

# FAIR USE AND FAIRNESS IN COPYRIGHT: A DISTRIBUTIVE JUSTICE PERSPECTIVE ON USERS' RIGHTS

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## I INTRODUCTION

Australia is once again considering how to best protect the public interest in copyright. One of the most contested current issues in Australian copyright law is the question of limits and exceptions to the rights of copyright owners. The recent Australian Law Reform Commission ('ALRC') review into copyright exceptions recommended broadening and simplifying the exceptions to better protect the interests of users to access and reuse copyright material for socially beneficial purposes.<sup>1</sup> Despite the exhaustive consultation and report produced by the ALRC, and the support lent to it by the recent Productivity Commission Inquiry Report,<sup>2</sup> there is little consensus about its recommendations. The proposal to introduce fair use is strongly contested by rightsholder groups, who are reluctant to cede further control over the use of information and cultural goods, particularly given the challenges they have faced transitioning to a digital environment.

The debate over the appropriate scope of limitations and exceptions to copyright is heated, and usually stuck for want of data. The dominant metaphor of copyright is one of balance. Copyright is a utilitarian bargain; it enables publishers to invest in the production of books, music, art, films and other works, in order that the public can benefit from access to new knowledge and culture. This bargain is delicate: if copyright is too strong, it unduly restricts the flow of information; too weak, and too many works may go unproduced or undistributed. But it turns out that the utilitarian balance in copyright is largely indeterminate: we do not have the evidence necessary to identify a utility-maximising level of protection for copyright. Rightsholders, users groups, and authors' representatives are accordingly locked in an increasingly heated battle over the limits of copyright, with little prospect of agreement in sight.<sup>3</sup>

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1 See generally Australian Law Reform Commission ('ALRC'), *Copyright and the Digital Economy: Final Report*, Report No 122 (2013).

2 See generally Productivity Commission, 'Intellectual Property Arrangements' (Inquiry Report No 78, Productivity Commission, 23 September 2016) <<http://www.pc.gov.au/inquiries/completed/intellectual-property/report>>.

3 See William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009). Cf Ezieddin Elmahjub, 'A Case for Flexible Intellectual Property Protection in Developing Countries: Brief Lessons from History, Psychology and Economics' (2016) 38 *European Intellectual Property Review* 31.

In this article, we propose a thought experiment: a thumb on the metaphorical utilitarian balance that can help to increase the equality of the system. At the core of distributive justice is a principle that property rights should be structured to maximise equality.<sup>4</sup> In the absence of good empirical evidence, we suggest that the principles of distributive justice can help to resolve some of the current dispute over the boundaries of copyright. We argue that copyright must not only be seen as a utilitarian bargain that allows rightsholders to increase and accumulate wealth with the hope that it increases overall public welfare. It must also be a fair bargain for users of knowledge and culture. The principles of distributive justice may supplement the utilitarian focus of current copyright debates in order to empower users to better access and use copyright works.

In Part II, we provide a brief overview of the application of distributive justice theory to copyright. We proceed on the basis that copyright is justifiable under distributive justice principles, and sketch the extent of distributional inequality in the international copyright system. On the whole, copyright predominantly provides benefits to large corporate producers and distributors.<sup>5</sup> The interests of the bulk of individual authors and consumers are somewhat less well served. This owner-centred approach concentrates power in the hands of the conglomerates of the copyright industry and can act to exclude large groups of people from adequate access to knowledge and culture that is required for effective participation in society. This article uses the theory of distributive justice to provide an initial critique of the effect of copyright in supporting the concentration of wealth and power in intermediaries. Given these significant inequalities, we suggest that at least where the utilitarian analysis is indeterminate, the law should err on the side of empowering users with solid capabilities to access and reuse knowledge and culture.

In Part III, we explore how copyright might evolve to better empower users, focusing on the limitations and exceptions to copyright. Limitations and exceptions are only one of the areas where user interests are explicitly balanced against owners' rights, but they are unique in presenting a clear moment of flux in the evolution of copyright law. While there are strong international boundaries on the breadth of these limits, there remains significant scope for nation states to enlarge their limitations within these bounds. The recent ALRC report highlights the availability of a political choice about how to safeguard the interests of users in domestic copyright law.<sup>6</sup> We argue that the distributional imbalance in current law presents a strong reason to exercise some of the flexibility available in international law and enhance the protection for user interests in Australian law.

As a preliminary conclusion, we suggest a conceptual shift: instead of thinking about the boundaries of copyright as limited exceptions, we should follow the lead of the Canadian Supreme Court in characterising these zones as positive

4 John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 6; see generally Thomas C Grey, 'Property and Need: The Welfare State and Theories of Distributive Justice' (1976) 28 *Stanford Law Review* 877.

