Imagination foregone:
A qualitative study of the reuse practices
of Australian creators

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Between January and April 2017, we conducted in-depth, semi-structured interviews with 29 Australian creators across a variety of artforms and with a range of expertise in their relevant fields. We asked participants open-ended questions about their experiences in creative practice, focusing on how legal rules and other forms of regulation influenced their work (if at all). In particular, participants were asked about their licensing and reuse practices. The aim of these interviews was to understand how creators engage with copyright law in the course of their practice, and to explore any barriers that may exist regarding how these creators choose to use copyright content in creating new cultural goods.

From these interviews, we drew the following findings:

1. **The rules of fair dealing are confusing for and poorly understood by creators. Many creators we spoke to believe Australia already has fair use.**

   There was a great deal of confusion about the scope and application of fair dealing exceptions. Many creators conflated fair dealing and fair use, wrongly believing that Australia already has an open-ended fair use exception that applied to their practices. It was clear from the confusion around existing law that fair dealing is not as certain for creators as is commonly presumed.

2. **Instead of following the legal rules, creators use common-sense values of fairness when reusing copyright material.**

   When reusing the works of others, creators operate in accordance with norms and values about acting fairly and treating the work of others with respect. These norms and values influence behaviour more than legal rules. Creators seemed more comfortable with standards than with rules, indicating that fair use would potentially better align with their expectations than the specific fair dealing exceptions.

3. **Particularly for creators who do not have access to professional help, clearing rights is very time consuming and sometimes prohibitively expensive.**

   Creators experienced considerable problems with licensing content for reuse. Correspondence to rightsholders often went unanswered for long periods of time, requiring creators to spend considerable time and effort chasing up permissions. Transaction costs and licence fees were often high.
4. The difficulties of licensing leads creators to ignore the law or abandon creative projects.

Creators responded to the difficulties of lawfully reusing content in the following ways: they deliberately ignored copyright rules which they knew would make it impossible to do their work; they altered or abandoned projects to avoid problems with the law; and/or they self-censored such that they avoided even starting projects that they predicted would be too difficult to undertake legally.

5. One of the most important norms for creators is proper attribution.

Creators valued attribution and acknowledgement highly. In general, they had strong community norms about how to exhibit respect for other artists, which included giving credit. In seeking permissions, they preferred to deal with other individual creators – who they felt understood them and their work – rather than with corporate rightsholders.

6. Creators felt that Australian stories were going untold and Australian identity was being lost as a result of the difficulties experienced with reusing Australian culture and content.

Australia has a rich and diverse cultural history. Several of the creators we spoke to expressed a desire to engage more actively with Australian culture by documenting, using and sharing this culture within their own works. However, they were reluctant to reuse Australian cultural content because of the difficulties (real or perceived) with obtaining permission and the risks of copyright enforcement.
1.0 Introduction

This study looks at how a sample of Australian creators understand, use and manage copyright law when they want to incorporate copyright material into their work. We focus particularly on creators’ licensing practices and their employment of copyright exceptions (fair dealing).

Recent and current debates on copyright reform in Australia have largely bypassed the actual experiences of creators, particularly those who rely on copyright exceptions and licences to build on the culture that has come before. Some attention has been devoted to the economics of being a creator – when and how creators make money and the difficulties inherent in earning a living as a creator. These are important conversations and there is much work still to be done on how the copyright system can better support creators economically. But in advocating for the economic rights of creators, there is a tendency to treat the use by others of existing copyright works as necessarily counter to the interests of creators and copyright owners.

Our argument is that this dichotomy between ‘creators’ and ‘users’ is both unhelpful to copyright law reform and fundamentally false. Existing copyright scholarship has highlighted that creators routinely seek inspiration from creative works around them and draw on these works when creating their own.

In this study, we sought to better understand the choices that creators make when they create and the extent to which those choices are influenced by copyright law. We asked creators about the problems they experience, both legal and practical, when they produce new works that explicitly incorporate the works of others. Knowing what kinds of problems surface in the creative process is useful for law and policy makers in planning any copyright reform.
Our study revealed that far from being purely derivative, there are serious, professional creators who draw on the works of others as a core part of their creative practice. What these creators lack is the support of a copyright system that allows them to create without confusion, fear and strong self-censorship around the use of existing culture. As US Professor Rebecca Tushnet has stated, “Respect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy.”

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This study involved a series of semi-structured interviews with 29 participants, conducted over a three-month period between January and April 2017. Participants were all Australian creators from a variety of artforms, including documentary filmmakers, authors, composers, musicians including DJs and sampling artists, ‘VJs’ (creators who sample visual material as well as sounds), remix artists, street artists and YouTube creators. We recruited participants with varying levels of expertise and experience in their industries – our sample consisted of 7 emerging creators (with < 5 years’ experience in the field), 9 established creators (5 - 10 years’ experience in the field and recognition from their peers), and 13 veteran creators (10+ years’ experience and considered experts in their field). In our sample, there were 10 participants who identified as female and 19 participants who identified as male. We used snowball sampling to recruit participants, through word-of-mouth and email.

### Figure 1 Types of artforms of creators interviewed

These numbers are greater than the interview sample size because some creators worked across multiple artforms. Roughly half worked across two or three different fields, with the other half working in a single field. Ten people identified as documentary filmmakers. Nine people identified as writers, which included book authors and screen writers. Eight people identified as musicians, including composers and DJs. Four worked in other forms of visual art, including street art and digital collage. Eight people were online content creators, including YouTube creators, web designers and game developers. The ‘other’ category includes seven participants who worked as curators and/or educators in addition to their creative practice.
Seven creators had less than 5 years’ experience (‘emerging’), nine creators had between 5 and 10 years’ experience (‘experienced’) and 13 had greater than 10 years’ experience (‘veterans’).

Interviews typically ran for between 40 and 60 minutes. They were conducted at locations selected by the participants as being comfortable to them and were conducted either in-person (in Brisbane, Sydney and Melbourne) or via Skype for those participants located rurally or in Perth. During the interview, participants were asked open-ended questions about their experiences in creative practice, focusing particularly on how legal rules and other forms of regulation influenced their work (if at all).

