cake that they and Nature and the capitalists were co-operating to produce’, while on the other, the capitalists were allowed to call the best part of the cake theirs ‘on the tacit underlying condition that they consumed very little of it in practice’. (p24)

Of this long-lived arrangement of affairs Keynes observes that society knew what it was about. He means that the arrangement was wise policy that held the different interests in balance and was a triumph of native good sense over the raw politics of class. Keynes also suggests that society had a capacity to work its way toward wise policy without direction and despite surface conflicts — in the unconscious recesses of its being. Thus Europe before the War found a path to growth that could not have been openly stated but was all the more effective for remaining unsaid. The implication is that a society’s long run interests may assert themselves in the institutional arrangements it evolves, without ever being made explicit.

The question I wish to pose in this chapter is whether we should view the copyright system in this light, as an institution that embodies our collective good sense, notwithstanding the poor outcomes for authors that we have observed. Are there unspoken explanations for these outcomes that, on examination, make good policy sense? And should the evidence
of the system’s longevity and its evolution over time count in its favour.\textsuperscript{150}

In short, can we say of the copyright system that society knows what it is about?

\textbf{THERE ARE THREE PLAUSIBLE REASONS} why we might think that copyright is a wise policy institution and that society would do well to leave it alone. The first is an argument from incumbency. This is an argument that says, in effect, that an institution which has weathered 300 years — or longer, if we count the operation of the Stationers Company before the Statute of Anne — must be doing something right. If the system were failing, surely we would have heard about it. There would be complaints; the people affected would have made a fuss. That there is no fuss is evidence of acceptance and there would not be acceptance unless the system was working and its outcomes were fair.\textsuperscript{151} Not only the longevity but the stability of the system offers evidence of its fitness as a policy institution. It has ridden out the waves of change in media technologies and continues to do so. In the vernacular: \textit{if it ain’t broke, don’t fix it.}

The force of this argument does not lie in asserting the perfection of the copyright system. Given the conflicting interests that copyright seeks to reconcile — of publishers, authors and readers — there may never be agreement about what perfection is. Rather, this is an argument for accepting long-standing practice as the nearest approach to perfection we may feasibly make. We could even accept, as Macaulay argued before the English House of Commons, that copyright is an ‘evil’ but that it is one to which we should submit for the sake of the ‘good’:

‘It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated; and
the least objectionable way of remunerating them is by means of copyright.’ (Macaulay 1841)

Yet before we give way to the force of incumbency, we should consider to what extent copyright’s outcomes have truly been contested, or even contestable. It is nearly 140 years since the British Royal Commission (described in chapter eight) briefly considered the system of author royalties proposed by Thomas Watts. Authors’ interests have rarely surfaced in subsequent discussion of copyright policy — it is the publishers whose voices have dominated the conventions and hearings and committee meetings where policy has been set. With their size and political heft, they have had the ear of policymakers for 300 years. Authors, by contrast, as though they were the children of publishers, have been seen but not heard.

There are other reasons to doubt the merits of incumbency. The longevity of a system might be proof of fitness but it could also be, simply, evidence of institutional inertia. The copyright system is particularly rule-bound and rigid, with national laws tied to international treaties that limit unilateral action. Reform is the work of decades and the thickets of the system are so arcane that only experts — lawyers — venture in. The lay public can have very little insight into how the system works or the outcomes for authors. They have to take it on trust.

These conditions — a one-sided power structure, opacity of outcomes, institutional inertia — are not markers for wide social acceptance. They do not suggest a system made robust by contest and accommodation. Rather, they suggest a system locked up and ringed around with defenses: a fortress not a city. On this evidence it would be unsafe to conclude that copyright’s longevity proves its fitness.
THE SECOND ARGUMENT for leaving copyright alone is that its outcomes are market outcomes, freely reached. This is an argument about industrial inevitability. If authors sign contracts that deliver poor money outcomes (the argument goes) then we should look to the other factors driving their decisions — the psychic income, the desire to push their work into the public sphere and the other sources of money income available to them. When we understand the calculations they are making we will view the market differently. Authors are not fools and we should not condescend to see them as victims of a system in which they are, in fact, competent participants.

Furthermore the content industries — books, movies, music — are very competitive. While publishers may dwarf individual authors in terms of scale and turnover, they have to compete with other publishers for the right to publish an author. If authors find they lack bargaining power, they can retain an agent to bargain on their behalf (or secure their own finance in the case of movies). They are not helpless. And if, over time, publishers and movie studios have built large businesses it is because they are efficient competitors who deliver value to the authors and filmmakers they serve. Their scale in turn has made them the natural entry point for investors seeking exposure to the content industries and the profits they earn are necessary to attract and hold these investors.

These are the arguments of history. They describe, accurately enough, how the relations between author and publisher, filmmaker and studio, have played out during the past century. As we saw in chapter seven, publishers have gained enormous scale in their operations while authors have stayed atomised — barely organised at all. The implication is that publishing by its nature scales up and authoring does not. One is industrial, the other artisanal. What we see in history is just the expression of their different economic destinies, with each side moving towards its natural place and scale through the undirected play of market forces.
The difficulty with these arguments is that they overreach. The long history of publishing does not run in a straight line to its present place. Market forces may have shaped the industry but other, larger forces have shaped the market itself. In chapter eight we saw how successive new media technologies have funneled content (movies, books, television) down narrow media channels (cinemas, retail shelf-space, the electromagnetic spectrum) to the audiences waiting at the other end. By controlling these channels the publishers have won control of the whole business, in much the same way that holding a mountain pass gives control of the valley beyond. Technology then has shifted the balance of power between author and publisher, increasing the asymmetry of the encounter. And it is not just technology. Copyright itself has been enlisted in the cause of the publishers. In particular, the construction of copyright as a long-lived monopoly right has given book publishers their ‘backlists’ and movie studios their ‘libraries’ — assets they have used to attract the investment capital that has funded their long run of growth.

In short, we cannot say that the outcomes we observe in the market — the industrial publisher towering over the artisanal author — are the inevitable result of market forces, freely played out. Rather they are artifacts of 18th century copyright policy and of 19th and 20th century media technologies, with nothing free or inevitable about them. A different policy (Thomas Watts’ royalty system) and different technology (the Internet) might yield very different outcomes.

**THERE IS A THIRD REASON** why we might think that, with copyright, society knows what it is about. It is an old reason, older than copyright, as old as writing itself — probably older. It is the fear that the pursuit of knowledge is dangerous.

In a very early iteration, it is the story of the Fall, how the serpent enticed the first woman, Eve, to ignore God’s warning about eating the fruit of
the forbidden tree, soothing her fears: ‘You will not certainly die,’ the serpent said to the woman. ‘For God knows that when you eat from it your eyes will be opened, and you will be like God, knowing good and evil.’ (Genesis 3:4) The woman eats from the tree and shares the fruit with her husband, Adam. Their eyes are opened. They realise they are naked and sew fig leaves to cover their nakedness. God then discovers their transgression and banishes them from the Garden of Eden. They and their descendants are condemned to mortality and hard labour.

There are many other versions of this story. In Greek mythology, the first woman on earth was Pandora. She was created in the forge of Hephaestus and given by Zeus to Epimetheus, along with a box (or jar) which the couple were instructed never to open. One day when Epimetheus was away Pandora, overcome by curiosity, opened the box and unwittingly released evil into the world. Curiosity brings us undone.

In other stories, it is not just curiosity but the reckless disregard of limits that brings disaster. In the Faust legend, a rogue scholar makes a pact with the Devil who promises unlimited knowledge. Eternal damnation is the price. There have been many versions of this story. In some accounts, the Faust figure was identified with Johann Fust, who was Gutenberg’s financial backer in his development of the printing press. Christopher Marlowe wrote a play based on the story, The Tragical History of the Life and Death of Dr Faustus, based on the German tradition and first performed around 1594. Probably the most famous version of the story is Goethe’s Faust, published in 1808. In this account the Devil (as Mephistopheles) undertakes to serve the scholar until he reaches a pinnacle of happiness, at which moment his soul will be forfeit. The deal is set and the moment in due course arrives but Goethe rewrites the ending and Faust’s soul is saved by God’s grace, in recognition of his striving. Thomas Mann, by contrast, was less forgiving. In his version of the tale, published in 1947, Faustus is a German composer, Adrian
Leverkühn, who willfully contracts syphilis in order to intensify his genius. In a crucial passage, the Devil appears to Leverkühn and promises him 24 years — but he must renounce love. Leverkühn agrees and begins a period of extraordinary creativity. Later, however, he violates the contract by loving his young nephew, Nepomuk. The child dies and Leverkühn descends into a neuro-syphilitic madness reminiscent of philosopher Friedrich Nietzsche’s final years.153

The Faust story pins the sins of curiosity and pride squarely on the scholar/author. Scholars want to know about the world and will accept no limit on the search; authors want to express what they know and will accept no limit on their expression. It is the demand for no limits that damns Faust and all his kind, and itdamns them not just biblically but socially. By demanding no limits they place themselves beyond the pale.

Perhaps the most resonant modern iteration of the story is Frankenstein, Mary Shelley’s 1818 novel about a scientist, Victor Frankenstein, who creates a living creature in an experiment that goes horribly wrong. The story quickly captured the popular imagination. Horror writer Stephen King (1981) has described it as a Shakespearean tragedy and its monster as the archetypal ‘Thing Without A Name’. Here is how Shelley herself described the origin of the story in the introduction to a new edition of the novel published in 1831:

‘When I placed my head on my pillow I did not sleep, nor could I be said to think. My imagination, unbidden, possessed and guided me… I saw — with shut eyes, but acute mental vision — I saw the pale student of unhallowed arts kneeling beside the thing he had put together. I saw the hideous phantasm of a man stretched out, and then, on the working of some powerful engine, show signs of life and stir with an uneasy, half-vital motion. Frightful must it be, for supremely frightful would be the effect of any human endeavour to mock the stupendous mechanism of the Creator of the world. His success would terrify the artist; he would rush
away from his odious handywork, horror-stricken. He would hope that, left to itself, the slight spark of life which he had communicated would fade; that this thing, which had received such imperfect animation, would subside into dead matter; and he might sleep in the belief that the silence of the grave would quench for ever the transient existence of the hideous corpse which he had looked upon as the cradle of life. He sleeps; but he is awakened; he opens his eyes; behold the horrid thing stands at his bedside, opening his curtains, and looking on him with yellow, watery, but speculative eyes.’ (Shelley 1999 [1831])

Beneath the lurid melodrama of the story is a substrate of disquiet. Shelley taps into fears about tampering with the unknown and mixing that which is alive with that which is dead. It is perhaps no accident that Frankenstein and his monster have been conflated in the public imagination, for the creator’s hubris turns him into a moral monster and social outcast, haunted and eventually hunted by his grotesque creation.

The idea of open knowledge and inquiry is a modern one. Earlier cultures recognised the necessity of limits and marked off certain areas as taboo or sacred or not to be spoken of. American literary scholar Roger Shattuck noted that ‘proverbs in every language tell us that it is possible to know too much for our own good’ (Shattuck 1996, p1). But science and art have thrown off such constraints:

‘Today, relying on principles of experiment, pure research, free speech, artistic license, and academic freedom, science and art can affirm a measure of independence from limitations on ordinary behavior. In extreme instances, each has claimed to be a no-fault activity occupying a morally tax-free zone… Our passwords today are experiment, originality, and even subversion as embodied in our two established — and sometimes rogue — institutions of science and art.’ (Shattuck, p310)

Freed from the ‘limitations on ordinary behavior’ the author/scientist stumbles forward. But who grants this license? And how may it be
regulated? There is a conundrum here that society cannot solve but must carry forward as a permanently unresolved tension between caution and creation, stasis and innovation. They are warring principles: politically, intellectually, socially, emotionally. We want the new but we fear it too and the fear is deep and atavistic. It is the fear of the serpent, the opened box, the Thing Without A Name. We fear unleashing what we cannot control. And we fear the reckless creator.

From fear it is a short step to anger and from anger to resentment. Thus we arrive at the curious ambivalence that society harbors towards creation, welcoming, even eager for the fruits but suspicious of their source and prepared to believe the worst.