5 See generally Jessica Litman, 'Real Copyright Reform' (2010) 96 *Iowa Law Review* 1.

6 See generally ALRC, above n 1.

user rights.<sup>7</sup> This relatively simple shift in approach could significantly increase the fairness of the copyright bargain by placing users' interests on a more equal footing with those of rightsholders. We apply this reasoning to three current areas of policy indeterminacy to demonstrate the implications of such a shift on copyright lawmaking. First, a conceptual shift from exceptions to positive rights suggests that it would be desirable to reverse the common law principle that commercial providers may not rely on the purposes of their users in order to benefit from the fair dealing exceptions.<sup>8</sup> This change would prioritise users' interests when determining whether or not third parties are able to help them exercise their legitimate rights. Second, we suggest that this conceptual shift would support proposals for limiting contractual arrangements that lead to overriding users' permitted uses. While both of these issues were considered in the ALRC's recent report, the necessarily utilitarian framing and limited terms of reference precluded the review from reaching a definitive conclusion on the desirability of these reforms.<sup>9</sup> We suggest that it is in exactly these cases that the theory of distributive justice can help to guide policy-making in the future. Finally, we broaden the analysis to consider whether Australia should introduce a fair use right. We argue that particularly since there is no good evidence to suggest that introducing fair use would be harmful to rightsholders, the principles of distributive justice suggest that enhancing the responsiveness of copyright law to demands of users is likely to be an improvement over the status quo.

## II THE DISTRIBUTIONAL STRUCTURE OF COPYRIGHT

Copyright regulates the flow of knowledge and culture in our society. It is this system that provides the infrastructure for creative industries to organise investment in the creation and distribution of information and entertainment goods (books, music, film and television content, etc). It is also this system that regulates how consumers and future producers gain access to these goods. Access to culture and information is a fundamental prerequisite for full participation in society — in education, expression, leisure, and creative play.<sup>10</sup> Copyright accordingly strikes a balance between the incentives provided to producers and distributors and the costs imposed on the ability of users to access the knowledge and cultural goods they require to participate in society. Because copyright can interfere with socially and personally important functions, it contains both exclusive rights designed to protect owners and limitations to those rights that empower users — the public who want access to these goods. At a theoretical level, the interests of copyright owners and users often align — both groups benefit from a flourishing culture and the continuous flow of new knowledge.

7 See *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; see also Part III, below.

8 See *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; *Singtel Optus v National Rugby League Investments (No 2)* (2012) 199 FCR 300.

9 ALRC, above n 1, 180–1.

10 See Julie E Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 *University of California Davis Law Review* 1151, 1154, 1190–205.

At a practical level, however, rightsholders and users often have conflicting interests. Rational copyright owners maximise their profits by controlling and limiting access to and use of their products. At this level, copyright is zero-sum; any benefit extracted by producers comes at the expense of consumers.

While balance is at the heart of copyright theory, in practice, modern copyright law is fundamentally skewed in favour of copyright owners. Overall, the accommodation of the interests of rightsholders and users reflected in current copyright systems focuses overly strongly on owners' exclusive rights while giving insufficient weight to the interests of users.<sup>11</sup> Part of the explanation for copyright's distributional problems is that the main theoretical justifications for copyright are themselves usually skewed in favour of stronger copyright. As a utilitarian bargain, copyright provides incentives to investors to produce and distribute knowledge and cultural goods.<sup>12</sup> This is said to advance the public interest by promoting progress and the dissemination of new works. These incentives must be balanced against the costs of granting monopoly rights over expression, which necessarily make access to works more expensive.<sup>13</sup> But the utilitarian analysis remains, at its core, indeterminate. There is insufficient analysis to determine where the optimal balance lies.<sup>14</sup> Indeed, the very notion of balance has been critiqued as an inappropriate — and unresolvable — way

- 11 Analysis in scholarship on this point is very extensive. Some of the most important scholarship in this area includes: Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press, 2004); Yochai Benkler, 'Freedom in the Commons: Towards a Political Economy of Information' (2003) 52 *Duke Law Journal* 1245; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006) 23; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66(1–2) *Law and Contemporary Problems* 33; Jessica Litman, 'Readers' Copyright' (2010–11) 58 *Journal of the Copyright Society of the USA* 325; Pamela Samuelson, 'Enriching Discourse on Public Domains' (2006) 55 *Duke Law Journal* 783; William Patry, *How to Fix Copyright* (Oxford University Press, 2011); Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press, 2008); Julie E Cohen, 'The Place of the User in Copyright Law' (2005) 74 *Fordham Law Review* 347, 347–8; Margaret Chon, 'Intellectual Property "from Below": Copyright and Capability for Education' (2007) 40 *University of California Davis Law Review* 803.
- 12 Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283, 288, quoted in William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 173.
- 13 Charles Robert Gaston (ed), *Macaulay's Speeches on Copyright and Lincoln's Address at Cooper Union* (Ginn and Company, 1914) 25 (reprinting Lord Macaulay's famous point that copyright 'is a tax on readers for the purpose of giving a bounty to writers'); William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325, 326.
- 14 See Ruth Towse, 'What We Know, What We Don't Know and What Policy-Makers Would Like Us to Know About the Economics of Copyright' (2011) 8(2) *Review of Economic Research on Copyright Issues* 101; Christian Handke, 'Economic Effects of Copyright: The Empirical Evidence So Far' (Report, National Academies of the Sciences, April 2011) <[http://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga\\_063399.pdf?\\_ga=2.75522069.1627392755.1500591517-1359096401.1500591517](http://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_063399.pdf?_ga=2.75522069.1627392755.1500591517-1359096401.1500591517)>; see also Ivan P L Png, 'Copyright: A Plea for Empirical Research' (2006) 3(2) *Review of Economic Research on Copyright Issues* 3, 4 (arguing that insufficient empirical research exists on the appropriate balance in copyright law); Ruth Towse, Christian Handke and Paul Stepan, 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5(1) *Review of Economic Research on Copyright Issues* 1, 15–16 ('there is nothing in all the literature we surveyed here to guide us towards the "optimal" copyright standard').

