Copyrights and copyfights: copyright law and the digital economy

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Abstract: This paper will consider questions around the reform of copyright law, and how they are increasingly being framed by the challenges of the digital economy. It discusses the review of copyright and the digital economy being undertaken by the Australian Law Reform Commission, with particular reference to the costs and benefits of copyright law to consumers and creative producers. We argue that there is a pressing need to develop fair copyright rules that encourage investment in the digital economy, allow widespread dissemination of knowledge through society, and support the innovative reuse of copyright works. To better align copyright law with these goals, we recommend that Australia introduce an open ended 'fair use' style copyright exception, and encourage the development of a digital copyright exchange of the sort discussed in the UK by the Hargreaves and Hooper Reports.

Keywords: copyright law; intellectual property; digital copyright exchange; DCX; fair use; open access; creative industries.

Reference to this paper should be made as follows: Flew, T., Suzor, N. and Liu, B.R. (2013) 'Copyrights and copyfights: copyright law and the digital economy', *Int. J. Technology Policy and Law*, Vol. 1, No. 3, pp.297–315.

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1 Competing principles of copyright law

Copyright and intellectual property law has become, in many respects, the crucible for issues and challenges presented by the development of new media for law and policy. These legal and policy issues are being played out in a variety of national and international forums, and are at the core of how the digital economy will develop in the 21st century.

One of the features of debates surrounding copyright law is that they typically combine longstanding issues with more contemporary ones. The history of copyright, going back to the 18th century and the *Statute of Anne* in Britain in 1709 and the US *Copyright Act* of 1790 onwards (Bettig, 1996; Boyle, 1997; Litman, 2001; Drahos and Braithwaite, 2002; D'Agostino, 2010), has brought forward four enduring questions:

1 Identifying the most appropriate balance between public good and private benefit criteria for the use of, and access to, information. This balance is one that needs to both support innovation and the creation of original content, yet also promote sufficiently widespread access to existing information so that it can be effectively used to create new knowledge.

2 Determining the most appropriate balance between individual rights of ownership and forms of social use for common benefit.

3 Dealing with the legal implications of knowledge existing as both a commodity that can be used for commercial advantage, and as a public good available to all for common use.

4 The best ways in which to both promote and equitably share the benefits of knowledge and creativity.

Copyright is a form of intellectual property that incorporates rights in artistic and literary works, as distinct from industrial property rights such as patents, designs and trademarks. Copyright law is derived from the principle that neither the creator of a new work nor the general public should be able to appropriate all of the benefits that flow from the creation of a new, original work of authorship. It presumes that original forms of creative expression can belong to individuals, who have both a moral right to ownership and a legitimate economic right to derive material benefit from the use of these works by others, as an incentive to create further original works. It also presumes that the use of their original works should be subject to the laws of free and fair exchange, that there should be adequate compensation of use by others, and there should be safeguards against misuse.

At the same time, it is recognised that original ideas and works are drawn from an existing pool of knowledge and creativity, and that it is therefore essential to guarantee that such ideas and works can exist in the public domain so that they can be fairly used by others. Moreover, since such information is the lifeblood of democracy, commerce, and the development of future knowledge, broad access by the community to the widest possible pool of information, knowledge, and forms of creative expression is a valuable end in itself, as a condition for participation in public life and the development of new knowledge. In order to balance these competing claims on knowledge, copyright law divides up the possible rights in uses of protected works, giving control over some of these rights to the creators and distributors and control over others to the general public.

Copyright law includes a series of exceptions where it is deemed to be in the public interest to make material more widely available at no cost. These exceptions form a fundamental part of the copyright balance by limiting the extent of the copyright grant (Leval, 1989). The *Australian Copyright Act* 1968 (Cth), like the copyright law of most jurisdictions, and unlike that of the USA, contains no open ended 'fair use' exception to copyright. Instead, Australian law includes a series of exceptions for specific purposes (including research and study; criticism and review; news reporting; parody and satire – ss 40–43, 103A–104) and specific technological use cases (including limited format-shifting and time-shifting – ss 110AA, 111). The question of whether these limitations are appropriately tailored for the digital economy is currently under consideration by the Australian Law Reform Commission (ALRC). The limitations to copyright should ideally ensure that copyright law does not unnecessarily constrain the ability of people to learn from existing works; to critique or discuss cultural materials and contribute to public discourse; to innovate and compete; and to create new works of authorship (Samuelson, 2008; Suzor, 2013). This last category includes transformative use, which has been defined by the ALRC as involving 'works that transform pre-existing works to create something new that is not merely a substitute for the pre-existing work. Works that are considered transformative may include those described as 'sampling', 'remixes' and 'mashups' (ALRC, 2012). Unlike the position under US fair use law, the fact that a work is transformative is not in itself a reason to make it non-infringing. As we note below, transformative use has become increasingly central to current considerations of the scope and limitations of copyright law.