Perhaps the most ready expression of this ambivalence is the desire to censor. Society has long exercised the power to decide which works and which parts of works may enter the public domain. Works that are blasphemous, immoral, seditious or transgressive may be refused or redacted. The censoring hand may be heavy or light. In the extreme case books may be burned; book-burning has a long history going back at least as far as the destruction ordered by China’s grand councillor Li Szu in 213 BC (Fishburn 2008, p2).154 A French publisher reportedly went so far as to produce a fireproof edition of the works of Voltaire (Fishburn, p13). Marlowe’s Doctor Faustus at the very end offers to burn his own books to fend off Lucifer. The offer is not accepted.

An alternative is to restrict the circulation of works. Thus only certain kinds of audience are permitted: the cognoscenti, the initiates, those with special understanding or the ‘patience’ necessary in the ‘exercise of curiosity’ (Shattuck, p313). The ordinary reader is shut out.155 In the previous chapter we saw that Krushchev’s assistant Lebedev had a private library of banned books and gave Solzhenitsyn instructions on how to tone down One Day in the Life of Ivan Denisovitch to an acceptable pitch; it was safe for Lebedev to collect and study works that ordinary citizens
could not be trusted with. But control of this sort is becoming difficult to sustain in face of the open diffusion enabled by the internet. Banned works bob up in accessible places. The machinery of censorship is breaking down.

Censorship in any event arrives on the scene after the horse — the author — has bolted. A better alternative surely would be one that arrived earlier on the scene and interrupted the author in the act of authoring. Or better still one that arrived even before the act and interrupted not its performance but its feasibility. Imagine then an intervention that made authors pause before they had got very far in their work and wonder how they could continue; that eroded their creative confidence through continuous negative feedback about the economic value of their work\textsuperscript{156}, that turned away potential backers by projecting an investment history of high risk and low returns; and then steered authors in search of support towards patronage institutions whose aims were aligned with or even decided by the state.

This describes of course the copyright system.

Here it is worth recalling that the state’s original interest in copyright lay in the scope it offered — ‘a suitable remedy’ — for the control of dissent. The Stationers Company got its monopoly but the \textit{quid pro quo} was the enlistment of the stationers in the suppression of ‘divers scandalous malicious schismatical and heretical persons’, to quote from the Company’s original charter granted by Queen Mary in 1557. Of course this purpose has long since given way to one based in the construction of property rights and even the enabling of speech. But we do not need to imagine a sinister continuance of the old policy. All we need imagine is that society is comfortable with the system’s outcomes, including its slowing down of the author’s impulse, its check on investment and its corralling of authors around the patronage institutions. All we need imagine is that society knows what it is about.
In short, it is open to us to view the economic outcomes of the copyright system as serving an unstated but continuing public interest in constraining the work of authors. It is not a conspiracy, there is no cabal of ministers meeting to administer the policy, just a steady social acceptance of a set of economic outcomes that has this consequence.

**COPYRIGHT AS A BRAKE** as well as an incentive is an idea that stretches the understanding yet fits the facts. Society holds out an incentive to authors but views with equanimity the failure of nearly all those who respond to it — like suitors in a fairy tale slain by the dragon. There is no contradiction once we register society’s ambivalence about the author/scholar/knowledge seeker. We want them to make the attempt but we don’t want to make it too easy. In fact we want to make it hard. Then having made it hard, we propose to reward, liberally, those few who succeed. They may kiss the princess and live happily ever after.

And if the ambivalence starts from fear of what the author/scholar/seeker may unleash, it soon finds other grounds. Someone will complain that the author’s hands are too soft (they do no real work); that anyone could do that (the work is trivial); that the author is a liar, a fabulist (and cannot be trusted); the author is immoral (does not respect boundaries); a corrupter of youth (who will lead them away from the proper paths); or lives in an ivory tower (does not live among us). The grounds multiply as we discover our distance from the author. Even when we revere them, we soon uncover their difference — they are ‘mad, bad and dangerous to know’, as the disgraced Lady Caroline Lamb said of the poet Lord Byron, her lover.¹⁵⁷

Here we reach a line in the sand. If we fear the consequences of open inquiry and what Shattuck called its modern passwords — experiment, originality, subversion — then it makes sense to leave copyright as it is, not repair it. On this view copyright, whether intentionally or not, serves
the public interest by inducing creative effort but only rarely rewarding it. Authors are encouraged to ‘try out’ but not to continue unless their work meets with extraordinary success. In effect, they are induced to submit to a winnowing machine that strips their numbers down to some small fraction of those who started. A further unknown number are deterred from starting altogether. Socially the benefit is the opportunity to view the try-outs but reward only exceptional performance. Publishers of course are not subjected to the same winnowing; they are privileged by their early access to revenue streams.

This is a viable line of argument. Just as society offers a particular system of incentives and rewards to teachers, doctors and plumbers, so too it offers authors the copyright system, which they are free to engage with or not. But there is a corollary — a necessary consequential adjustment in our understanding of the creative act. For if we choose to persist with copyright as it is, then we must understand what it means to treat the creative act in this way. We have to recognise just how cautious and ambivalent we are about experiment, originality and subversion. We need to let go of the idea that the creative act is central to our culture and accept the truth that we have pushed it to the margin. And we would have to reconcile our commitment to intellectual freedom with the fact of our subjection of authors to the necessity of patronage. Franklin Delano Roosevelt said, ‘Necessitous men are not free men,’ and the same is true of authorship.158

The consequential truth is that authors and authorship inhabit a much darker place in social reckoning than society acknowledges; the facts of copyright are the proof.

**THERE IS A MORAL ANGLE** to the argument. What are we to make of a public incentive that induces people to undertake a high-risk activity leading commonly to poverty? In *Strings Attached: untangling the ethics*
of incentives (2012), American philosopher and political scientist Ruth W Grant suggests that in contemporary usage the word incentive has come to mean ‘a factor involved in the rational calculation of one’s interests’ (p32). The implication is that the person responding to an incentive is informed and rational in their response and therefore the person offering the incentive is absolved of responsibility for the outcome. Grant notes ‘the effect of this language of incentives is to render ethical problems less visible’ (p38).

Yet in the case of copyright we have seen that authors may be quite mistaken about their prospects, either failing to understand the very poor odds of success (the ‘reckless gamble’ described in chapter five) or overestimating their personal prospects (‘confident gamble’). This is a particular risk for authors early in their careers, before experience has tempered their expectations. What makes these mistakes so easy to make is the opacity of the copyright system. There is very little public disclosure of outcomes. The little that is known is only rarely and unwillingly revealed — through threatened or actual court cases like writer Winston Groom’s suit against Paramount over the missing profits of Forrest Gump (discussed in chapter four) or outbursts like musician Courtney Love’s famous diatribe against the record companies, ‘Courtney Love does the math’ (2000). Meanwhile the movie studios and record companies pump the myths of stardom, of eye-popping wealth and overnight success. No wonder authors mistake the odds.

Grant explores cases where people offered incentives are exposed to consequent risks. She cites the Belmont Report published in 1979 by the US National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The Report set a binding standard for medical research using human subjects, based on ‘beneficence, respect for persons, and justice’ (Grant, p89). These principles imply that risks to participants should be minimised and are only acceptable if the
benefits of the research are proportionate: ‘If the risks are unreasonable, it would be unethical to ask anyone to take them, regardless of whether they are asked to volunteer or offered wages or incentives’ (p91). Further, there must be informed consent: ‘individuals who are asked to participate in research are given relevant information about the research, in a manner they can understand, before they authorise their participation.’ (p89) Finally, the principle of justice requires that subjects be protected from exploitation: ‘Incentives are simply inappropriate if a person is unable to weigh and evaluate them,’ (p97). Plainly, the copyright system does not meet this standard.

Of course there are authors who plunge ahead regardless of the odds, who write from an inner compulsion or pursue a subject obsessively. They are unlikely to be put off by disclosure of copyright’s outcomes. But others might be deterred. They might weigh the disclosed risks of authoring against other possibilities available to them and choose a different path. Still others might continue as authors but with a different strategy; they might leave after a time or join their authoring to another, supplementary profession. Almost certainly, if the risks were disclosed, a large proportion would review their position and make changes that might reduce their exposure to the risks of authoring and copyright. They would become more like the informed and rational agents assumed by theories of incentives.

The question is, what form of disclosure? We have seen just how difficult it can be to decipher the cashflows of copyright assets. What is needed is a simple measure that anyone can understand, without having to be coached in the accounting practices of the publishers. It should show the author’s share of the cashflows from their copyrights relative to the publisher’s share. And the disclosure should be public, not just for the benefit of the author concerned but for all authors, actual and prospective.
The specific form of the disclosure might be: 1. A money amount representing the author’s projected share of the sale price of the unit of consumption of a work — thus a book, cinema admission or download; 2. Posted or embedded with the sale information — the back cover of the book, the cinema ticket or the download transaction page; 3. Linked to an explanatory note on the publisher’s website or other accessible location giving details of the method of calculation of the projected share; and 4. Required by legislation. For example, the publisher of a book with a retail price of $20 and a wholesale price of $12 paying an author royalty of 15 percent of wholesale would be required to post on the back cover of the book a statement that the author’s share of the sale price was $1.80. Where the amount to be paid to the author is contingent on overall sales or other contingent factors, the posted share should be a ‘best estimate’ based on the revenues projected at the time the project was approved by the publisher and should be updated in light of actual revenues as and when the opportunity arises.

We may imagine that publishers would find this requirement onerous; however, the process of approving a book or movie project almost invariably involves the creation of a financial model that is used to generate projections of revenues, income, costs and profit, and it should be perfectly feasible to generate estimates of the author’s share using the same model.

Disclosing the author’s share in this way over time would create a cumulative body of data about the performance of the copyright system and would be a step towards the splitting of authors’ and publishers’ rights proposed in chapter eight. Authors would be better informed, so would readers — and so would policymakers.

**IN CONCLUSION,** the copyright system harbors a great division. Its poor returns pose a direct challenge to the great project of human
knowledge creation, but the fact that society has ignored those poor returns for so long poses an even deeper challenge. For it calls into question our actual commitment to the great project.

We have seen data for films made in Australia, the United Kingdom, New Zealand and the United States. It is the same story in each place. Neither size nor ‘commerciality’ nor proximity to the centre (Hollywood) makes any difference. At the copyright level, where the filmmaker works, there can be no realistic expectation except of losses. Copyright is a poverty trap for filmmakers. Kretschmer and Hardwick (2007), who assembled data for 25,000 German and British authors, drew much the same conclusion. They wrote: ‘After this study, copyright policy cannot remain the same.’

And yet it has. Nothing has changed in 300 years. An 18th century London bookseller miraculously transported to the 21st century would know exactly what to do.

It is possible that the inaction of 300 years is an unacknowledged social choice that reflects the dark view of authors and authorship described in this chapter. In that case the reforms advanced in this thesis and before me by Plant, Macfie and Watts may be safely ignored — all except one, the need to better disclose copyright’s outcomes so that authors know what they are getting into.

Alternatively, we may conclude that the reason why there has been no action is that copyright was long ago captured by the publishers and has been shaped ever since to serve their interests. In that case, reform is viable and should be attempted. For unquestionably, reform would serve the cause of open inquiry and free speech — causes the West has championed for even longer than it has championed copyright.

There is more at stake here than authors’ incomes. Our commitment to the viability of authorship measures our support for the ‘progress of
science and useful arts’. It is a test of our belief in the great project of knowledge creation.
12: Conclusion

[We must give up] the ideology of copyright = control = money. The new equation must be simply copyright = compensation.
— William Patry (2012)

The incentive mechanism on which we depend for the production of films, books and other creative works is broken. Fundamentally, the mechanism does not adequately reward authors for the risks they take — the risks are much greater than the rewards — and for most authors the rewards fall well short of viability. The mismatch means there is actually a disincentive for authors who need to make a living from their work. Publishers have bent the mechanism out of shape by leaning on it for their own benefit.

Although many people assume that authors have the same interests as publishers, they do not: their interests lie in different directions. Publishers want exclusive monopoly rights in the works they publish and over many years have persuaded policymakers to shape copyright in this way. Authors want to be recognised for the work they do and many also need to make a living from it. Exclusivity for them is unnecessary, a sledgehammer to crack a nut. What they need is a right of remuneration. Policymakers seem not to have noticed the problem.