of framing interests in copyright.<sup>15</sup> In recent years, in the absence of empirical evidence to the contrary, a maximalist approach has often dominated; if some level of copyright protection is good, more must be better.<sup>16</sup>

The maximalist utilitarian view is reinforced by underlying natural rights claims that assert that creators ought to be able to control their creations.<sup>17</sup> These claims are usually justified either on the basis that creators own the fruits of their labour or that creators have a special bond to their creative works in which they invest and express their personality. While these rights claims often include strong theoretical justifications for limits on exclusivity, these limits have not yet been heavily canvassed in mainstream copyright discourse.<sup>18</sup> Instead, the simpler common-sense, intuitive appeal of rights-based theories — rooted in assumptions that creators of content deserve strong property rights in their expression — serves to bolster the utilitarian claim where evidence is lacking.<sup>19</sup>

In this Part, we provide an introduction to the application of distributive justice to copyright. We explain the essential contours of a distributive justification for property rights in expression, and proceed on the basis that copyright regimes are in general able to be supported on distributive grounds. We then turn to sketch the important distributional inequities of current copyright systems. First, a disproportionate share of wealth and power is concentrated in the hands of a relatively small set of large rightsholders. Second, only a tiny proportion of authors achieve commercial success; the copyright market is more accurately thought of as a lottery of attention. Third, users' interests are systematically subjugated to the interests of large rightsholders. Combined, these observations suggest that the benefits of copyright are distributionally skewed towards a relatively small sector of society. In the next Part, we will take up current potential reforms to

15 See generally Abraham Drassinower, 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2009) 34 *Journal of Corporation Law* 991; Nicolas Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 297, 309–13.

16 Jessica Litman, *Digital Copyright* (Prometheus Books, 2006) 80 ('Copyright legislation has recently been a one-way ratchet, and it's hard to argue that that's bad within the confines of the conventional way of thinking about copyright.').

17 See Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011) 8–10; Derek E Bambauer, 'Faulty Math: The Economics of Legalizing *The Grey Album*' (2008) 59 *Alabama Law Review* 345, 353–4; David McGowan, 'Copyright Nonconsequentialism' (2004) 69 *Missouri Law Review* 1, 36–8; Jean-Luc Piotraut, 'An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared' (2006) 24 *Cardozo Arts & Entertainment Law Journal* 549, 556–7 ('both natural law principles and economic policy decisions motivated copyright law development in the United States. ... Decidedly, authors' personal claims as well as an economic argument underlay both French and American copyright laws') (emphasis altered) (citations omitted); Pamela Samuelson et al, 'The Copyright Principles Project: Directions for Reform' (2010) 25 *Berkeley Technology Law Journal* 1175, 1213 (Samuelson notes that 'many members of the public, and certainly most creators, are likely to have a dose of "natural rights" theory in their perception about copyright law, under which authors would have at least some control over the use of their works even if the use is non-commercial — and especially when the use is commercial.').

18 Abraham Drassinower, 'A Note on Incentives, Rights, and the Public Domain in Copyright Law' (2011) 86 *Notre Dame Law Review* 1869, 1871 (arguing that we should further examine 'the as yet largely unexplored potential of a rights-based minimalism') (citations omitted); see also Hugh Breakey, *Intellectual Liberty: Natural Rights and Intellectual Property* (Ashgate Publishing, 2012).

19 Suzor, 'Access, Progress, and Fairness', above n 15, 306.

copyright exceptions as an opportunity to redress some of the inequality that users in particular face.

## A A Distributive Theory of Copyright

The first step to evaluating the distributive fairness of copyright law is to examine whether exclusive property rights in expression are justifiable. We note that while most contemporary rights-based analyses support some version of exclusive property rights in expression, this is not wholly uncontroversial. A full analysis is, however, somewhat out of scope of the present paper. For our purposes, it suffices in this section to articulate the core theoretical arguments that support the initial vesting of exclusive rights in creators of expression and neighbouring rights in producers, publishers, and distributors of expressive works. The remainder of this paper will proceed on the assumption that the initial allocation of rights is justifiable, in order to interrogate the issues of current policy concern about the limitations and exceptions to those rights.