Embedded within copyright, then, are two competing normative visions of intellectual property. One is the notion that it that can be privately owned as property, from which its owners can expect a reasonable level of remuneration from its use. The other is that intellectual property consists of ideas, concepts and forms of expression whose public circulation is central to the principles of freedom of speech, equitable access to public

information, and economic efficiency. The cultural economist Christian Handke has provided a useful matrix for considering, at a conceptual level, the overall costs and benefits of a copyright system.[1]

Table 1 Costs and benefits of a copyright system

	Benefits	*Costs*
Short run	Greater revenues to rights holders	Access costs to users
		Administration costs
		Transaction costs in trading rights
Long run	Greater incentives to supply copyright works for rights holders	User innovation being obstructed by the costs of compliance

Source: Handke (2011, p.4)

2 The challenge of the digital economy

While copyright debates have a long history, the intensity of debates surrounding the nature of copyright law, its scope, how it is enforced, and limits set to its reach, has increased over the last two decades. A key driver of this has of course been the generalisation of global access to the internet and networked personal computing, and the associated digitisation of media content, but this is symptomatic of a range of other developments. There has been the rise of what has been variously referred to as the information society (Bell, 1976), the knowledge economy (David and Foray, 2002), the network society (Castells, 1996), the networked information economy (Benkler, 2006), the creative economy (Howkins, 2001; UNCTAD, 2010) and, most recently, the digital economy (ALRC, 2012). Benkler (2006, p.4) captures the relationship between the new economic significance attached to information and knowledge, and the enabling capabilities of the internet and digital media, in observing how "removal of the physical constraints on effective information production has made human creativity and the economics of information … core structuring facts in the new networked information economy".

Of the many issues that render copyright law ever more complex and significant in an age of new media and the internet, four stand out. First, the rapid development and mass dissemination of technologies that enable low-cost reproduction of data and information has dramatically changed the issues arising in copyright law. The commercial creative industries are characterised by high costs of production of original material, a high failure rate for new commercial product, and near-zero costs of content reproduction (Hesmondhalgh, 2013). From the perspective of rights holders, the unauthorised reproduction of works appears as a problem of piracy, and much attention has been given to enforcing copyright in the face of illegal copying, as it is seen as preventing rights holders from amortising the considerable up-front costs associated with the production of new creative works. On the other hand, critics of the copyright industries point to inequitable pricing arrangements as drivers of piracy, particularly in developing countries, and identify the problems as being one of insufficient attention being given to alternative business models in a transformed digital environment (Karaganis, 2011; Lobato, 2012).

Second, the rise of a knowledge economy has seen intellectual property rights become a key source of new corporate wealth. As a result, a very high premium is

attached to successful creative product that is likely to accrue economic rents over time. As Drahos and Braithwaite (2002) note, the 'knowledge game' of capturing patents was critical to the formation of industry cartels from the early 20th century onwards, and the global economy has seen substantial growth in the role played by intellectual property as a source of corporate revenues. The World Intellectual Property Office [WIPO, (2010), p.33] has observed that the number of patent applications worldwide grew from about 1 million in 1995 to 1.9 million in 2008, and the number of patents granted increased from 450,000 in 1995 to 750,000 in 2008. In discussing the rise of a knowledge economy, David and Foray (2002) related the acceleration of knowledge production to the interrelationship between four developments:

1 the growing role of intangible capital (education and training, research and development, information, logistics, health) in total capital formation

2 the growing speed and intensity of innovation, and the increasing diversity of sources of innovation, including users themselves as co-creators of new or improved products and services

3 the ICT revolution, which has fundamentally transformed the conditions for creating, storing, accessing, distributing and reusing information and data

4 the rise of knowledge-based communities and global knowledge networks, where information can be easily shared and re-used, and where collaboration can occur that is not reliant upon physical co-presence in particular geographical locations.

Third, copyrighted products are now a part of global popular culture to a historically unprecedented degree. When combined with the exponential increase in the amount of content that is easily available through digital technologies, this also means a massive proliferation of infringement in both commercial uses of copyrighted materials (e.g., pirated versions of CDs, DVDs, etc.), and non-commercial uses of copyright material by consumers in their everyday (digital) lives. In the digital age, where most dealings with copyright material are potentially infringing reproductions, the question of what rights users have to make uses of copyright material has become increasingly important to resolve. As individuals increasingly make use of 'cloud' services to retain, store, and share content, it also becomes important to consider the limits that exist to the liability of intermediaries who facilitate these uses through cloud and other services. In the absence of copyright reform, there is a risk that intermediaries cannot be certain of their potential exposure for the services they provide, even where most uses are likely non-infringing. The uncertainty involved in licensing the unknowable range of user behaviours, however, is likely to result in a 'tragedy of the anti-commons' (Heller, 1998), where high transaction costs and strategic behaviour may prevent efficient licensing of the large number of exclusive rights required for any cloud service to operate. They are examples of the 'metapublic' good status of information, where it is not only valuable to the public as a whole, but generates positive benefits to a community over and above those that are immediate and tangible (Perelman, 2002).