Participants were asked about whether they had ever used another’s work in their own creations, and if so, whether they had sought permission for that use, and what the process for getting permission was like for them. They were also asked about their response if they were refused permission (i.e. whether they abandoned or adapted the project, or proceeded anyway). Finally, creators were asked about the importance to them of asserting copyright to protect their own works from misappropriation by others.

Interviews were recorded and transcribed. We then conducted thematic analysis of the data collected. We coded for themes around participants’ understanding of the law; practices of reuse; experience with copyright licensing; reliance on copyright exceptions; problems encountered in reuse; responses to problems encountered; and use of copyright law to protect the participants’ own work. This report sets out the results of our analysis.

The aim of the interviews was to understand how creators engaged with copyright law in the course of their practice, and to determine whether any barriers existed regarding how those creators chose to use copyright content in creating new cultural goods. The environment that creators and artists operate in is rich and complex. This study sought to accurately reflect the nuances and complexities faced by creators in their creative processes.
3.0 Australia copyright law: Some relevant background

Australia’s *Copyright Act 1968* (Cth) sets out the law that applies to the creation and dissemination of new creative works. It provides protection for original literary, dramatic, musical and artistic works, as well as for broadcast material, sound recordings and films. This protection is in the form of a monopoly right granted (in most cases) to the creator to control the work.⁶

For most types of works, the copyright owner has the exclusive right to copy, publish, perform and adapt the work,⁷ as well as to share the work online.⁸ It is an infringement to do any of these things without the copyright owner’s permission (‘licence’) or a legal exception.

The *Copyright Act* incorporates a set of provisions permitting the use and reuse of existing copyright material without permission. The most prominent of these provisions are known as the fair dealing exceptions. They permit the use of copyright material for particular purposes: research or study; criticism or review; parody or satire; reporting the news; and for judicial proceedings or in giving legal advice.⁹

There are two steps to determining whether a use is a fair dealing: first, it must be for one of the specified dealings or purposes, and second, it must be fair. Fairness will depend on the circumstances of the use: for example, in reviewing or critiquing an artistic work, such as a portrait, it will likely be necessary and therefore fair to reproduce the entire image. The same will not be true for a review of a film or book.
### Fair dealing for purpose of research or study – Copyright Act 1968 (Cth), s. 40(1)

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.

*(Section 103C extends this fair dealing to audio-visual items)*

### Fair dealing for purpose of criticism or review – Copyright Act 1968 (Cth), s. 41

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

*(Section 103A extends this fair dealing to audio-visual items)*

### Fair dealing for purpose of parody or satire – Copyright Act 1968 (Cth), s. 41A

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

*(Section 103AA extends this fair dealing to audio-visual items)*

### Fair dealing for purpose of reporting news – Copyright Act 1968 (Cth), s. 42

1. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:
   
   (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
   
   (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

2. The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

*(Section 103B extends this fair dealing to audio-visual items)*
In Australia, there is no fair dealing for quotation – as there is in the United Kingdom – unless the quotation is for one of the purposes specified, such as a criticism or review. What this means is that many quotations for ongoing creativity – such as quoting song lyrics in a book, or including a few bars from Kookaburra Sits in the Old Gum Tree in the song Down Under – may be an infringement of copyright unless the creator obtains permission from the copyright owner of the quoted material. Permission can often be difficult or impossible to obtain and can come with costs, whether for a licensing fee or simply the transactional costs involved in locating and corresponding with the copyright owner.

The UK Copyright Act also contains an exception for the incidental inclusion of a copyright work in the background of an artistic work, sound recording or film. This protects, for example, documentary filmmakers from being sued for infringement because a television happens to be on in the background of an interview shot. There is more limited protection in Australia.

Australia’s fair dealing exceptions are frequently contrasted with (and sometimes confused with) the doctrine of fair use in the United States of America. Fair use is a flexible provision, which provides a defence to copyright infringement for certain actions where the use may be considered ‘fair’. In determining whether actions are considered fair use, the court assesses four factors known as the ‘fairness factors’: the purpose and character of the use, including whether the use transforms the original work in some way; the nature of the copyright work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyright work.

Central to the application of fair use is the consideration weighing the social value of the material used against any harm to the right holder. The scope of fair use is considered open-ended for the purpose of providing a “flexible standard that limits the scope of copyright protection and renders certain actions relating to copyrighted works, non-infringing”. In the US, creators who build upon, incorporate or remix existing works do not need to show that their use fits within a particular listed purpose such as parody or satire; they only need to show that their use is fair.
Copyright is a highly contentious area of law in Australia. Recent Australian law reform debates have focused on recommendations to amend Australian copyright law to reflect more flexible exceptions such as the US fair use doctrine.18 Those in support of copyright reform argue that such flexibility plays an essential role in balancing competing interests of rights and access.19 Those opposing law reform argue that flexibility is inherently uncertain and potentially damaging to copyright owners.20 The key voices in this debate are publishers, collecting societies, rightsholders, universities, academics, libraries and technology companies.21 While these reform debates provide two very distinct points of view, they do not fully consider the way in which copyright law is understood, discussed and actually used in creative practice by creators and artists.

Historically, shifts in social practice affect change in the law. Social norms do not dictate the law, but they do provide policymakers with insight into public expectations and community standards.22 This report seeks to shine a light on the grey areas between laws and norms in creative practice. This study does not make recommendations regarding law reform in Australia; expert bodies have recently undertaken that task.23 The purpose of this study is to document the opinions and practices of artists and creators within Australia who encounter copyright law within their day-to-day creative activities.
We began our interviews by asking creators to describe their experiences with reusing other people’s content. The nature of each person’s reuse practice varied depending on their artform – for some creators, their experiences involved quotation, for others it was remixing, homage or appropriation. We asked creators to describe why they had chosen to use this content and how they had gone about it – did they ask permission? Our goals here were twofold: first, to ascertain, indirectly,\textsuperscript{24} what creators understood about copyright law and how they situated themselves within it, and second, to understand the difficulties that creators face when reusing content for ongoing creativity. We found that most creators try hard to do the right thing by other creators, but many face significant impediments in terms of the transaction costs of locating and communicating with copyright owners and the financial costs and creative restraints imposed by licensing schemes.