Rawls' theory of justice requires allocation of rights and resources to satisfy two principles. The first principle requires equality in the assignment of *basic* rights and duties.<sup>20</sup> These are constitutional liberties that must be available for all, for which no inequality is permitted.<sup>21</sup> The benchmark for what is to be considered as 'basic liberties' is the necessity of a particular right or liberty to promote autonomous life, a life of free choices and maximisation of self-advancement and self-fulfilment. If copyright expression is a basic liberty, it cannot be limited in an unequal way and traded off against other social benefits.

We do not consider intellectual property to be a basic liberty, at least not in the full and extensive form that is familiar in modern copyright law. It is possible that a core interest in expression can be justified as a fundamental right of authors, although the shape and size of that right may be much more curtailed than is often thought. Some form of exclusive right may be justified on the basis that it enables authors to gain independence and pursue a fulfilling career.<sup>22</sup> Article 15.1(c) of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')<sup>23</sup> recognises some fundamental interest of authors '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production', although the same article also recognises essential rights in access to knowledge and to participate in cultural life.<sup>24</sup>

20 Rawls, *A Theory of Justice*, above n 4, 53.

21 Ibid 53–4.

22 Merges, above n 17, 110.

23 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

24 See Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' (Paper presented at the Panel Discussion on Intellectual Property and Human Rights, Geneva, 9 November 1998) <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf)>.

Even if some interests in copyright can be considered to be universal rights, it is likely that this subset is relatively small. Any rights-based justification of intellectual property has strong internal limits that are necessary to protect the interests users have in learning, enjoying, sharing, and making use of recorded knowledge and creative cultural expression.<sup>25</sup> Evaluating the complex interaction between different interests in owning and accessing expressive works within a human rights context requires a detailed and careful analysis of the specific attributes of the intellectual property rights at question.<sup>26</sup> For our purposes here, it is sufficient to note that the current policy debates over limitations and exceptions deal with boundaries of intellectual property rights that are far removed from any core of essential rights.

The second principle that must be addressed in Rawls' framework imposes the condition that social and economic inequalities are only permissible if they 'result in compensating benefits for everyone, and in particular for the least advantaged members of society'.<sup>27</sup> This is where copyright begins to exhibit serious problems. The dominant justification is that exclusive rights in expression are justified on the basis that without the incentives they provide, fewer works would be created, less 'progress'<sup>28</sup> would be made, and everyone would be worse off. The limits of copyright — including particularly its finite terms, the exceptions to infringement, and the idea/expression dichotomy — are designed to mitigate or 'balance' the impact of granting exclusive rights in expression on users and future authors. If we assume that the balancing incentives argument is theoretically justifiable,<sup>29</sup> at least at some level, the current unequal structure of copyright markets suggests that the practical implementation of the copyright balance is severely lacking. The copyright grant, as observed in practice, allows the concentration of private power and control over the distribution of information and culture. There is good reason to suspect, as we discuss below, that current copyright rules skew wealth and power in favour of a small proportion of society, allowing them to disproportionately control access to knowledge and participation in culture. This,

25 See Suzor, 'Access, Progress, and Fairness', above n 15, 305, 312–13; Abraham Drassinower, 'A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law' (2003) 16 *Canadian Journal of Law and Jurisprudence* 3, 18–19; Drassinower, 'A Note on Incentives', above n 18, 1871; see also Breakey, above n 18.

26 Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 *University of California Davis Law Review* 1039, 1042; see also Laurence R Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 *University of California Davis Law Review* 971.

27 Rawls, *A Theory of Justice*, above n 4, 13.

28 Suzor has argued that despite deep uncertainty, the necessity of the 'incentives-access paradigm' is often assumed in copyright theory in part because of the difficulty of identifying what counts as 'progress': Suzor, 'Access, Progress, and Fairness', above n 15, 301–9.

29 For an analysis of categories in which copyright may not be necessary to incentivise production and distribution of copyright materials, see Nicolas Suzor, 'Free-Riding, Cooperation, and "Peaceful Revolutions" in Copyright' (2014) 28 *Harvard Journal of Law and Technology* 137.

we suggest, leaves large segments of society without proper access to essential knowledge and cultural goods for their own autonomy and self-fulfilment.<sup>30</sup>

If copyright is to be compatible with the principles of distributive justice, the system of rights must be carefully calibrated to ensure that the benefits it brings to the wealthy do not come at the expense of the most disadvantaged members of society. Rawls' theory differs from utilitarian analysis here: even large relative gains in wealth of a small number of copyright owners cannot be justified if they reduce the opportunities of those who are worst off. Applying the principles of distributive justice, we should prefer changes to the copyright system that improve the real opportunities of those who struggle the most under the current system, even if that means some reduction in incentives and therefore also some reduction in both the wealth of the most successful and the volume of new material produced.<sup>31</sup> Doing this analysis at the scale of the entire copyright system will require new methods that can model the likely practical effects of changes on dynamic production in complex systems.<sup>32</sup> In this paper, we focus instead on the more modest goal of identifying potential changes to limitations and exceptions that should improve access without greatly interfering with incentives. Before turning to that challenge, we first sketch the extent of inequity in current copyright systems.

