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COPYRIGHT LAW: PHILOSOPHY, LEGISLATIVE HISTORY AND BASIC PRINCIPLES

INTRODUCTION

Copyright is generally familiar to the community as a body of law affecting the world of art and entertainment by providing financial reward to those who make and distribute literature, art, music and other forms of entertainment. Even in colonial days Australian creators understood that they were reliant upon intangible property rights, in particular copyright, to generate income. But how copyright law generates wealth, for whom, and how it supports Australian content creation is not well understood.

Although copyright is important for helping sustain the creative life, for most Australians it only delivers a precarious financial existence. Out of financial necessity, almost eight in ten artists mix their creative practice with other work, in arts-related roles and outside the arts. A 2016/17 survey of Australian creators reported that the average gross annual income received by arts practitioners from all sources was only $48 400, amounting to an average hourly (before tax) rate of $21. These earnings are 41 per cent below income received by other professionals with equivalent level qualifications, 47 per cent below that of managers and 21 per cent below the Australian workforce average in this period.[1] To appreciate how copyright factors into these figures, it is worth considering that the average reported income of authors in the 2013/14 financial year was $62 000, but the average income derived from practising as an author was only $12 900.[2] We need to understand the connections between the philosophy of copyright and its legislative history to begin to understand how this situation has arisen.

Copyright does much more than just provide monetary rewards to writers, artists and entertainers. It also regulates the creation and use of cultural goods, and affects a broad sweep of cultural, commercial, technological and educational activity. The big money and cultural influence generated by copyright comes from rights aggregation and distribution of cultural goods—not from the original award of an intangible property right to an individual artist. However, when we read books, e-books and magazines, post content on social media, access YouTube or Netflix, enjoy live streaming music and gaming platforms like Spotify or Twitch, or read cases for class, the copyright transactions that sit behind these activities will rarely be apparent. A close study of copyright law

1 D Throsby and K Petetskaya, *Making Art Work: An Economic Study of Professional Artists in Australia* (2017), p 5.
2 J Zwar, D Throsby and D Longden, *Australian Authors Industry Brief No 3: Authors Income* (2015), p 2.

is necessary to appreciate how the law underpins everyday cultural consumption and is integral to international trade in cultural goods and services.

This chapter provides a brief overview of the philosophical underpinnings of copyright law. It then discusses the law's common law and legislative history, including discussion of the imperial origin of Australian copyright law. This chapter also sketches the intellectual and cultural property rights of First Nations peoples under Australian law. It concludes with an introduction to foundational copyright principles.

The philosophical, political and normative values that underpin copyright principles need to be kept in mind as you learn about the structure and logic of the rights in following chapters. Chapter 3 addresses criteria for the subsistence of copyright. Chapter 4 provides an understanding of the various categories of works and other subject matter protected. Chapter 5 describes rules on the ownership and exploitation of copyright. Chapter 6 considers how copyright is infringed and the scope of possible defences to infringement. Chapter 7 surveys additional rights of creators and related schemes that provide other kinds of protection and income for artists. There is also a need to consider the overlap between copyright and design law in Chapter 8, because in some circumstances copyright protection is lost, and only design protection is available.[3]

Generally, copyright cases are not especially difficult to understand in terms of their facts or legal reasoning. But some core concepts are sufficiently open-textured that more than one interpretation is possible: understanding why one interpretation prevails requires a grasp of the broader rationales and purposes of copyright. In addition, working out how the various pieces of the jigsaw fit together—mapping the legal logic across the whole, and working through the implications of the law for others who may be affected, or extrapolating from one case to related scenarios—can be challenging.

PHILOSOPHICAL JUSTIFICATIONS

The idea of authorial property is an idea that slowly grows from the Renaissance period. The works of genius of Renaissance artists like Michelangelo, Raphael and Da Vinci were attributed to God or Nature. They also reflected glory to the patron that supported significant commissions, where important artistic works displayed public virtues and celebrated religious meaning. However, the expression by the artist him or herself was not really thought of as something capable of being privately 'owned' in the way we understand the rights of artists today. Still, some artists did entertain ideas of their personal talents as God-like. This can be seen in Michelangelo's dispute with a competitor, the 'divine' Raphael. Michelangelo was frequently criticised for his arrogance, aloofness and obsessive secrecy while he worked. He had had to flee Rome after an incident in which he refused Pope Julius II admission to see his progress with the painting of the Sistine Chapel. During his absence, a friend of Raphael, who had the keys to the Chapel, allowed Raphael to see the works and study Michelangelo's technique. According to Vasari's account, after doing so, Raphael immediately repainted some of his works, though they had already been finished, so that they might have 'more majesty and grandeur'. Michelangelo felt he had been wronged by this copying.

