

# Copyright and Creativity: An Ongoing Debate in the Creative Industries

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## ABSTRACT

This paper critically analyzes the divergent perspectives on how copyright and intellectual property laws impact creativity, innovation, and the creative industries. One perspective defines the creative industries based on copyright as the means by which revenues are generated from innovation and the dissemination of new ideas. At the same time, it has been argued that copyright and intellectual property regimes fetter creativity and innovation, and that this has become even more marked in the context of digital media convergence and the networked global creative economy. These issues have resonated in debates around the creative industries, particularly since the initial DCMS mapping study in the UK in 1998 defined creative industries as combining individual creativity and exploitable forms of intellectual property. The issue of competing claims for the relationship between copyright and the creative industries has also arisen in Australia, with a report by the Australian Law Reform Commission entitled *Copyright and the Digital Economy*. This paper will consider the competing claims surrounding copyright and the creative industries, and the implications for policy-makers internationally.

**Keywords:** Copyright, Creative industries, Fair use, Innovation, Digital economy

## 1. INTRODUCTION: THE BALANCES OF COPYRIGHT LAW

When we consider the concept of copyright, we find a combination of old questions and very current concerns. From the *Statute of Anne* in Britain in 1709 and the *US Copyright Act of 1790* onwards, copyright has been legally defined as a form of intellectual property that incorporates rights to artistic and literary works, building on the proposition that original forms of creative expression can belong to individuals, who have both a moral right to ownership of original ideas and concepts as expressed in such works, and a legitimate economic right to derive material benefit from the use of these works by others. The capacity to earn royalties from copyright in turn provides an incentive to create further original works. Yet, copyright law acknowledges that original ideas and works are drawn from an existing pool of knowledge and creativity, and that it is therefore essential to guarantee that such ideas and works can exist in the public domain so that they can be fairly used by others.

The challenge, then, has always been to develop copyright laws which acknowledge that neither the creator of a new work nor the wider public should be able to appropriate all of the benefits that flow from the creation of an original work, and to balance these competing claims by dividing up the potential rights to use of protected works, giving control over some of these rights to the creators and distributors, and control over others to the general public. Additional concerns overlay these competing notions of individual rights of ownership and forms of social use for the common good. If information is the lifeblood of democracy, then minimal restrictions on access to information is a precondition for participation in public life. Similarly, the development of new knowledge is enhanced by broad access on the part of all sections of the community to the widest possible pool of information, knowledge, and

forms of creative expression at the lowest feasible cost, so that knowledge can be both promoted and equitably shared.

Embedded within copyright are two competing normative visions of intellectual property. One is that it can be privately owned, and its owners – itself an ambiguous term, as will be discussed below – can expect a reasonable level of remuneration from its use. The other is that intellectual property consists of ideas, concepts, and forms of expression whose public circulation is central to such core principles of modern societies as freedom of speech, equitable access to public information, and economic efficiency. Handke (2011) has provided a useful matrix for considering the overall costs and benefits of copyright as a system for managing intellectual property rights according to these competing principles:

**Table 1. Costs and benefits of a copyright system**

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

Source: Handke, 2011, p. 4

The intensity and significance of copyright debates, including the nature of copyright law, its scope, and how it is enforced, have increased exponentially over the last two decades. A key driver of this has been global access to the Internet and networked personal computing, and the enabling capabilities of digital media technologies to ‘remov[e] ... the physical constraints on effective information production’, which have ‘made human creativity and the economics of information ... core structuring facts in the new networked information economy’ (Benkler, 2006,

p. 4). What is variously referred to as the information society (Bell, 1976), the network society (Castells, 1996), the digital economy (Tapscott et al., 1998), the knowledge economy (David & Foray, 2002), the networked information economy (Benkler, 2006), and the creative economy (UNCTAD, 2010; UNESCO, 2013), is premised on the new relationships between knowledge, information, creativity, innovation, and economic structure and growth that are enabled by digitally networked information and communication technologies (ICTs).