## **B Concentration of Wealth and Copyright Power**

In very general terms, copyright policies and laws, at both the international<sup>33</sup> and domestic levels, contribute to the concentration of private power and control over the distribution of information.<sup>34</sup> The operation of copyright law means that important components of our shared knowledge and cultural heritage are enclosed within private control.<sup>35</sup> The network effects that underpin copyright markets mean that a relatively small number of firms are able to utilise copyright law as a mechanism to control access and reuse of creative works.<sup>36</sup>

30 Cf Justin Hughes and Robert P Merges, 'Copyright and Distributive Justice' (2016) 92 *Notre Dame Law Review* 513 (focusing on some positive aspects of copyright law on the distribution of income flowing to creative individuals as opposed to copyright's impact on the distribution of opportunities to access and reuse information).

31 Another method of addressing inequity may be to increase progressive taxes on the income of highly successful producers and distributors of creative works in order to fund programs that enhance the opportunities of those worse off.

32 Suzor, 'Free-Riding, Cooperation, and "Peaceful Revolutions" in Copyright', above n 29, 190–1.

33 For a critique of the international copyright system, particularly with regard to its insufficient consideration for distributive justice concerns, see Chon, above n 11. See also Peter Drahos, 'Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid' (2004) 36 *Case Western Reserve Journal of International Law* 53.

34 See Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House, 2001) 116–19; see also Lawrence Lessig, 'The Creative Commons' (2004) 65 *Montana Law Review* 1, 8–9 (arguing that '[n]ever in our history have fewer exercised more control over the development of our culture than now. ... Never has the concentration been as significant as it is now').

35 See generally James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2010).

36 Ben H Bagdikian, *The New Media Monopoly* (Beacon Press, 2004) 66.



On an overall global level, media markets exhibit substantial concentration of ownership and control. Eli Noam's study of 30 countries with the strongest economies and contribution to the media world shows that 'on average, four companies control 60.7% of each country's national media'.<sup>37</sup> Globally, national media markets are heavily influenced by massive US-based media firms, where power is concentrated in a small set of corporate actors. Statistics from the US show that across films, television, newspapers, books, and magazines, a few dozen corporations control the greatest majority of the market.<sup>38</sup> For instance, as of 2014, the top eight US film companies had more annual revenue than the next 100 combined.<sup>39</sup> Similarly, in 2014, three US firms accounted for 65 per cent of the market share in the music industry.<sup>40</sup> The top six US companies account for more than 80 per cent of global film market share in 2015.<sup>41</sup>

The dominance of the US in international media markets has a massive effect on domestic creators and producers. In film in particular, the scope of Hollywood's market power makes it extremely difficult for the majority of the world to be part of the global cinema markets.<sup>42</sup> According to the European Audiovisual Observatory, in 2013, the US film firms dominated 69.5 per cent of the EU market share.<sup>43</sup> This had been the case well before that. Hanson and Xiang show that from 1992 to 2002, the US films in Europe dominated — over an average market share of 69 per cent of total box-office receipts.<sup>44</sup> In the global video games market at the end of the second quarter of 2015, the top six companies had more revenue than the next 19 companies combined.<sup>45</sup> Three corporations, Microsoft, Apple, and Google, exercise dominance over desktop and mobile operating system markets,<sup>46</sup> and these firms are increasingly able to position themselves to extract a substantial portion of the revenue of software developers, entertainment

37 Eli Noam, 'Who Owns the World's Media?' (Paper presented at the Research Conference on Communication, Information and Internet Policy, School of Law, George Mason University, Virginia, 27–29 September 2013) 13 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2242670](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242670)>.

38 Ben H Bagdikian, *The Media Monopoly* (Beacon Press, 6<sup>th</sup> ed, 2000) 4, cited in Lessig, *The Future of Ideas*, above n 34, 117.

39 Box Office Mojo, *Studio Market Share: January 1–December 31, 2014* <<http://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2014&p=.htm>>.

40 Statista, *Revenue Market Share of the Largest Music Publishers Worldwide from 2007 to 2016* <<http://www.statista.com/statistics/272520/market-share-of-the-largest-music-publishers-worldwide/>>.

41 Box Office Mojo, *Studio Market Share: January 1–December 31, 2015* <<http://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2015&p=.htm>>.

42 Stuart Cunningham and Jon Silver, *Screen Distribution and the New King Kongs of the Online World* (Palgrave Macmillan, 2013) 33.

43 European Audiovisual Observatory, 'Box Office Up in the European Union in 2014 as European Films Break Market Share Record' (Press Release, 5 May 2015) 4 <<http://www.obs.coe.int/documents/205595/3477362/MIF2015-CinemaMarketTrends2014-EN.pdf/3a393b66-1428-4e38-8484-ecdb60962236>>.

44 Gordon H Hanson and Chong Xiang, 'International Trade in Motion Picture Services' in Marshall Reinsdorf and Matthew Slaughter (eds), *International Trade in Services and Intangibles in the Era of Globalization* (University of Chicago Press, 2009) 203, 213.