The 'wrong' Michelangelo recognised was his view that Raphael's work was compromised. Rather than acting like a God and creating divinely, on viewing the work of a great Master, Raphael changed

3 For details of what is covered in the other chapters of this text, see p 361 (for Chapters 9–13), p 564 (for Chapter 14), p 596 (for Chapters 15–18) and pp 790–2 (for Chapter 19).

his mind and copied, like an artisan.[4] The distinction between works of genius and lesser creations is an enduring one, though, as you study this subject, you will see that it is not a distinction that copyright law cares much for. This is because of the influence of myriad other ideas about owning cultural expressions that have affected the making of Anglo-Australian copyright law. In the sections below, the most influential philosophical ideas are introduced.

ENLIGHTENMENT THEORY

Enlightenment is a concept that is difficult to define precisely. It rose to prominence in the eighteenth century as a philosophy related to the serious pursuit of scientific questions about the nature of truth and how it could be reliably made known. Enlightenment philosophy is relevant to copyright history in three ways.

First, it raised the question about how we can ever objectively define the essence of the intangible property created by the author. As philosopher John Locke observed, what is conveyed to others by the language choices of the author is very imprecise in the sense that 'our Words convey so little Knowledge or Certainty in our Discourses about them'.[5] How can we clearly specify what it is that the creator of a text owns? For example, we can name 'Locke' as the author, but we cannot clearly see how the man called Locke, as rational activity, is reproduced in the text. We know little of him. All that we can objectively know of the primary qualities he describes, such as bulk, shape and motion, we too can perceive. Not only do we struggle to objectively determine what it is that the author alone has created: how can an author claim to own ideas once they are made public?

> Most certainly every Man who thinks, has a right to his thoughts, while they continue to be HIS; but here the question again returns; when does he part with them? When do they become *public juris?* While they are in his brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are cloathed? Where does this fanciful property begin, or end, or continue?[6]

Objectively and precisely defining what one author owns in a text, and what belongs to another who may have helped inspire the work, or to the public domain at large, is a problem copyright avoids by the technical way infringement issues are constructed.

A second way Enlightenment thinkers impacted on copyright law follows from the importance they attached to the pursuit of truth, in the form of information, improvement and instruction, above pleasure and delight (mere ornaments). The dissemination of useful works was considered an important political project.[7] In Locke's time there was a live debate about how much 'Enlightenment' of the citizenry was possible or desirable. Press licensing and censorship laws had been enacted during Elizabethan times, controlling the right to own presses and to print literature, in order to restrain seditious, blasphemous and politically undesirable publications. The Stationers' Company of London was established by Royal Charter in 1557. In exchange for the exclusive right to print books

4 G Vasari, *The Lives of the Artists*, trans G Bull, Penguin Books, London, 1965, p 298.
5 J Locke, *An Essay on Human Understanding*, as quoted in R Ashcraft, ed, *John Locke: Critical Assessments*, Routledge, London, 1991, p 254.
6 Lord Camden, *Donaldson v Becket* (1774) in S Parks, ed, *The Literary Property Debate: Six Tracts 1764–1774*, Garland Publishing, New York, 1975, F32.
7 J Schmidt, ed, *What Is Enlightenment? Eighteenth Century Answers to Twentieth Century Questions*, University of California Press, Berkeley, 1996.

in England, the Stationers' Company provided the Crown with assistance in censorship. As part of this process, the printers registered their 'sole right' to a copy of a manuscript in an official register (referred to as the 'copy right' or 'stationers' copyright'). However, by the end of the seventeenth century these kinds of censorship laws were considered incompatible with the educational pursuit of Truth, Progress, Science and Knowledge and the political liberty of free men. The first copyright statute, the *Statute of Anne 1709* (8 Anne, c 19), was a law that secured the property rights of London stationers after the lapsing of the regulation of printing presses.[8] The significance of the *Statute of Anne* is discussed further below.