We also found that creators consistently misidentified the uses that they could legally make under Australia’s Copyright Act. Some creators sought permission for uses that would arguably fall within Australia’s existing fair dealing exceptions (and therefore would not require permission); others believed that their uses were non-infringing for reasons that are not reflected in the law, such as non-commercial use. In this part, we present our findings on how creators understand and grapple with copyright infringement, exceptions and licences.

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4.1 Understandings of fair dealing (vs fair use)

Most of the creators we interviewed had a very limited understanding of the fair dealing exceptions available to them under Australian copyright law. Creators also tended to conflate the concepts of fair dealing and fair use, and used the terms interchangeably when discussing copyright limitations. For example, a career music composer and writer stated that when using quotations in books: “I am discussing the quotation and analysing it, in which case, it’s - to use a few lines it’s fair use.”

It became clear throughout several of the interviews that when creators were making judgments about whether their uses constituted fair dealing, the considerations they gave the most weight to were actually closer to a fair use analysis than fair dealing. Notions of transformativeness and market harm loomed large. This was particularly prominent for the creators we interviewed who had shared their work via YouTube – the platform’s copyright education initiative and its Content ID processes, situated as they are in US law, seemed to have influenced the Australian creators’ understandings of copyright exceptions.

One interviewee, a parodist and video creator, noted that in disputing copyright claims and takedowns on YouTube, he relied most heavily on “the meaning and character [of his work] being transformative.” It was the transformativeness of his work, rather than its character as a parody or satire, which he understood to be the most important thing in determining whether or not his work was infringing. He explained: “You can say [to YouTube:] it’s transformative; I’ve added a lot to it. It’s not competing or causing market harm. So please let it stay up.”

Other creators reflected these understandings of copyright law, even when they had not interacted significantly or at all with YouTube. We asked interviewees both about their own reuse practices and their experiences with and feelings about other people reusing their copyright works. Overwhelmingly, interviewees indicated that their determinations about infringement and their consequent feelings about whether or not the ‘right thing’ had been done depended on two things: the commerciality of the use and extent to which the subsequent creator (whether themselves or another) had added to the original work. Commercial use, of course, does not render a use ‘unfair’ under either Australian or US copyright law, but the generation of money from a subsequent use changed things for many of the creators we interviewed.
The interviewees’ understandings of ‘commercial’ were fluid – no creator indicated that others should never make money from reuse, but many indicated that they considered large amounts of profit to be both morally and legally wrong if permission had not been obtained for the use. Many also differentiated between uses by small-scale artists, charities and nonprofit organisations, on the one hand, and uses by large, commercially successful artists and organisations on the other. These understandings meant that a number of the creators we interviewed considered their own work to be potentially non-infringing, largely because they weren’t making any money from it.

Some creators understood that their work might be technically infringing, but thought that copyright owners should not take issue if the impact on the market for the original was minimal. As one remixer stated, “I want to make companies realise that remixing and mashing up is not about causing market harm. It’s about communicating with people who like similar things to you.”

Many creators we interviewed considered their own work to be potentially non-infringing, largely because they weren’t making any money from it.

Many creators focused on the transformativeness of subsequent creations in the sense that they paid particular attention to how much was added to or changed in a pre-existing work. While this reflects, to some extent, the US analysis in fair use, it bears no connection to the legal assessment undertaken under Australian law with respect to copyright infringement. Australian copyright law is concerned primarily with what has been taken; it pays little attention to what has been added. In this sense, the version of ‘creativity’ that is embodied in Australian copyright law is significantly at odds with the notion of creativity that was repeatedly described to us by Australian creators.

In public policy debates about copyright exceptions, advocates of fair dealing exceptions frequently assert that fair dealing has the benefit of being clear, consistent, well-defined and easily understood. However, the exact opposite opinion was expressed by many of the creators we interviewed – a finding that surprised us. Interviewees indicated that they did not know what particular terms within fair dealing meant and what actions they covered; as one participant stated: “It’s a lot harder to break down what is parody? What is satire? What is criticism?”
Two people used the word “minefield” to describe assessments about exceptions, another noted that fair dealing “takes a lot more brain power”, and yet another remarked, “Everybody is out there flying a bit blind about this.” On the whole, creators indicated that they were far more comfortable and confident operating within "the spirit" of fairness and respect, rather than trying to interpret and understand specific exceptions. One filmmaker remarked: “We talk about being a country of clever people with great aspirations for creative endeavour and we bandy around the word innovation time and again as if it’s the lifeblood of what we are and what we do. Yet we - the people who are actually doing the work - are constantly inhibited by the restrictive frameworks that are applied to copyright."

Creators indicated that they were far more comfortable and confident operating within “the spirit” of fairness and respect, rather than trying to interpret and understand specific exceptions.

As we detail further in part 5 of this report, confusion about fair dealing exceptions has an observable impact on creative practice. Many creators self-regulate to avoid the risk of infringement and some make decisions based on erroneous assumptions about the law. One creator began a historical project believing that the news reporting exception would apply, but then discovered that it did not, rendering the nearly completed work useless. A filmmaker wanted to employ an exception that might plausibly have been appropriate, but “because there’s no standards, it’s open to interpretation” and decided that it was too risky. A YouTube creator had produced mash-up content that was almost certainly parody or satire, but was advised by lawyers that it was too risky to contest a copyright takedown notice and so reluctantly paid a heavy licence fee. The creator told us:

“I know so many creators on YouTube that have a massive problem with fair dealing and copyright. Basically people taking down parodies, and satire, and really stuffing around with people's lives. Because we're talking about people who are trying to do this for a living. There's not a lot of us, but there's a few of us, and we do important work, I think. There is a law in place, and somehow this law doesn’t actually protect us.”
Confusion about fair dealing exceptions has an observable impact on creative practice. Many creators self-regulate to avoid the risk of infringement and some make decisions based on erroneous assumptions about the law.

