

## **Contributors and Arguments in Australian Policy Debates on Fair Use and Copyright: The Missing Discussion of the Creative Process**

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A discourse analysis of 350 submissions to two Australian governmental inquiries on introducing fair use to Australian copyright law demonstrates the importance of independent research and expertise in policy debates, but the scarcity of creator voices and attention to the creative process. The absence points to the need for more scholarly research that can transcend stakeholder positions.

*Keywords: copyright, fair use, exceptions and limitations, innovation, user rights*

This analysis of a public policy discussion, held in two Australian governmental venues, explores the terms of discussion of an increasingly important aspect of copyright policy: copyright exceptions and limitations, or user rights. Copyright is a policy fundamental to conditioning the terms of cultural creation, transmission, and preservation. Australia has recently undergone a thorough, society-wide, open discussion of the value of different approaches to incorporating fair use. Australia has a thriving cultural sector and tech sector, for both of which fair use is a highly relevant issue. How Australians have discussed the value of fair use, and what they have not addressed is relevant to debate about user rights internationally.

### **Exceptions and Limitations**

Exceptions and limitations are an important part of copyright regimes internationally. They have become increasingly important with the growth of copyright monopoly terms, with the extension of derivative rights, and with the default granting of copyright upon creation of fixed expression. As the public domain has progressively shrunk, many have argued in both the legal and cultural and information studies spheres, the importance of policies that give access to copyrighted material has become increasingly important to permit the generation of new cultural expression and economic innovation (Aufderheide & Jaszi, 2011; Boyle, 2008; Hugenholtz & Okediji, 2008; Kenyon & Wright, 2010; McLeod, 2005; Netanel, 2008; Rimmer, 2005, 2012; Sinnreich, 2010; Suzor, 2013).

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Copyright monopoly provisions have been harmonized internationally much more than exceptions and limitations. Two tendencies prevail: principle-based general rule (fair use) and specific lists associated with actions, actors, and technologies (e.g., the Commonwealth-wide approach of fair dealing). Because fair use is grounded in general principles and executed through reasoning, rather than being a specific rule linked either to a practice, people, place, technology, or medium, it has been more adaptable. It has enabled some of the most basic innovations of the digital era, such as search and systems caching. Fair use in some form exists in the U.S., Bangladesh, Israel, South Korea, the Philippines, Sri Lanka, Taiwan, Singapore and Uganda (Cohen, Loren, Okediji, & O'Rourke, 2015; Hugenholtz & Okediji, 2008; Okediji, 2016). The government of the United Kingdom conducted extensive study (Hargreaves, 2011). Australia has repeatedly visited this topic since 1998.

The Australian Law Reform Commission (ALRC), a national agency that conducts public inquiries at the request of the Attorney General and provides recommendations to government to ensure Australian laws are equitable, modern, fair and efficient, investigated issues in copyright reform in 2011–14. The ALRC released its issues paper in August 2012; its final report was issued February 2014 (Australian Law Reform Commission, 2013a, 2013b, 2014).). The Australian Government Productivity Commission (AGPC), a national agency on issues relating to Australia's economic performance, conducted an open inquiry on the impact of Australia's IP arrangements on investment, competition, trade, innovation, and consumer welfare between 2014–2016. (Australian Government Productivity Commission, 2015, 2016a). Its final report was issued December 2016, after the writing of this paper, which analyzed the process up to and including its draft report. On fair use, the final report's conclusions aligned with the draft report's (Australian Government Productivity Commission, 2016b).

### **Theoretical Frames**

This public policy process is an example of a highly structured, but still open public space involving stakeholder groups. Following public-choice theory work by Mancur Olson (Olson, 1965), collective action theorists study, using the analytics of economics, how collective action by interest groups conditions and changes processes away from one that could be predicted by a classic economic analysis (Mueller, 2003) and usually working against economic efficiency. Without proposing a counterfactual ideal world or supporting the larger public-choice critique, our analysis assumes the role of interest groups in policy debates behaving as economic actors.

Critical discourse analysis provides ways to look more closely at frameworks within which interests are channeled and expressed. With clear rules of engagement, public policy fora constitute strong framing, in the terms of critical discourse analysis (Fairclough, 2010). Public spaces create the possibility of participation in decision making about allocation of power in society; they are examples of public sphere activity, in a Habermasian sense (Habermas, 1989), although a highly structured one (Habermas, 1996).

In line with critical discourse analysis (Fairclough & Fairclough, 2012), we understand this process to be both an active conversation—between a governmental agency and entities that submit interventions, and among participating entities—and also an element of larger political and social

processes. The inquiries actively involve the social and economic interests most clearly affected but also leave open participation to all. Critical discourse analysis understands discourse in a Gramscian sense as a key part of the apparatus of power, which must be maintained dynamically. Thus, discourse itself is not coterminous with power, but is part of the structure and flow of power making. A range of approaches are used to analyze texts, so long as the methods are systematic. Finally, critical discourse analysis asks normative questions—what the implications are for power and its more equitable distribution (Fairclough, 2010).

This work undertakes a limited discourse analysis, focusing on core arguments in formal submissions to two related inquiries; seeing submissions as texts crafted both to respond to the inquiry and also reflecting interests of contributors; and categorizing the kinds of argument made, without extended analysis of how they are made. We look at which interests are represented, what arguments are made, where underlying frameworks are shared among differing participants, and who and which arguments are not included. We depend methodologically as well on grounded theory, which argues that systematic inquiry about human systems can and sometimes should develop iteratively, to discover rather than impose patterns on behavior.