The consequences of this policy failure go beyond questions of fairness to authors. They ripple across the whole sphere of intellectual endeavor — everywhere that people give expression to ideas and strive to do so in a coherent way over time, whether in words, film or music. For all of these people the failure of copyright introduces questions of viability and sustainability. For some — an unknown number — it presents an absolute barrier to expression. If they cannot earn a reasonable return from the work then they cannot keep going with it. For others it means the work must somehow be subsidised, whether by taking a ‘day job’, by transfers
from ‘Family, Friends and Fools’, by enlisting a private patron or by becoming eligible for public subsidy. All of these pathways involve delay and compromise: the prospect of the work recedes.

Among those turned away by copyright’s poor returns, we may imagine, are many potential authors from the third world and the margins of the first world. But these are conjectural authors: an absence not a presence. It is no accident that so much of the world’s creative expression comes from the fortunate elite of the first world, with ‘a room of [their] own and 500 a year’ (Woolf 1928). Also turned away are those authors whose work, because of its subject matter, requires some measure of independence. These are our truth-tellers, dissidents, breakaways and originals. Unable to make a living from the work, their capacity for independence is compromised by their need for financial assistance. Even without those pressures, the grind of poverty may wear away their resolve. It is a striking coincidence that copyright’s original purpose — a grant of monopoly to London’s booksellers in return for suppressing seditious authors — finds a modern echo in its de facto discouragement of independence.

This turning away of whole classes of author means that copyright is not merely a piece of background machinery grinding away in the market for intellectual works — it is an active, shaping principle.

Is this what policymakers intended? What saves us from that unhappy conclusion is the readier, more probable explanation: that copyright’s outcomes are a 300-year-old policy accident brought about by the inveigling of London’s booksellers and compounded over time by their successors. On this view the poor returns to authors are a reversible policy failure not a natural market outcome and it is open to us to reform the copyright system in such a way as to make authorship a viable venture, at least in principle — a venture capable of growth and profits through talent and ordinary exertion rather than extraordinary luck.
The benefit would be a society where dissent and open inquiry were feasible independent pursuits open to authors everywhere.
Epilogue: Shakespeare’s fortune

William Shakespeare was a practical man with a head for business. Not for him the drinking and dangerous living of Christopher Marlowe and his fellow ‘university wits’. At 30, unlettered, he became a ‘sharer’ in the Lord Chamberlain’s Men, a new company formed in 1594 under the patronage of Henry Carey, the Lord Chamberlain. During the next 10 years the young playwright and actor helped build it into one of the great theatrical companies, with a permanent troupe of actors, a bookkeeper, wardrobe-keeper, musicians, carpenters, stagehands and ‘gatherers’ to collect the money. Shakespeare and his partners were tough-minded entrepreneurs who took their chances as they found them. In 1598 they responded to an impasse in their negotiations with the landlord of the Theatre, their main performing venue, by turning up one morning with a gang of armed men, dismantling the building, ferrying the timbers across the Thames and constructing a new theatre on the south side of the river. The new theatre was the Globe. It could hold 3,000 and Shakespeare became a ‘housekeeper’ in it, owner of a 10 percent share. It was a very successful venture that made the partners wealthy men. Ten years later they leased a second theatre, Blackfriars, within the walls of the city. It was a venture almost as bold as the Globe, since Blackfriars was a much smaller theatre and required much higher admission prices — sixpence for a seat in the gallery compared to a penny at the Globe. The King’s Men (as by then they had become) changed the whole idea of theatre, transforming it from a low-life entertainment to a high-brow one. In the process they lifted themselves from the status of vagabonds, ‘masterless men’, to gentlemen, entitled to wear the King’s red livery and to display a coat of arms. Shakespeare’s punning heraldry, a falcon ‘shaking’ its wings and holding a spear, bore the motto ‘Non sainz droict’ — not without right.
Throughout his London career Shakespeare invested his profits away from their source. Stratford real estate was the mainstay of his wealth. With his share of the profits from the Globe he bought New Place, a 10 room dwelling called the ‘great house’ by the people of Stratford, where he set up his family while he continued to lodge and work in London. Over time he bought adjacent properties, demolished a cottage, and enlarged the gardens of the Stratford estate. He also bought farming land and invested a substantial sum in ‘tithes’ of corn, grain, wool and lamb.161

From the moment we catch sight of him in the Tudor hurly-burly Shakespeare comes across as a shrewd, pragmatic player. He makes good choices about the people he works with. His investments, though Stratford-skewed, are all cannily made. Over a long career he avoids the many risks of the theatrical scene — risks that brought down many of his contemporaries, gaoling and impoverishing and even killing them. He navigates with equal ease the seething politics of Queen Elizabeth’s court and the cutthroat alleys of the south bank, where he lived. Shakespeare passes through it all unscathed.162

William Shakespeare is an antidote to the poisonous myth of the incompetent author, head in a cloud, hopeless at business. We need an antidote because the myth is an obstacle to copyright reform, perhaps the major obstacle. For if it were true that authors were congenitally unbusinesslike — essentially children — then there would always be a need for publishers willing to conduct the business on their behalf. The publishers, being grown-up and businesslike, will naturally require the security of an exclusive interest… And so we are returned to the place we started from, a monopoly copyright that rewards publishers primarily and authors secondarily.

The idea that authors are incompetent at business descends from the Romantic conception of the author as someone driven by inner passions
to pursue their work regardless of worldly concerns. It was reinforced by
the tradition of the gentleman author, who wrote for fame or love of truth
but certainly not for money. Business was dirty, mean, undignified, the
very opposite of Art; to write for money was contemptible. We have seen
how the idea flowered in modern estimation, for example in Keynes’
characterization of the artist as ‘free, undisciplined, unregimented,
uncontrolled’ (Skidelsky 2000, p294). The description may seem a little
quaint but such ideas are alive and well on the internet where
‘information wants to be free’ and it is widely assumed that authors may
be asked to work for nothing, without embarrassment to either side.¹⁶³

But not William Shakespeare.

Together with George Bryan, Richard Burbage, John Heminges, Will
Kempe, Augustine Phillips, Thomas Pope and Will Sly, Shakespeare
founded a company that rewrote the meaning and the possibilities of
theatre. In doing so the partners did not neglect to make money; they were
disciplined, focused and hard-working. They built a profitable business
that ran for nearly 50 years — and only came to an end, in 1642, when the
Puritans closed down London’s theatres. The company was the
entrepreneurial site of Shakespeare’s work; he wrote for it exclusively. Of
the original founders, five including Shakespeare became owners of the
Globe by funding its construction (along with Burbage’s brother Cuthbert
and Henry Condell, who bought out George Bryan). The same tight group
later became owners of the upmarket Blackfriars, an indoor theatre whose
acquisition meant the company could perform year-round (the Globe was
open to the weather). After Shakespeare’s death, it was Condell and
Heminges who assembled the First Folio of his work, published in 1623.

Andrew Gurr has called the company ‘the only effective democracy of its
time in totalitarian England’ (Gurr 2004, pxiii). Certainly it was a
company of equals in a time of radical inequality. Shakespeare and his
partners adopted what was then a very unusual business model. Instead of
separate ownership of company and theatre, they brought the two together. Today we would say the company was ‘vertically integrated’. There was no corporate hierarchy — the founders were a partnership and held the Globe as a ‘tenancy in common’. The tenancy structure was designed to prevent dispersal of the shares in the theatre: the partners very deliberately set about constructing a stable, long-run vehicle for their common enterprise. 164

A telling point of reference is the Admiral’s Men, a rival theatre company active in the same period as the Chamberlain’s Men. The Admiral’s Men performed at the Rose and later the Fortune theatre but the players were never owners. Rather they entered into a business relationship with Philip Henslowe, an impresario who owned the Rose and had an interest in the Fortune. Henslowe became their banker as well as their landlord. His business dealings in the form of a diary have come down to posterity and the story they relate is instructive. Together with his son-in-law Edward Alleyn, Henslowe exerted considerable control over the company. Bart van Es reports that the two ‘made decisions about the acceptance of texts, took directly for themselves a half-share of performance revenue, had hired actors under contract, took effective possession of theatrical stock (meaning both apparel and playbooks), and even made decisions on the physical movement of [the company]’ (Van Es 2013, p46). Financially, these arrangements very much favoured the two impresarios over the players: Henslowe and Alleyn died immensely wealthy; the players did not and the company eventually collapsed. 165

Shakespeare had a very different experience to that of his peers among the Admiral’s Men. Not only did his stake in the Chamberlain’s Men enrich him — it also enabled his art. It brought him every day to a place where he could practice the craft of playwriting. It placed him in a circle of peers whose interactions shed a continuous critical light on his practice. It gave him an ensemble of actors to work and invent with,
including three of the most celebrated actors of the period, Richard Burbage, Will Kempe and later Robert Armin. And it delivered him an audience whose feedback measured both the errors and perfections of his work. Van Es writes (p111):

‘The company — its sharers, its hired men, and its apprenticed boy players taking women’s and children’s parts — were the matrix though which he could structure his thinking. Having a literary playwright at the centre of commissioning, casting, rehearsing, and performing plays was transformative. The formation of the Chamberlain’s Men thus inaugurated a mode of production that was unprecedented and would rarely if ever be repeated on the English stage.’

The company also made Shakespeare independent. In the period immediately before he joined the company, with the theatres closed because of plague, Shakespeare published two books of poetry, *Venus and Adonis* in 1593 and *The Rape of Lucrece* in 1594. According to Stephen Greenblatt, they were an attempt to find a patron, ‘probably for the first and only time in his career’ (p241). Writing for the company and becoming a sharer opened up a different path for Shakespeare, free of patronage and free of the conventions that went with writing for a patron. Shakespeare took and used this freedom. His exploration of psychological complexity in the characters he created — what Greenblatt (p323) calls his ‘intense representation of inwardness’ — was the fruit of this independence. Few other playwrights had the same scope for innovation or the opportunity to revise their work over as long a period as Shakespeare did with *Hamlet* and *Lear*. Van Es again: ‘Not only [as a sharer] did he now play a determining role in first performance, his plays would take a permanent and central place in the company’s repertory and would remain alive to him over the decades.’ (p110)

It was this Shakespeare, renting a room in a house in Cripplegate, working at an outdoor theatre next door to a bear-baiting arena, helping
build a company that became home to three generations of English actors and writers\textsuperscript{166} — it was this man who ‘wrote Shakespeare’. To see him ‘seated’, as the Romantic writer Samuel Taylor Coleridge described (1817), ‘on one of the two glory-smitten summits of the poetic mountain’, while it does him honour, does not do him justice. He was not separate from his time or circumstances but distinctly of them. He was the son of a glover who made good, a poet, a playwright and a businessman, brilliant at all three.

Four hundred years later, there are lessons for writers and filmmakers and for policymakers. One is that there is no fundamental conflict between art and business: they are not oil and water; it is possible to pursue both at the same time without compromising either. The second lesson is that authors have much to gain through working with others, collaboratively. The idea that they should work alone denies them the creative possibilities of interaction and the breakthroughs that can sometimes be achieved within the dynamics of a group working together over time. The third lesson is that a creative enterprise in direct contact with its audience is a powerful economic force, a virtuous loop. Getting between author and audience is the business model of the middlemen; keeping them out was what made the King’s Men rich.

Shakespeare is thus a vision of the possibilities of authorship. He shows us what an author was before authorship was atomised by copyright and infantilised by the Romantics. He is the beacon we should now steer towards.
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American playwright Robert Anderson made a killing with his play *Tea and Sympathy* (1953) but found it a hard act to follow (Bergan 2009).

The argument is carried on in many places. See for example Deazley, Kretschmer, & Bently (2010).

For the policy view see for example the website of the US Copyright Office: ‘Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression.’ Or of the Australian Attorney General’s Department: ‘Copyright is a type of property that is founded on a person's creative skill and labour.’ For the origins of copyright as a publisher’s right see Patterson (1968, p8).

Moral rights originated in France and Germany and remain more a European tradition than an English-speaking one. The Berne Convention provides: ‘Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.’

Boldrin and Levine have argued (2002) that the ‘first sale’ of a creative work could be sufficient to compensate the creator without any ‘downstream protection’ ie without copyright. In a subsequent book (2008) they cite the *9-11 Commission Report* as a natural experiment confirming their ‘first sale’ conjecture. They report that the publisher, W. W. Norton, was able to make a profit despite having only a two-week window ahead of a competing edition from St Martin’s and a competing, free-download edition.