While the majority of creators interviewed had difficulty with fair dealing, a few creators reported successfully employing these exceptions. One author noted that they had been able to employ criticism and review to write a biography after the subject of the biography had refused to give permission to quote any of the subject’s work. Two filmmakers employed the same exception somewhat more aggressively to argue that their historical analysis of an artistic trend was criticism and review.
Almost all of the creators we interviewed had experience seeking (and sometimes obtaining) licences to use other people’s copyright material. For the few who had not, this was because they were near the beginning of their careers and had chosen to either “fly under the radar” with respect to copyright use or had avoided using copyright material altogether because they perceived that it was too risky or difficult. We discuss this further in part 5. A few of the more experienced creators spoke about licensing matter-of-factly, as simply part of the process and cost of creating. However, the majority of creators we interviewed discussed copyright permissions as a source of confusion and frustration. A musician described the licensing process as “a nightmare. A total legal nightmare”.

One reason that creators felt overwhelmed by the licensing process was that publishers require creators to complete long and complex paperwork to request permissions, and this varies from publisher to publisher. A filmmaker told us: “I think any process that requires securing rights is always painful ... the amount of information required to fulfil requirements for publishers is not standard.”

A common experience was the significant cost to a creative budget, both in time and money, that seeking permissions entails. In terms of time, established and veteran creators reported that they generally expect to invest months in negotiations, even for very small samples and simple uses, and even where the ultimate answer might end up as ‘no’. One creator noted that, “When I write to a publisher, I never expect to hear back for months.”

The same creator reported that large organisations often simply ignore requests. A musician told us that they had to budget a six-month time lag into album releases in order to get permissions for samples used. Another musician remarked, “I always found the process of getting samples cleared very, very difficult, incredibly onerous, and it kind of takes the joy out of the original creation.”

“[The licensing process is] a nightmare. A total legal nightmare”, said one musician.
A filmmaker who had attempted to chronicle a musical trend complained of months of negotiations and frustrations over licensing, much of it offshore. The negotiations over the work of one musician took four months, and ended with refusal. “I’ll never do another music doc, unless I’m working directly with the artists,” the maker said. “It’s just been too much pain.” An author of historical work said that the permissions process for quotations essential to their work was “lengthy and time consuming.”

Even where creators tried to avoid the need for licence negotiations by finding public domain or openly-licensed material to use instead, time was a substantial issue. Several creators complained to us about the time it takes to trawl through all the free, online content to “find the gem amongst the muck.”

The financial costs of licensing were also a source of stress for many creators. One filmmaker described a project in which short snippets of music were included in a film. The snippets ranged between three and seven seconds in length. The licensing fees for these snippets were between $500 and $1000 per song, “irrespective of the duration and irrespective of who sung it and irrespective of the cause behind the film”. Publishers also placed significant restrictions on the film – the film could only be screened at film festivals within Australian, no theatrical release, no international film festivals, no online release, and only 100 DVDs could be printed. For a 20-minute film with less than two minutes of copyrighted music content, the total cost for licensing came to over $10,000. The project was ultimately abandoned because the filmmaker could not raise the funds to cover the licensing fees. In another case, an internationally-successful film producer with a track record in negotiating clearances ended up in debt over final arrangements for licensing. For the creators we interviewed, copyright licensing was often perceived as a transferral of wealth from small creators to large publishers.

This is a cost without any real balance for those creators licensing out small segments of their own works, at least within the small group of creators we interviewed. Two of the most veteran creators, both of whom are semi-retired, noted that occasionally they receive licensing payments, but that it is well under a thousand dollars a year and may not even occur in a year. “It’s a nice surprise when it comes,” one said.

For the creators we interviewed, copyright licensing is often perceived as a transferral of wealth from small creators to large publishers.
As with exceptions, creators often spoke about fairness when it came to licensing. There was a sense that fees requested by rightsholders were too high and failed to take into account the creativity and value added by the subsequent creator. For example, we interviewed a musician who had set an existing poem to original music. The poet’s agent asked for 50% of the royalties generated from the music. The musician told us that while a 50/50 split was fair if the project was a collaboration, it did not seem reasonable for a poem that “already exists”. Similarly, an online content creator complained about YouTube’s Content ID system, where copyright owners can claim the revenue generated by a video that incorporates their copyright material. Revenue is redirected in full to the copyright owner, notwithstanding that the subsequent creator may have added considerable creative material to the video. The creator said, “I think it’s a bit nasty to have a company redirect all revenue back to them, because then they’re getting the money plus they’re getting your free labour in terms of creating promotion, enthusiasm and the community around their product.”

On the whole, creators perceived these problems to lie with publishers and corporate rightsholders rather than with other creators. Several interviewees reported that they had, on occasion attempted to work around licensing issues by going direct to the artist rather than the artist’s manager.

Creators often perceive that it is easier to work around licensing issues by going direct to the artist rather than their publisher or manager.

In a few instances, creators had actually obtained permission from the original artist even after they had been denied by the artist’s manager or publisher. This is interesting not only because of how creators privilege communications with others within their communities of practice. It demonstrates, again, the difficulties that creators may have with understanding the scope and management of copyright interests. The creators we interviewed demonstrated no awareness that other creators may not, in fact, have the legal ability to grant them a licence if those creators had previously assigned their copyright interest to a publisher. Additionally, they seemed unaware that publishers may hold rights separate from and in addition to rights held by the artist – such as copyright in a sound recording as distinct from a musical composition.
4.3 Fears and anxieties

The unfortunate result of the confusions and difficulties detailed above is that many creators feel a persistent and pervasive anxiety about copyright. A digital creator confided that trying to understand and manage copyright is “incredibly stressful”. Another digital creator and parodist spoke about the anxiety that surrounds an endeavour which may or may not fall within a specific fair dealing exception:

“It’s quite a terrifying feeling when you think we’re about to spend the next week writing, then recording, and getting guests in to record on this specific track. You can’t then change the track, because all your lyrics are going to be out of sync. Or even if it is the same tempo, it’s just not going to feel the same. Then we’re going to film it, and then edit it. There’s hundreds of hours of work, and thousands of dollars. It’s terrifying to think that you might upload it and then it gets taken down.