### **Power and Discourse in Fair Use**

Underlying current exceptions/limitations policy discussions typically is the question of what negative effects copyright monopoly policies may have on future ability to generate culture. However, the fact that the debate engages interests that cannot be well represented by economic interests today (a much-discussed problem in collective action theory) is vividly clear. As Suzor (2013) notes:

Both utilitarian and rights theories require some form of balance between the interests of authors in having exclusive rights and the interests of the public in having access to expressive works. This balance pits the authors' interests (incentives or rewards) against the more inchoate interests of society (or users), and the balance generally tips in favor of the more concrete authorial interests. (Section II)

The play of economic self-interest so widely seen in policy processes also features the invisibility of *imagination foregone*. Arguably, in copyright, the greatest cost—certainly hardest to estimate—may be social consequences of quiet self-censorship that occurs when a potential creator (i.e., anyone) undertakes an imaginative act conditioned by felt obstacles. Without a way to document the cost of imagination foregone, discussion tends to minimize the value of access.

The difficulty of documenting imagination foregone leads to a preconception that Matthew Sag has noted in U.S. policy debate: Fair use is discussed not as a vital part of policies that encourage creation, but instead as a patch for the deserving poor. Treating it as a favor to needy constituencies makes it a subsidy, which “naturally suggests that the doctrine’s benefits should be reserved for the truly deserving, if not eliminated altogether” (Sag, 2012, p. 65). This insight obliquely demonstrates the power of economic incumbency in political deliberation. Discussion of exceptions and limitations, moreover, often

discounts the importance of custom. Bowrey and Handler (2014), for instance, note that many creative decisions are made without reference to, or within ambiguous spaces, of copyright law.

Fair-use debates, nationally and internationally, typically focus on its reliability, the costs of implementing a legal regime, and costs to innovation versus costs to incumbent owners of businesses that depend on profits from copyright monopoly. These divisions can create a blinkered debate because the benefits of exceptions can occur across sectors. Sharply opposed interests typically create intense and polarized rhetorical stances. Representatives of and holders of copyrighted assets—archives, estates, large media companies, collecting societies, some unions and guilds—often argue that cultural creation depends on their ability to run businesses that reward both creators and themselves, and that any expansion of exceptions and limitations, especially users' rights, jeopardizes the future of culture as well as showing disrespect to existing creators. (These arguments may, of course, be at some variance from actual practice, because much media creation depends on exceptions and limitations.) Other stakeholders, especially hardware and technology companies, articulate benefits including to consumers, innovation of new business platforms, and lowering of ambiguity (Gillespie, 2007; Logie, 2006; Patry, 2009; Postigo, 2012; Reyman, 2010).

Concerns about cultural consequences that do not have well-funded private interests attached are also seen in these debates, complicating easy and cynical conclusions about current economic interests dictating policy. Librarians routinely participate both nationally and internationally, representing concerns about access to knowledge generally. Among disabled communities, the visually impaired have been vocal. Some public-interest policy advocacy groups have both national and international presences. Academics contribute, across national boundaries, both analysis and independent data. In some cases, their participation is crucial to understanding larger socio-politico-economic issues (Bridy, 2012; Levine, 2012). That these entities often see themselves not only as representatives for their own self-interest but also (as Brennan & Hamlin, 2008, stipulate in their discussion of revisionist public-choice theory) as spokespeople for larger, inchoate, cultural, and even as yet unborn interests gives them a distinctive position. They are easily accused of lack of realism while also being seen as having moral stature.

It is perennially a challenge to get information on how cultural creators may depend not only on monopolies but also on exceptions that permit them access to existing culture because of the weakness of interest-group representation. There are few and frail organizations of independent artists, musicians, authors, game designers, writers, visual artists, and filmmakers themselves. Creators are mostly represented by entities that profit from controlling monopolies based on existing work, and by guilds or unions with barriers to entry and that protect existing work of current creators (Reyman, 2010). In such situations, academics may often represent the independent creative voice.

Creators, surrounded by arguments against copyright exceptions, from licensing agencies, brokers, guilds and unions, often and understandably confuse exceptions with the piracy threat. This was evident in a survey of Australian artists' attitudes toward copyright and fair use, issued by the major collecting society. The survey included scenarios that erroneously described both plagiarism and outright taking as "fair use" (Copyright Agency & Viscopy, 2016). Understandably, survey respondents did not support fair use as described.

Research with several creator communities in the U.S. has provided some insights into imagination foregone, or self-censorship. In the U.S., fair use is ubiquitous and largely invisible. Students cite others' work in their papers, and journalists quote copyrighted material in their stories and build on other journalists' work—every Google search involves a fairly used copy of original material. But where fair use either is not customary or involves relatively new practice, many creators without institutional support have only a dim understanding of its potential and often get misinformation.

Until they are able to get accurate information on the logic of fair use, they often default to self-censorship, as recent research shows. In 2005, U.S. documentary filmmakers, unaware of their access to fair use, routinely excluded works that would involve quotation from popular music, popular films, or films that dealt with public affairs or politics (because of the inevitable need to quote from media; Aufderheide & Jaszi, 2004). So did filmmakers in South Africa (Flynn & Jaszi, 2009). This changed profoundly in the U.S. when documentarians shaped a code of best practices in fair use, which then had immediate effect on both insurers' and broadcasters' decision making (Aufderheide & Jaszi, 2011; Aufderheide & Sinnreich, 2015). Similarly, media literacy teachers in the U.S. were afraid to use actual popular culture in the classroom, even though the subject of their classes was popular culture (Aufderheide, Hobbs, & Jaszi, 2007). Art historians routinely acceded to the demands of artists' estates to get permission to use the works they analyzed as illustrations in their academic work, and even accepted estates' private censorship of their arguments (Aufderheide, Jaszi, Milosevic, & Bello, 2014).

Creating best practices codes in the U.S. challenged these deeply reinforced self-censorship behaviors successfully (Aufderheide & Jaszi, 2011; Falzone & Urban, 2010), within the communities of practice that developed best practices codes. For the more general community, fair use was both explained and normalized in a series of highly publicized U.S. court cases, including especially Google Books, in which fair users were unequivocally victors.