Since the Enlightenment, the impact of copyright on freedom of speech and access to education has remained a significant issue. In studying the law, you might notice that informational works, while subject to the same principles of copyright, are judged more critically than creative endeavours, in order not to unduly restrict access to ideas.

A third way Enlightenment ideas influenced thinking about copyright comes from the way they linked the need to protect the public interest in access to knowledge to the creation of limits to the protection of the private property rights of authors. This view is reflected in Lord Mansfield's comment in an early case about the copyright protection for navigational maps:

> We must take care to guard against two extremes equally prejudicial: the one, that men of ability, who have employed their time for the service of their community, may not be deprived of their just merits and reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.[9]

The clash between access to knowledge considerations and claims of the natural rights of authors to literary property complicated legal discussion about the status and merit of natural rights claims to authorial property in copyright cases in the late eighteenth and nineteenth centuries.

The idea that copyright requires a balance of public and private considerations is often referred to today as a utilitarian justification for copyright. Enlightenment theory remains influential, underpinning two foundational principles discussed below: the public domain and the idea/expression dichotomy.

ROMANTIC THEORY

There are a number of tenets of Romantic theory that have impacted upon copyright jurisprudence.[10] The Renaissance defined excellence in the arts with reference to the technical proficiency of the creator and utility of particular mediums of expression for imparting distinctive lessons about the human condition, our faculties and our relation to Nature or God. However, the Romantics argued that the fine arts—poetry, painting, sculpture, architecture, eloquence, dance and music—shared common values. Regardless of the medium of expression, the function of fine art was to communicate beauty and excellence by offering insights into an interior world of the creator. It was the idea that all creators

8 R Astbury, 'The Renewal of the *Licensing Act* in 1693 and Its Lapse in 1695' (1978) 33 *Library* 296; P Prescott, 'The Origins of Copyright: A Debunking View' (1990) 12 *European Intellectual Property Review* 453.

9 *Sayre v Moore* (1785) 102 ER 139. For a discussion of this case see I Alexander, '"Manacles upon Science": Re-evaluating Copyright in Informational Works in Light of 18th Century Case Law' (2014) 38 *Melbourne University Law Review* 317.

10 This section draws on K Bowrey, 'Law, Aesthetics and Copyright Historiography: A Critical Reading of the Genealogies of Martha Woodmansee and Mark Rose' in I Alexander and H Tomás Gómez-Arostegui, eds, *Research Handbook on the History of Copyright Law*, Edward Elgar, Cheltenham, 2016 and K Bowrey, *Copyright, Creativity, Big Media & Cultural Value: Incorporating the Author*, Routledge, London, 2021, ch 2.

of intangible property share common qualities that justified copyright jurisprudence adopting the term 'author' as a generalisation to denote a large range of creators including playwrights, composers, artists, photographers, sculptors and engravers. In copyright, authors are the first owners of rights in their creative expressions. The legal term now includes far more than arts practitioners.

Romanticism drew upon and extended the bifurcation of cultural production into high and low art. Fine art was defined by its originality, judged with reference to the sincerity of the work in reflecting 'the actual state of mind of the poet while composing'.[11] It did not reflect conventional tastes or pander to popularity. In valorising the organic, original outpouring of the artist, this set in train a fractious relationship between the artist and the external world—between art, the market and the public. The appropriate attitude of the true artist towards audiences was one of 'indifference'. This position made the pursuit of fine art a vocation largely for those who were independently wealthy. It was precarious to pursue art as a 'profession'.