... It’s a very familiar feeling. We’ve had it a lot of times, so yes. I can’t think of a specific example, but we often went ‘it would be so good to be able to do this, to use that, but someone might not understand that this is a satire, or a parody’. Or in some cases, it might not even be a satire or a parody. It’s just better not to risk it.”

Many creators feel a persistent and pervasive anxiety about copyright.

One filmmaker noted that even though she tries to do the right thing, “it is one of those crazy fears that you have as a creator that somewhere you’ve done the wrong thing and you’re going to get done for it in terms of copyright.” Another creator described this as an “inbuilt fear” of getting sued for copyright infringement. Much of this fear was related to the expenses associated with copyright disputes. Several creators spoke about the likely high costs of legal advice and assistance in contesting or settling disputes, and the high payouts that might be demanded for use of copyright material. The financial aspects of legal management were a source of anxiety for many creators – they worried about being made to pay money that they simply didn’t have.
The anxiety was most acute around content owned by large corporations – for some creators, there were big-name copyright owners that were simply no-go zones. One visual artist remarked, “They totally scare us, or scare me, you know?” Many creators were critical of the significant fees or damages demanded by copyright owners in disputes. Again, creators raised issues of fairness in terms of proportional responses in copyright enforcement. One creator said, “I think the punishment far outweighs the crime. It’s just seen in a really black-and-white perspective. That you’ve broken a law, so therefore I get to put you in court and you give us lots and lots of money. In terms of culture, there’s nothing to be gained from that.”

The creators who were more laid-back about copyright enforcement tended to discount the possible financial consequences of infringement actions. Rather, they focused on the risk that their own content would need to be taken down from the internet or altered to remove the copied content. They viewed this more as a frustration or disappointment than a source of fear.
5.0 Findings: How creators cope with the problems

Creators cope with a copyright exceptions regime that does not match their creative process in a variety of ways: they flout the law; they change their work; they invest substantial time and money, sometimes to get permissions and sometimes to complete the changes; and they either avoid or abandon the work.

5.1 Flout

We heard a range of stories about ignoring known copyright obligations when creators believed that these obligations would make it impossible to do their work. Visual and digital artists working in multimedia told us that the long tradition of appropriation and recombination in the arts overrides, for them, consideration of copyright. “I would not be able to make art if I paid attention to that,” one said. Visual artists described their choices as a calculated risk, given that they only exhibit their work in galleries and, in two cases, at a one-time large public event. They often, however, avoid displaying their work online because of concerns about copyright infringement notices and letters of demand. Some artists take a calculated risk to ignore the law rather than go through the difficult licensing process.

This calculation is mirrored in the behaviour of art museum curators. One curator, asked about collage work displayed, clearly had never been troubled by displaying it. “He didn’t use very much,” the curator said. But when asked if they would display the work online, the curator said they would think twice about that. Another curator regards showing recombinant art within the physical institution as “acceptable risk,” but going online with the same digital art as exceeding tolerable risk.

Some artists take a calculated risk to ignore the law rather than go through the difficult licensing process.

Musicians who ground their art in sampling similarly reported disregarding the law; they appeared to be more comfortable than those in the visual arts with digital exposure for their choices. One musician extensively sampled a vintage collection of vinyl records and uploaded the samples to SoundCloud, without complaint.
A musician and audio-visual artist put together a remix work and launched it online without clearing it. They received a complaint a year after it had been initially released and negotiated a payment with the complainant at that point. Musicians in particular viewed legal requirements as a restriction on their creativity, and so more frequently ignored the law than other creators. As one musician said to us about legal restrictions: “I think if that’s your excuse for your lack of creativity, that’s a pretty poor excuse.”

Artists may ignore counter-intuitive legal restrictions that they see as unfair restrictions on their creativity.

Flouting the law was more common among emerging creators, who considered themselves poor targets for litigation. Many considered that their work would go unnoticed by large rightholders – that they would be able to “fly under the radar”. Even if their work was noticed, they figured that rightholders would not sue them because it would be obvious that they had no money. Beyond this, most emerging creators were simply concerned with other things: “I think when you’re quite small and independent, something like that [copyright] is just so far from your mind. Because just even getting people to listen to your music or play a gig with a reasonable amount of people is really the mission. Your head is in a very different space, I think.” We observed a continuum with these attitudes - some of the veteran artists relayed stories about ignoring or actively disobeying the law when they were developing in their field, but having to pay greater attention to the rules as they became more established and successful.

5.2 Change

Our interviewees spoke of “workarounds,” or techniques to avoid having to license work. Some of these included seeking openly-licensed or public domain works; replicating or paying someone to replicate closely an expression (a piece of music, often) that falls under copyright; and paraphrasing rather than quoting, an option used often with text. Workarounds were typically seen as second-best options, the use of inferior material to that most appropriate to the work’s purpose or goals. For instance, an author we interviewed tries to avoid quoting anyone else when writing books even though this can weaken the effectiveness of the work.
One musician told us a story about how as a student he set a poem to music, got the work accepted for public performance in a prestigious theatre venue, and then waited for the better part of a year to get permission from the (long-dead) poet’s publisher. The musician finally had a friend write replacement lyrics, which was an arduous process:

“It was very, very difficult, of course, because you have to find words that fit the music then, because I had already fitted my music to [the poet]. So the words that she came up with, the new words, had to have the same rhyme scheme and the same—essentially, the same meaning and the same stresses and all the rest of it, so that when they were then sung to this existing music, that they didn’t sound ridiculous.”

Ironically, permission finally came through from the poet’s publisher a year after the public performance.

Filmmakers, especially, had accounts about workarounds. A filmmaker who could not afford licences for audio-visual material for a section of film that involved setting historical context substituted instead headlines from old newspapers, resulting in lower-quality images shot off projected microfilm. Another filmmaker, to avoid charges that would double the cost of the film, degraded sound on pub scenes essential to the film:

“We had to take stuff out, bring it down to “insubstantial,” but to do that, in the process we degraded the content of the film. We’re making a film based in actuality, and this very key component of actuality, people drinking in a pub where the music is playing. We’re hamstrung, we can’t be observational filmmakers if we can’t observe reality, and the reality is that people listen to music. We’re not using extra-diegetic sound to deliberately borrow the sentiments of a certain track to enhance our storytelling. We’re observing people making their own choices about music and allowing that to say something about them. In the US that would be transformative and we could use it.”