The digital environment makes questions of exceptions and limitations high stakes. As the Australian Digital Alliance (2015) noted, most borrowing in the burgeoning, fertile, protean, and unpredictable digital environment is between creators, not between incumbent creators and users. Work emerges from the productivity of emergent social networks that contributes new meanings to existing works, creates new work, and also builds new social networks (Froehle, 2016; Xu, Park, Kim, & Park, 2016). The growth of what some scholars call participatory culture (Jenkins, 2006; Jenkins, Ford, & Green, 2013; Suzor, 2013) and others call recombinant (Sinnreich, 2010) or remix (Lessig, 2008) is built on this relationship between individual expression and social interchange. This work is both amateur and professional, sometimes with one leading to the other (Masnick & Ho, 2012, 2013).

### **The Terms of the Inquiries**

We analyzed participants and arguments on the topic of fair use in the two previously referenced inquiries. The ALRC inquiry remained open for a year, with submissions eligible to file online. As noted, the terms of reference of both provide a constraint on the range of responses. ALRC focused on exceptions and limitations in copyright, targeting four concerns:

1. The objective of copyright law in providing an incentive to create and disseminate original copyright materials.
2. The general interest of Australians to access, use, and interact with content in the advancement of education, research and culture.
3. 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.
4. Australia's international obligations, international developments, and previous copyright reviews.

Within that framing of the issue, the terms ask the ALRC to consider whether existing exceptions are appropriate or whether further exceptions should

- recognize 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, 2013a)

Thus, the ALRC's terms of reference put exceptions and limitations in the center of the problem focus, and they embrace both creative production and technological and other innovation. They specifically suggest fair use as one option to address problems.

The Productivity Commission's inquiry was more focused on questions of innovation and efficiency, although it did not specifically exclude creative production. Its first stage was open for months, with submissions online. The AGPC's charge went far beyond questions of exceptions and limitations (although this analysis only concerns the submissions dealing with fair use). The inquiry solicited information to inform its charge to

1. Examine the effect of the scope and duration of protection afforded by Australia's intellectual property system on
  - a. research and innovation, including freedom to build on existing innovation;
  - b. access to and cost of goods and services; and
  - c. competition, trade and investment.
2. Recommend changes to the current system that would improve the overall well-being of Australian society, which take into account Australia's international trade obligations, including changes that would

- a. encourage creativity, investment, and new innovation by individuals, businesses, and through collaboration while not unduly restricting access to technologies and creative works;
- b. allow access to an increased range of quality and value goods and services;
- c. provide greater certainty to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others; and
- d. reduce compliance and administrative costs associated with intellectual property rules. (AGPC, 2015)

The AGPC was also charged to consider Australia's international arrangements, relative contributions of domestic and imported intellectual property to the economy, the government's desire to retain incentives for innovation and investment, the efficiency and fairness of the system in light of technological changes, and the findings and recommendations of other reviews.

Both inquiries were driven by concerns both in the corporate and governmental sectors about Australia's competitiveness in the technology sector, by skirmishes between corporate entities over changing business practices online, and by competition among government departments to control policy agendas. One example of the entanglement of business and policy was the decision that permitted Internet service providers to carry, with a slight delay, sports games that were also being offered exclusively to broadcasters, a decision that then enraged major sports interests (Harrison & Willingham, 2012). This conflict, one of many, demonstrated differential economic benefits of copyright policies. A tension has grown between governmental entities that have historically controlled the copyright policy agenda, mostly focusing on the creative industries, and government entities concerned with technological innovation and enterprise (Matthew Rimmer, personal communication, November 28, 2016). Both inquiries were initiated by entities responding to the latter agenda, which was reflected in the focus on innovation in the terms of reference.

### **Method**

The researchers reviewed 1,442 submissions—870 from ALRC's inquiry and 572 from AGPC's—and engaged in a two-step editing process. One researcher took the lead in developing the pool, and the other consulted and checked the choices. There were thus no issues about intercoder reliability. The original sample was narrowed for relevance: First, for each report, researchers sorted for submissions that addressed fair use. Within that pool, researchers concentrated on those from organizations and individuals who were not simply submitting form letters or highly similar letters at the request of an organization. Duplicate submissions from the same person or entity were then removed; different submissions from the same people or entities were kept. What remained were 350 submissions from 277 people and entities: 222 to ALRC and 128 to AGPC.

We decided to discount form letters because we were analyzing the kinds of arguments made by both individuals and institutions that shaped the discussion. The form letters might in principle amplify the political weight of a particular argument, but they did not change it. We noticed three sets of form letters, each several dozen, for authors, surveyors, and teachers, apparently prompted, (based on similar

patterns) respectively, from representing organizations. In the inquiry reports, the form letters are not referenced.

We then determined the categories of contributors to both reports and characterize arguments for and against fair use. For contributors, we used self-descriptions and Web-available descriptions of their organizations. For arguments, we noted how they interpreted keywords provided in the original notices.

Data were collected and analyzed using Glaser and Strauss's (1968) constant comparative method, an iterative process in which coding categories evolve from an accumulation of attributes pertaining to each. For example, the frequent appearance of stakeholders from the information sector resulted in the category libraries and archives. Likewise, similar arguments for fair use from libraries and museums resulted in a category dedicated to digitization for preservation or sharing.