45 Newzoo, *Top 25 Companies by Game Revenues* <<http://www.newzoo.com/free/rankings/top-25-companies-by-game-revenues/>>.

46 Statista, *Statistics and Market Data on Software* <<http://www.statista.com/markets/418/topic/484/software/>>.

distributors, and information producers who distribute their products on each firm's platform.

Ruth Towse argues that copyright, among other factors, offers 'at least a partial explanation for the observed concentration of ownership'.<sup>47</sup> The copyright industries have been, over the last century, quite successful in lobbying for the expansion of copyright law to limit competition, access and wide distribution of knowledge and culture products.<sup>48</sup> In general terms, user interests have not been well represented in the development of copyright law and policy. From the introduction of the first copyright laws, the focus of the copyright system has primarily been on the interests of authors and owners,<sup>49</sup> a perspective which has persisted through subsequent legislative developments of copyright laws to the present day. The major stakeholders in copyright systems are 'small, homogeneous, well-organized, and well-financed ... representing the entertainment, software, and publishing industries'.<sup>50</sup> For decades, they have successfully lobbied to ensure that copyright laws are, in the main, crafted so as to prioritise their interests.<sup>51</sup> In contrast, those who use the knowledge and culture embodied in copyright works, though large in number, are heterogeneous and have not been effective in adequately embedding their interests and needs into copyright policy and law. Instead, copyright policy-making worldwide has largely progressed through a combination of compromises between special interest lobby groups, particularly established rightsholders and technological innovators,<sup>52</sup> and the steady ratcheting up of domestic laws through international fora.<sup>53</sup>

### C The Lottery of Attention

Much of the rhetoric of copyright centres around artists, but individual artists are also very poorly served by the copyright system. Copyright does not provide the

47 Ruth Towse, 'Creative Industries' in Ruth Towse (ed), *A Handbook of Cultural Economics* (Edward Elgar, 2011) 125, 127–8.

48 Niva Elkin-Koren, 'Making Room for Consumers under the DMCA' (2007) 22 *Berkeley Technology Law Journal* 1119, 1122, 1154.

49 Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2005) vol 2, 881.

50 Elkin-Koren, 'Making Room for Consumers under the DMCA', above n 48, 1152, 1154.

51 Ibid.

52 For a discussion of the legislative process in the US, see Jessica Litman, 'Copyright Legislation and Technological Change' (1989) 68 *Oregon Law Review* 275; Jessica D Litman, 'Copyright, Compromise and Legislative History' (1987) 72 *Cornell Law Review* 857; see also William F Patry, 'Copyright and the Legislative Process: A Personal Perspective' (1996) 14 *Cardozo Arts & Entertainment Law Journal* 139, 141.

53 See, eg, Kimberlee Weatherall, 'ACTA as a New Kind of International IP Lawmaking' (2011) 26 *American University International Law Review* 839; Adronico Oduogo Adede, 'Origins and History of TRIPS Negotiations' in Christophe Bellmann, Graham Dutfield and Ricardo Meléndez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPS, Trade, and Sustainability* (Earthscan Publications, 2003) 23.

incentives for artists to create; creativity is much more intrinsically motivated.<sup>54</sup> Copyright does not even provide a reward for most creative expression. For the proportion of the Australian workforce that identifies as professional artists, ‘more than half ... [earn] less than \$10,000 [per year] from their creative income’,<sup>55</sup> and average total wages are significantly less than in professional or blue-collar industries.<sup>56</sup> Figures from other western countries reflect similar findings.<sup>57</sup> Conversely, while they are underlooked in copyright discourse, artists employed within the creative industries or in creative occupations in other industries earn more than the average wage,<sup>58</sup> and report higher job satisfaction.<sup>59</sup> Importantly, however, these are not traditional copyright markets; for these industries, which deal in copyright goods but do not necessarily sell access to them, the relative role of copyright in supporting these jobs is less clear.<sup>60</sup>

In the core creative industries, copyright is structurally designed to encourage authors to assign their rights to producers and publishers.<sup>61</sup> Because the creative industries are inherently risky — ‘nobody knows’<sup>62</sup> which productions will be successful — copyright provides a mechanism for large publishers and distributors to hedge their bets. Copyright enables producer intermediaries to aggregate risk,

54 See generally Roberta Rosenthal Kwall, ‘Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul’ (2006) 81 *Notre Dame Law Review* 1945; Diane Leenheer Zimmerman, ‘Copyrights as Incentives: Did We Just Imagine That?’ (2011) 12 *Theoretical Inquiries in Law* 29; Jeanne C Fromer, ‘A Psychology of Intellectual Property’ (2010) 104 *Northwestern University Law Review* 1441.

55 David Throsby and Anita Zednick, ‘Do You Really Expect to Get Paid?’ (Report, Australia Council for the Arts, 10 August 2010) 9 <[http://www.australiacouncil.gov.au/workspace/uploads/files/research/do\\_you\\_really\\_expect\\_to\\_get\\_pa-54325a3748d81.pdf](http://www.australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_pa-54325a3748d81.pdf)>.