Four issues that render copyright and intellectual property rights ever more complex in an age of digitally networked ICTs are:

- (1) The rapid development and mass dissemination of technologies that enable low-cost reproduction of data and information;
- (2) The growing importance of intellectual property rights as a source of income and wealth. This is particularly important in the cultural and creative industries;
- (3) Copyrighted products now being readily available worldwide, and a key part of global popular culture, used for legal commercial purposes, non-legal commercial purposes, and non-commercial purposes;
- (4) Copyright and intellectual property law becoming increasingly global, with the passing of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and the establishment of the World Intellectual Property Organization (WIPO) along with the World Trade Organization (WTO).

## 2. COPYRIGHT AND THE CREATIVE INDUSTRIES

As has been widely noted (Flew, 2012; Hesmondhalgh, 2013), copyright was central to the early definitions of the creative industries as developed in the United Kingdom. While a greater focus on

the economic benefits of public investment in culture had been a feature of cultural policy statements since the 1980s (e.g. the Australian *Creative Nation* cultural policy statement, launched in 1994), the definition of creative industries first put forward by the UK Creative Industries Task Force (CITF) in 1998 drew attention to the relationship between creativity, intangible forms of wealth, and intellectual property. In its highly influential *Creative Industries Mapping Document*, the CITF defined creative industries as: 'Those activities which have their origin in individual creativity, skill and talent, and which have the potential for wealth and job creation through the generation and exploitation of intellectual property' (DCMS, 1998, p. 1).

In launching the Task Force's Mapping Document, the Minister for Culture and Heritage, Chris Smith, made the link between creative industries and intellectual property more explicit:

*The role of creative enterprise and cultural contribution ... is a key economic issue ... The value stemming from the creation of intellectual capital is becoming increasingly important as an economic component of national wealth ... industries ... that rely on creativity and imaginative intellectual property, are becoming the most rapidly growing and important part of our national economy. They are where the jobs and the wealth of the future are going to be generated (Smith, 1998).*

In one of a number of influential works of the period that drew attention to the importance of intangible wealth and creativity in the 'new economy', John Howkins claimed that 'patents and copyright are the currency of the information age', as one of his 'seven laws' in *The Creative Economy: How People Make Money From Ideas* (Howkins, 2001, p. 19). Howkins argued that intellectual property in the forms of trademarks, designs, copyright and patents were at the core of

the creative economy, and that ‘in the same way as successive generations of managers have needed to learn about computers and the Internet, so they have to learn about intellectual property’ (Howkins, 2001, p. 22).

Howkins acknowledged the difficulties involved in equating copyright with patents, in that ‘societies that are open and democratic assume that individual expressions of a literary and artistic nature should be freely shared as part of ordinary discourse’, as ‘our contribution to a conversation’ (Howkins, 2001, p. 55), as well as the related problem of determining what was the original component in a creative work given that it draws upon a common knowledge pool of other creative works. He also drew attention to ways in which digital technologies ‘flipped’ the traditional relationship between content creators, content distributors, and copyrighted works, by radically reducing the costs of reproducing, repurposing and redistributing creative works in digital form (Howkins, 2001, pp. 58-64). Nonetheless, Howkins clearly saw copyright, like patents, as being central to the ‘property contract’ that was the basis of all intellectual property law, which seeks to maintain a balance between ‘the principle that people deserve to be rewarded for their creative efforts, and will only do so if they are rewarded, and that society as a whole benefits if the resulting creations and inventions are put into the public domain and made freely available’ (Howkins, 2001, p. 28). Howkins has himself recognized the need for reforms to copyright and intellectual property laws in the context of a digital creative economy, and was a leading figure in developing the Adelphi Charter on Creativity, Innovation, and Intellectual Property, issued by the UK Royal Society on Arts in 2005, and subsequently taken up internationally. But the association of the creative industries with legally protected copyright has remained a core definitional element of the field.