As Glaser and Strauss (1968) suggest, categories developed both from the language of the texts themselves and from our own generalizations about different arguments made. For example, two words used in ALRC's (2013a) discussion paper—*innovation* and *future-proofing*—were examined to discover different interpretations of those triggering, but highly general words. Arguments supporting developing new products and services, for example, were common instantiations of innovation, whereas arguments for wanting to do currently prohibited acts (e.g., digitization for preservation and sharing) were common instantiations of future-proofing. We created larger categories within which several specific arguments could be aggregated. For instance, arguments that fair use will enable services like Google Books (Digital Rights Watch), social media like Facebook and Pinterest (Australian Information Industry Association), and technologies like 3-D printing (Angela Daly) to develop in Australia went under *support development of new services*. Arguments that it will allow libraries to make preservation copies before works in their collections are lost, stolen, damaged, or destroyed (National and State Libraries Australasia) and to digitize their collections to share online (Grey Literature Strategies Research Project) or that it will allow museums to do the same for their exhibits housed at remote geographic locations (Museum Victoria) went under *digitization for preservation or sharing*. Finally, we developed metacategories, discussed later, to aggregate arguments.

The researchers met regularly to discuss coding choices, which resulted in combining similar categories and breaking others into several new ones. When the categories reached what Glaser and Strauss call saturation, which in this case meant reasonable confidence brought by seeing consistency in application of categories, the researchers considered coding complete.

## Results

We divided the groups into pro- and anti-fair use. The main categories of the 94 fair use supporters were

- universities and scholars (23);
- libraries, archives, and professional associations of librarians/archivists (14);
- government bodies (16);



- public interest groups (12);
- companies and professional associations of the tech sector (7);
- museums (4);
- trade and professional associations not accounted for elsewhere (e.g., dentists) (7);
- cable and Internet providers (4);
- online service providers (3);
- disability advocates (2); and
- companies and professional associations of artists/creatives (2).

This group can be reduced to four general contributor categories: academics, including librarians (37); the tech sector (14); cultural/content organizations and their trade associations (6); and government organizations (16). Along with the major groups were a few unusual entrants. Dental associations entered because dentists wanted to be able to play unlicensed music in their offices. An organization supporting more open access to culture associated with the Pirate Party also supported fair use. There were also contributions from U.S. academics who supported the adoption of fair use, particularly for its flexibility and its reliability.

The main categories of arguments we identified for fair use were that fair use will

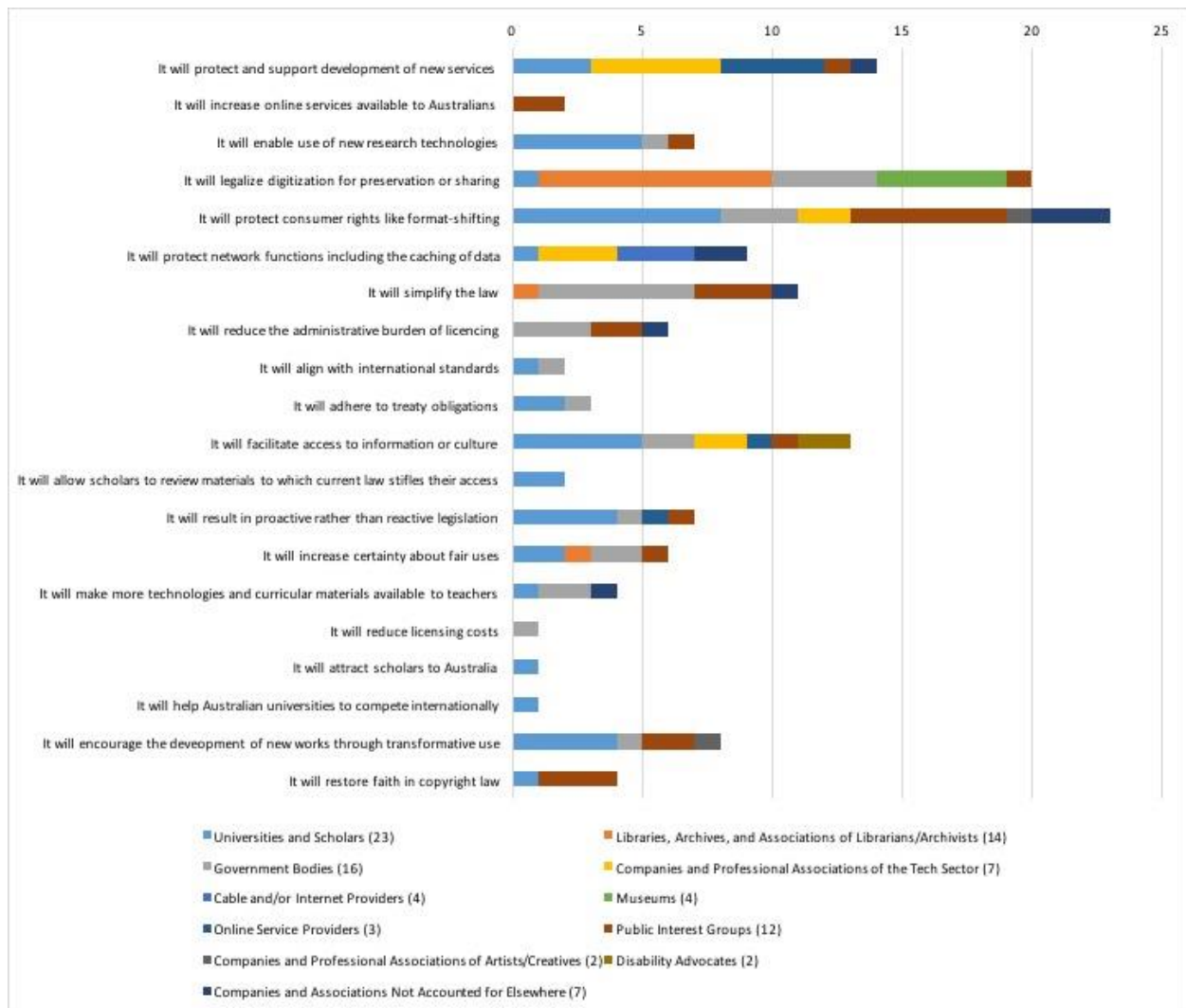
- protect and support development of new services,
- increase online services available in Australia,
- enable use of new research technologies,
- legalize digitization for preservation or sharing,
- protect consumer rights like format shifting,
- protect network functions like the caching of data,
- simplify the law,
- reduce the administrative burden of licensing,
- align with international standards,
- adhere to treaty obligations,
- facilitate general access to knowledge and culture,
- allow scholars to review materials to which current law stifles their access,
- result in proactive rather than reactive legislation,
- increase certainty about appropriate use of exceptions,
- make more technologies and curricular materials available to teachers,
- reduce licensing costs,
- attract scholars to Australia,
- help Australian research universities compete internationally,
- encourage development of new works through transformative use, and
- restore faith in copyright law.