Another workaround involved attempting either to relocate or to collaborate with someone in a nation where the copyright regime was more flexible. For instance, a gallery curator considered setting up a US office in order to use US exceptions in co-producing work. Likewise, filmmakers considered finding a US co-producer in order to distribute a film with copyrighted elements. This approach is an echo in the creative sector of concerns already highly visible in the technology sector, where technology businesses and start-ups relocate to other jurisdictions (often, Silicon Valley) where copyright laws are more conducive to experimentation and innovation.27

Creators were, however, proud of the fact that they had found workarounds. On a few occasions, a creator argued that facing a barred door from licensors could result in a more creative product in the end.
5.3 Avoid and/or Abandon

A much graver consequence of copyright confusion and barriers around licensing and exceptions is that creators reported abandoning projects that were already in development or ideas for projects in their early stages. We found a few cases where creators harboured private dreams for projects that they simply never started because it seemed too difficult or risky under copyright law. For instance, one mentioned that a film about an imitator of an iconic Hollywood character could not be made for lack of access to film images and work of the celebrity. One experimental artist wanted to work with ephemeral films, but had decided that the licensing problems, particularly around orphan works, would be impossible.

Sometimes absence is a quiet testimonial to paths not taken. One gallery curator noticed that Australian arts curators tend to avoid appropriation works, for instance – a tendency that has effects both on what is shown and what is attempted.

Sometimes, however, absence makes the loss invisible. Teachers of artistic practice told us that their students’ work often cannot be submitted for festivals or otherwise circulated publicly, although it is important for students to get visibility, because the cost in both money and time for permissions is prohibitive for students. A maker of video records of public events in the arts found again and again that podcasts could not be made available because of problems with timely rights clearance. One filmmaker told of a film that went out of distribution because limited rights expired, two others described films that could not be launched, and several others were in the process of negotiations hoping they could overcome what seemed to be insuperable licensing difficulties. Several online video creators described takedown challenges that made their work invisible.

Much more often, ideas never get developed or possibly even surface. A gallery manager of arts programs and business partnerships said that ideas ‘get filtered out before they even get considered seriously. It’s not that they get fully developed and squashed. Many creative ideas that involve reusing existing material ‘get brainstormed out’. The ideas that get past the first filter already reject a lot.” Another creator talked about copyright avoidance as censorship: “You learn how to self-censor. ‘Professionalism’ is a kind of censorship.” We saw this sentiment reflected again and again in the interviews we conducted: that it wasn’t worth even trying to obtain licences because lawful reuse of content was only available to those with deep pockets.
For example, three different creators expressed the same concern:

“So for me it was always a principle of my filmmaking that if I was to use anything copyrighted that it could be problematic and it just wasn’t worth using it.”

“I’m usually pretty gun-shy, in the sense that I don’t even try. I just think it won’t be possible or it’d be too expensive.”

“There were often times that I would like to weave in existing stuff, but I just think, it’ll be too expensive to - yeah probably just too expensive. It’s just not in the realm. I see it as like big people budget activity, rather than indie activity.”

Many creative ideas that involve reusing existing material ‘get brainstormed out’ in the early stages of a project.

As well, people learn to avoid entire areas, subjects and genres. A young filmmaker, based on recent arduous work to secure clearances for news coverage, said this experience “would put me off creating the best film with media footage in the future.” A creator who had experimented with music mashups has abandoned the genre due to ongoing copyright problems. Other creators referred often to recent history as a problem area to be avoided, whether to tell Australian history, to provide historical context, to write biography or to make digital art featuring well-known historical references. Creators felt the loss of historical narrative as a loss to Australian identity. One said of the difficulties around music licensing, “Australian music heritage is at stake because doco makers won’t go near it. The 80s in Australian music culture is vibrant and is ripe for a doco but I’m not going there.” Another lamented, “This is what we risk when we limit too much. We stop these kind of creative potentials from happening.”

Creators felt that the reuse difficulties involved in doing historical work resulted in a lack of Australian stories and a loss to Australian identity.
6.0 Findings: What Creators Value

Our interviews with Australian creators revealed, starkly, where creators attribute value in their creative practice and interactions. We found that creators value their industry, other creators and their own work. Value is expressed through giving credit to other creators and creating works that deal 'respectfully' with former creations. Creative practices tend toward less formal means of interacting with other creators and their works, in ways that often do not align with legal obligations to seek specific licences for use of content. Creators frequently operate according to community norms and unwritten ethical considerations rather than the letter of the law.

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6.1 Giving Credit

All but one of the creators we interviewed considered attribution to be a fundamental part of their creativity, both in terms of their own practices and what they expected from others. Almost all creators indicated that being credited and giving credit was central to their creative practice and formed part of an unwritten agreement amongst creators. “It’s just good old fashioned etiquette,” one said.

The focus on attribution by the people we interviewed is due, in part, to the nature of their work, which is often sampling, remixing, or appropriation artforms. By giving credit, creators are not only showing respect to the original artists, they are also allowing audiences or users to track the story of various pieces of work. As one creator eloquently said, “I feel it’s important that one is acknowledged for the source of one’s work, but more importantly, to acknowledge that the origin of those works could come from anywhere and everywhere. That our creativity is the product or the sum of - the end result of the sum of many, many, many parts.”

Using an existing work and acknowledging that work through credit can be seen as a continuation of the dialogue that was started in the original piece. “I am trying to pay
respect to the original and often the original is something that’s - to me, I find already, an amazing piece of work and I just want to continue that conversation,” said one creator. “It’s out of total respect”. The giving and receiving of credit forms part of the broader theme of respect: for both the artists and for the industry that the creators work in.