We can see, then, how UK policy discourses around the creative industries came to align with those of the copyright industries. Indeed, when we look at Howkins’ list of the copyright industries – which, along with the trademark, design and patent industries, make up the creative economy – they largely map onto the DCMS list of creative industries: advertising, computer software, design, photography, film, video, performing arts, music (publishing, recording and performing), publishing, radio and TV, and video games (Howkins, 2001, xii). The two areas that he saw are being creative industries but not copyright industries, since their economic value largely resides in their physical form, were arts and architecture.

The various critiques made of the creative industries policy in the UK and elsewhere (e.g. Throsby, 2008a, 2008b; O’Connor, 2009; Oakley, 2009) very much focused on a wish to uncouple the arts from the creative industries around an assertion of the primacy of cultural value over economic value. In the policy domain, this equated with the ‘concentric circles’ modelling of the cultural and creative industries (Throsby, 2008b; c.f. Flew, 2012, pp. 25-28), where the arts and cultural industries are differentiated from the commercial creative industries on the basis of the higher ‘cultural’ or ‘expressive’ value of the former, as compared to the more ‘functional’ or commercial bases of the latter. The European Commission has also made use of such a distinction as seen in its 2010 Green Paper, *Unlocking the Potential of the Cultural and Creative Industries*, where it defined *cultural industries* as ‘those industries producing and distributing goods or services which at the time they are developed are considered to have a specific attribute, use or purpose which embodies or conveys cultural expressions, irrespective of the commercial value they may have’ (EC, 2010, p. 4). By contrast, the *creative industries* are defined as ‘those industries which use culture as an input and have a cultural dimension, although

their outputs are mainly functional' (EC, 2010, p. 5). In such accounts, what Howkins termed the copyright industries can sit on either side of the ledger; the EU situates – not altogether convincingly – film, radio and TV, video games, music and publishing with the arts as part of the cultural industries, while advertising, design, fashion and advertising are in the creative industries.

### 3. THE DIGITAL ECONOMY DIMENSION

Hasan Bakhshi, Ian Hargreaves, and Juan Mateos-Garcia, in their 2013 *Manifesto for a Creative Economy*, have critiqued the UK creative industries discourse for largely sidelining the impact of the Internet and digital media technologies on the creative industries. They argue that the focus on copyright, and on how to develop the industries that derive their primary revenues from the exploitation of copyright and other forms of intellectual property, has led to defensiveness towards the impact of the digital economy on traditional models of content creation and distribution. This may be understandable in the context of the late 1990s, when the Internet was only just becoming a mass medium, although the impact of peer-to-peer file-sharing services such as Napster was already transforming the music economy, and the major distributors were, for the most part, responding in the wrong way to the challenge of digital distribution (Wikstrom, 2009).

But even in the late 2000s, the authors argue, there remained an inadequate understanding among UK policymakers responsible for the creative industries of 'the implications for competition and other regulatory issues of rapidly growing digital markets including the role within them of powerful Internet platforms, such as Google, Amazon and Apple' (Bakhshi et al., 2013, p. 25). By equating the state of the creative economy with the health of the creative industries, and the large incumbent content distributors that had long constituted their core businesses,

UK policymakers left themselves open to regulatory capture by incumbent interests and their resistance to change, that was 'most evident in policymakers' traditional hostility to flexibility in the intellectual property regime' (Bakhshi et al., 2013, p. 14). Bakhshi et al. observe that 'in the acrimonious arguments about copyright between rights holders and technology companies ... UK governments have, traditionally, taken a highly defensive stance, making choices such as a succession of term extensions that disregard hard economic evidence' (Bakhshi et al., 2013, p. 15).

As the content of most creative industries – with the exception of fashion, architecture and some art forms – is readily available in digital formats, the digital revolution has hit many of the traditional media and creative industries firms quite hard. The crisis of the newspaper and magazine industries, the collapse of music stores and video rental businesses, the challenges to traditional book publishing and distribution from sites such as Amazon, and the challenge to broadcast and now cable industries from ready consumer access to digital distributors such as Netflix, Amazon and Apple iTunes, are well known stories. As consumers have gone to digital platforms for media content, so too have advertisers, with Internet advertising being the fastest growing segment of the advertising industry worldwide. Even where traditional businesses have held up reasonably well in the post-2000 era, such as Hollywood film majors, digital transformations have undercut lucrative formats such as DVD sales and rentals. Steirer (2015) cites the ill-fated attempt by the Hollywood majors to develop an alternative digital distribution system for its content, called UltraViolet, as indicative of the challenges they now face from consumers accessing their content from sites such as Apple iTunes, and where returns to distributors are thin, compared to the fat profit margins they enjoyed when viewing platforms were device-agnostic, and DVDs were the only way to access feature films for viewing at home.