Finally, copyright and intellectual property law has been progressively globalised over time, particularly with the passing of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, signed by more than 100 nations in 1994 after agreement by the signatories to the General Agreement on Trade in Services (GATS), and the establishment of the World Intellectual Property Organization (WIPO) along with

the World Trade Organization (WTO). Almost all developing nations are net importers of intellectual property, while the USA has such a dominant position as a net intellectual property exporter, through creative industries such as software and entertainment as well as many of the world's most important trade marks. Sell (2002, p.185) argued that the TRIPS Agreement was reflective of "unchecked industry dominance over the intellectual property agenda' in the 1990s", which only subsequently came to be more effectively challenged by "an increasingly vociferous and mobilised civil society campaign" to challenge such dominance. The question of whether the existing global IPR framework acts to entrench global inequalities is the subject of ongoing debate in multiple international *fora* (Netanel, 2009; Karaganis, 2011).

3 The digital economy and creative innovation

In 2012, the ALRC was given the task of reviewing Australia's copyright laws in light of the digital economy. In the Terms of Reference given by the Attorney-General, the ALRC was required to recommend changes to the *Copyright Act 1968* with regard to:

- the objective of copyright law in providing an incentive to create and disseminate original copyright materials
- the general interest of Australians to access, use and interact with content in the advancement of education, research and culture
- the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies
- Australia's international obligations, international developments and previous copyright reviews.

In doing so, it was asked to consider

> "whether existing exceptions are appropriate and whether further exceptions should:
> - recognise fair use of copyright material;
> - allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
> - allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes." [ALRC, (2012), p.3]

Its recommendations need to take account of Australia's international legal obligations, such as the Australia-US Free Trade Agreement, signed in 2005), as well as related inquiries such as the Convergence Review into media and communication legislation (Convergence Review, 2012).

The ALRC observed in its *Copyright and the Digital Economy* issues paper that the Terms of Reference for the inquiry require it to consider:

> "Whether amendments to copyright law are required in order to create greater availability of copyright material in ways that will be socially and economically beneficial … The context and political economy of copyright law is changing

> as copyright has a more direct impact on disparate users and producers, extending beyond rights holders and institutional rights users." [ALRC, (2012), p.14]

The ALRC (2012, p.11) follows the Department of Broadband, Communications and the Digital Economy definition of the digital economy as "the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, mobile and sensor networks" [DBCDE, (2009), p.1]. But, as noted above, a variety of other synonyms have been used for an economy transformed by digital technologies, including the information economy, the knowledge economy and the creative economy. Deloitte Access Economics (2011) has referred to the internet economy, estimating that the contribution of internet-driven businesses and occupations are worth about $80 billion to the Australian economy, or 3.6% of Australia's GDP.

Behind the question of nomenclature lies a recurring dilemma in the relationship of copyright to these various discourses of the 'new economy'. On the one hand, the creative industries have been defined as combining creative and intellectual talent with commercially exploitable intellectual property; sometimes referred to as the copyright industries, they are estimated to contribute about 6–8% of the GDP of advanced industries economies (PwC, 2012; WIPO, 2012). On the other hand, overly restrictive copyright laws that are poorly designed for the digital economy present their own costs, which are largely invisible yet substantial. The Hargreaves Report estimated that copyright reform could add between 0.3% and 0.6% to the size of the UK economy by 2020 – between £5 billion and £8 billion – and that deadweight costs in the economy could be reduced by over £750 m (Hargreaves, 2011). In its responses to the Hargreaves Report, the UK Government identified some of these deadweight costs as including:

> "Vital medical research held up, cultural and commercially useful works locked away for generations and crumbling in archives for want of an owner to give permission for their use, and great business ideas that can't be turned into successful, growing businesses." [HM Government, (2011), p.3]

The ALRC faced a review of copyright law where strong claims about its economic costs and benefits can be found on both sides of the ledger. It sought in its issues paper to reconcile these competing claims by adopting a principles-based approach to the evaluation of current copyright law and recommendations for change [ALRC, (2012):, pp.19–22]. The eight principles that the ALRC articulated as informing its deliberations were:

- reform should promote the development of the digital economy by providing incentives for innovation in technologies and access to content (Principle 1)
- reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets (Principle 2)
- reform should recognise the interests of rights holders and be consistent with Australia's international obligations (Principle 3)
- reform should promote fair access to and wide dissemination of information and content (Principle 4)
- reform should ensure that copyright law responds to new technologies, platforms and services (Principle 5)

- reform should take place in the context of the 'real world' range of consumer and user behaviour in the digital environment (Principle 6)
- reform should promote clarity and certainty for creators, rights holders and users (Principle 7)
- reform should promote the development of a policy and regulatory framework that is adaptive and efficient and takes into account other regulatory regimes that impinge on copyright law (Principle 8).

