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Calculating the consequences of narrow Australian copyright exceptions: Measurable, hidden and incalculable costs to creators

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ABSTRACT

The kind and extent of exceptions and limitations to copyright monopolies are a major focus of copyright reform discussion worldwide. The debate is often portrayed as pitting the interests of creators against users. Australian copyright law features narrow and limited exceptions. Australian creators benefit from copyright monopolies; but do they suffer any costs for lack of flexible exceptions? A national survey of creators showed that they experience significant costs in time and money in making work; avoid or abandon projects because of copyright problems; and avoid developing ideas for projects that involve use of third-party copyrighted materials. These costs have previously been uncalculated and not included in national policy debate. The results provide information not only for the Australian context but for policy discussion internationally.

1. Introduction

This study analyzes how Australian creators negotiate a highly restrictive copyright regime, in which they cannot use copyrighted material without licensing it in many situations where international colleagues, particularly those in fair use jurisdictions, can.

The question is relevant to international scholars concerned with the relation of creative practice generally to the regulatory contexts that variously stimulate and inhibit it. This concern has been raised with rising frequency since the passage of U.S. copyright legislation in 1976, which vastly extended and expanded copyright monopoly, while also codifying 135-year-old judge-made law in fair use. From the early 1990s, U.S. international treaty negotiations routinely have included clauses that harmonize national practice on the monopoly side, without harmonizing it on the exceptions side (Burrell & Weatherall, 2008; Drahos & Braithwaite, 2003).

With this broad and international expansion of copyright monopoly, legal and communication studies scholars have postulated a cost to cultural circulation, to creative expression, and innovation. Some have described this as an encroachment on a metaphorical cultural commons (Benkler, 2006; Bollier, 2001; Boyle, 2008; Cunningham, 2015; Greenleaf & Bond, 2013; McLeod, 2007). Others have described copyright law as unbalanced, or as tight, or strong (Aufderheide & Jaszi, 2011; Fisher, 2004; Fitzgerald, 2008; Flew, Suzor, & Liu, 2013; Flew, 2015; Geiger, 2017; Giblin & Weatherall, 2016; Patterson & Lindberg, 1991). Recent empirical research with creative communities in the U.S. has documented costs of copyright confusion or uncertainty around employing fair use, among documentary filmmakers, media literacy teachers, librarians, musicians and visual arts professionals among others (Aufderheide & Jaszi, 2004; Aufderheide, Hobbs, & Jaszi, 2007; Franzen et al., 2010). It has also documented expansion and innovation in creative practice with fair use knowledge and with institutional acceptance of fair use claims (Aufderheide & Jaszi, 2011; Aufderheide & Sinnreich, 2015; Sinnreich & Aufderheide, 2015). Interviews conducted with a small pool of creators who recycle copyrighted

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material into new work in Australia has also demonstrated that confusion over exceptions and limited exceptions have creative costs (Pappalardo, Aufderheide, Stewart, & Suzor, 2017). Other empirical research, including experimental research, demonstrates an uncertain and contingent relationship between copyright incentives and actual production, thus challenging the notion that copyright is inevitably a driver of creative production (Sprigman, 2017). As well, scholars have charted creative expression that moves beyond or outside copyright law, in areas as diverse as tattoos, vidding, fan fiction and cooking (Coppa, 2011; Darling & Perzanowski, 2017; Suzor, 2014; Tushnet, 2010).

Copyright policy is thus directly implicated as a governmental and institutional policy affecting freedom of expression (Sunder, 2000; Tushnet, 2011). How it is administered, debated and changed is inevitably a battle not only between economic stakeholders but also about who can speak and create. The current Australian debate is a political conflict in which creator agency has been invoked by publishers and licensing interests, which have also assisted in directing positions for creator organizations. However, creator practices in using current Australian exceptions to make new work, employing licensed copyrighted materials in making new work, and in shaping projects around the exigencies of accessing copyrighted material have not been documented or presented to policymakers.

The question of how creators in particular cope with this regime is of urgent and practical significance in the Australian context, where a 20-year-long debate over reform of the outdated and inflexible law has recently been renewed. As recent research has shown, Australian copyright debates have typically opposed the benefits of flexible exceptions for technology (e.g. online search, protections for hosts of user-generated content, non-consumptive uses for artificial intelligence) and for consumers, educators and libraries against the interests of creators in protecting their copyright monopolies (Aufderheide & Davis, 2017). Some researchers have explored how copyright works within the creative process in specific areas, e.g. (Bowrey & Handler, 2014). But until this study, there has been no systematic, detailed inquiry into how Australian cultural creators experience exceptions in this regime during the creative process itself.