It is now a legitimate question, as Eli Noam (2009) has argued, whether we need to broaden the definition of media industries and media markets beyond the traditional conglomerates (News Corporation, Disney, Time-Warner, Sony etc.), to include the big digital players such as Google, Apple, Microsoft, Amazon, Netflix, and Facebook. Similarly, as Bakhshi et al. argue, the traditional creative industries and their associated business models, which typically strongly stressed copyright revenues, are now challenged on all fronts by emergent players and new business models that are far less reliant upon conventional rights holding practices, and at times may be at odds with them (as with Google News and Google Books). Advocates of the new approaches would argue that they are simply responding to consumer preferences – alternative ways to access songs than through CDs, or news stories that are ‘unbundled’ from a single print product – and the problem is that of laws and business practices that have not sufficiently adapted to the challenges of the changes in technologies and consumer expectations.

The challenges of the digital economy do not, however, simply rest in its threat to the traditional big media and creative industries firms. In *The Wealth of Networks* (2006), Yochai Benkler argued that the impact of networks ran more deeply than their impact on economics or organisations, and that the early 21<sup>st</sup> century has brought the rise of a *networked information economy*, whose core characteristic was one of ‘decentralised individual action ... [and] cooperative and coordinated action carried out through radically distributed, non-market mechanisms that do not depend upon proprietary strategies’ (Benkler, 2006, p. 3). For Benkler, the Internet and networked ICTs had enabled ‘the removal of the physical constraints on effective information production [which] has made human creativity and the economics of information ... core structuring facts in the new networked information

economy’ (Benkler, 2006, p. 4). But the rise of the Internet and networked ICTs provides a necessary but not sufficient explanation for the networked information economy, which is also associated with:

- (1) The rise of information, knowledge, and creative industries which have always needed to be more flexible and more reliant on non-market motivations and incentives for creativity than more traditional industries;
- (2) The boost to all non-market forms of production and distribution of information, knowledge, and culture provided by the networked architecture of the Internet, as there are *coordinate effects* to a multiplicity of individual actions that greatly enrich the networked information environment;
- (3) The rise of peer production of information, knowledge, and culture through large-scale cooperative efforts, whose roots lie in the free and open source software movement and hacker culture, but with the rise of Web 2.0 and social software have been generalised and diffused across a range of domains.

Benkler points to the rise of *social production*, and models of information, knowledge, and cultural production that are loosely collaborative, not necessarily driven by market criteria, and not directly proprietary in terms of who owns and controls the use by others of the final product.

Benkler’s optimistic embrace of social production and participatory media has been critiqued, with numerous authors pointing to the capitalist dimensions of social media platforms, the ways in which user behavior is appropriated as data for purposes of marketing or surveillance, and a tendency to overestimate the extent to which social media platforms are generators of original, user-generated content (Andrejevic, 2013; Fuchs, 2014; Van Dijck & Nieborg, 2012). With regard to the latter, a 2011 study found that almost 50 per cent

of all posts on Twitter (tweets) accessed by the service's 500 million-plus user community were produced by 20,000 people, or 0.5 per cent of the world's Twitter users, and that of these, the most significant tweeters were celebrities, bloggers and mainstream media outlets (Wu et al., 2011). But the wider point raised by Benkler and others around the multi-directional nature of content flows in a digital networked environment, and the growing difficulties involved in corralling these into exposing copyright and intellectual property laws to the benefit of the copyright-based industries, are drivers of copyright reform. In the case study of the Australian Law Reform Commission's review of Australian copyright laws, we see how the stance of the Australian creative industries has come to be a defensive, and at times hostile, response to such pressures.