These arguments generally and unsurprisingly align with the categories of contributors. Fair use will help scholars do their work (academics/librarians); it will help consumers be able to use their devices more appropriately and get access to content (public interest groups); it will protect and encourage the

development of technology options (tech sector); it will reliably make Australia more compliant with the law internationally and also its laws more efficient and trustworthy, without engendering undue uncertainty (government, among others). Contributors typically made several pro-fair-use arguments in their submissions.

The most common pro-fair-use arguments (see Fig. 1) were that fair use will protect consumer rights such as format shifting (in 23 submissions), that it will enable digitization for preservation or sharing (in 20), that it will facilitate other kinds of public access to information or culture (in 13). We take these together because they are all proconsumer arguments; the beneficiaries are people who will use copyrighted material to consume it, not to create new material. The next most common argument, with 40 appearances in seven variations, is that the law will work reliably, more efficiently, and responsively, with greater compliance. This argument is made on behalf of the general public, future users, and specific agencies and entities that argue it will improve their workflow in serving the general public. The next most common arguments, with 25, are about encouraging technology services—encouraging new and more online services (with 16), and improving network functionality by permitting caching (9). These focus on provision for corporate digital/Internet services for consumers; again, the ultimate beneficiary is consumers (as well as the Australian economy as a whole). Scholars made eight arguments that research, a creative activity that builds culture, would be improved with fair use, and seven submitters from four constituencies argued that new cultural creation would be encouraged.

Thus, among pro-fair-use arguments, proconsumer arguments were made 81 times. An argument for better administrative and legal efficiency was made 40 times. Only 15 times was any kind of creative process explicitly given as a rationale for needing fair use, and eight of these were academic submissions. Creative practice was, of course, implied in some other arguments, particularly those noting that remixers and others would be compliant with the law; that digitization would be facilitated and people could access digital culture (implying the creative work of librarians, curators, and other creators in making it accessible), and potential creative work done on digital platforms and services that would be enabled. However, the primary foci were serving consumers and facilitating good government.



**Figure 1. Pro-fair-use arguments in ALRC and AGPC submissions.**

The main categories of fair use opponents were

- publishers (60);
- companies and professional associations of artists/creatives (21);
- media companies (15);
- teachers' unions/associations (15);
- trade associations for media industries (17);
- collecting societies (9);
- professional sports (4);

- churches (3);
- government bodies (7);
- libraries and archives (3); and
- companies, trade, and professional associations not accounted for elsewhere (e.g., surveyors) (19).

This group can be reduced to three general categories: representatives of incumbent rights holders (145); teachers (15); and nonprofits (churches, libraries, archives, government bodies) (13). All one way or another represent creators of materials. Teachers' unions wanted to protect the copyrights of their members' own work and also expressed the concern that their access to teaching material could be jeopardized and their work lives made more complicated. Surveyors were concerned that their drawings could be reproduced by governmental bodies for free. Governmental and other libraries feared their current exemptions, which make it easy for them to use unlicensed copyrighted material for their members, would be taken away if fair use is adopted and licensing would become more complex. The Australia Council, a government arts body that subsidizes and promotes Australian creators, sided with licensing bodies. Churches, concerned that their work, created to celebrate their religious beliefs, might be reused inappropriately, argued for the moral rights of authors. As well, two submissions came from anti-fair-use scholars who criticized it for uncertainty.

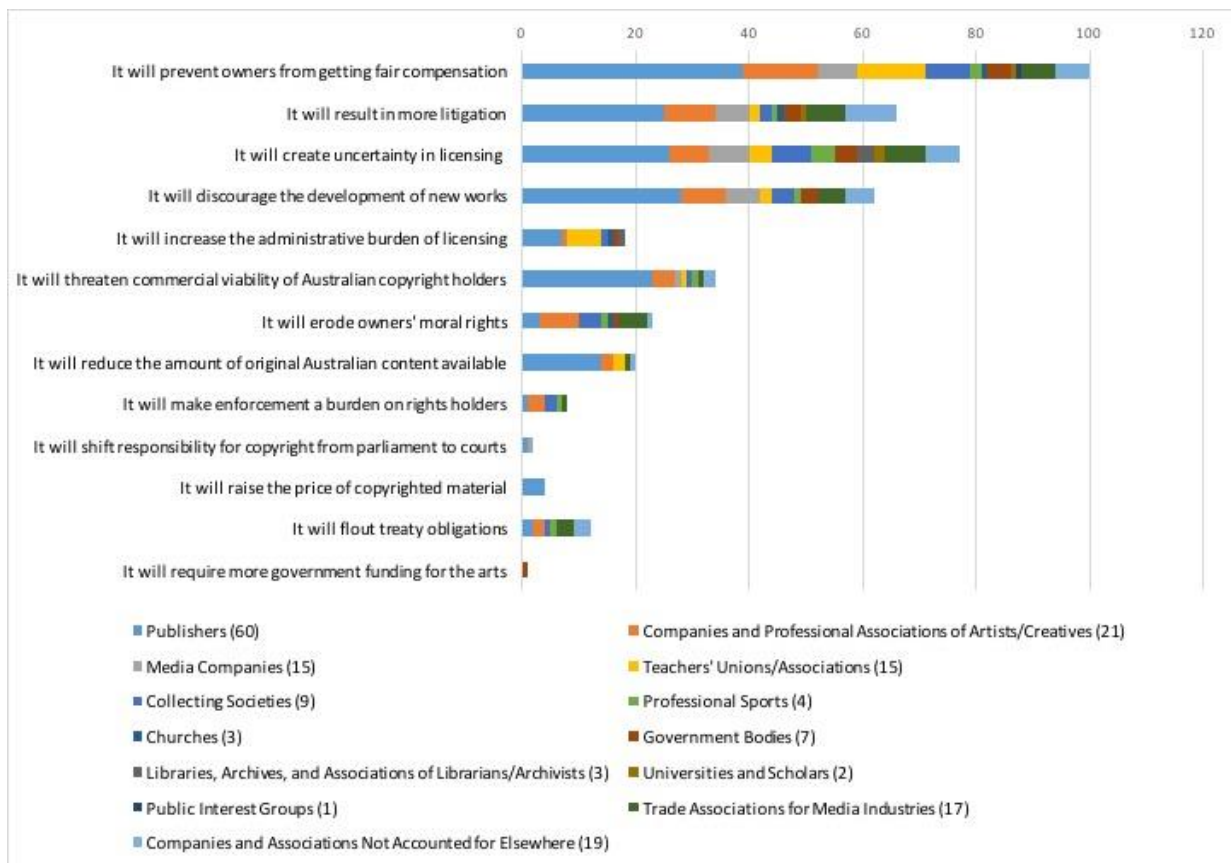
The main categories of arguments against fair use were that fair use will