56 Stuart Cunningham and Peter Higgs, ‘What’s Your Other Job? A Census Analysis of Arts Employment in Australia’ (Report, Australia Council for the Arts, 10 August 2010) 9–10 <[http://www.australiacouncil.gov.au/workspace/uploads/files/research/what\\_is\\_your\\_other\\_job\\_the\\_cen-54325a7993203.pdf](http://www.australiacouncil.gov.au/workspace/uploads/files/research/what_is_your_other_job_the_cen-54325a7993203.pdf)>.

57 Martin Kretschmer et al, ‘Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers’ (2011) *Social Science Research Network* 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1780206](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780206)> (finding that ‘[v]isual artists [in the UK] have precarious careers, with typical earnings well below the UK national median wage’ and that ‘[t]he distribution of income is highly unequal’); Martin Kretschmer and Philip Hardwick, ‘Authors’ Earnings From Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers’ (2007) *Social Science Research Network* 23 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2619649](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619649)> (finding that professional writing is risky in the UK and Germany, with median wages of approximately 64 per cent and 42 per cent of the national median respectively and the top 10 per cent of writers earning approximately 60 per cent and 41 per cent of the total income, respectively); US Bureau of Labor Statistics, *Occupational Outlook Handbook* (US Government Printing Office, 2010) 328 (‘[B]ecause many musicians find only part-time or intermittent work and experience unemployment between engagements, they often supplement their income with other types of jobs. The stress of constantly looking for work leads many musicians to accept permanent full-time jobs in other occupations while working part time as musicians’).

58 Cunningham and Higgs, above n 56, 5.

59 See Jason Potts and Tarecq Shehadeh, ‘Compensating Differentials in Creative Industries and Occupations: Some Evidence from HILDA’ in Greg Hearn et al (eds), *Creative Work Beyond the Creative Industries: Innovation, Employment and Education* (Edward Elgar, 2014) 47.

60 See Terry Flew, Nicolas Suzor and Bonnie Rui Liu, ‘Copyrights and Copyfights: Copyright Law and the Digital Economy’ (2013) 1 *International Journal of Technology Policy and Law* 297, 305.

61 See Jessica Litman, ‘The Exclusive Right to Read’ (1994) 13 *Cardozo Arts & Entertainment Law Journal* 29, 37–9.

62 Richard E Caves, *Creative Industries: Contracts between Art and Commerce* (Harvard University Press, 2000) 86 (emphasis altered).

control, and profits, in order to offset the flops against the hits.<sup>63</sup> The result is that producers obtain some certainty, but only a tiny proportion of authors ever profit from the system. For individual artists, copyright is a lottery.<sup>64</sup>

## D The Subjugation of Users' Interests

Users too are typically under-served by the copyright system. Copyright law is owner-centered; it assumes 'a natural state of affairs where the ability to control all unauthorized uses is the norm'<sup>65</sup> and any permitted uses are the exceptions. The law gives copyright holders, as a general rule, exclusive rights as control mechanisms which can be used to prevent users from reading, listening, viewing and reusing the intellectual products.<sup>66</sup> While the formal exceptions exist at both national and supranational levels to protect the ability of users to engage with knowledge and culture, the limited way in which these are generally interpreted often makes them necessarily subservient to the interests of producers. In practice, the law is configured to empower rightsholders to exercise substantial control over the ability of users to access, use, and reuse copyright works.

The legal ability of copyright owners to control access has markedly increased in the digital age. In an analog media environment, copyright protected mostly relationships between rival publishers.<sup>67</sup> In the digital environment, almost every interaction with creative expression involves creating a 'copy' or 'reproduction', however temporarily, and is therefore a potential copyright infringement.<sup>68</sup> This structural configuration of copyright enables those who commodify culture and knowledge to exercise exclusive rights to control access and dissemination.<sup>69</sup> As copyright law has exponentially expanded the zones of privatisation of knowledge and culture over the years,<sup>70</sup> it marginalises the interests of users in

63 See William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 *University of Chicago Law Review* 471, 495 ('which will be hits and which will be flops is not known in advance. ... Copyright protection enables the record company to earn enough money on the hits to cover both their costs and the production and marketing costs of the many failures').

64 See Ruth Towse, *Creativity, Incentive, and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Edward Elgar, 2001) 132–6 (arguing that copyright supports an asymmetry in market power between professional artists and publisher intermediaries and generally fails to adequately reward all but superstar artists).

65 William Patry, 'Limitations and Exceptions in the Digital Era' (2011) 7 *Indian Journal of Law and Technology* 1, 2.

66 See generally Ezieddin Elmahjub, 'Situating Intellectual Property Policy into a Human Development Paradigm' (2015) 18 *Journal of World Intellectual Property* 245; Litman, 'The Exclusive Right to Read', above n 61, 43.

67 See L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, 1991) 66.

68 Lessig, 'Free Culture', above n 11, 143–4.

69 See generally Julie E Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain' in Lucie Guibault and P Bernt Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International, 2006) 121.