Pokorny and Sedgwick (2010) report that the profitability of Hollywood movies has been rising since the 1990s. However, media companies themselves may not be faring so well. Knee, Greenwald & Sieve (2009, p7) report: ‘The shocking, evident, persistent and oddly ignored fact is that the financial returns of media companies significantly and relentlessly fall below those of the stock market as a whole… For all the excitement, glamour, drama and publicity releases they produce, why can’t these companies manage to come close to delivering the kind of returns available from closing your eyes and throwing a dart?’ Their answer: ‘the curse of the mogul’.

Mike Fleming, a reporter for Deadline.com, published a 2007 distribution report for *Harry Potter and the Order of the Phoenix* where the movie, despite grossing US$938 million worldwide, was said to be still US$167 million in the red. Fleming quoted a dealmaker who said: ‘If this is the fair definition of net profits, why do we continue to pretend and go through this charade? Judging by this, no movie is ever, ever going to go to pay off on net participants. It’s an illusion to make writers and lower-level actors and filmmakers feel they have a stake in the game.’ (Fleming 2010)

Johnson wrote to Chesterfield: ‘Is not a patron, my lord, one who looks with unconcern on a man struggling for life in the water, and when he has reached ground, encumbers him with help? The notice which you have been pleased to take of my labours, had it been early, had been kind: but it has been delayed till I am indifferent and cannot enjoy it; till I am solitary and cannot impart it; till I am known and do not want it.’ (quoted in Bate 1977)

The Writers Guild of America West reports that it registered 70,000 new ‘items’ in 2011, while the WGA East reports 10,000. I have assumed that half of these registered items are screenplays. (See discussion in chapter five.) The Motion Picture Association of America (a trade organization representing the major studios) estimates that 754 films were made by US production companies in 2010 (734 in 2009, 759 in 2008). This was made up of 98 films produced by MPAA members and their subsidiaries, 233 films...
made by non-members with budgets above US$1 million and 419 made by non-members with budgets below US$1 million. (MPAAb 2011)

Plant was not the first to propose this reform. He drew on Robert Macfie, who advocated just such a system before the British Royal Commission on Copyright of 1876-78. Macfie himself cited Thomas Watts, Keeper of Printed Books at the British Museum, who proposed a similar royalty scheme in the *Mechanics’ Magazine* in 1837. Watts’ scheme is discussed at length in chapter eight.

The story of the rebirth of the Australian industry has been told in several texts. I have relied particularly on Graham Shirley’s and Brian Adams’ *Australian cinema: the first eighty years*, Elizabeth Jacka’s and Susan Dermody’s *The screening of Australia: anatomy of a film industry*, Vol 1 and their later edited volume, *The imaginary industry: Australian film in the late 80’s*. Shirley and Adams date the rebirth from 1965.

In 1962 an inquiry into the six-year-old television industry, led by Senator Victor Vincent, noted the ‘melancholy spectacle’ of the rise and fall of the Australian film industry and rejected the idea that filmmaking was ‘best left to those countries (meaning the United States) who can do it better than we can’. Vincent’s committee recommended government loans for film producers, tax concessions for investors, a climate of support. The Menzies government never responded.

‘The Report, together with the Minutes of Evidence, constitute the most thorough description and analysis of the structure of the Australian film and television industry ever undertaken.’ Dermody & Jacka (1987, p56).

This was the so-called Division 10B incentive, legislated in 1979, an accelerated capital depreciation schedule that allowed investors in Australian films and certain other assets to write off their investments over two years instead of the 25 years that would otherwise have applied.

For an investor in the top tax bracket, the effect of the concessions was to reduce their risk in a film investment to just 10 cents in the dollar.

The best way to see the effect of these changes is in the investment market’s response. Market intermediaries quoted a ‘presale benchmark’ to producers; this was the level of income required to give investors accounting break-even. The idea was to presell the film rights to this level, so that investors had the comfort of break-even but still the possibility of ‘blue sky’. At 150/50, the presale benchmark was just 10 percent, that is, 10 percent of the production cost of the film — a hurdle so low it was hardly worth jumping. At 133/33, the benchmark went to 20 percent. At 120/20, it went to 40 percent and then to 60 percent (because, in a separate move, the top marginal tax rate was reduced from 60 to 48 cents in the dollar). At 60 percent, the industry struggled.

These fears had some foundation. Other tax schemes then being promoted to Australian investors were used to fund US-originated movies like *Arthur* and *Superman III*. These were highly leveraged schemes where investors were characterised as partners of the producers.

The idea was floated in a lengthy discussion paper, *Film Assistance: Future Options*, published by Allen & Unwin in 1986. I was the author of the paper in my then capacity as policy adviser to the Australian Film Commission.

In almost every case the offset is contributed to the financing of the films it rewards. The benefit to the producer arises from the equity interest thus created, which devolves upon the producer unless negotiated away.

American economist Arthur De Vany (2004) calls this an uninformative information cascade: ‘It is a cascade because it is a sequential choice process in which early choices condition the subsequent choices… uninformative because the individuals do not
exchange their private information about the quality of the film; the only signals observed are the choices of the previous moviegoers.’ (p124)


22 Celluloid prints are being made obsolete by digital projection but there will still be a cost, as distributors are subsidising exhibitors’ switchover to digital through payment of ‘virtual print fees’. Like celluloid prints, these will be charged to the owners and creators of the movies passing through the distribution system.

23 Of course the order of recoupment is a matter for negotiation and so may vary from film to film. As we will see, the FFC required that fees deferred by producers or others be recouped in last position, after it had recouped its equity investment.


25 The skewness means the distribution of returns is not a ‘normal distribution’ — the familiar bell-shaped curve that describes the distribution of heights in a random sample of people and much else in nature. Instead we have a right-skewed distribution, where the mean (average) is greater than the median (the mid-point of the range). Thus the average rate of recoupment for the FFC was 27 percent (in the absence of the underlying recoupment figures it is not possible to calculate the average recoupment, only the average rate of recoupment) but the median was only 10 percent and the mode (the most frequently occurring value) was zero. These figures confirm De Vany’s prince-and-pauper characterisation of the business.

26 I thank George Raftopoulos, who compiled and graphed the ASX data for this comparison from the ASX 200 index. Company returns have been calculated for a five-year period and include share price movements and dividends paid across the period. The selection of a five-year period is consistent with the economic life of a film investment (including the period of production): most films exhaust their potential within a few years of release.

27 There may have been cases where the FFC had a ‘corridor’ to the early returns from a film, giving it a share in the gross rentals from ‘first dollar’. In such cases the FFC would have been in receipt of funds before the distributor was fully recouped. In other cases, distribution rights may have been shared between two or more distributors, so that returns were not cross-collateralised. In those cases, returns may have flowed to the FFC from one territory despite distribution losses in another.

28 Daniel Kahneman (2011) among others has critiqued the idea of the ‘hot hand’, arguing (in the case of professional basketball) ‘there is no such thing as a hot hand… either in shooting from the field or scoring from the foul line. Of course, some players are more accurate than others, but the sequence of successes and missed shots satisfies all tests of randomness. The hot hand is entirely in the eye of the beholders, who are consistently too quick to perceive order and causality in randomness.’ (p116-117) But the very perception of success can be enough to heat up performance: success breeds success. Certainly the producer of this year’s box office champ can take her pick of next year’s screenplays.

29 There were, however, cases where the FFC required or accepted ‘deferrals’ by the filmmakers. 24 of the 158 films were financed in part through deferrals (ranging from 1 to 32 percent of the film’s budget). In such cases the filmmaker became in effect a low-ranked investor, contributing not cash but their budgeted fee and recovering it only if and after the FFC itself recouped its investment.
See for example comments by Antony I Ginnane, then President of the Screen Producers Association of Australia: ‘We cannot simply expect $100 million worth of support a year to be handed over by government if our share of the theatrical box office remains at an appallingly low 2 to 3 percent.’ Sydney Morning Herald, 12 November 2008. http://www.smh.com.au/news/entertainment/film/aussie-films-nobody-goes-to-see-them/2008/11/12/1226318729492.html

There is no available breakdown of the sources of private equity. They were probably mostly private individuals such as the group of private investors recruited by producer Ted Albert for Strictly Ballroom. The figures possibly include equity investments by film distributors but this would have been unusual, since distributors usually invest in independent films by way of advances (which are preferentially recouped) rather than equity funds (which are recouped last).

All five figure in the top 100 Australian feature films of all time, ranked by total reported gross Australian box office (as at March 2011). Babe at #3 with $36.8 million box office, Moulin Rouge at #5 with $27.7 million, The Dish at #8 with $18 million, The Piano at #18 with $11.2 million and The Castle at #23 with $10.3 million. <http://www.screenaustralia.gov.au/research/statistics/mrboxaust.asp>.

See for example the chairman’s letter transmitting the FFC’s final, 2007/08 annual report, which confirms the organisation’s pride, at the end of 20 years, in ‘the many memorable film, television and documentaries we have invested in. Projects that have enriched the lives of Australians, as well as showcasing our rich and diversified creative talents to the world’. This was an organisation pursuing multiple goals beyond mere commerce. <http://www.screenaustralia.gov.au/ffc/annual/FFC_07_08.pdf>.

To model this doubled hit rate, I have assumed an additional nine profitable film investments exactly mirroring the performance of the original nine hits.

Both Napoleon and Strictly Ballroom — which in Table 4 seem to do better domestically — did big business in Japan.

A 2013 report by the British Film Institute estimated that 7 percent of of British films were profitable. The report was based on a study of 613 films produced or co-produced in the UK between 2003 and 2010. Profits were calculated using a ‘statistical method of estimated profitability that the BFI developed by looking at a large data set of lottery funded films’, according to a report in Screen Daily (Rosser 2013).

In 2000 the New Zealand Government set up a Film Fund to invest as a charitable trust in New Zealand films, augmenting the investment program of the New Zealand Film Commission. As at March 2009 the Fund had invested in eight films, of which six had been released. Total returns for the six films released to that date were NZ$7,555,000, against total investment by the Fund of NZ$21,650,000, or 35 percent (and an average rate of return of 37 percent). The Fund had two hits, Whale Rider and The World’s Fastest Indian. If we add these six films to the New Zealand Film Commission’s 58, we get an average recoupment of 23 percent for New Zealand films. Of course this figure excludes Sir Peter Jackson’s Lord Of The Rings trilogy, which was funded within the Hollywood system.

Adjusted for ticket price inflation, E.T. The Extra Terrestrial comes in at #4, Jurassic Park at #20 and Forrest Gump at #24, according to a ranking by Box Office Mojo based on US domestic grosses adjusted to 2012 ticket prices. The top three films on this adjusted basis are Gone With The Wind, Star Wars and The Sound Of Music. Viewed at <http://boxofficemojo.com/alltime/adjusted.htm>.

Here we may note that the costs charged to a film by its distributor are invariably exhaustive and fully priced. There is no incentive to discount them; on the contrary, since profits when they are reached must be shared with other ‘participants’, the
distributor has every incentive to load the film with every conceivable cost and so delay the arrival of profits. For example, while Warner Bros put the production cost of *Harry Potter And The Order Of The Phoenix* at US$316 million, professional observers pegged it differently. The International Movie Database (IMDB) gives an estimate of US$150 million, as does Box Office Mojo. Wikipedia gives £75-100 million, citing a report in *The Scotsman*. It is probably safe to conclude that Warner Bros has missed nothing in its accounting and, at US$316 million, is not just recovering actual costs but also overheads and internal profit margins that would all go to boost its bottom line.

40 The ratio varies in the telling, depending whether it’s a studio or a filmmaker in the frame. Studios do better than filmmakers, as we’ve seen. Using an 11-year data set from EDI/Neilson, De Vany (2006) modeled outcomes at the studio level and estimated a one-in-five ratio of profitable-to-unprofitable films: ‘Seventy-eight percent of movies lose money and only 22 percent are profitable.’ (p214) Pokorny and Sedgwick (2010) tell a more positive story, suggesting that the ratio of profitable films doubled in the 20 years to 2009, from about 40 percent of films to 90 percent (again at the studio level). The discrepancy between the two studies can probably be attributed to differences in the method of calculating profitability. Remember, this is profitability at the distribution level, a very different thing to profits at the copyright equity level.