#### 4. THE ALRC REVIEW OF COPYRIGHT AND THE DIGITAL ECONOMY

Many of the issues relating to copyright, creative industries and the digital economy were canvassed in the Australian Law Reform Commission's (ALRC) Inquiry into Copyright and the Digital Economy. The ALRC is an independent statutory authority, established in 1975, whose primary role is to review Commonwealth laws and to advise the Attorney-General on reforms that would better align laws with current conditions and needs, as well as simplifying laws, removing defects, adopting new or more effective methods for administering the law and dispensing justice, and providing improved access to justice (ALRC, 2013a, p. 15). In June 2012, the ALRC was asked to review Australia's copyright laws, particularly the *Copyright Act 1968*. In its Terms of Reference, it was required to have regard not only to 'the objective of copyright law in providing an incentive to create and disseminate original copyright materials' and 'the general interest of Australians to access, use and interact with content in the advancement of education,

research and culture', but also to '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' (ALRC, 2013b, p. 7). Professor Jill McKeough was seconded from the University of Technology, Sydney (UTS) Law School to chair this review.

ALRC inquiries go through a three-stage process of: circulating an Issues Paper with questions for public comment; a Discussion Paper that makes proposals for comment; and a Final Report with recommendations that go to the Attorney-General and, through the Attorney-General's Department, to the Federal Parliament. Over the 15 months that the Copyright and the Digital Economy inquiry was conducted, the ALRC received over 1300 submissions and undertook 109 consultations. There were sharply divided views among stakeholders over the efficacy of existing copyright provisions and their suitability in the digital economy context. In its Issues Paper, the ALRC observed that the inquiry's terms of reference required it to consider how 'the context and political economy of copyright law is changing as copyright has a more direct impact on disparate users and producers, extending beyond rights holders and institutional rights users' (ALRC, 2012, p. 14), meaning that its recommendations needed to consider the interests of those who are users of copyright works, who may not necessarily be represented in the submission and consultation process. In order to develop a principles-based approach to law reform that went beyond responding to competing interest groups (Barnett, 2011), the ALRC articulated five framing principles to enable it to define the policy settings for its recommendations:

- (1) To acknowledge and respect the rights of authors, artists and other creators, including their moral rights;
- (2) To maintain and enhance incentives to cre-

ate works and to allow the dissemination of original material;

- (3) Promoting fair access to content;
- (4) Providing rules that are flexible, clear and adaptive to new technologies;
- (5) Consistency with international obligations such as those arising from the Berne Convention.

In its Final Report (ALRC, 2013b), the ALRC made recommendations, relating to fair use, fair dealing, statutory licenses, private and social use, data and text mining, use by libraries and archives, orphan works, educational and government use, access for people with disabilities, the retransmission of free-to-air broadcasts, and contracting out of fair use and fair dealing exceptions. Of these, the key recommendation of the ALRC Report is for the introduction of a flexible fair use exception, to replace the current fair dealing exceptions. Under the *Copyright Act*, there is a prescribed list of fair dealing exceptions in Australia relating to research or study, criticism or review, parody or satire, reporting news, and legal and professional advice. The ALRC proposed replacing these with a non-exhaustive list of exceptions that would include current provisions such as research or study, criticism or review, parody or satire, reporting news, and professional advice, but also include quotation, non-commercial private use, incidental or technical use, library or archive use, educational purposes, and access for people with disabilities.