- prevent owners from getting fair compensation,
- result in more litigation,
- create uncertainty about licensing,
- discourage development of new works and services,
- increase the administrative burden of licensing,
- threaten commercial viability of Australian copyright holders,
- erode owners' moral rights,
- reduce the quantity and quality of original Australian works,
- make enforcement a burden on rights holders,
- shift responsibility for copyright policy from Parliament to courts,
- increase the price of copyrighted material to compensate for revenue loss,
- flout international treaty obligations, and
- require more government support for the arts.

These arguments also align expectably with the perceived interests of their authors. Creators will not be compensated appropriately, which will jeopardize media businesses and discourage new creation (funders of, representatives, of and licensors for copyright holders); copyright law will be less efficient and increase costs (copyright holders' representatives, government/nonprofits); less work will be made (copyright holders' representatives).

Of all the arguments, the one most frequently made (162 times) was that legal uncertainty and inefficiency would be created with an uncertain, unclear and untested law, which would engender a variety

of financial problems but also be a hallmark of bad lawmaking. Although the general public may be the concern of these complaints in some way, the focus is on the costs to creative industries. The next most common (142 times), with publishers in the lead, was that both individual artists and the market would suffer financially because artists would be paid less and have to pay more for enforcing their rights. Far behind (with 82) was the argument that fair use would impair the creative process. This argument was tied to the financial arguments. The most common was that loss of licensing revenues would discourage creators and jeopardize their publishing and other economic support systems. Some 23 comments concerned moral rights, some attached to financial arguments, and others, as in the churches, out of concern for the author's ability to control the kind of use made of their work. Consumers were the center of concern only for four comments, all from publishers, who argued they would pay more for copyrighted material because of lowered revenue and increased costs of distribution. Fig. 2 provides a visualization of the breakdown.



**Figure 2. Anti-fair-use arguments in ALRC and AGPC submissions.**

We also examined the nature of evidence used by submitters. Most did not present more than opinion. Sixty-five used copyright research or studies to support their arguments around fair use. This

research was divided between very broad, high-level studies and anecdote. Of those, 23 cited the Hargreaves report (Hargreaves, 2011), which considered, but decided against introducing fair use in the UK in part because of the different legal traditions there. Twenty cited one or more of three industry-sponsored PriceWaterhouseCooper reports. These reports were all commissioned by anti-fair-use stakeholders, and only considered—by the company's own explanation—evidence and arguments supporting their position. The reports, which featured considerable speculation, were soundly debunked by submissions from both the Australian Digital Alliance (2016) and the Program on Information Justice and Intellectual Property at American University (Jaszi, Carroll, Flynn, & Palmedo, 2016) and in the AGPC's draft report (2016). Anecdotes ranged from pointing to remix artist Perth's Pogo as an example of Australian creativity working currently in the shade of illegality, and to salutary fair uses, such as sharing vital information during wildfires by creating info mashups, using Google Maps (Google, 2012).

Economic evidence on costs and benefits of fair use in any particular economy was at a high level of generality. Some cited research from the Washington College of Law at American University in Washington, DC, especially one surveying exceptions and limitations worldwide and linking these to general economic performance (Palmedo, 2015). This compilation, while authoritative, could not comment on cultural practices in any one country. Another set of studies depends on aggregation of GDP in entire sectors, which often include many businesses that depend both on copyright monopolies and copyright exceptions to get their work done. The discredited PricewaterhouseCoopers report was countered with a more rigorous study of Australian economic activities dependent on exceptions (Houghton & Gruen, 2012). Referenced as well were studies of U.S. economic activities dependent on monopoly and exceptions (Rogers, Szamosszegi, & Trade, 2007; Siwek, 2014), which also depend on sectoral numbers, sometimes from the same sectors.

### **Discussion**

Anti-fair-use forces were more numerous with 176 entrants submitting 228 documents, compared with pro-fair use (95 submitting 117), but their arguments tended to focus more narrowly and to echo each other more consistently. They tended to sidestep access concerns, often arguing that the existence of the Internet alone demonstrated widespread access. They also argued that unlicensed work would reduce licensing costs, with broad economic effects, and change would introduce uncertainty and confusion. The pro-fair-use forces commonly argued for consumer interests, particularly access, partly through innovative digital businesses. They also proposed that a flexible exception would make for more flexible, rational and adaptable law.