41 In the first edition of *Entertainment Industry Economics*, published in 1986, Vogel presented a table showing ‘Estimated average profit (or loss) on national distributor releases, 1970-84’ (table 3.4, p87). The average in the last five years was a modest loss; in the preceding 10 years it was a modest profit. The table was not reprised in subsequent editions.

42 Personal communication 30 March 2012: ‘Registerable material includes scripts, treatments, synopses, outlines and written ideas specifically intended for radio, television and film, video cassettes/discs, or interactive media. The WGAW Registry also accepts stageplays, novels and other books, short stories, poems, commercials, lyrics, drawing, music and other media work.’

43 Personal communication 4 April 2012: ‘The Writers Guild of America, East registers material for thousands of writers each year. Before writers start sending work to agents, producers and actors, we recommend it is protected with the Writers Guild Online Script Registration service… Last year the WGAE received approximately 10,000 registrations, we anticipate an increase this year.’

44 Caves (2000, p113) quotes a Twentieth Century Fox executive who stated that the company each year receives 10,000 screenplays, treatments, books and oral pitches, puts 70-100 projects into development, but makes just 12 films.

45 Neil Netanel (2008, p136) quotes studies by C. Merle Crawford and Eric Berggren & Thomas Nacher showing that ‘from 37 to more than 80 percent of all new consumer goods and between 20 and 40 percent of new industrial goods fail in the market’. He observes that copyright industries ‘also rely far more heavily on revenues from new products than most manufacturers’.

46 Dutch photographer, painter and economist Hans Abbing (2002, p114) gives six explanations for artists’ low incomes: ‘1. The winner-takes-all principle… 2. Unfitness for non-arts professions… 3. An orientation toward non-monetary rewards… 4. An inclination to take risks… 5. Overconfidence and self-deceit… 6. Wrong information.’ These explanations map closely to analysis I present in this chapter, with the exception of ‘unfitness for non-arts professions’, which Abbing elaborates as follows: ‘Because artists believe they are unfit for other, non-art professions, they believe they are better off in the arts despite the prospect of a low income.’ In our survey of film producers, described below, more than 80 percent expected they would earn the same or more income if they chose another occupation.
The Screen Content Producer Survey was developed by David Court with Allan Cameron (AFTRS), Deb Verhoeven (RMIT), Simon Molloy (SKC Pty Ltd) and John Berenyi (Bergent Research). It was conducted by Bergent Research and funded by the ARC Centre of Excellence for Creative Industries and Innovation. An interactive visualization of the survey data was developed by Massive Interactive and can be accessed at [http://csb.aftrs.edu.au/survey/](http://csb.aftrs.edu.au/survey/). There were 247 respondents to the survey from a sample of 2,000 and an estimated producer population of 4,500. They included producers working in film, television, corporate communications and new media. In terms of income, 47 percent said television provided most of their income, 24 percent said film, 21 percent said corporate communications and 8 percent new media. However, 43 percent said film was the most important to them personally. While the chances of a ‘big hit’ obviously vary between these categories, between film and television they are broadly similar.

American economist Lester Thurow (1978) defined psychic income as the opportunities provided by work ‘for nonmonetary benefits and costs — fame, power, friends, physical discomfort, risk to life etc’, noting that while economists traditionally added it to money income and talked about total income maximization, ‘there is often the implicit assumption that psychic income makes little difference to the conclusions which follow’. He set out to show that it does matter, a conclusion supported here too. Landes and Posner use the term ‘nonpecuniary income’, which they define in terms of prestige and celebrity (2003, p48).

The survey was led by Mark Ryan and Stuart Cunningham at Queensland University of Technology with David Court (AFTRS), Deb Verhoeven (now at Deakin University) and John Berenyi (Bergent Research).

A small proportion of producers (five percent) thought they would earn less in their next best alternative job.

The results are summarised below:

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<th>Mean ($)</th>
<th>Median ($)</th>
<th>Standard Deviation ($)</th>
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<tr>
<td>Current income as producer</td>
<td>76,190</td>
<td>62,050</td>
<td>56,360</td>
</tr>
<tr>
<td>Projected income in alternative</td>
<td>138,820</td>
<td>119,890</td>
<td>65,040</td>
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<td>occupation</td>
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The upper bound, at $295 million, was based on a weighted estimation of psychic income for the 13,844 persons reported by the Australian Bureau of Statistics (2008) to be employed in ‘film and video production and post-production services’, weighted according to educational attainment and position in the industry, being either ‘creative principal’, ‘senior creative’ or ‘below-the-line personnel’. The lower bound, at $150 million, makes allowance for possibility that some producers are investing in the future rather than earning psychic income.

This calculation is based on an assumption that between half and two-thirds of all psychic income generated in the sector is generated in connection with drama production (that is, feature film and television drama production). According to Screen Australia (2011), drama production spending in Australia averaged $661 million in the four years to 2010/11. Within this, feature film production spending averaged $225 million, or just over one-third. Given total psychic income equal to $150–295 million, this yields a low estimate of $25 million and a high estimate of $67 million for the value of psychic income.
income generated in connection with feature film production.

54 UK screen reporter Geoffrey Macnab tells this story, describing how Laemmle promoted Lawrence into ‘America’s foremost moving picture star’ and in doing so gave birth to the concept of movie stardom (Macnab 2010). Lawrence, down on her luck, committed suicide in 1938.

55 1920s movie star Louise Brooks, who came to see movie stardom as a ‘pestiferous disease’, wrote: ‘To a film star, on the other hand, to be let alone for an instant is terrifying. It is the first signpost on the road to oblivion.’ (2000/1982)

56 The idea of a currency based in movie stars has an interesting echo in the Hollywood Stock Exchange, a web-based ‘fair and orderly’ market where players use a virtual currency of ‘Hollywood dollars’ to buy and sell ‘MovieStocks’ and ‘StarBonds’. The market is owned by financial services firm Cantor Fitzgerald and operates at http://www.hsx.com/. Cantor Fitzgerald’s efforts to establish a market in box office futures contracts was thwarted by the major studios, which successfully lobbied Congress to ban the move. (Lang 2010)

57 De Vany argues that stars ‘only change the odds [of success] slightly and at high cost’. They also expose the studios to what he calls ‘the curse of the superstar’ (p225-6). Because the distribution of movie returns is skewed positively, ‘the expected value [is] substantially greater that the most likely outcome’. If the superstar is able to negotiate payment based on the expected value, the most likely result will therefore be a loss to the studio. Studios seeking to avoid this outcome should offer the superstar ‘some form of contingent compensation in exchange for a reduced fixed fee.’ Such deals in fact are common.

58 Peter Bart (2007) suggests Lord Of The Rings may have been ‘the bravest gamble in the history of filmmaking’. Director Peter Jackson had won attention with his low-budget ‘splatter’ films Brain Dead and Meet The Feebles. But Lord Of The Rings was on a completely different scale: a trilogy of films that eventually cost $361 million to make. New Line Cinema’s Bob Shaye backed Jackson to produce them after every other studio had passed. Jackson asked Shaye to fund two films; after a few minutes’ reflection, Shaye reportedly decided it should be three. He also agreed that Jackson could make them in faraway Wellington, New Zealand. Former Viacom chief executive Tom Freston said of the deal: ‘Bob was a calculating gambler in the old Hollywood spirit. He just tripled down and did it. And in this risk-averse day of modern Hollywood, no one else was going to make that decision.’ (DiGiacomo 2009)

59 De Vany writes: ‘There really is nothing that is predictable, not costs, not performance value and certainly not revenue. Genre means nothing; rating has only a small effect on probabilities and varies so much that only a portfolio of films is capable of capturing the difference. Stars only change the odds slightly and at high cost. These are the overriding lessons.’ (p267)

60 Box Office Prophecy was developed in 2006 by Professor Plott and David Court. It was designed to test whether a pari-mutuel market mechanism could be used to aggregate information privately held (in the form of intuitions and opinions) by industry professionals and whether it could provide reliable forecasts of the box office revenues of unreleased films. Two further iterations of the study were conducted in 2010 and 2012 with Jordi McKenzie from University of Sydney.

61 Film producer Al Clark interviewed by David Court for AFTRS Centre for Screen Business. Edited interview at http://csb.aftrs.edu.au/

62 The slogan was popularised by a blog launched in August 2011 called wearethe99percent.tumblr.com.
Mean income from film producing was $43,090, the median was $27,720 and the standard deviation $41,090. Mean income from all sources was $76,190, the median $62,050 and the standard deviation $56,360.

According to the Melbourne Institute of Applied Economic and Social Research, the poverty line for a single person for the June quarter, 2011, was $446.47 (equivalent to an annual income of $23,216) and for a couple was $597.24 (equivalent to $31,056 annually). See ‘Poverty Lines: Australia, ISSN 1448-0530, June Quarter 2011’.

This sketch of the author’s perspective is based on my personal dealings with filmmakers and writers over 30 years. I believe it is uncontroversial. However, it would be interesting to track authors’ views of their connection with their creative works as publication shifts online and the integrity of works becomes more permeable.

Aston and Mansfield came to the view that authors had a common law copyright in their works, independent of statute. Their majority decision, with Justice Willes, was a great victory for London’s booksellers. But it was overturned just five years later in the landmark case of Donaldson v. Becket.

The system of moral rights is an exception, being grounded in justice. Authors’ moral rights are primarily rights of attribution and of protection of the integrity of works. They are a European tradition, first adopted in France and Germany and only much later and in weaker form, in the US, UK and Australia. Article 6bis (1) of the Berne Convention states: ‘Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.’

There are many accounts of the history of copyright. I have relied primarily on John Feather’s A History of British Publishing, Lyman Ray Patterson’s Copyright in Historical Perspective, Mark Rose’s Authors and Owners and William St Clair’s The Reading Nation in the Romantic Period.

The Stationers Company’s members included printers and booksellers. Their modern day equivalent is publishers. I use the terms stationers and publishers interchangeably.

The publishers could not have foreseen that they and their descendants would spend the next 300 years crouching behind the Human Shield they raised up in the Statute of Anne. In a modern example, the Record Industry Association of America published a game called ‘Starving Artist’, intended to educate secondary students about the evils of file-sharing (Holson 2003). ‘Starving Record Industry Executive’ presumably would not have had the same educative effect.

What began as a standard 14 year term in the Statute of Anne (renewable for a further 14 years if the author lived beyond the first 14 years) and applying only to books, maps and charts, now stands at ‘author’s life plus 70 years’, applying to books, maps, photographs, music, films and software.

This breakdown is from The economic contribution of Australia’s copyright industries 1996-97 to 2010-11, prepared for the Australian Copyright Council by PricewaterhouseCoopers in 2012. In this section I have also drawn on Stephen E Siwek’s Copyright industries in the US economy: the 2011 report, prepared for the International Intellectual Property Alliance and Professor Ian Hargreaves’ Digital opportunity: a review of intellectual property and growth, prepared for the UK Government in 2011.

PwC follows ‘the standardised global framework for assessing the economic contribution of copyright industries developed by the World Intellectual Property Organisation (WIPO 2003)’. It describes the core copyright industries as ‘Primarily
involved in the creation, manufacture, production, broadcast and distribution of copyrighted works and have a substantial level of copyright activities. These are industries that would not be in existence if not for the copyright subject or matter. The ‘interdependent’ copyright industries are ‘involved in the manufacture, performance, broadcast and communication of copyright material, in order to support and facilitate the creation of copyrighted works and other protected subject matter’. Essentially they are equipment manufacturers. ‘Partial’ copyright industries have ‘A portion of activities which are related to copyright through manufacture, performance, exhibition, broadcast, communication or distribution and sales’. These are industries involved in craft goods and services such as jewelry, furniture, toys and interior design. ‘Non-dedicated’ copyright industries are those where ‘Part of the activities are related to broadcast, communication, distribution and sales in protected subject matter and not included in the core copyright industries’. These include ‘general wholesale and retailing, general transportation and telephony and internet’. (PwC 2012, p8-10) The framework measures the value added by each of these sectors in connection with copyrighted works.