In making this extended and open ended fair use recommendation, the key principle for the ALRC was that any rule adopted for fair use or fair dealing exceptions should be flexible, clear and adaptive to new technologies, minimize transaction costs for both copyright holders and users of copyright material, and be technology-neutral and predictable to the greatest degree possible. This would involve reforms that would minimize legal complexity, and move towards adopting

principles-based regulations that could in turn be interpreted in the courts. For the ALRC, the arguments for reforming Australian copyright law to incorporate a more flexible fair use provision were that:

- (1) It is a broad, principles-based exception that uses technology-neutral terms, and hence is more adaptive over time than the current specific, closed-list approach;
- (2) There are precedents for using broad standards such as prescriptive rules, such as with the prohibition on 'deceptive or misleading conduct' in Australian consumer law;
- (3) It promotes transformative uses, by leaving 'breathing room' for new works and new productive uses that make use of existing copyright material;
- (4) It promotes – or at least does not discourage – innovation in technologies and their application;
- (5) It would better align with reasonable consumer expectations about the scope of copyright law and limits on the sue of copyright material;
- (6) It can help protect rights holders' markets, recognizing that rights holders are very often both producers and users of copyright material;
- (7) By building on current fair dealing exceptions, it can provide a degree of certainty and predictability to both rights holders and users of copyright material;
- (8) It can be compatible with both moral rights and Australia's obligations under international copyright law.

Internationally, the clearest precedent for such a fair use provision was set in the United States, where Section 107 of the *Copyright Act*, as amended in 1976, established a fair use exception that would be subject to judicial interpretation based around four fairness factors (purpose or character of use; nature of the copyrighted work; portion of the copyrighted work being used; and the effect of use on the potential market or value



of the copyrighted work being used). Such a provision is consistent with international agreements such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs), and the provisions of the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). ALRC noted that a number of countries have moved towards adopting such a fair use provision in their own laws, including South Korea, Singapore, the Philippines, and Israel, and that it has been recommended in previous Australian government inquiries into copyright law, such as the 1998 report of the Copyright Law Review Committee (CLRC). With regard to such reports, the ALRC observes that 'it is interesting to reflect on whether Australia might have been better placed to participate in the growth of the nascent digital economy, had the CLRC's fair use exception been enacted in 1998' (ALRC, 2013b, p. 92).

## 5. COPYRIGHT, THE INCOME OF CONTENT CREATORS, AND BUSINESS MODEL INNOVATION

Experienced observers of copyright law reform debates in Australia were not surprised by the institutions and groups that lined up for and against changes along the lines of a more flexible fair use provision. Advocates of copyright reform included the Australian Digital Alliance, the libraries' sector, schools and universities, digital companies such as Google, research organizations such as the Australian Research Council Centre of Excellence for Creative Industries and Innovation and the Cyberspace Law Centre, and prominent intellectual property law academics and economists. Opposition to such changes came from organizations representing book publishers, film producers, film and DVD distributors, the music recording industry, broadcast television, and the major sporting bodies, the Australia Council for the Arts, the Australian Copyright Council, and companies such as News

Corporation and Walt Disney Company. What we see is that those industries and organizations that derive revenues from copyright largely favored the *status quo*, or perhaps harsher penalties for copyright infringement, and that such claims were generally backed up by the need to support content creators by safeguarding the economic well-being of Australia's cultural and creative industries.

In this polarized environment, where the interests of content creators and distributors are seen as synonymous, and the well-being of the creative industries is tied to the defense of strong copyright laws – even at a time of clear digital transformations to the cultural and economic environment – it is not surprising that some important issues can be glossed over. One is the degree to which content creators actually benefit from strong copyright laws. It is generally assumed that the existence of copyright and other forms of intellectual property protection is particularly important to artists and others involved in the production of creative works. The cultural economist David Throsby, in studies prepared for the Australia Council, has argued that:

*From the viewpoint of individual artists, if they are to gain the full economic benefit to which their creative endeavor entitles them, their intellectual property in their work must be adequately protected against unauthorized exploitation or appropriation ... the copyright held by writers, visual artists, craft practitioners and composers in the literary, dramatic, artistic and musical works that they create may be essential to their economic survival* (Throsby & Zednik, 2010, p. 60).

Given the general importance attached to copyright for the income of artists, it is a subject around which surprisingly little research has been undertaken in Australia, and the work that exists does not necessarily support this conclusion.