As is common in such discussions, members of emergent creative fields such as remix video, recombinant art, multimedia scholarship, multimedia media literacy teaching, and digital scholarship were barely represented, and mostly in references by others. Established creative fields were most often represented by their distributors (publishers, media companies) or service organizations such as collecting societies. In some cases—for instance, surveyors, teachers, and creative unions—creators or their own associations contributed, but as copyright holders, not as creators. Surveyors, church members, and teachers wanted control of licensable content. Some teachers' organizations focused on potential losses in revenue to the business of providing curriculum to schools, although some also stressed the convenience

of current arrangement and fears of uncertainty. Unions pointed to threats to income and to control over one's own content (moral rights). Academics, by contrast, did sometimes speak to the creative process. For instance, they pointed to the creative process as one enhanced by access to information, and they described how their scholarly research processes could benefit from digital access in ways that pose no economic threat.

Aside from academics, individual creators (rather than organizations representative of copyright-monopoly or moral-rights interests) were largely absent, understandably since individuals may not even have been aware beforehand of the opportunity to contribute to a policy discussion that may have seemed far from their creative concerns. Occasionally nonacademic individual writers appeared, although they used language apparently derived from a template offered by the Australian Society for Authors, an advocacy organization that among other things established the collecting society for statutory licenses, the Copyright Agency. Although two "name" authors, including Wendy Orr, contributed, they did not comment on fair use. Thus, creators themselves did not volunteer and were not asked in what way a flexible copyright exception might change their creative process.

Most submissions on the pro-fair-use side did not specifically reference the creative process. On the anti-fair-use side, creators were generally represented as being primarily motivated by financial gain, although this does not mirror the behavior of many artists, including professional Australian authors, most of whom do not receive the bulk of their income from royalties (Zwar & Longden, 2015).

So it is hardly a surprise that that rarely, and mainly in academic submissions, did the implications for actual creation of new work surface. Where it did, there was sharp dispute about which creators matter. The Australian Society of Authors' ALRC submission, for instance, after a nod to educational and amateur work as part of "the creation of meaning" at the heart of culture, notes:

But the advancement of society needs in particular the attention of vocationally dedicated thinkers and writers. The terms and nurture of their creativity are profoundly important matters. Copyright is the single most important precept and legal tool developed since the Enlightenment to protect and facilitate "meaning making" by those who actually do it for a living. The work they produce for and on behalf of us all, their addressing the question of how to live, is always far more important than the technologies used to deliver it. Printing presses never made human meaning, and nor today do search engines or electronic carriage services. (Loukakis, 2013, p. 23)

Several academics cautioned against dismissing amateurs in an emerging digital culture. The Australian Digital Alliance's AGPC submission responded to the notion that fair use hurt creators by pointing out that fair users typically are creators: "In a dispute between two creators, each of whom are contributing new expression and learning to their works, it is nonsensical to describe fair use as tilting any balance away from creators" (AGPC, 2015, p. 2). Thus, any argument that fair use hurts creators privileges incumbents over new creators of culture. Nicolas Suzor's ALRC submission was a rare exception:

Creativity is always informed by previous works; our future culture will always be built upon the past. Because borrowing is fundamental to artistic practice, any copyright law that requires licensing of creative influences acts as a tax on creativity. Restrictions on borrowing create disincentives for the creation of new work; enable existing owners to veto new expression; cause artists to self-censor; and introduce non-trivial transaction costs that slow the creative process. Allowing creative borrowing, by contrast, imposes little harm on the revenues of copyright owners. . . .

The positioning of copyright law as centered on protecting romantic authorship has created a discourse that preferences established authors to the detriment of "mere" amateurs, "postmodern" appropriation artists, or "free-riders." The current debate seems to embody a restitutionary view of fairness that does not adequately respect the authorship interests of decentralised and emerging creators. (Suzor, 2013, p. 1)

Several pro-fair-use contributors to the inquiry noted that many Australians, such as Perth's Pogo, in fact participate in this active, recombinant culture, although their participation may be illegal under today's law. This participation is thus stigmatized, and potential voices relevant to the discussion of the creative costs of monopoly are discouraged. But no actual remixers, or organizations representing any kind of digital cultural creation, submitted to either docket.

The scarcity of actual creators in this debate was then reflected in the nature of the interchanges. The anti-fair-use claim to represent actual creators could not be countered by the pro-fair-use stakeholders, for several reasons. Most of the businesses on the pro-fair-use side were primarily serving and speaking for consumers, excepting academics. Many of the pro-fair-use creators defended emergent/amateur work, occurring within an unorganized creative sector. Many creators to be affected by copyright policy did not exist yet; the future could not testify for itself.

Certainly, creators who did submit contributions to the inquiries showed the limits of today's environment in predicting the possible and the constraint on imagination. The pro-fair-use submissions of a photographic society argues for a limited right to be able to reuse photographs to create audiovisual sequences to share within their societies and submit to competitions:

Most of the AV sequences in question would only be seen a few times outside of the home—at a local Photographic club or two, a State photographic event and perhaps two National AV events or competitions. After that, the AV makers usually move on to their next project. No money ever changes hands and the authors could be described as "enthusiastic amateurs." It is our experience that these people do wish to do the right thing and do not wish to "unreasonably prejudice the legitimate interests of the rights holder." (Australian Photographic Society, 2013, p. 1)

This mild-mannered request, self-limiting in a way that would stifle evolution of the creative work in question, demonstrates a suppression of imaginative capacity. Limiting work to a non-commercial environment would, of course, lose all the economic benefits of creating new kinds of digital art and, more



importantly, lack of circulation would inhibit evolution of that art form and currently unimaginable new culture.