Fortunately for Australian creators, the right to attribution is included as an author’s right in the Copyright Act 1968. Creators of literary, dramatic, musical and artistic works, and of most films, have the moral rights of attribution of authorship (s193), not to have the authorship of a work falsely attributed to someone else (ss. 195AC – 195AH), and of integrity (s195AI). The moral right of integrity protects a work from derogatory treatment, which is generally defined as an act that results in a material distortion, mutilation or material alteration to the work that is prejudicial to the author’s honour or reputation (ss. 195A – 195AL). Moral rights can only be held by individuals (s190), last for the lifetime of copyright in the work (s195AM) and cannot be transferred (s195AN). The moral rights provisions of the Australian Copyright Act give Australian creators an important edge over US creators with respect to attribution. Not only is giving credit an important norm of practice within many creative communities, but the right to attribution is a legally enforceable right in Australia.
6.2 Showing Respect

A strong theme in all of our interviews was the idea of ‘respect’. Creators were anxious to ensure that their practices were respectful to the other creators in their field, particularly those artists that they had sampled. Respect was primarily about two things: dialogue with other creators (or at least being open to the potential for difficult conversations), and ensuring a level of transformativeness within their own work.

Creators spoke about seeking permission to use work in creative practice, though their notion of ‘permission’ was not synonymous with legal requirements. For creators, ‘permission’ was about artist-to-artist conversations, not about labels or management companies. An experienced sampling and remix artist noted that working with artists directly is a more “open and creative experience.” Creators preferred to speak with like-minded individuals who “tend to get it”. Importantly, these conversations could occur after the fact of the use, and might even involve light criticism from the original artist. Almost all of the emerging artists noted that they would have no hesitation in removing their own work from the internet if the artist that they had sampled was unhappy with the work on a creative level. In fact, because part of their intent is “to do justice to the original”, there would be an element of shame for many of these emerging creators that their creation had somehow detracted from the original.

For the most part, however, the established and veteran creators we spoke to were happy to have their work sampled and used, particularly by up-and-coming creators. One veteran musician said, “I have been sampled and I was asked permission. I was very happy to give it. I think most of the time people would be happy to give it. I think that’s perfectly reasonable.” In fact, most of the creators we interviewed said that they would be flattered if someone wanted to use or remix their work. This sentiment was consistent across all artforms.

Most of the creators we interviewed said that they would be flattered if someone wanted to use or remix their work.
A musician observed, “I believe in the whole imitation being the greatest form of flattery and things like that. I just kind of accept it as part of the landscape... [w]e're all sampling each other”. An author said, “In some ways I think I would be more flattered than annoyed about that. If someone actually took the time to read [my work] and was so affected that they had to create something from it that would actually be an amazing outcome from a work”.

An online content creator said, “If there was an intent to have a conversation with the work and continue the work in some way rather than trying to pretend as if it’s their own, I’d have no problem with it. I would be flattered that someone wanted to do that.”

The interviewees, in general, were philosophical and positive about the reuse of their own work by others, even where those uses were unremunerated. As one musician opined: “Part of me almost sees that as a little bit like, well, instead of making your own sound, you needed me. I’m not sure that I’m not the winner in this.” Even where creators refused permission to others or expressed disapproval about the use of their works, they preferred to do this in ways that kept conversations open. For example, one creator purposely eschews YouTube’s Content ID system, preferring to personally contact users who have uploaded their videos:

“We’d always be very polite and say: ‘Really glad you like our work, but if you want to support us, can you not reupload our stuff? Because we really need people to subscribe to our channel.’ I don’t remember one case of people saying no. Everyone was like yeah, sure; sorry. They just thought it was cool to do that. We never had a problem in that regard.”
In only a few instances was there an imbalance in how creators viewed their own practices and that of others – i.e. they did not ask permission themselves, but they hoped that others would seek permission from them to make use of their work. This inconsistency existed chiefly among emerging creators, who generally tried to avoid attention in creating their own work by flying under the radar. However, these creators also stressed that their failure to seek permission was not done out of any disrespect to the original artist. Normally, the reason was shyness or a still-developing confidence in their own creative abilities. Ultimately, for the creators we spoke to, permission was a matter of ethics, etiquette, and respect. It was a simple “getting in touch” to let another creator know what they had done; it was “just good manners”. It was also something more personal and polite than legal licensing practices. As one online content creator told us about the legal process, “[The] whole process of the politeness of asking is not facilitated. There's nothing polite about all of these forms and all that sort of stuff.”

For the creators we spoke to, permission was a matter of ethics, etiquette, and respect.

Another important element of showing respect involved the level of originality, creative process and adaptation that occurred in relation to the original work. All creators drew clear distinctions between creative remixing or use, on the one hand, and “rip offs” or “piracy” on the other. Several creators had stories of their own works being blatantly copied purely for commercial gain – for example, works of art printed on clothing without permission or attribution. This kind of behaviour was never acceptable. Creators judged this behaviour according to their own set of moral standards, rather than the law. One creator explained that they knew what was ‘right’ and ‘wrong’ “in some sort of quasi-ethical way. Yeah, regardless of the legal issues. I think there is kind of an unspoken set of rules or ethics in there”. Another noted, “I think the distinction has to be made between the way we’re using content – which is parody and satire, and using elements of an original and transforming it into something else - and what is happening to us, which is people just taking the entire content”.


The finding that creators place great value not only on their own works but on the works of others is important. It indicates that creators who reuse existing content are not ‘bad actors’ who disrespect the works of others or disregard the fact that other creators may be trying to earn a living or generate revenue from their creations. As discussed earlier in this report, most creators considered seriously the degree of commerciality of a use when deciding whether or not that use was fair and reasonable.30 In almost all cases, creators were genuinely trying to do the right thing by the creator of the existing work, to the best of their abilities and resources.

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In short, the creators we interviewed were not simply trying to get something for nothing. Instead, they are participating in a long and rich tradition of creative practice that draws on, refers to, adapts, remixes, samples, quotes and appropriates the creative and cultural works around them. They are trying to create new from old, and to contribute value to their industry and society.
This study revealed some concerning patterns with how Australian creators understand and experience copyright law. Creators were worried, rather than empowered, by copyright law. Their understandings of the scope of copyright infringement and of Australia’s copyright exceptions were often inaccurate, at least as a matter of law. Australian law was frequently confused with US law and practice; understandings of the law were informed by creators’ own ethics and community norms. Law and norms aligned only part of the time. Creators were frightened by the potential strength of copyright enforcement and the risk of large financial penalties, but they were also stifled by the smaller, though still imposing, fees charged for copyright licences. Overall, many of the creators we interviewed were frustrated with a copyright system that they felt did not understand or respect the work that they were trying to do.