4 Copyright and innovation

One of the difficulties in addressing the question of whether copyright laws affect the introduction of new or innovative business models is the absence of counter-factual information, or what Towse (2011, p.110) describes as "a situation comparable to those in which copyright does apply to one in which it does not". Towse (2011, p.111) also observes that "fast moving technical changes also affect production and consumption and it can be very difficult to pin down a 'before' and 'after' test of the impact of the change to copyright law".

Over the last two decades, copyright owners have often responded to the challenges of copying in the digital environment through strategies of enforcement and deterrence. Copyright owners have sought to shift user behaviour and the social norms that support infringement through education campaigns, high profile lawsuits against both intermediaries and individual users, and, most recently, decentralised warning and enforcement through internet service providers. In order to support these efforts, pressure has been applied to governments worldwide to strengthen copyright law by reducing exceptions, increasing its duration, increasing penalties, and providing cheaper and more punitive enforcement mechanisms. None of these approaches have so far been able to substantially reduce copyright infringement.

With some notable exceptions, copyright industries around the world have been slow to offer legitimate alternatives to satisfy consumer demand for creative content. The absence of lawful and convenient digital services, offering timely and affordable access to copyright material, appears to be a key driver of infringement. In his international study of media piracy in emerging economies for the U.S. Social Science Research Council, Karaganis (2011) observed that high prices for digital media goods relative to income was a primary driver of piracy in developing countries, that anti-piracy measures and copyright education had little impact, and that rising standards of living combined with competition that reduced prices for legitimate product were the key factors in reducing overall levels of piracy.

Since 'born digital' information is very easy to copy and distribute, the prospect of eliminating all forms of illegal copying is near zero. The economist Hal Varian has identified a number of possible alternative business models that could be adopted by copyright industries. These included price discrimination (e.g., making the physical copy more attractive to consumers than the downloaded version), delivery of bundled services (e.g., providing free access to a back catalogue for subscribers), and advertising around digital content as an alternative revenue stream to direct sales. He observed that "copyright is a second-best solution to intellectual property provision", but also that "the same technological advances that are making digital content inexpensive to copy are also

helping to reduce the fixed cost of content creation", and that lower production costs leading to lower prices has its own dynamic in reducing levels of content piracy [Varian, (2005), p.136].

The work of both Varian and Karaganis indicates that it is innovative new business models, rather than strengthened regimes of copyright enforcement, that is likely to ultimately be of most significance in reducing piracy and copyright infringement, and developing sustainable business models for the creative industries in the digital age. In *Hidden Innovation: Policy, Industry and the Creative Sector*, Cunningham (2013) identifies a number of ways that this has been addressed by companies such as Google, including the ContentID and Partnership programmes developed for YouTube. The successes of digital distribution stores such as Apple's iTunes for music, apps, and games, Valve's Steam for games, and Amazon's Kindle store for books also demonstrate that consumers are willing to pay for convenient access to copyright content. The increasing range of subscription-based services, like Netflix and Spotify, are beginning to show how sustainable models may develop in the absence of scarcity.

All of these models focus on providing users with the carrots of legitimate digital distribution channels – rather than the sticks of harsher and more regular enforcement. It seems reasonable to expect that innovation in copyright business models may be more fruitful in the long term than efforts to increase the strength or frequency of penalties for copyright infringement (Summer et al., 2011). This is particularly the case where, as the recording industry has demonstrated, enforcement actions come at great public relations costs, and where new digital models can provide significant efficiency gains in reducing distribution costs.

5 Copyright and the creative community

It is often assumed that, whatever the benefits for consumers of lower-cost or free digital goods, the existence of copyright and other forms of intellectual property protection is particularly important to artists and others involved in the production of creative works. In a study commissioned by the Australia Council for the Arts, Throsby and Zednik (2010, p.60) highlighted "the importance of intellectual property as a means of providing remuneration to creators", and argued that "the copyright held by writers, visual artists, craft practitioners and composers in the literary, dramatic, artistic and musical works that they create may be essential to their economic survival". On such a basis, the case is made for the centrality of copyright protection for those working in the arts and creative industries.