The late eighteenth century was also a time where literary entertainment was becoming an industry.[12] While poetry could be both a fine art and commercially popular, common literature formats, such as the novel and short story writing for magazines and newspapers, were not fine art. The more popularist genres, including realist, historical and sensation novels, engaged major debates about literary value and their corrupting effects on readers, particularly women. But, '[a]fter Romanticism ... the act of writing for the public was imagined with decreasing anonymity and increasing relish. On the face of it, the rhetoric of self-disclosure and the image of reader as personal friend became less loaded, more acceptable.'[13] The struggle of life as a writer united high and low ends of the literature market in advocacy for writing as a 'profession'. This centred upon advancing the idea of authorial property as a universal natural right: the author possessed a natural right to their original expressions. This conception drew upon an eighteenth century German philosophical distinction between two kinds of property which helped distance concern about trade considerations debasing intellectual achievement.[14] The distinction between the kinds of properties is well illustrated in the following quote from founder of the Society of Authors (1884), historian and novelist, Walter Besant. He told potential recruits to the society:

> There are two values of literary work—distinct, separate; not commensurable—they cannot be measured—they cannot be considered together. The one is the literary value of a work—its artistic, poetic, dramatic value; its value of accuracy, of construction, of presentation, of novelty, of style, of magnetism ...
>
> But once finished and ready for production, then comes in the other value—the commercial value—which is a distinct thing. Here the artist ceases and the man of business begins.[15]

11 MH Abrams, quoted in D Williamson, *Authorship and Criticism*, Local Consumption Publications, Sydney, 1989, p 7.

12 M Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics*, Columbia University Press, New York, 1994, p 25.

13 B Hochman, 'Disappearing Authors and Resentful Readers in Late-Nineteenth Century American Fiction: The Case of Henry James' (1996) 63 *English Literary History* 177 at 178 n 8.

14 M Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics*, Columbia University Press, New York, 1994, p 51.

15 W Besant, *The Society of Authors: A Record of Its Action from Its Foundation*, Incorporated Society of Authors, London, 1893, pp 15–16.

Concern for how the property right serves commodity production, and how commercial considerations can debase originality, was deflected. A natural right of authors was justified because the origin of the property right was located with the unique, original expression of the author.[16] These special expressions deserved legal protection and such works could be distinguished from ordinary commodities and 'domestic' works lacking an assertion of ingenious activity. That the author's work was multiplied and sold as a commodity without endangering its claim to be an original work of art became one of the paradoxes of the legal formulation. For reasons that are discussed below, in Australian copyright jurisprudence this line of thinking also contributed to a distinction between the 'moral rights' of the creative author and the 'economic rights' assigned or licensed to the industrialist who mass reproduces and distributes the work.

NATURAL RIGHTS THEORIES OF PROPERTY

In legal scholarship John Locke's *Two Treatises of Government* (1689) is far better known than the Enlightenment philosophy discussed above. His political treatise celebrated the importance of private property and the natural right to own the fruits of one's labour. This was largely a political argument that justified the need for a private sphere separate from government secured by a private right to real property. However, Locke's labour justification for property became increasingly influential in the late eighteenth century and was taken up by William Blackstone's *Commentaries on the Law of England* (1765–69). Blackstone extended Locke's claim for landed property and intangible rights into a case for the natural right of authors to perpetual copyright.

The idea that creators have a natural right to own the fruits of their labour finds voice in arguments that infringers have 'misappropriated' the labour of others or are trying to 'reap where they have not sown'. Although this kind of thinking is influential in copyright cases, the High Court has cautioned against focusing too closely on misappropriation. Gummow, Hayne and Heydon JJ in *IceTV Pty Ltd v Nine Network Pty Ltd* [2009] HCA 14; (2009) 239 CLR 458 at [131]–[132] warned against:

> the dangers when applying the Act of adopting the rhetoric of 'appropriation' of 'skill and labour'. A finding that one party has 'appropriated' skill and labour, of itself, is not determinative of the issue of infringement of a copyright work. The Act does not provide for any general doctrine of 'misappropriation' and does not afford protection to skill and labour alone.
>
> ... To speak of the 'appropriation' of '[the company's] skill and labour', rather than attending to the relevant 'original' work of the author or authors, [is] to take a fundamental departure from the text and structure of the Act.