In How to Fix Copyright Patry challenges the idea that the creative industries are the drivers of 21st century economies. Drawing on Ruth Towse, he notes that the use of very general industry classifications may result in inflated figures. Furthermore ‘the aggregate figures for those industries are derived by attributing all revenues generated as being dependent on copyright… These are vast, vertically integrated multinational companies, with revenue sources from thousands of activities, many of which have nothing to do with the production or distribution of copyrighted works’ (Patry 2012, p125) Towse provides a useful history of attempts to quantify the value of the cultural industries. While advising caution in methodology she notes also that ‘the true value of copyright cannot be fully captured by measuring value-added in the cultural industries, however accurate those measures are, because there are external benefits that are not priced through the market place; the national culture, a creative environment and freedom of expression are examples of non-appropriable benefits’. (Towse, 2001, p37) However, not everyone is convinced. Economists Michele Boldrin and David Levine maintain ‘the “copyright” industry is about on par with the furniture industry in terms of economic importance.’ Even so, ‘in a classic case of the tail wagging the dog, [it] manages to threaten our freedom and our culture’ (2008, p97).

See for example Towse (2001, p9): ‘The acknowledged economic role of copyright law is to provide incentives to create and disseminate the expression of ideas.’ See also Ku (2002, p27): ‘Arguably, the need to ensure adequate compensation to distributors is at the heart of the neo-classical economic theory of copyright… It should not come as a surprise, then, that distributors have influenced copyright law’s development from its inception…’

The fourth volume, The Passage of Power, was published in May 2012. A fifth volume is under way. Gottlieb, now 80, has edited all four volumes. Asked if the books were profitable he said: ‘So what if at the end of 45 years it turns out we lost money by one kind of accounting?...Think of what he has given us, what he has added. How do you weigh that?’ (McGrath 2012)

The ‘work for hire’ doctrine supplies copyright’s closest approach to ‘financier’s copyright’. ‘If a work is made for hire, an employer is considered the author even if an employee actually created the work. The employer can be a firm, an organization, or an individual.’ (US Copyright Office 2012) In the US, the term of protection for a work made for hire is 95 years from date of publication or 120 years from date of creation, whichever expires first. In Australia, the term is the life of the actual author plus 70 years.

Liebowitz and Margolis have argued that it is misleading to describe a copyright as equivalent to a monopoly: ‘Although copyright provides a monopoly over the particular
title, there might be many close substitute titles available. This monopoly is no different than the fact that every firm has a monopoly on the name of its product. Kia and Mitsubishi have a monopoly over automobiles with their names, although few would argue that they have monopoly power in the automobile market.’ (2005, p441, footnote 12) Boldrin and Levine will have none of this: ‘A realistic view of intellectual monopoly is that it is a disease rather than a cure. It arises not from principled effort to increase innovation, but from an obnoxious combination of medieval institutions – guilds, royal licenses, trade restrictions, religious and political censorship – and the rent-seeking behaviour of would-be monopolists seeking to fatten their purse at the expense of public prosperity.’ (2008, p244)

79 There is an opportunity in US law for the author to reclaim the copyright in a work 35 years after first publication or 40 years after the rights were granted to the publisher, whichever comes first. See Ginsburg (2009).

80 See Patry (2012, p109): ‘Trickle-down economics works just as poorly in the copyright market as it does in the general economy.’

81 Macaulay’s arithmetic was confirmed by 17 prominent economists who joined a ‘friends of the court’ brief in a case challenging the Sonny Bono Copyright Term Extension Act (Ackerlof et al 2003). The 17 economists, among them five Nobel laureates, said the incentive effect for authors of a 20 year extension was negligible: ‘Because the additional compensation occurs many decades in the future, its present value is small, very likely an improvement of less than 1% compared to the pre-CTEA term. This compensation offers at most a very small additional incentive for an economically minded author of a new work. The term extension for existing works makes no significant contribution to an author’s economic incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made.’ Liebowitz and Margolis have critiqued this analysis, arguing inter alia that ‘small increases in payment need not have small impacts on the creation of additional works. There is a possibility that for some authors, in some range of income and propensity to create, a small increase in present value could make an important difference in creative output, perhaps because they reach a point where they switch to full-time writing’ (2005, p439).

82 Towe, writing in 2001, noted: ‘Apart from Plant, no economist seems to have raised the question of whether the interests of author and publisher are the same or whether they conflict, although there are numerous instances (including court cases) of disputes.’ (p115)

83 William St Clair, reviewing publishers’ contracts with authors in the 18th and early 19th centuries, noted that it was publishers who decided how a work should be published and at what price. His research showed there were four main types of contract: 1. outright sale of the copyright, 2. sale of copyright for a single edition, 3. sharing of net profits and 4. publishing ‘on commission’ ie at the author’s risk. St Clair’s conclusion: ‘under all four main types of contract commonly used in the romantic period the interests of the publishers and the authors were sharply divergent’ (2004, p166-7).

84 The worldly economist John Maynard Keynes decided to take on the publisher’s role for his breakthrough work The Economic Consequences of the Peace, for which he bore the printing costs and contracted Daniel Macmillan as distributor for 10 percent of the profits. As soon as he learned the printing costs, Keynes decided to raise the price of the book from 7s 6d to 8s 6d per copy. The venture was very successful and Keynes thereafter paid for the printing of all the English editions of his books. (Skidelsky 1983, p381)

85 Landes and Posner (2003) have modeled this aspect of copyright, noting that ‘the absence of copyright protection is, paradoxical as this may seem, a benefit to authors as
well as a cost to them. It reduces the cost of writing by enabling an author to copy freely from his predecessors. Shakespeare would have had to work harder and so might have written fewer plays, had he not been able to copy gratis from works of history and literature…” (p52)

86 The Chinese writer Yu Hua in an opinion piece for the New York Times drew attention to the extreme poverty of China’s poorest 100 million citizens, noting: ‘They live surrounded by contaminated rice, adulterated milk powder, tainted vegetables, spoiled ham, unsafe toys, even fake eggs. Day after day, year after year, they consume substandard food and rely on defective supplies. Reading offers a means to improve their condition and low-cost, pirated books are the only ones they can afford. ‘Years ago, in a talk at a university, I said: “I am opposed to counterfeiting in all forms, but so long as poverty is a huge problem in China, I think it’s only proper that my books be pirated. I make enough to support my family from the regular sales of my books.” Some of my fellow writers disagree, but I still believe it.’ (Yu Hua 2013)

87 See for example Mark Rose, who has observed that ‘With its concerns for origins and first proprietors, the liberal discourse of property blended readily with the eighteenth-century discourse of original genius’ (1993, p6).

88 In No Law American academics David L Lange & H Jefferson Powell argue the case for abolition of copyright on free speech grounds. The ‘No Law’ of their title is a reference to the First Amendment to the US Constitution: ‘Congress shall make no law abridging freedom of speech or of the press’. On their fundamentalist view, copyright fails this injunction because it gives authors ownership in their words and with it the right to abridge others’ use of those words. No quibbling, no caviling: ‘Now think the supposedly unthinkable: the First Amendment to the Constitution of the United States forbids American government, in any of its parts including the courts, to undertake in any fashion to create or maintain a monopoly over expression.’ (2009, p301)

89 Economists Abhijit Banerjee and Esther Duflo in a discussion of global poverty describe the poverty trap as an S-shape curve. For those in the poverty trap zone (the lower curve of the S) ‘income in the future is lower than income today: the curve is below the diagonal line’ (2011, p11).

90 Average creative income was $18,900 (median $7,000). Other arts-related income (mean $8,800) and income from other sources (mean $13,500) brought total average income up to $41,200 (median $35,900).

91 The Gini Co-efficient ranges between 0 and 1. 0 represents perfect equality (everyone receives the same income); 1 is perfect inequality (one person receives all the income).

92 Watts rose to become Keeper of Printed Books at the British Museum but did not live to see his idea debated at the Royal Commission on Copyright (1876-78).

93 In the account of the Royal Commission that follows I have relied on Paul Saint-Amour’s The Copyrights: intellectual property and the literary imagination, as well as the Report of the Commission, the Minutes of Evidence and Ronan Deazley’s ‘Commentary’.

94 Mallet was Permanent Under-Secretary of State for India and argued in favour of the royalty system. Sir Arnold Plant in his 1934 paper praised ‘the uniformly high quality of reasoning in Sir Louis Mallet’s minority report’ (p192, footnote).

95 There have been numerous proposals for the reform, replacement and even abolition of the copyright system. Lessig (2001a) argued that copyright should be measured out in renewable five-year terms to a maximum of 75 years; Patry (2012, p201) argued for terms that were ‘dramatically cut back and tailored to each type of work’. He also recommended the abolition of national and regional licensing for digital works, so that
there would be ‘worldwide exhaustion of digital rights once a work has been licensed in one country’ (p182). William Fisher III proposed a more fundamental change — ‘a governmentally administered reward system’ where works would be registered and the government would compensate creators in proportion to their measured usage by the public; once the system was in place ‘we would modify copyright law to eliminate most of the current prohibitions on authorized reproduction, distribution, adaptation, and performance of audio and video recordings. Music and films would thus be readily available, legally, for free.’ (2004, p202) More broadly, Sunder (2012, p20-1) ‘makes the case for broadening our methodological approaches to intellectual property to include perspectives from fields including but beyond economics, such as development economics, anthropology, cultural studies, and philosophy… Call it the ripping, mixing, and burning of law.’ Boldrin and Levine (2008, p11) go further: concluding that ‘intellectual property is an unnecessary evil’, they propose its abolition. The reason why I have focused here on Thomas Watts is that his proposal directly addresses the ‘doubleness’ of the copyright system by distinguishing the author from the publisher and awarding them differing interests in the copyright work. Further, Watts’ proposal received serious consideration at a Royal Commission and thus has counterfactual plausibility.

96 Kretschmer and Kawohl (2004) note: ‘The normal exploitation cycle of cultural products suggests that a short exclusive term would be sufficient. If the first statutory copyright, the Statute of Anne, granted a term of 14 years (renewable once), the faster dissemination and exploitation environment of digital technologies would suggest an even shorter term.’ They give the example of the UK’s first design copyright (1787) which granted an exclusive right to print and reprint ‘linens, cottons, calicos and muslins’ for just two months.

97 To be clear, I am not proposing any change to authors’ moral rights. We should note, however, that it may be more difficult to enforce these rights in a royalty system where a work has many publishers, compared to the present system where there is generally only one exclusive publisher in each territory, who is in a continuing, contractual relationship with the author. But then again, a royalty system would likely induce some illegal publishers (‘pirates’) to come within the fold of legal publication — and that should result in fewer injuries to authors’ moral rights.

98 See Patterson (1968, p52): ‘…the procedure for obtaining copyright was for the stationer to present a copy — that is, a manuscript — licensed by the official authorities to the company wardens for the endorsement of their permission, after which the owner would submit the approved copy for entering on the register.’

99 Registration is also a necessary step in filing a suit for infringement of copyright in a US court.

100 Landes and Posner proposed registration in 2003 as part of their concept of ‘indefinitely renewable copyright’; Lessig proposed it in 2004 as a way of reducing the burden of copyright; and Hargreaves proposed a ‘digital copyright exchange’ in his 2011 report.

101 New York editor and publisher Jason Epstein notes: ‘Traditionally, Random House and other publishers cultivated their backlists as their major asset, choosing titles for their permanent value as much as for their immediate appeal, so that even firms grown somnolent with age and neglect tottered along for years on their backlist earnings long after their effective lives were over.’ (Epstein, 2002, p16-17). Elsewhere he has described the backlist as ‘the vital annuity on which book publishers… relied for year-to-year stability through bad times and good’ — and reports that he has been obsessed with ‘the preservation and distribution of backlist’ since the start of his career (2010).

102 In this account of the congers, I am following Feather (p68-72) and St Clair (p93-98).
St Clair is referring to the period between 1710 and 1774 when publishers believed and acted upon the belief that — beyond the statutory copyright established by the Act of 1710 — there was a common law copyright which was perpetual. St Clair calls this the ‘high monopoly period’ and describes it thus: ‘At the beginning of the eighteenth century, the London book industry thus found itself with all the privileges and institutions of the guild system, but without any of [the] controls which normally accompanied such a regime. They were able to act as an unregulated and unrestrained private commercial monopoly over the whole text-based culture of England, and this is what they proceeded to do.’ (p93)

Ruth Towse notes that in the music industry, the capture of live performance in a recording transforms the performance ‘from labour to capital’. The record company controls the capital asset and may transact it without the performer’s consent. Control of such assets drives the record companies’ growth. Towse concludes that ‘copyrights are a double-edged sword that are instrumental in the growth of large corporations with huge market power and bargaining power over the division of revenues that only really successful artists…can assail.’ (Towse 2001, p134-5)

St Clair describes the many resistances of the booksellers in their long efforts to control the book market. Wu updates the story in The Master Switch (2010), detailing the controlling practices of the ‘information empires’ of the 20th century.