Given the importance attached to copyright for the income of artists, it is a subject around which surprisingly little research has been undertaken, at least in Australia.[2] A 2003 study for the Australia Council (Throsby and Hollister, 2003) attempted to calculate the actual contribution of royalties and other copyright-related revenue streams to the incomes of Australian artists. This study found that royalties, advances and other copyright earnings accounted for 6% of the creative income of the over 1,000 artists it surveyed, with the Public Lending Right and the Educational Lending Right accounting for a further 2%. These sources of creative income were particularly important for writers (27% of total creative income) and composers (23% of creative income): for all other categories of artistic and creative practice surveyed, they accounted for no more than 2% of total creative income.

Table 2 Sources of creative income by category of artist in Australia, 2003 (percent)

	Writers	*Visual artists*	*Craft practitioners*	*Actors*	*Dancers*	*Musicians*	*Composers*	*Community cultural development workers*	*All artists*
Salaries, wages, fees	55	34	21	94	90	95	38	78	63
Gross sales of work, including commissions	13	54	68	3	1	2	25	12	22
Royalties, advances	18	2	2	2	1	1	22	-	6
Other copyright earnings	*	*	-	*	1	1	1	-	*
Grants, prizes, fellowships	5	10	7	1	7	1	11	6	6
Public lending right	4	*	-	-	-	*	-	-	1
Educational lending right	5	*	-	-	-	*	-	-	1
Other creative source	*	*	2	-	-	*	3	4	1
Total	100	100	100	100	100	100	100	100	100
Weighted *n* =	158	202	84	127	23	264	28	57	943
Unweighted *n* =	203	219	108	138	54	126	58	34	940

Notes: '*' indicates less than 1%; '-' indicates nil in this sample.

Source: Throsby and Hollister (2003, p.103)

This is not to say that income derived from copyright is unimportant to artists as a group, or to some artists: a minority of works does continue to generate significant revenues for rights holders over time. However, available evidence does not support the claim that the current copyright regime is of such importance for the generation of new artistic and creative works that the supply of new works would be significantly inhibited by changes to those laws (Kretschmer and Hardwick, 2007). It is consistent with international findings, reported by Towse (2011, p.107), that "research on artists' total earnings including royalties shows that only a small minority earns an amount comparable to national earnings in other occupations and only 'superstars' make huge amounts'. The economist Caves (2000) associated this with the 'A list' / 'B list' phenomenon, or the economics of superstars, in the creative industries, where an elite cohort of creative producers are able to accrue economic rents, through mechanisms such as copyright payments, long after the period of production. Copyright does play a role in the incentives of commercial producers of copyright works, who provide employment for creators, but the extent of this role has not been extensively studied and would appear to be less than is commonly thought. Certainly the problems of inadequate incomes for most artists in Australia cannot be redressed through stronger enforcement of existing copyright laws.

There is considerable evidence which indicates that the complexity of copyright imposes significant inefficiencies on users of copyright material, particularly for creators using existing material in the creation of new works. This is particularly visible in the film industry, where high transaction costs in identifying and negotiating with rights holders has been identified as a factor that often prevents creators and users from reaching mutually beneficial outcomes. Wilson (2009, p.6) noted that "[t]here can be 20 or more rights holders in a screen content product and rarely are there less than six". Creators of new works typically face high transaction costs in obtaining licences from all relevant rights holders (Heller, 1998). Creators also often face insurmountable difficulties with orphan rights, uncooperative right holders, and the lack of clarity that surrounds performance rights. The full costs of administering, licensing, and enforcing copyright in Australia have not been examined in sufficient detail. In particular, there has been little empirical examination of the transaction costs of negotiating copyright licences, and the cost structure of copyright licensing has not been examined systematically. Some empirical evidence exists in comparable jurisdictions (Aufderheide and Jaszi, 2004; McLeod and DiCola, 2011), but quantitative data on the costs of copyright in Australia is very limited.

The problems have been identified in the documentary filmmaking field by Aufderheide and Jaszi (2004), whose survey of US documentary filmmakers found:

- rights clearance costs are high, and have escalated dramatically in the last two decades
- gatekeepers, such as distributors and insurers, enforce rigid and high-bar rights clearance expectations
- the rights clearance process is arduous and frustrating, especially around movies and music
- rights clearance problems force filmmakers to make changes that adversely affect – and limit the public's access to – their work, and the result is significant change in documentary practice.

An interview conducted with documentary filmmaker Cathy Henkel supported these findings.[3] Discussing her 2012 documentary *Show Me the Magic*, about the acclaimed Australian cinematographer Don McAlpine, Henkel observed that in order to get clips from his famous films, such as *Romeo & Juliet* and *Moulin Rouge*, she faced standard licence fees of around $300,000, and rights holders that were initially not willing to negotiate licence fees that were acceptable to all parties. The difficulties Henkel faced were compounded by overlapping contractual rights that prevented studios from providing licences, which meant that Henkel had to seek agreements from many of the actors and extras in each clip, including stunt people and dancers. Negotiating licences for archival footage alone delayed her project by at least two months, and she points out that independent documentary filmmakers will never have the resources to meet the licence fees being requested.