Another related, popular nineteenth-century rationale for copyright protection can be found in the philosophy of Georg Hegel (1770–1831). Drawing upon the work of Immanuel Kant (1724–1804), Hegel also argued that cultural products are an emanation of the personality of the author. On this view, copyright is a form of legal protection for the author's own personhood, and exclusive rights in cultural products recognise the vital and ongoing connection between author and work.[17] For much of the late nineteenth and early–mid twentieth century, copyright was linked to the idea that authors, as artists, deserve a monopoly right to protect their original expressions, but the

16 M Woodmansee, 'The Cultural Work of Copyright: Legislating Authorship in Britain 1837–1842' in A Sarat and TR Kearns, eds, *Law in the Domains of Culture*, Michigan University Press, Ann Arbor, 1998.

17 J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287.

significance of this theory was not confined to arguments that were only supportive of the private property claims of authors. Ideas about the importance of the public realm or community of ideas we all share were also considered. Peter Drahos explains:

> The real relevance of Locke to intellectual property lies in the link he and other natural law thinkers made between property and the idea of positive and negative community, that is between a community in which the commons is owned by all and a community in which the commons is open to ownership by all. ...
>
> Unlike Locke, Hegel is not concerned to know just the origins of property but also its evolutionary fate within the context of a social system. Property for Hegel is in the first instance a fundamental mechanism of survival for individuals. But it also has the potential to rupture community in various ways. Intellectual property particularly poses dangers of this kind.[18]

The importance of protecting the information commons, the body of knowledge, data and information that all creators and innovators draw upon to create new works became the focus of IP advocacy with the growing importance of digital communication from the late twentieth century.[19]

LATE TWENTIETH-CENTURY DISRUPTIONS TO AUTHORIAL PROPERTY

For much of the late nineteenth and early–mid twentieth century, copyright was linked to the idea that authors, as artists, deserve a monopoly right to protect their original efforts. However, this view came under stress in the late twentieth century. In terms of literary history and theory, postmodern and poststructuralist theorists, most notably Michel Foucault[20] and Roland Barthes,[21] questioned the intellectual presumptions of authorship. They considered the rise of the 'individualisation of ideas' in the context of the historical development of juridical and institutional systems that placed the author and his or her text in a system of market relations. This scholarship stimulated significant new historical work in humanities and law that encouraged closer examination of the role and function of property rights in modern cultural markets.[22] In this literature concern for the protective function of copyright was displaced by critiques of the cultural power of the multinational publishing, film and recording companies that determine which works are commercialised and who benefits from exploitation of rights. This scholarship included cultural studies of the phenomenon of celebrity, and ethnographic research that raised questions about race and identity politics in copyright.[23]

Alongside this, the development of computing, the internet and peer-to-peer technologies led to alternate mechanisms for the distribution and circulation of cultural works, impacting upon the commercial expectations of the media companies whose business models had prioritised selling hard

18 P Drahos, *A Philosophy of Intellectual Property*, ANU-e-text, 2016, p 12.

19 R Cunningham, *Information Environmentalism: A Governance Framework for Intellectual Property Rights*, Edward Elgar, Cheltenham, 2014.

20 M Foucault, 'What Is an Author?' in JV Harari, ed, *Textual Strategies*, Cornell University Press, Ithaca, NY, 1979.

21 R Barthes, *Image, Music, Text*, trans S Heath, Noonday Press, New York, 1988.

22 Leading works include M Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, Cambridge, MA, 1993 and M Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics*, Columbia University Press, New York, 1994.

23 J Gaines, *Contested Culture: The Image, the Voice and the Law*, University of North Carolina Press, Chapel Hill, 1991; R Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press, Durham, NC, 1998.

copies of books, music, software and games. Futuristic Californian technology enthusiasts stressed the importance of light-touch regulatory frameworks that were supportive of the expansion of the global information 'super-highway'. The politics of intellectual property and the priority of IP protection intersected with questions about private political influence over public policy, democracy, government and technological regulation. At the most anarchic end of the spectrum it was argued that IP rights had no place in 'cyberspace' because this would solidify the fluid character of internet relations and destroy the life inherent in the online medium and media. In the view of John Perry Barlow, IP laws were designed for a different time and space:

> Copyright worked well because, Gutenberg notwithstanding, it was hard to make a book. Furthermore, books froze their contents into a condition that was as challenging to alter as it was to reproduce ... For all practical purposes, the value was in the conveyance and not the thought conveyed. [24]

Devices such as the photocopier and the video-recorder had also allowed users to make identical copies of copyright works with relative ease and in the absence of owner scrutiny. However, the digital technologies of the late twentieth century exacerbated this trend. There were technical efficiency justifications and social aspects that highlighted the importance of copying and sharing files in digital culture. Digital piracy and remix culture challenged the reach and logic of copyright protection. While the idea of 'free culture' always remained controversial, especially with professional artists and media content owners, within the computing industry the free software movement[25] demonstrated that a monopoly right was not essential for investment in the development of new software and platforms.