The Australia Council studies conducted in 2003 (Throsby & Hollister, 2003) and updated in 2010 (Throsby & Zednik, 2010) found that royalties, advances and other copyright earnings accounted for about 6 per cent of the incomes of creative workers, with Public Lending Right and Educational Lending Right accounting for a further 2 per cent. These sources of creative income were particularly important for writers (27 per cent of total creative income) and composers (23 per cent of creative income), but for all other categories of artistic and creative practice surveyed, they accounted for no more than two per cent of total creative income (Throsby & Hollister, 2003, p. 103). Comparable international studies have also found little support for the proposition that copyright has a significant impact on the ability of most artists and content creators to earn a living. Ruth Towse has made the point, based upon available international evidence, that ‘research on artists’ total earnings including royalties shows that only a small minority earn an amount comparable to national earnings in other occupations and only “superstars” make huge amounts’ (Towse, 2011, p. 107). This is not to say that income derived from copyright is unimportant to artists as a group, or that it is not very important to some artists: a minority of works do continue to generate significant revenues for rights holders over time. It is rather to make the point that available evidence does not support the claim that the current copyright regime is of such importance for the generation of new artistic and creative works that the supply of new works would be significantly inhibited by changes to those laws.

A second issue concerns business model innovation, and the question of rent-seeking in the policy process as an alternative to such innovation. The term rent-seeking is used in economics to refer to ‘the expenditure of scarce resources to change existing legal and other constraints so that monopoly rents can be captured’ (Furubotn

& Richter, 2010, p. 566). It essentially involves lobbying in the political process and use of the legal process to inhibit competition in a market, as an alternative to business model innovation in response to new competitors. There is a long history of rent-seeking behavior in Australian media markets, as seen with the delayed introduction of subscription television and the rules preventing new commercial broadcasting licenses from being awarded (Productivity Commission, 2000; Flew, 2006), and opposition to copyright law reform has been seen in such a light.

Cultural economist Ruth Towse has warned of the risk of moral hazard for firms in industries that have long been reliant upon copyright income as a primary revenue stream, as ‘copyright in itself can create an incentive for existing industries to rely on law enforcement to protect their business model, rather than to adopt new technologies’ (Towse, 2011, p. 101). Hal Varian has argued that ‘born digital’ information is very easy to copy and distribute, and the prospect of eliminating all forms of illegal copying is near zero – particularly as digital goods are much easier to distribute globally – business model innovation must occur in a context where the fundamental nature of the commodity being traded has changed. Varian contended:

*The same technological advances that are making digital content inexpensive to copy are also helping to reduce the fixed cost of content creation ... the increased availability of content due to the reduction in the cost of creating and distributing it will presumably increase competition and reduce the price consumers pay for legitimate access to content (Varian, 2005, p. 136).*

In his international study of media piracy in emerging economies, Joe Karaganis observed that high prices for digital media goods relative to income was a primary driver of piracy in de-

veloping countries, that anti-piracy measures and copyright education had little impact, and that rising standards of living combined with competition that reduced prices for legitimate product were the key factors in reducing overall levels of piracy (Karaganis, 2011). These findings indicate that it is innovative new business models, rather than strengthened regimes of copyright enforcement, that will ultimately be of most significance in reducing piracy and copyright infringement (Cunningham, 2013), and that rent-seeking behavior is unlikely to change this in the longer term, although it may inhibit innovation in some jurisdictions in the short-to-medium term.

## 6. THE POLITICAL RESPONSE TO COPYRIGHT LAW REFORM IN AUSTRALIA

In his Ministerial statement tabling the Report on 13 February, 2014, Senator George Brandis, the Attorney-General of Australia, emphasized the economic contribution of Australia's creative industries, and the need to promote their further development. He observed that 'Australia's creative industries are not just a vital part of our culture, they are also a thriving sector of our economy' (Brandis, 2014a). In a presentation to the Australian Digital Alliance the following day, Brandis reiterated his concern for the economic contribution of Australia's creative industries, observing that in his dual role as Minister for the Arts as well as Attorney-General, 'the promotion and protection of Australian content developed by our creative industries is very important to me'. Observing that 'Australian art, music, literature, film and television all contribute to the fabric of our society and the copyright framework is central to ensuring their ongoing success', Brandis added that 'the creative industries are also a major driver of economic growth', and that 'for these reasons the creative industries are clearly an area the Government will continue to support through strong copyright protection' (Brandis, 2014b, p. 2).