6 Fair use and digital copyright exchanges

Making the copyright system appropriate for the digital economy fundamentally requires enhancing the flow of expression for reuse in innovative (and unexpected) ways. In order to articulate an effective and fair copyright regime that facilitates reuse of expression, particular attention should be paid to the types of uses which should trigger an obligation to remunerate the copyright owner, and the categories of uses which are more desirable to be open to all, without fee or the need to seek permission. We conclude this paper with a discussion of a combination approach to addressing some of the problems identified above in a way that can extend 'fair use' provisions in ways appropriate to the digital age, without disadvantaging existing rights holders or undermining copyright law more generally. We argue copyright law should positively empower users to make socially valuable uses of copyright works that impose little harm on copyright owners, that are important for speech and democracy, or that are unlikely to be voluntarily licensed. For other categories of uses, we suggest that it is crucial to reduce licensing transaction costs in the digital economy. To this end, we investigate the concept of *digital copyright exchanges* (DCXs), which have been featured in recent UK reports, such as *Digital Opportunity: A Review of Intellectual Property and Growth*, authored by Professor Ian Hargreaves (Hargreaves, 2011), and *Copyright Works: Streamlining Copyright Licensing for the Digital Age* (Hooper and Lynch, 2012).

Copyright law in the digital age needs to address three key issues:

1 it must provide clear exceptions for socially valuable uses for which obtaining a licence is inefficient or undesirable

2 it must enable more streamlined licensing practices for other uses of copyright material

3 it must clearly differentiate between these two categories.

In the digital age, where many interactions with cultural materials constitute a potential infringement of copyright, reducing the friction imposed by the copyright system is of primary importance. Reducing friction, in this sense, means both reducing transaction costs for uses which should be licensed, and clearly allowing uses for which neither permission nor remuneration is deemed necessary.

Australian copyright law is currently premised upon a narrow set of purposive 'fair dealing' exceptions, and a set of complicated statutory licences to address the needs of users of copyright material. This approach has proved to be too inflexible to adequately address technological change, too limited to provide certainty to intermediaries, and too complex to sufficiently reduce transaction costs in licensing. Australian copyright law needs to move beyond statutory licences, and instead introduce a broad 'fair use' exception for uses that do not require remuneration and encourage the development of a simplified licensing process for uses that do.

The challenge for Australian copyright law, if a 'fair use' exception is to be introduced, is to provide a mechanism to clearly determine which uses should be licensed and which uses ought to be available for free reuse. An open-ended 'fair use' exception should either subsume or act in addition to the existing fair dealing provisions, but must provide a simplified, flexible, and technology neutral approach that allows unforeseen socially beneficial uses of copyright material. At the same time, a 'fair use' exception should provide sufficient guidance to enable both users and copyright owners some degree of certainty in understanding what types of unlicensed uses are permitted by law.

Setting the exact bounds of copyright exceptions is a complex and contested political process. These boundaries are an enunciation of a particular society's sense of how to best achieve particular cultural goals – including free speech and democratic discourse (Netanel, 2008); distributive justice and fair rewards (Sunder, 2012); knowledge and learning (Breakey, 2012); and innovation and creative expression (Boyle, 2008; Lessig, 2002). Whatever its particular bounds, a 'fair use' exception should clearly address the balance in copyright between the rights of authors and publishers and the needs of both readers and future creators. Accordingly, an Australian 'fair use' or similar provision should particularly remove the need to license uses in situations where licences are unlikely to be granted; where the free-speech and other expressive interests of users outweigh the interests of copyright owners; and where minimal harm is imposed on the legitimate interests of copyright owners by reuses that are transformative or otherwise socially valuable. A flexible, open-ended exception is important because many innovative, expressive, and valuable uses of copyright material in the digital economy are technically infringing, but are outside of the core licensing interests of copyright owners. These include broad swathes of amateur creativity; many categories of transformative uses that use existing works to create new works that do not directly compete with the original; uses for social commentary; uses that promote learning; and personal uses of copyright material (Samuelson, 2009). Requiring users and creators to seek licences and pay royalties for these uses can often stifle innovation and speech without a strong countervailing benefit to authors (Litman, 2010). In all cases, the social interests in allowing these types of uses needs to be weighed against the impact on copyright owners, so a flexible approach that enables an iterative and ongoing judicial balancing process seems to be the most appropriate manner in which to draw the line. In introducing such an exception into Australian law, the simplest and most certain approach is likely to be to model it closely on the US fair use test, in a way which enables Australian courts to look to the substantial US fair use jurisprudence for persuasive precedent (Burrell et al., 2012). Our point here is not to prescribe a particular form of exception, but instead to note that some additional flexibility is certainly required in Australian law, in order to better enable the socially beneficial use and reuse of copyright expression in the digital economy.