See ‘Frequently asked questions about Amazon.com’ at amazon.com: ‘Because we exist virtually on the Web, we have unlimited shelf space and can offer a selection of more than 14 million titles. Compare that to mall bookstores in the physical world, which typically carry about 25,000 titles, or superstores in the physical world, which carry around 170,000 titles.’

‘Bandwidth’ is both 1. a measure (in hertz) of the width of radio frequencies used in broadcasting and 2. a measure (in bits per second) of the rate of data transfer in computing. In Australia, the National Broadband Network Company will offer ‘superfast’ connection speeds to 93 percent of homes, schools and businesses using fibre, wireless and satellite technologies.

Here for example is vibewire blogger Tom Langshaw (2012): ‘If we had a crude representation of today’s cultural business model, it would be a Venn diagram in which two circles, ‘Artist’ and ‘Consumer’, are being squeezed together with increasing force. Fans wield greater influence and artists receive a greater cut of profits — everyone wins, except vested corporate interests.’

Plant (1934) quotes at length from a petition of 1643 from the Stationers’ Company to the English Parliament which was ‘cunningly designed to make the flesh of an uncertain authority creep’ and which he notes ‘would not discredit an “economic adviser” to a modern publishers’ association’ (p175-77).

In its annual review of the global media and entertainment sector, PricewaterhouseCoopers forecast compound annual growth of 6 percent for the period 2011-15, (PwC 2011, p51). The highest growth was in Internet (9.6 percent), interactive games (8.2 percent) and subscription television (7.8 percent); and the fastest growing region was Latin America, at 10.8 percent, followed by Asia Pacific at 6.7 percent. The only negative growth was in recorded music, where the firm forecast a 1.1 percent annual contraction. Even there the firm predicted a turnaround in 2014. As things turned out, the industry beat the forecast, returning to growth in 2012 (Luckerson 2013).

The music industry was the first to respond to the possibilities of ‘disintermediation’, with many bands building direct relationships with their fan bases. For example, Nine Inch Nails, after its split from Interscope Records, independently released its sixth album, Ghosts I-IV, via its website, in formats ranging from free download to a $300
limited-edition package.

112 Kaufmann (2013) reports that while self-published authors receive no advance, they typically receive 70 percent of sales, compared to 25 percent of digital sales under a standard publishing contract and just 7-12 percent of list price for bound books.

113 St Clair (2004, p89-90) traces the use of the term to the late 17th century and quotes English writer and politician Joseph Addison, who compared the efforts needed to produce a book to fitting out a ship for a hazardous voyage, which may then be “plundered by privateers”. Professor of comparative literature Daniel Heller-Roazen recounts the history of piracy in legal and political thought in *The enemy of all: piracy and the law of nations* (2009). Historian Adrian Johns explores the deep history of intellectual piracy in *Piracy: the intellectual property wars from Gutenberg to Gates* (2009). Johns (p415) reports that Sir Arnold Plant researched ‘the origin of the usage in the context of intellectual property of the term pirate’ and says he hopes to publish a study of Plant’s research.

114 IndieGoGo ([www.indiegogo.com](http://www.indiegogo.com)) was launched in 2008, Kickstarter ([www.kickstarter.com](http://www.kickstarter.com)) in 2009 and the Australian site Pozible ([www.pozible.com](http://www.pozible.com)) in 2010 as Fundbreak.

115 There are echoes here of the stationers’ petition of 1643 to the English parliament, which concluded ‘that all such importation of foreign books ought to be restrained as tends to the disadvantage of our native stationers’ (quoted in Plant 1934, p177).

116 The Productivity Commission was unmoved, noting in its report: ‘[W]hile the removal of [parallel import restrictions] should see an increase in imported books where these represent better value, it is probable that most Australian publishers, including the major publishing houses, would generally adapt to the new regime, that Australian stories and content will continue to be demanded and that talented and marketable Australian authors would continue to be widely published.’ (pXXIII) The Australian Government was less sanguine. It chose to retain the import restrictions.

117 Biographer Peter Ackroyd conjectures that Southampton may have given Shakespeare the £50 he invested to become a ‘sharer’ in the Lord Chamberlain’s Men on its formation (Ackroyd 2006, p226-7).

118 After his unhappy experience with Chesterfield, Johnson rewrote a couplet in his poem ‘The Vanity of Human Wishes’. In the original version, it read: ‘There mark what ills the scholar’s life assail, Toil, envy, want, the garret and the gaol.’ In the later, post-Chesterfield version, the second line becomes: ‘Toil, envy, want, the *patron* and the gaol.’ English scholar Marjorie Garber, recounting the story, observes: ‘The fact that a patron could so readily be summed up as part of the problem, rather than presented as the solution to it, tells the whole story in brief — for Johnson’s London, and for the ages’ (Garber 2008, p6).

119 St Clair reports that Wordsworth lived in fear that the patronage system would be reformed. He notes also the irony that the appointment made him ‘a direct personal beneficiary of an abuse of state power aimed at discouraging reading’ — that is, the stamp duties applied to newspapers (St Clair, p310-11).

120 Literary scholar Dustin Griffin has observed that some recent studies ‘broadly share the view that patronage was an old and dying cultural form that never provided adequate support to authors and fortunately gave way, in the eighteenth century, to a superior system in which authors were at last properly recognised as independent owners and professionals’ (Griffin 1996, p3). In this view, copyright ownership transformed authors into professionals, able to make a living from their work and thus rescued them from
dependence on patronage. But as Griffin demonstrates, the 'patronage economy' continued to operate alongside the emerging 'literary marketplace'; they were 'overlapping' systems and most authors needed both.

121 The account that follows is drawn from Janet Adam Smith's short history of the Fund. She describes Williams, the Fund’s founder, as ‘a dissenting minister apt to quarrel with his congregations; a friend of Garrick and of Benjamin Franklin, to whom he gave shelter in 1774; a correspondent of Voltaire and Frederick the Great; author of many works, including *Sermons, chiefly upon Religious Hypocrisy*; honorary citizen of France, in recognition of his enthusiasm for the Revolution, expressed on a visit in 1792.’ (Smith 2005)

122 Benefactors of the Fund include W Somerset Maugham and *Winnie-the-Pooh* author A A Milne. Their combined bequests increased the Fund’s income ten-fold.

123 The pleasures of giving are strongest for patronage systems, where assistance is given selectively. Choosing who will benefit, and who will not, not only fulfills the patron’s mission but may satisfy a sense of husbandry, of carefully awarding (and withholding) the available resources. Patrons may view the choices they make as critical and defining — and so they may be. There are pleasures too, of proximity and involvement in the creative process, of anointing the talented and quickening the work. There is also the glamour of association, the dinner parties and receptions. There is gratitude too. The newly-chosen recipients find themselves drawn into a world of connections and opportunity. They feel vindicated by their discovery and tied now to their discoverer.


125 Presales are sales made before production of a film begins. They may be a license fee or an outright sale of rights, or an advance (or minimum guarantee) against future sales. Financiers set the benchmark rate at a level designed to ensure that investors at least broke even on an after-tax basis.

126 Here we may observe that there is a direct correlation between the diffusion of a subsidy (that is, how widely the subsidy is distributed among the population of potential recipients) and its impact on price expectations. Broadly, the more widely diffused a subsidy is, the greater its impact on price expectations. For any given producer, a subsidy will have a negative value when he or she judges that the probability of receiving it is outweighed by the likely deflationary effect on buyers’ price expectations — or more precisely, when the price falls are greater than the expected value of the subsidy. Notice that this equation will yield differing results depending on the producer’s confidence in winning, or being eligible for, the subsidy.

127 Not all subsidies induce price deflation. They may have the effect of simply advantaging their recipients — increasing their prestige, lowering their cost of capital, or subsidizing their costs. Whatever the effect, the consequence for non-recipients is relative disadvantage.

128 Filmmaker Robert Connolly (*The Turning*, *Balibo*, *Romulus My Father*) has argued that Australian funding agencies have favoured an entrenched production methodology ‘based on the inappropriate template of the Hollywood film’ and resulting in unnecessarily high costs of production (Connolly 2008, p5). Connolly makes the case for a radical rethinking of production and financing methods.

129 The ‘beauty contest’ dimension arises where a subsidy is selectively distributed among qualifying applicants, rather than being distributed equally to all qualifying applicants. This of course describes the patronage model. In the film industry, through
four decades of subsidy, there has always been a patronage agency, distributing funds selectively to filmmakers. Thus the Australian Film Development Corporation (1970-75) became the Australian Film Commission (1975-2008), which sponsored the Film Finance Corporation (1988-2008), and was finally merged with it to form Screen Australia (2008-). In the same period there have been two great experiments in open-ended subsidy: the 10BA tax concession and the Producer Offset. Both widened the subsidy net, distributing the same benefit to all qualifying filmmakers on the same terms. Neither displaced the patronage agency.

130 Jungian analyst Mario Jacoby has explored the close connection between shame and self-esteem. He notes: ‘Shame is intricately tied to one’s social context. It revolves around the question of what respect I enjoy in others’ eyes and what effect they have on my sense of worth as a person.’ (Jacoby 1994, pviii)

131 Perhaps if writers and filmmakers paid more attention to audiences, their work would be more appealing and they would make more money? In my professional life, I have often heard comments to this effect. The situation is more complicated than it appears. Authors who are not strongly engaged with their subject matter are unlikely to achieve the insights and novel perspectives that audiences expect. They may also find it difficult to sustain interest over the long haul of creative work. My own experience — a small sample but a clear finding — is that successful filmmakers combine an almost obsessive focus on subject matter with a canny awareness of audience. I would concur also with the American poet John Ashbery’s observation: ‘It’s that old idea, of each of us having only one or two ideas in life and spending our years expressing them, and expressing them, and expressing them’ (quoted in Shekerjian 1990, p79). Another American poet, Robert Frost, put it more strongly: ‘All that makes a writer is the ability to write strongly and directly from some unaccountable and almost invincible prejudice’ (quoted in Parini 1999, p198).

132 Ortner reports Boyd’s injunction in a discussion of film producers’ ‘agency’, which she defines as ‘a number of interrelated ideas revolving around self-confidence, around the idea of being able to make things happen in the world, around activity rather than passivity, around energy and will’ (Ortner, p158). She goes on to cite producer Louis Drubner (a pseudonym): ‘a kind of forcefulness’; Vance Van Petten, executive director of the Producers Guild of America: ‘individualism, entrepreneurialism and independence’; producer Christine Vachon: ‘I think producing is about being fearless’; and producer Lynda Obst: ‘Unfortunately, nerve, not talent, is the one necessary and sufficient trait for success’.

133 Of course, there are authors who voluntarily stop working as authors. The poet Arthur Rimbaud gave up poetry when he was 19 and spent the rest of his short life as a commercial agent and merchant. J D Salinger, author of The Catcher in the Rye, published his last work in 1965, 45 years before his death. Harper Lee published just one work, To Kill A Mockingbird, in 1960. But such examples are rare enough to attract attention and in these three cases, continuing wonder.

134 Frost wrote the poem after an all-night session at his kitchen table, writing the poem ‘New Hampshire’. After finishing this, he reported, ‘I went outdoors, got out sideways and didn’t disturb anybody in the house, and about nine or ten o’clock went back in and wrote the piece about the snowy evening and the little horse as if I’d had an hallucination’. (Parini, p212) In a letter to Louis Untermeyer, Frost called it his ‘best bid for remembrance’.