While recognizing that technological changes mean that 'we now consume, create and distribute content in ways that would have been beyond imagining when [Lord] Macaulay introduced the first copyright law', it did not follow that 'the principles that underpin copyright are incapable of adapting', and it remained his view that 'the fundamental principles of copyright law, the protection of rights of creators and owners, did not change with the advent of the internet and they will not change with the invention of new technologies' (Brandis, 2014b, p. 3). While he recognized the need for modernizing of Australia's copyright laws in order to reduce administrative and bureaucratic complexity he was personally unconvinced about an extended fair use extension to copyright, as the ALRC had recommended, Brandis concluded that he 'believe[d] in strong protections and enforcement mechanisms in support of Australia's creative industries', and that 'in any copyright law reform process, we must ensure that the potential economic and social benefits of modernization do not come at the expense of our creative industries ... in shaping its reforms the Government will engage with this risk, but it will be careful not to throw our copyright system into a state of uncertainty' (Brandis, 2014b, pp. 5, 6). Subsequent to the ALRC Report's release, the Attorney-General and the Abbott Government have given considerably more attention to issues of online piracy, and the blocking of sites used for illegal content downloading, than they have to reform of copyright laws.

## 7. CONCLUSION

This paper has drawn on the experience of the *Copyright and the Digital Economy* review undertaken by the Australian Law Reform Commission to bring attention to a recurring risk in debates surrounding the creative industries and copyright. As the generation of revenues based on copyright and other forms of intellectual property is often taken to be a defining feature of

the creative industries, and one that is arguably less contentious than whether they demonstrate greater 'creativity' than other industries, there has been a tendency to conflate the creative industries with what are termed in the US context the copyright industries. This has consequently led to an identification of the interests of those who derive income and employment from these industries with strong copyright protections. As the Australian case indicates, such arguments have had strong resonances with government ministers, even in contexts where they have not been notable advocates of other policies sought by representatives of those industries.

The problems identified with this strong identification of the creative industries with existing copyright laws are threefold. First, they routinely over-estimate the extent to which the benefits of copyright laws accrue to content creators, as distinct from copyright distributors. This is not to say that content creators have no interest in copyright, but rather to note that the benefits are highly unequally distributed among both categories of artists and among artists themselves, and mostly go to the "top tier" in a relatively small number of professions, such as writing, film and television production, and music composition. Second, the negative impacts of unduly restrictive prohibitions on the re-use of copyrighted materials impact on the creators of original creative works as they do on others seeking to be innovative, and hence what economists term the "deadweight costs" associated with archaic copyright restrictions that have not been revised for the digital economy context impacts on the creative industries just as it impacts on producers and consumers elsewhere in society. Finally, it has had the effect of putting artists and content creators on the side of the incumbent creative industries firms, and the protection of their established business models, at a time when there is considerable flux in these industries, and new industry players and business models are gener-

ating opportunities for those who are pursuing different approaches to reaching audiences with digital creative content.

The argument presented here should not be read as an argument against copyright and intellectual property laws. The issues presented by the digital economy are complex and multi-faceted, particularly when it is also related to the globalization of the media and creative industries. In Flew (2013), I noted that the issues differ for content creators in many developing countries, where the absence of any effective forms of copyright protection act as a barrier to the development of sustainable local industries, rather than as a means of protecting monopoly rents. It is, however, to argue that those with an interest in developing the creative industries should approach questions of reform to copyright and intellectual property laws in an open-minded way, and not simply accept that the interests of creative content producers are automatically those of the established creative industries sectors, based around the *status quo* of strong copyright protections. The impacts of the digital economy on the arts, media and culture are many and varied, and need to be understood through more complex frameworks than this simple equation of copyright with the creative industries.

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