Creators were worried rather than empowered by copyright law.

This was a modest initial study. Evidence was drawn from a small interview base, and it focused primarily on the personal experiences of creators who were reusing content (both licensed and unlicensed) and employing exceptions. Our study did not, for instance, seek detailed information on how much the subjects paid in licensing fees compared with how much they took in from licensing similar amounts of material from their own work. It did not explore what proportion of creators’ payments went offshore. We were not able to assess the value of royalties over the course of a creator’s life. We could learn much more about the experience of older creators, who might be presumed to be more dependent on royalties, as compared with younger ones, were we to study a larger pool. We did not compare the experience profile that we developed with that of creators in other countries. We did not compare budgets for completed work with those for comparable work done elsewhere. We did, however, get information that suggests strongly that such inquiries would be worth doing.
The greatest concerning pattern is the hardest to assess in its scale and scope: Imagination foregone. Young creators who might, for example, make historical documentaries learn in university not to think of projects like that; their professors are proud of teaching them industry standards and practices that eschew material too difficult to license. Both visual artists and art galleries avoid appropriation works for fear of copyright issues; musicians avoid certain samples deemed too “risky”; filmmakers shy away from subjects that would require more extensive use of media content or music.

The greatest concerning pattern is the hardest to assess in its scale and scope: Imagination foregone.

Creators working in Australia’s current regulatory environment self-censor and, as a result, they may inadvertently limit the range of content and creative possibilities to which new and future Australian creators are exposed. Creators who do not have access to culture cannot know what they might have to work with or what they might want to do with it. Because of the way that a risk-averse understanding of copyright law is embedded in creative practice and education in Australia, creators may not even know what it is that they cannot do.


3 Aufderheide and Hunter Davis, above n 2.


5 Tushnet, above n 4, 539.

6 An exception to this rule exists in cases of employment: works created by an employee in pursuance of the terms of their employment will be owned by the employer. Copyright Act 1968, s 35(6). Copyright ownership can also be transferred by written agreement (called an assignment) so that, for example, a publisher may end up being the copyright owner of an author’s literary work.

7 Copyright Act 1968 (Cth) ss 31 (literary, dramatic, musical and artistic works), 85 (sound recordings), 86 (films), 87 (broadcasts). There is no right to control the adaptation of an artistic work.

8 This is called the right to “communicate the work to the public”: see Copyright Act 1968 (Cth) s 31.

9 Copyright Act 1968 (Cth) ss 40, 41, 42, 43, 103C, 103A, 103AA, 103B, 104(d) and 104(c). Additionally, the recent Copyright Amendment (Disability Access and Other Measures) Act 2017 inserts a new provision into the Copyright Act: s 113E. Fair dealing for purposes of access by persons with a disability.


12 Copyright, Designs and Patents Act 1988 (UK) ss 31. Section 1 defines copyright work broadly.

13 Copyright Act 1968 (Cth) ss 65 – 67. Section 67 permits incidental background filming of artistic works, such as a painting, but does not extend to broadcasts.

14 Copyright Act of 1976 (United States), 17 USC §107.

15 Copyright Act of 1976 (United States), 17 USC §107.


17 The United States is not the only jurisdiction that has broad user rights provisions. Israel, South Korea, Singapore, Taiwan, India and the Philippines all have flexible user rights. See Australian Government Productivity Commission, Intellectual Property Arrangements, Final Report (2016), 71-72; Copyright Act 1957 (India), s 52; Jeremy Hua, Toward a More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era (Springer, 2014), 164.


19 See, for example, submissions to the ALRC Discussion Paper on Copyright and the Digital Economy by the Australian Competition and Consumer Commission (ACCC); the Australian Communication Consumer Action Network (ACCAN); IP Australia; Universities Australia; and Choice, all available at: http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc.

20 See, for example, submissions to the ALRC Discussion Paper on Copyright and the Digital Economy by the Arts Law Centre of Australia; the Australian Broadcasting Corporation (ABC); Penguin Australia; and NewsCorp Australia, all available at: http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc.

21 Aufderheide and Hunter Davis, above n 2.


24 In general, we avoided asking creators directly about particular copyright rules and exceptions. The few times we did introduce these concepts, we found that the creators became worried about ‘getting it wrong’ and evoked to the interviewer for guidance. Our goal was that the interviewee should always be leading the discussion. Thus, we allowed the participants to bring up their understandings and applications of copyright law on their own within the discussion about reuse, and we did not direct them to consider particular exceptions to copyright infringement.

25 See note 20.

26 Users do have the ability to dispute Content ID claims or to appeal rejected disputes. YouTube also provides the functionality to allow users to remove Content ID claimed songs or to swap audio tracks on videos without removing the video itself from the platform. Google holds any advertising revenue generated on a video during a Content ID dispute separately, and pays it out to the appropriate party once the dispute is resolved. See further, https://support.google.com/youtube/answer/27974547?hl=en and https://support.google.com/youtube/answer/7000361 (current as at 12/01/2018).


28 The one creator who did not consider attribution to be critical was a street artist who undertook much of their creative work anonymously. They considered their art to be part of a social and political commentary rather than a ‘work’ requiring attribution.

29 In the United States, most creators do not have a legal right to attribution of authorship.

30 While the degree of commerciality of a subsequent use was important to many of the creators we interviewed, commerciality is not a determining consideration under law in any of the tests for copyright infringement, fair use or fair dealing. Under the fair use doctrine, courts will look to the impact of the use on the potential market for or value of the copyright work, as part of the overall fair use assessment. The same consideration applies to the fair dealing for research or study under Australian law, in sections 40 (q) and 103C (2) of the Copyright Act 1968 (Cth). However, a use may still be ‘fair’ under either doctrine even where that use is commercial.