135 Like a new technology, the work of an author must climb the S-curve of diffusion, described by Everett Rodgers, a professor of rural sociology, in 1962 (Rodgers 1995/1962). In Rodgers’ model, the adoption of a new idea or technology is a process driven by communication among members of a social system. Graphically, it resembles
an elongated S that leans to the right. The foot of the S is the potentially long period when the innovator (in this case, the author) is unknown, except to a small circle of ‘innovators’. The upward curve of the S begins only when the author/innovator gains a wider circle of ‘early adopters’. The curve then steepens with acceptance by the ‘early majority’ and reaches the inflection point (where the curve turns down) with acceptance by the ‘late majority’. Finally, the curve flattens out, as ‘laggards’ catch up to the majority. Of course, the curve may give out at any point; a work may fail to attract a following.

136 ‘The only reliable, durable, and perpetual guarantor of independence is profit.’ So said media scion James Murdoch in a speech to the Edinburgh International Television Festival in 2009 (Murdoch 2009). Subsequent events have impugned the speaker; the force of his observation, however, is undiminished.

137 In this account I draw on D M Thomas’s Alexander Solzhenitsyn: a century in his life (1998, pp255-68). The quotation from Solzhenitsyn is from The Oak And The Calf, translated by H T Willetts. According to Thomas, Solzhenitsyn’s reference to his head breaking water draws on an image of ‘dashing warriors emerging from the sea’ in Pushkin’s 1831 poem The Tale of Tsar Sultan.

138 The thaw, however, did not last: Khrushchev was ousted in 1964 and Solzhenitsyn quickly fell from favour. In 1974, he was deported from the Soviet Union. Tvardovsky, whose enthusiasm was so instrumental, lost his post at Novy Mir in 1970.

139 James C Scott discusses the world-upside-down tradition as part of the ‘arts of resistance’ and of political disguise (Scott 1990, pp166-72). He reports that Russian censors under Peter the Great required changes to a popular series of prints called ‘the war of the rats against the cat’ — so that the cat did not resemble the Czar (p168).

140 The classic example of a gestalt switch is the image of a rabbit-duck. At first glance the viewer sees a rabbit (or duck); on closer examination the image ‘switches’, becoming a duck (or rabbit).

141 Rose makes clear that ‘the focus of my discussion of authorship is not on subjectivity but on discourse’ (p7). In other words, he is mainly concerned with the way that the idea of authorship has been used to sustain the commercial activity of publishing. Nevertheless, in his comments about authoring, such as the suggestion that authors ‘do not really create in any literal sense’, he veers close to denying even the possibility of authoring.

142 Op-Docs are published by The New York Times’ editorial department, which describes them as ‘short, opinionated documentaries, produced with wide creative latitude and a range of artistic styles, covering current affairs, contemporary life and historical subjects…by both renowned and emerging filmmakers who express their views in the first person, through their subjects or more subtly through an artistic approach to a topic.’ [http://www.nytimes.com/ref/opinion/about-op-docs.html](http://www.nytimes.com/ref/opinion/about-op-docs.html).

143 The Shoah Foundation’s archive is the largest of its kind in the world and has secured the support of a who’s who of the movie business including the Wasserman Foundation, Universal Studios Foundation, the Ovitz Family Foundation, Paramount Pictures Group, Sony Corporation of America and the Time Warner group. In 2006 the Foundation moved to the University of Southern California and was renamed the USC Shoah Foundation Institute for Visual History and Education, reflecting ‘the broadened mission of the Institute: to overcome prejudice, intolerance, and bigotry — and the suffering they cause — through the educational use of the Institute’s visual history testimonies’. See [https://sfi.usc.edu/about/institute](https://sfi.usc.edu/about/institute). In 2013, as part of this larger mission, the Foundation added Rwandan testimonies to its Archive and IWitness website.

144 Pauline Kael, herself the child of Holocaust survivors, panned the film as a ‘long
moan’, and it was strongly criticised in Poland when released there (Schatz 2012).

Lanzmann has written about the scene with the barber, Abraham Bomba, in his memoir The Patagonian Hare (2012). It had taken him several years to track Bomba down and he proved an extraordinary witness, one of 17 professional hairdressers whose task was to cut the hair of Jewish women before they were gassed at Treblinka. Lanzmann describes the critical moment, when Bomba is suddenly unable to continue, as ‘a conversation between two supplicants, he pleading with me to stop, me gently urging him to continue… The camera kept turning, Abraham’s tears were as precious to me as blood, the seal of truth, its very incarnation. Some people have suggested some sort of sadism on my part in this perilous scene, while on the contrary I consider it to be the epitome of reverence and supportiveness, which is not to tiptoe away in the face of suffering, but to obey the categorical imperative of the search for and the transmission of truth.’ (pp434-35)

Biographer Hermione Lee reports that Virginia Stephen had inherited capital of £9,013 when she married Leonard Woolf in 1912. This yielded an income of just under £400 a year. In 1928 — the year of the lectures that became A Room Of One’s Own — the sale of family real estate brought a further £4,925. In present day terms the two capital sums would be worth £655,000 using the retail price index or £2,100,000 using average earnings (MeasuringWorth calculations). Lee notes that until 1929, despite their prolific output, Virginia and Leonard could not have lived on the earnings from their books (Lee 1996, pp320-1).

Officer and Williamson give the example of an accountant earning US$2,250 in 1931. In terms of the goods and services he could buy, the comparative purchasing power in current dollars would be $31,700. But his contemporary standard of living was over twice that amount, or $70,700, while his economic status was close to $170,000 in current terms and his economic power close to $420,000. ‘The interpretation is that his wage enabled him to go to the same country club as someone today earning $170,000 and that he would be perceived to have the same economic influence as someone with a current annual income of almost half a million dollars’ (Oliver & Williamson, p4).

Even if we take the lowest estimate from Table 12, £24,720, and tax it at the 1928 rate of 30 percent, leaving £17,304, the recipient would be among the richest 5.1 percent of the world’s population, according to Giving What We Can, a website that forms part of the Centre for Effective Altruism in the UK (http://www.givingwhatwecan.org). National Geographic, in a study published on the occasion of the world’s population reaching seven billion, classified incomes above US$12,196 (about £7,980 in August 2013) as High, with one billion people in this range, the rest below (Kolbert 2011).

This is an idea that perhaps bears comparison with Keynes’ notion of the ‘animal spirits’ that sometimes drive human action. Keynes wrote that ‘…our decisions to do something positive, the full consequences of which will be drawn out over many days to come, can only be taken as the result of animal spirits—a spontaneous urge to action rather than inaction, and not as the outcome of a weighted average of quantitative benefits multiplied by quantitative probabilities.’ (Keynes 2007/1936, pp161-2)

When I first began thinking about the questions developed in this thesis nearly 20 years ago, I thought the case for reforming copyright was clear-cut. But the question of social intent — whether society ‘knew what it was about’ — brought me up short. It is a hard question. It is the question that sent me off on the long errand of this thesis.

I am not addressing here the questions of public access and fair dealing that dominate much of the public discussion of copyright. These are very significant questions but they lie beyond the scope of this thesis.

This appears to be a confusion caused by the similarity of names. John Man recounts
the story of an early rival to Gutenberg whose secrets were reported to have been stolen by an apprentice named Johann Faustus. This person seems to have been confused with Gutenberg’s financial backer, Johann Fust. The implication was that Gutenberg benefited from the alleged theft — a story that continued in circulation ‘well into the twentieth century’. (2002, p120-1)

Nietzsche suffered a mental collapse in 1889 from which he did not recover, though he lived on until 1900. Tertiary syphilis was suspected but the diagnosis has been challenged in recent years by Schain (2001) and others.

Fishburn reports that people convicted of protecting books were forced to work on Emperor Ch’in Shih-huang-ti’s other great project, the construction of the Great Wall (p2).

One mechanism for restricting circulation is price. St Clair drew attention to the deliberate use of price as an exclusionary mechanism by England’s 18th century political elite: ‘Among the main arguments put forward in the parliamentary bill that introduced a stamp duty on periodicals in 1701 was that the resulting higher prices would keep such print from the ‘poorer sort of people’, and so reduce the allure and enticement of reading among their children. In 1757, Soame Jenyns argued that to “encourage the poor man to read and think, and thus to become more conscious of his misery, would fly in the face of divine intention”.’ (2004, p109)

Essayist and cartoonist Tim Kreider in an op-ed piece for the New York Times about the common expectation that artists should work for free wrote: ‘Not getting paid for things in your 20s is glumly expected, even sort of cool; not getting paid in your 40s, when your back is starting to hurt and you are still sleeping on a futon, considerably less so. Let’s call the first 20 years of my career a gift. Now I am 46, and would like a bed… Practicalities aside, money is also how our culture defines value, and being told that what you do is of no ($0.00) value to the society you live in is, frankly, demoralizing. Even sort of insulting. And of course when you live in a culture that treats your work as frivolous you can’t help but internalise some of that devaluation and think of yourself as something less than a bona fide grown-up.’ (Kreider 2013)

And dangerous to look at. Lady Liddell reportedly instructed her daughter to avert her eyes when they encountered Byron on the rooftop of St Peters in Rome: ‘Don’t look at him, he is dangerous to look at.’ (McCarthy 2002)

Roosevelt made the observation in his State of the Union address of January 11, 1944. He apparently drew on an English law case, Vernon v Bethell, in which Lord Henley observed: ‘Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.’ Vernon v Bethell (1762) 28 ER 838

Love begins: ‘Today I want to talk about piracy and music. What is piracy? Piracy is the act of stealing an artist’s work without any intention of paying for it. I’m not talking about Napster-type software. I’m talking about major label recording contracts.’ She proceeds through an analysis of the economics of releasing a music album, concluding ‘the band may as well be working at a 7-Eleven’ (Love 2000). A more recent example is musician David Byrnes’ deconstruction of Spotify, in which he documents the near impossibility of earning a viable wage from streaming services (Byrnes 2013).

Disclosure would also give authors absolution. One of the most pernicious aspects of copyright’s poor outcomes is the message of failure this conveys to authors. A system of disclosure would counter this by letting authors see how common ‘failure’ was. In a personal example, a filmmaker who read this thesis reported feeling first anger and then relief when she realised that the poor returns she had earned for her investors were entirely within the normal range for film investments.
Shakespeare’s investment was £440, equivalent in 2011 to £85,250 in terms of ‘historic standard of living’ or £2,298,000 in ‘economic status’ or £16,940,000 in ‘economic power’ (Officer & Williamson 2013). Tithes were entitlements to a 10 percent share of the produce of the district originally paid to the Church but acquired by the Stratford Corporation at the time of the Reformation and made available to wealthy investors like Shakespeare seeking regular, annuity income. The tithes also bestowed the right to be buried in Stratford Church, as Shakespeare later was.

There is a growing body of Shakespeare scholarship. In this account I have relied in particular on Lukas Erne’s Shakespeare and the Book Trade, Bart Van Es’s Shakespeare in Company, Stephen Greenblatt’s Will in the World, Andrew Gurr’s The Shakespeare Company 1594-1642, James Marino’s Owning William Shakespeare, Charles Nicholl’s The Lodger Shakespeare and James Shapiro’s 1599: A Year in the Life of William Shakespeare. It is difficult to engage with this literature and not lose patience with theories that it was the Earl of Oxford or Christopher Marlowe or someone other than William Shakespeare who ‘wrote Shakespeare’.

Thus writer and activist Jonathan Tasini (2012): ‘Creative people, especially writers, are a funny breed. We are the only profession I know of who work for free. No coal miner, nurse, shipyard worker, accountant, or any other person with bills to pay works for free. But, that is what writers are often being forced to do. And the consequences for creativity and democracy are dire.’ Tasini sued the Huffington Post in a class action on behalf of bloggers whose work was aggregated on the Post site. The suit sought a share of the US$315 million sale of the site to AOL. Judge John Koeltl rejected the claim on the basis that the bloggers knew in advance they would not be paid. (Pilkington 2012)

The tenancy was created through an ingenious system of collective ‘gift and regrant’. The details were revealed in a court case brought by the new husband of Augustine Phillips’ widow some 20 years later. See Bart Van Es (2013, pp157-8).

The sharers in the Admiral’s Men owed £300 to Henslowe at the turn of the century, when the Chamberlain’s Men were already well in profit. By the final years of his life Alleyn ‘was spending over £1000 per annum where ordinary playwrights would do well to earn £30’ (Van Es, p49).

Gurr lists 99 men and boys known to have worked for the company from its inception to its close, including 27 sharers and housekeepers (Appendix 1, pp217-246).