At the same time, there are a large and growing range of ways in which people are seeking to use copyright materials that may not be covered by a fair use style provision,

but where licensing arrangements are not able to be negotiated in an efficient or equitable manner. This includes the range of uses identified by the Hargreaves Report (Hargreaves, 2011) and the Hooper Review (Hooper and Lynch, 2012) in the UK as those where current arrangements unnecessarily restrict access to copyrighted works, and generate transaction costs in excess of those appropriate for use of the material in question. A much-cited example would be the use of a piece of music in a recorded wedding video that is subsequently placed on *YouTube*. Outside of the USA, Canada and 11 small nations, Google is currently required to block the distribution of such content, as it would be in breach of copyright laws. Both content creators and content users would benefit from rights being able to be established more straightforwardly, and for a low-cost mechanism to exist for the user to fairly reimburse the creator of the copyrighted work and enable its distribution by other means.

The Hargreaves Report recommended that the Government of the UK address this problem through the establishment of a DCX. A DCX has been defined as an automated e-commerce website or network of websites which allows licensors to set out the rights they wish to license and allows licensees to acquire those rights from the licensors (IPO, 2012). Through such a system, copyright licencees can:

- look for different types of content across the range of media types
- define and agree what uses they wish to make of the chosen content with the licensors
- be quoted a price by the licensor for those uses of the specified content that the system is programmed to offer
- pay for the rights online within the normal e-commerce framework
- have the content made available to them in the appropriate format
- account back to the licensor as to what content was actually used so that the rights creators can be paid their shares.

The Hargreaves Report identified the benefits of a DCX as enabling "an open, standardised approach to data" that would be based around "a network of interoperable databases to provide a common platform for licensing transactions" [Hargreaves, (2011), p.33]. The benefits that the Hargreaves Report identified from the establishment of a DCX include a much more efficient mechanism for consumers and reusers to identify copyright owners and obtain licenses. Importantly, a DCX could also provide the opportunity for intermediaries to automate licensing through standard terms and to easily identify a representative agent for custom licensing negotiations. For creators and rights holders, a DCX could provide improved routes to market, clear recording of ownership of works and the terms on which they are available for reuse, increased opportunities for direct licensing, and a single point of access for collecting societies.

The two-volume digital copyright feasibility exchange studies undertaken by Richard Hooper to the U.K. Intellectual Property Office (IPO, 2012; Hooper and Lynch, 2012) argued that through a DCX, "copyright licensing can be made more streamlined, easier and cheaper to use, especially for the small and medium-sized enterprises (SMEs) which make up 90% of the creative industries, without eroding the rights of rights owners" [Hooper and Lynch, (2012), p.6]. In particular, a copyright exchange would enable greater legal clarity, combined with greatly reduced transaction costs, for the use

of copyrighted works for purposes that are legitimate from the point of view of the content creator, but where it is appropriate that the user should make some financial payment for the right to make use of such works.

The Hooper Report *Rights and Wrongs* (IPO, 2012) identified libraries, archives and museums, educational institutions, the audiovisual industry, the publishing industry, the music industry and images industries (still pictures, photo libraries, art works) as creative industries and related sectors that would be much better served by a more streamlined approach to the handling of copyright licensing in ways that recognised the reasonable expectations of existing copyright owners while better enabling the development of new forms of digital content and digital services, which are at the core of the emergent digital economy. Indeed, by normalising payment arrangements for all forms of copyright works, such a scheme is likely to be of financial benefit to copyright owners themselves.

In their second report, *Copyright Works*, Hooper and Lynch (2012, p.1) proposed the development of a not-for-profit, industry-led Copyright Hub that:

> "links interoperably and scalably to the growing national and international network of private and public sector DCXs, rights registries and other copyright-related databases, using agreed cross-sectoral and cross-border data building blocks and standards, based on voluntary, opt-in, non-exclusive and pro-competitive principles."

