

# THE SATURDAY PAPER

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## NEWS

Unlike countries with a fair use exemption, copyright laws in Australia require artists to secure prohibitively expensive licences for even the smallest quotation of others' work. By *Patricia Aufderheide*.

## Copyright rules crippling artists

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A scene from Andrew Garton's documentary film 'This Choir Sings Carols'.

CREDIT: SECESSION/FILMS AND FIRST IMPRESSIONS YOUTH THEATRE



Once a year, in early October, about 60 people gather at the City of Whittlesea's Fountain View Room in the northern fringes of Melbourne to begin 10 weeks of rehearsal for a single concert.

They span generations – aged from eight to over 90 – cultures and faiths. For nine months of each year they never see each other, and then they come together to sing Christmas carols as part of a healing process that began after the 2009 Black Saturday bushfires. Filmmaker Andrew Garton has documented one year's worth of rehearsals with the help of a grant from the council and volunteers from First Impressions Youth Theatre.

The result, a 30-minute documentary called *This Choir Sings Carols*, will probably never be seen.

It cost \$15,000 to make, provided to Garton by local taxpayers to create local culture. That is, until Garton remembered that for mere seconds on screen some of the choristers auditioned singing popular Christmas tunes, among them the George Michael-penned “Last Christmas”.

Garton went through the laborious process of seeking permission from music publishers to use the brief snippets of singing and was grateful when Sony/ATV offered him a 50 per cent discount. But the total demanded, from all the publishing houses, was \$10,000 – almost as much as the film had cost to make. Raising such additional money is beyond this small community.

And the conditions imposed by the music publishers make it unviable anyway. The licence would only permit the film to be shown at festivals. Only 100 DVDs of it could be produced, and these could not be sold, only given away. It couldn't be broadcast on television, screened in commercial cinema sessions or shown online. It couldn't be shown outside Australia. After three years it couldn't be shown at all.

If Garton wanted to screen it outside Australia he would have to pay again, and once more he would be limited to festivals and 100 free DVDs with no commercial showing and none in any form after three years.

If he had made the film in the United States, however, he wouldn't have had to pay those music licensing fees or submit to onerous conditions. US copyright law includes fair use, a general exception for uses that do not intrude on the market for the original work. No one is going to decide against purchasing a copy of Wham's “Last Christmas” because they could instead listen to an amateur belting out a six-second snippet of it in Garton's documentary.

Garton might not have been required to pay licences in Canada, either, where fair dealing within copyright has become much more flexible than it is in Australia, through judicial action. There are other countries with the “right of quotation”. All over the world, copyright regimes have figured out how to write exceptions that don't hurt the market for creators' work but permit new work to be made without strangling costs.

But Australia has one of the most rigid copyright regimes in the world. What happens here to creators who have to work under those conditions?

A team at the Queensland University of Technology, for which I am principal investigator, has been tackling that question. I've been talking to Australian creators – writers, filmmakers, musicians, visual artists, curators and more – and conducting a survey to find out how they deal with Australia's copyright rigidities.

We are only asking questions about creators' own practices, and we are still collecting data. But we're already seeing patterns. And so far they are concerning for Australian national creativity, culture and identity.

Australian creators worry about piracy, and they worry about search engines such as Google making it easy to steal their work. But they also pay high prices – in money and time – to make work in Australia. Worse than that, they steer away from doing some kinds of work because they're experienced enough to know that it would either be too expensive or impossible.

Here's one filmmaker, interviewed as part of the study: “I'll never make another music doco – too painful. And we'll lose our Australian music heritage if we can't tell those stories.”

And a nonfiction writer: “The very same quotes I can publish without question in my journalism [because of a fair dealing exception] I have to spend months at the end getting permission for in the books I write. Sometimes, if the subject is difficult, I'm forced to paraphrase. That makes the prose flat and the work is less interesting. Why can't I do in a book what I can do in my journalism?”

A novelist: “I had song lyrics and references to popular culture in my novel, and had to take them out – there's no way I can pay those prices on the sales I'll get in the Australian market. So it's less vivid and specific.”

A visual artist experimenting with digital collage: “It was shown in a gallery setting once, but I can't run the risk of making it available generally, and certainly not online.”

So far about one-third of the hundreds of creators who've taken our survey – these results may change as we get more responses – say the bulk of their project costs are for licensing. About a third have had recent projects delayed more than three months due to arrangements for licensing. Almost two-thirds of all creators say they have abandoned or avoided undertaking a project for copyright reasons.

In six inquiries over 20 years – most recently conducted by the Australian Law Reform Commission, reporting in 2014, and the Productivity Commission, reporting last December – it has been consistently found that Australia's copyright laws are outdated and unready for the digital era. But in the inquiries, collecting societies and the organisations they bond to them have provided arguments that falsely pitted consumers and technologists against creators. But no one has provided any evidence that creators today are making any real money from the kind of licensing that exceptions cover. In one of the study workshops, a filmmaker said: “I'd trade my non-existent royalties from licensing clips for not having to pay the tens of thousands of dollars in licences.”

Collecting societies and their allied groups have ignored the facts that US creators embrace and fiercely defend their fair use rights, that among creators fair use is most employed by US media companies, that internationally creators produce at lower costs than Australian creators must, and that exceptions by definition do not intrude on existing markets. They have continued to make claims that have been thoroughly debunked; for instance, they keep saying that Canadian publishers have been harmed by Canada's exceptions, something the publishers themselves vigorously deny.

In this melee, creators have never been asked directly the costs of making work under such harsh conditions. And of course, filmmakers, choreographers, playwrights, designers, creative writers, visual artists and musicians are too busy making their work to become copyright experts and challenge the organisations that write them cheques.

Australian creators deserve to know more about what their colleagues pay in time and money, what doesn't get done at all and – most alarmingly – what ideas get filtered out of the creative process entirely for copyright reasons. They deserve to find out how much money they actually make from the kinds of licensing of their own work that bulks up their budgets when they're making new work. They deserve an accounting of how much of the licensing fees they pay to others when making their work goes offshore. But collecting societies say this data is proprietary.

In the end, creators may need independent research, not beholden to any stakeholder. In New Zealand, where they are debating the same issue, the government commissioned original, independent research on how films and books were created and what creators actually thought. Australian creators deserve a more sensible conversation, grounded in their own experience.

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