Law and economics critiques also came to the fore in IP scholarship in this period, further challenging 'incentive theories' of intellectual property and the role of monopoly power in the entertainment industry.[26] Garrett Hardin's essay, 'The Tragedy of the Commons', was particularly influential.[27] Hardin argued that when resources are scarce, they will be subject to overuse if no one person (natural or otherwise) has vested in them exclusive rights to control access. However, intangibles, such as copyright, can be identified as 'public goods'. Their maximisation does not rely upon (but in fact contradicts) ordinary assumptions about efficient resource use. Copyright works are not 'scarce' in the ordinary sense because they can be simultaneously used by multiple users. Copyright works are also not at risk of overuse because multiple uses do not exhaust them. Users who reap without sowing do not necessarily 'deplete' the commons. Some of the beneficiaries of

24 JP Barlow, 'The Economy of Ideas: A Framework for Rethinking Patents and Copyright in the Digital Age', *Wired,* March 1994, p 11.

25 RM Stallman, *Free Software, Free Society,* CreateSpace Independent Publishing Platform, 2009; L Torvalds, *Just for Fun: The Story of an Accidental Revolutionary*, Harper, New York, 2002; E Raymond, *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*, O'Reilly Media, Sebastopol, CA, 2001.

26 W Landes and R Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325; W Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford University Press, Palo Alto, CA, 2004; L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity*, 2004 <http://www.free-culture.cc/freeculture.pdf>.

27 G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243; Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press, New Haven, CT, 2006; J Boyle, *The Public Domain: Enclosing the Commons of the Mind*, 2008 <thepublicdomain.org>; N Suzor, 'Free-riding, Co-operation and "Peaceful Revolutions" in Copyright' (2014) 28 *Harvard Journal of Law & Technology* 137.

free uses create new productions and are similarly motivated to give back to the community. Others might pay what they think is appropriate, or can afford, rather than the inflated prices that come with monopolist control over distribution.

Copyright wars over digital piracy exploded in the last decade of the twentieth century and into the twenty-first. This has had a lasting impact upon popular understandings about the value of copyright. Today there are far more diverse points of view in circulation about the importance of copyright to artists, alongside the development of far more sophisticated ways in which creative artists can communicate with desired audiences and generate income. Platform capitalism reinforces the traditional belief that artists *should have* the capacity to make choices about the terms of distribution of their art and through these choices determine the emotional, educational and commercial connections they would like to make with readers, listeners and viewers. However, artists are questioning the fairness of royalty distributions from traditional labels and from platforms like Spotify and YouTube.[28] Determining what content should be paid for, and what is shared for free, requires more active engagement by artists. The need to choose a copyright strategy is now built into the business models promoted by new music distribution platforms like SoundCloud and Bandcamp. Today established artists from Radiohead to Banksy use authorship and copyright positions to signal their personal brand, challenging the priority of the more traditional universal identification of the author as owner of exclusive rights.[29]

The legacy of older contractual arrangements where artists have already assigned full copyright to the publisher or label can prevent experimentation with new forms of distribution occurring. A 2019 study of Australian author contracts revealed that 83 per cent of agreements gave the publisher the exclusive right to print, publish, and/or license the work for at least the entire copyright term. Once the works are out-of-print, the authors cannot financially benefit from royalties and exploring alternative publication options is also foreclosed. Additionally, the public cannot access this literary heritage.[30]

The problem here is not simply created by publishers' contracts, but also with creators not understanding the law and the financial implications of their copyright decisions when they assign their copyright. Empirical research with Australian creators shows that while copyright is very much valued, creators do not necessarily understand the law very well. Interviews with Australian creators, conducted in 2017, revealed that it was common for artists to resort to general concepts of 'fairness' and 'fair use' to explain permissible practices without consideration of the technicality of positive law:

> While creators' reuse practices may not have accorded strictly with the legal requirements surrounding economic rights—whether through licensing or under copyright exceptions—they did follow very closely the terms of Australia's moral rights provisions, even when the creators were unaware of those provisions. Creators valued attribution and acknowledgement highly.[31]

28 T Ingham, 'Should Spotify Change the Way It Pays Artists?', *Rolling Stone*, 7 December 2018.

29 K Bowrey, *Copyright, Creativity, Big Media & Cultural Value: Incorporating the Author*, Routledge, London, 2021, ch 7.

30 J Yuvaraj and R Giblin, 'Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements' (2020) 44(1) *Melbourne University Law Review* (forthcoming).

31 P Aufderheide, K Pappalardo, N Suzor and J Stevens, 'Calculating the Consequences of Narrow Australian Copyright Exceptions: Measurable, Hidden and Incalculable Costs to Creators' (2018) 69 *Poetics* 15.

In other words, creator self-identification with the Romantic ideal of copyright seems to displace a proper consideration of the value of economic rights and legal obligations. However, this might also be reflective of the limited practical role that economic rights play in generating a living wage for creators. Revenue from licensing was only important or primary to approximately one-third of those interviewed. Sales of products or ancillary works, performance fees, commissions, salaries and work for hire were other common revenue streams. Further, two-thirds said they had changed a project because of copyright issues. A similar number responded that they had avoided or abandoned work because of problems with licensing and access to copyright material.[32] There is far more social complexity inherent in creative practices today and in the cultural exchanges between creators and consumers than in the twentieth century—when most of the law discussed in this book was enacted and the copyright precedents were established.

COMMON LAW AND LEGISLATIVE HISTORY

Legal training teaches students to be attentive to the taxonomies, definitions and reasoning used to support decisions about legal rights. It will be no surprise to find that there is no neat mapping of any of the above philosophies onto Australian copyright law; however, some of these ideas can be located in the subtext and justifications of decisions. In this section we provide an overview of the history of copyright legislation, placing Australian law in an international context.

EARLY DEVELOPMENTS

Crown Patents were granted in a range of subject matter, including books, from the fifteenth century. It was not until the seventeenth century that the conditions of these grants came under review, with the complaint that they were unfair monopolies and a restraint on liberty and free trade.[33] Throughout the seventeenth and eighteenth centuries patents in literary works remained lucrative. Rights were granted in essential titles such as bibles, prayer books and alphabet books, and valuable interests were divided up and often traded as 'shares'. For the time, these patent rights were relatively secure forms of guaranteed future income and the interest was assumed to be perpetual. Private contracts between printers and publishers (and less commonly between publishers and authors) recognising exclusive rights were also utilised. These contracts could be enforced in Chancery with recourse to equity and conscience, as well as in the Common Law courts, in accordance with broader notions of natural justice. At the time, enforcement did not necessitate legal inquiry into the precise legal origin or status of the exclusive literary property right claimed by the plaintiff.[34]

32 Ibid.

33 See the discussion of the *Statute of Monopolies 1623* (21 Jac 1, c 3) in Chapters 9 and 10.

34 C Hesse, 'The Rise of Intellectual Property 700 BC–AD 2000: An Idea in Balance' (2002) 131 *Dædalus* 26; J Feather and P Lindebaum, 'Milton's Contract' (1992) 10 *Cardozo Arts & Entertainment Law Journal* 439; J Loewenstein, 'The Script in the Marketplace' (1985) 12 *Representations* 101; M Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, Cambridge, MA, 1993; H Tomás Gómez-Arostegui, 'What History Teaches Us about Copyright Injunctions and the Inadequate-Remedy-At-Law Requirement' (2008) 81 *Southern California Law Review* 1197; H Tomás Gómez-Arostegui, 'Equitable Infringement Remedies before 1800' in I Alexander and H Tomás Gómez-Arostegui, eds, *Research Handbook on the History of Copyright Law*, Edward Elgar, Cheltenham, 2016.