The focus of such a Copyright Hub would not be on "the low volume of customised, high monetary value licensing transactions at the top of the market", for which commercial contract remains the most appropriate mechanism for managing rights. Rather, it would be on "the very high volume of automatable, low monetary value transactions coming mostly from the long tail of smaller users". These may include:

> "The small digital start-up company wanting to use music and images and text creatively for its customers, the teacher in the classroom, a user posting a video on YouTube. Larger companies have told us that they also have requirements for access to easy to use high volume, low monetary value, low transaction cost copyright licensing systems, for example a broadcaster wanting a particular film clip or a publisher wanting a specific diagram or image." [Hooper and Lynch, (2012), p.2]

There is good reason to believe that a similar approach could greatly simplify copyright licensing in Australia. An Australian copyright hub could provide a repository of information about copyright works and access to a simple marketplace for licensing those works. There is ample evidence to suggest that high transaction costs operate as a significant barrier for licensing, creating pressures for users to either underuse copyright material or to infringe copyright. By reducing both the overall transaction costs, and the time consumed in rights negotiations, an DCX could act as a catalyst to new forms of creative expression, as indicated in the earlier discussion about documentary filmmaking. Creating a marketplace with more readily accessible information (to lower search costs) and greater standardisation in licensing agreements (to lower bargaining costs) is a crucial part of ensuring that copyright law is appropriate in the digital age, and that the deadweight costs associated with the current pre-digital arrangements are substantially reduced.

Importantly, a copyright hub or exchange should not be seen as an alternative to fair use. An extended definition of fair use is an essential reform to align copyright with community understandings of fairness and to encourage socially valuable uses of material, particularly where licensing is unworkable, harms are low, or social benefits are

high. In core licensing markets, however, it is in the interests of all actors to enhance efficiency by reducing transaction costs. The collecting societies, such as Copyright Agency Limited, already provide a substantial amount of the institutional infrastructure required for such an exchange to be established and to operate effectively. A DCX should simplify the process of dealing with the large and growing volume of 'small' uses of copyrighted works in ways that dramatically reduce transaction costs and greatly simplify processes, while meeting the appropriate rights and expectations of all parties to the process of rights licensing: creators of original works; rights owners/holders; rights managers; rights users/licensees; and consumers.

7 Conclusions

The current copyright reform process, in Australia and in elsewhere, represents the most recent in an ongoing process to develop rules that are appropriate to foster creativity and innovation in the context of constant technological change. Throughout copyright's history, change in the modes of production and distribution of knowledge and cultural works has necessitated a continual re-balancing of the rights allocated to authors, producers, intermediaries, and users. In the digital economy, the key challenge is to devise appropriate rules that simultaneously allow

1 a balance between rewards to existing owners and the ability of users to develop new expression and enable new uses of existing expression

2 an appropriate distinction between private rights and public benefits

3 sufficient regard to the way in which information flows throughout society, generate benefits to the community beyond conventional measures of value

4 a fair distribution of the rewards of creativity and innovation.

We argue that copyright reform should proceed along two complementary lines. First, the zone of uses of copyright material for which it is socially important to allow use without permission or compensation needs to be clearly articulated. Many socially valuable interactions with copyright material depend on a certain amount of flex in the flow of culture and information, and for these uses, a licensing regime, however efficient, is unlikely to be optimal. While the exact boundaries of this zone need constant revision in light of changes in technology and society, they include, at a minimum, highly transformative works that do not compete with the market for their original sources; many forms of social critique and commentary; uses which promote learning; and personal uses of copyright material. A flexible exception, implemented in a way that allows for ongoing contestation and rebalancing of its boundaries, is needed to provide copyright rules that adequately balance competing interests.

Second, we argue that government policy should encourage the development of streamlined licensing protocols to minimise transaction costs in the digital economy. The development of DCXs, where copyright owners are able to register their works for licensing on standard terms, is likely to greatly reduce transaction costs for the large volume of relatively low value licences that is expected to form a major part of the digital economy. An array of DCXs, potentially linked by 'copyright hubs', could feasibly assist

both users and copyright owners to reach agreement on mutually acceptable terms of use for copyright works.

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Notes

1 One difficulty with such a cost-benefit matrix is that of distinguishing between short-run and long-run benefits. This is because the time needed for adaptation by rights holders to changes in the external environment is not known.

2 There are important core copyright industries excluded from these surveys of those in the arts, including the newspaper and magazine, film, radio and television, and computer games industries, which limits the generalisability of these findings. To the best of our knowledge, no comparable work has been undertaken on the relevance of copyright-based sources of income for those working in these creative industries.

3 Cathy Henkel is a film producer with Virgo Productions, *who* has worked as a writer, producer and director of documentaries since 1988. She has directed documentaries such as *Heroes of Our Time: Walking Through a Minefield* (1998), *Losing Layla* (2000), *Spike Milligan: I Told You I was Ill* (2005), *The Man Who Stole My Mother's Face* (2004), *The Burning Season* (2008), *The Rise of the Eco-Warriors* (2012), and *Show me the Magic* (2012). In 2009, Cathy was awarded Documentary Producer of the Year at SPAA for her work on *The Burning Season*. The interview with Cathy Henkel took place in Brisbane on 15 November, 2012.