Australian copyright law is 'TRIPS+' (Frankel, 2008) following the implementation of the Australia – United States Free Trade Agreement in 2004. Copyright in original works lasts for 70 years after the death of the Author; there are extensive criminal offences for commercial and commercial-scale infringement; and there are criminal and civil prohibitions on circumvention of Digital Rights Management technologies. Australia has a moral rights regime, introduced in 2000 (Adeney, 2006), and a (limited) performers' rights regime, introduced in 2005 (Weatherall, 2005). The moral rights regime confers on individual authors and performers three non-economic rights: a right of attribution, a right against false attribution, and a right of integrity, being the right not to have a work or performance subject to derogatory treatment (*Copyright Act 1968* (Cth), Part IX). Derogatory treatment is defined as treatment resulting in a material distortion of, mutilation of, or material alteration of the work/performance that is prejudicial to the author or performer's honor or reputation (ss. 195AI – 195ALB). The rights of attribution and integrity are subject to a reasonableness requirement, such that there is no infringement if the person's conduct was reasonable in all of the circumstances (*Copyright Act 1968* (Cth), Part IX, Div. 6). Thus, moral rights generally are congruent with a decision to employ third-party unlicensed material, if credit is given and use is not derogatory.

Australian copyright exceptions fall into six general categories. The fair dealing exceptions permit uses of copyright material for the purposes of news reporting, criticism and review, research and study, parody and satire, for disability access, and for professional legal advice (*Copyright Act 1968* (Cth), ss. 40–43; 103 A – 104; 113E). These are supplemented by a narrow set of personal use exceptions (e.g. time-shifting in limited circumstances), specific exceptions for computer programs, a 'flexible dealing' exception for libraries, educational institutions, and the disabled, and a set of statutory licences for educational copying, re-transmission of broadcasts, and the recording of musical works (*Copyright Act 1968* (Cth), Part III, Div. 3–7; Part IV, ss. 104 A – 112 A; Part VA; Part VB).

Unlike many European and Commonwealth countries, Australia has no right of quotation (Adeney, 2013). The six categories of permitted 'fair dealing' purposes are exclusive, and unlike in Canada, courts have interpreted them narrowly. People who would legally reuse copyright material must be able to show that their use is genuinely for one of the permitted purposes and that they used no more than necessary for that purpose (Suzor, 2008). There is no exception for informational work outside of the business of immediate news. There is no exception that permits search or machine learning (artificial intelligence); thus, all companies operating Internet search functions serving Australia operate offshore. Unlike the U.S., Israel and some Asian nations, which have fair use, Australia must redesign its exceptions after innovation in communication, expression and technology occurs. For instance, the VCR, which was first made available commercially in 1971, was not legally useable to record free-to-air television for personal use in Australia until 2006, when a specific exception precisely for that purpose was created (*Copyright Act 1968* (Cth) s 111). At the same time, digital production and distribution are only accelerating the pressures for change. As far back as 2010, 38% of Australian artists made their art directly using the Internet (Throsby & Zednick, 2010). As of 2015, 14% of Australian creators were turning to Internet-based collaboration, building new platforms and projects on the Internet, reaching audiences and networking in their fields (Australia. Australia Council for the Arts, 2015).

The lack of a quotation exception or an open-ended fair use exception in Australian law has been the subject of policy debate over the last two decades. In 1998, the Copyright Law Review Committee's 'simplification review' recommended the introduction of an 'open-ended' fair use style exception (Copyright Law Review Committee, 1998). In 2000, the Ergas Committee reported that the costs of introducing fair use would likely outweigh the benefits (Australia. Intellectual Property & Competition Review Committee, 2000). In 2005, following the conclusion of the Australia – United States Free Trade Agreement, the Attorney-General's Department conducted a review of whether a Fair Use provision should also be introduced into Australian law, following criticisms that while Australia imported the extra enforcement strength of US law, it did not import the counter-balancing limitations (Weatherall, 2007). The most comprehensive review was completed in 2014 by the Australian Law Reform Commission, which recommended that Australia should introduce an open-ended fair use style exception (Australia. Australian Law Reform Commission, 2014). Rather than