The question of the damage done by copyright monopoly to the evolution of the creative process in a digital era was left unanswered in these inquiries in terms that could embody or illustrate the problem with any specificity, often by structural absence. This structural absence was perhaps encouraged by the terms of reference of the inquiries, but not created by them. Both inquiries opened the door to addressing the terms of cultural creation—the ALRC more specifically than the AGPC. Also, the general term *innovation* in the terms of reference, along with the term *future-proofing* raised in the discussion, were wide open to interpretation.

The structural absence of the creative process might also be conditioned by the expectable difficulties of having disorganized, unorganized, or emergent communities of creators. It certainly reflects patterns identified in even revisionist (Brennan & Hamlin, 2008) public-choice theory—the dominance of frameworks (and, therefore, likely outcomes) represented by dominant and organized economic interests. Most interestingly, and beyond calculations of presentistic interest of competing stakeholders, the absence reflects a lacuna in shared and common frameworks of reference for discussing exceptions and limitations. These frameworks work with widespread assumptions, including the following:

- Exceptions and limitations are not intended to stimulate cultural creation, but to provide a safety valve for exceptional band otherwise worthy cases.
- Exceptions and limitations inevitably hurt creators, so the question is how to balance that loss with gain in other sectors and values.
- Professional and paid creative work is more important to making that calculation than the prospect of creative innovation.

These assumptions were specifically challenged in these inquiries by academics, whose contributions were often derided by large corporate interests as woolly headed. But they pointed to an important feature and structuring absence in the discussion. Discourse analysis thus allows us to identify not only a minoritarian contribution to the discussion, but an absence in policy debate that can and should be addressed.

Reports reflected the terms of debate. Both the ALRC final report and the AGPC draft report endorsed the notion that some form of fair use should be instituted, in support of innovation and good government, while also preserving protections for Australian creators. The ALRC's main recommendation was to repeal most the fair dealing regime and introduce a flexible fair-use exception with a nonexhaustive list of fairness factors and a nonexhaustive list of illustrative purposes. Its reasons included making the law technologically neutral, promoting public interest and transformative uses, promoting innovation, and aligning with consumer expectations. ALRC (2013b) also suggested keeping some of the current specific exceptions and adding new ones to promote "good and transparent government" (p. 29). It further argued to limit the range of statutory licenses (ALRC, 2013b).

AGPC's draft report found that copyright monopolies were more extensive than is economically justified. It recommended replacing the fair dealing exceptions with a fair-use exception to promote

innovation, to make the law more efficient, to account for network functions like caching, to allow for transformative use. It challenged the notion that fair use is too uncertain to be helpful, critiqued PriceWaterhouseCooper data, and recast the Hargreaves report as recommending greater exemptions. AGPC (2016a) called ALRC's fair use proposal "the minimum level of change the Australian government should pursue" (p. 153). The final report (2016b) boldly described the costs of extended copyrighted terms as hurting "innovative firms, universities and schools, and consumers" (p. 2)—but not creators themselves.

These conclusions, in spite of occasional references to and interventions by creators on the creative process itself, were structured around the questions shaping the inquiry and the implicit framework governing the debate more generally—questions about innovation in business/technology and also consumer interests, balanced against costs to incumbent creators. The notion that the generation of culture itself requires access to existing material barely appeared. This leaves the more public and ongoing part of the policy process—in the press and public events—open to a false dichotomy of interests between consumers (in reality, everyone) and creators (potentially, anyone).

### Conclusion

This debate addressed threats of change to incumbent content-industry business models, potential advantages to consumers and exceptions-dependent industries, and the implications of change for good government. The issue of how the creative process—the generation of new culture, often in new ways—was largely addressed in the abstract, with little comment by creators about creative process, and without Australia-specific analytic studies of actual behavior of creators. The fact that, as academic submissions made boldly clear, creators benefit from both monopolies and exceptions was made in theory, but not spoken to by creators other than academics in practice. We know from international experience, particularly in the U.S., that pervasive self-censorship exists where there are, as a result of routine practice, expectations of licensing requirements. The experience of self-censorship is not typically self-documenting, however, and does not appear in the interests or participation of bodies representing incumbents.

Breaking from this pattern were people with independent expertise, experience, and perspective. Overwhelmingly this was the academic contingent, which spoke to creative practice, international experience with the reliability of fair use, the value of best practices codes in reinforcing its reliability, and the public interest generally. This made open inquiry more public and provided the strongest example of breaking with a framework for discussion that unnecessarily pitted "creators" against "innovators."

The results of the inquiries demonstrate not only that private interests organize public discussion but also that entrenched frameworks inhibit important aspects of the issue from surfacing and thus perpetuate conflict. Conclusions were shown entirely within the framework of inquiry, implicitly opposing the interests of innovation, technological growth, efficiency, and government service with the interests of creators/copyright holders. Quotations from and citations to academic research were largely in reference to innovation or legal-process issues, not creative process issues.

In national copyright debates, a core issue is the vitality of national culture, not least as a generator of economic value. In the absence of informed participation documenting actual creative practice, the conversation veers away into related, supporting, or follow-on practices. Independent expertise focused on actual creator process in a variety of fields would be helpful to mitigate inevitable stakeholder shaping of discussion. This work is most likely to be done within the academic community, conducting research with creators who may or may not have considered the implications of their creative practices. To overcome dysfunctional policy wrangling, government entities that open inquiries to public discussion would also have to build into terms of reference a focus on the process of cultural creation, not merely the implications for existing creators.

### Limitations

This study was conducted on a limited range of Internet-available, published materials. It reflects a moment, and not a process. It did not consider informal and follow-up interviews done by government officials with stakeholder representatives or creatives, or public campaigns. For further investigation into the patterns and implication of discourse, it would be valuable to interview participants of the policy process and to conduct a more elaborate critical discourse analysis of texts. It would also be valuable to conduct research into creative processes under today's copyright policy in Australia.

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