70 See generally Boyle, *The Public Domain*, above n 35.

having adequate open zones of expressions.<sup>71</sup> The dominance of owner interests means that even where less control would be socially beneficial, users continue to struggle to access, use, critique, improve, and remix existing works.<sup>72</sup> Put simply, copyright is more about rightsholders and less about users.<sup>73</sup> Throughout the structure of current copyright laws, it is clear that the interests of users are ‘an afterthought’.<sup>74</sup>

The marginalisation of users<sup>75</sup> in copyright systematically undervalues the importance of their role in creativity and advancing cultural progress. The digital environment has enabled a breathtaking variety of uses with great potential for social utility. Networked digital platforms provide massive potential for users to create for their own personal advancement, learning, expression, as well as to contribute to a vibrant culture. Users now are able to ‘drive both the production and distribution of new content and applications’.<sup>76</sup> This development is a cause for celebration — we are truly living in a golden age of creativity — but much of this creativity occurs in the margins of under-enforced copyright, zones of ‘tolerated use’ where users are free only to the extent that rightsholders choose not to exert their rights.<sup>77</sup> The law lacks clearly defined mechanisms that empower users to participate in re-creating culture around them and recognises their potential in advancing knowledge and culture production.<sup>78</sup>

71 Christina Bohannon, ‘Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright’ (2010) 12 *Vanderbilt Journal of Entertainment & Technology Law* 669, 678.

72 Victoria Stodden, ‘Innovation and Growth through Open Access to Scientific Research: Three Ideas for High-Impact Rule Changes’ in Kauffman Task Force on Law, Innovation, and Growth (ed), *Rules for Growth: Promoting Innovation and Growth through Legal Reform* (Ewing Marion Kauffman Foundation, 2011) 409, 410; Niva Elkin-Koren, ‘User-Generated Platforms’ in Rochelle C Dreyfuss, Harry First and Diane L Zimmerman (eds), *Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, 2010) 111, 128.

73 See Cohen, ‘The Place of the User in Copyright Law’, above n 11, 347–50.

74 Ibid 354.

75 Ibid 347.

76 Elkin-Koren, ‘Making Room for Consumers under the DMCA’, above n 48, 1152.

77 See John Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ [2007] *Utah Law Review* 537; Tim Wu, ‘Tolerated Use’ (2007) 31 *Columbia Journal of Law & the Arts* 617.

78 Neil Weinstock Netanel, ‘Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing’ (2003) 17 *Harvard Journal of Law & Technology* 1 (reporting how copyright law is being used to suppress the potential of peer to peer file sharing platforms). Copyright’s derivative works right is another good example which shows how current copyright doctrine is not responsive to the potential of users on the digital age: Mary W S Wong, ‘“Transformative” User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?’ (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 1075; Christina Bohannon, above n 71, notes, in relation to the US law, that ‘[c]opyright’s [d]erivative [w]orks [r]ight [i]s [e]xcessively [b]road’: at 676. She argues that the ‘definition [in the US Copyright Act] does not actually require that the defendant incorporate any copyrightable expression, but only that the defendant’s work is “based on an existing copyrighted work”’: at 678 (citations omitted). She also notes that granting ‘copyright [owners] the exclusive right over “any other form in which [their] work may be recast, transformed, or adapted”’ is a ‘catch-all language’ that grants copyright holders control that does not respond to the incentive function.

### III PRIORITISING FAIRNESS

The distributive effects of copyright law suggest that there is a real problem of fairness in copyright. Given the indeterminacy of the utilitarian copyright bargain, we suggest that copyright should be informed by the principles of distributive justice. We start here from the (somewhat contested) assumption that exclusive property rights in expression can likely be justified on distributive grounds. We suggest, however, that the theory of distributive justice can be used within the limits of current international copyright law to ameliorate the impacts of inequality in current copyright markets. In this paper, we focus particularly on the interests of users, as represented through limitations and exceptions, as a key current issue in the development of copyright policy in Australia.

We suggest that the theory of distributive justice can be used to advance the interests of users in copyright law. The main normative value of distributive justice is ensuring that institutions allocate rights, duties and opportunities fairly without undue concentration of powers and exclusion of other segments of the society.<sup>79</sup> From the perspective of distributive justice, the institutional arrangements in copyright laws, which lead to the concentration of private powers in the hands of copyright holders and marginalisation of users, need to be rethought. Rawls argues that 'a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice'.<sup>80</sup> In the context of copyright law, justice requires looking beyond copyright's role in the accumulation of wealth to the law's role in empowering individuals to have access to knowledge and culture, and participate in creating meaning in society. One way do this is 'to reexamine the [copyright] bargain from the vantage point of' users.<sup>81</sup> As a first step towards this goal, we consider the potential impact on the way domestic laws frame limitations and exceptions, which have historically been one of the primary methods of achieving balance in copyright law.

There is a little scope in modern international copyright law, with its overlapping multilateral, bilateral, and plurilateral agreements, to effect significant distributive change in the immediate future.<sup>82</sup> The basic structure of copyright as an exclusive right that inheres in almost all recorded expression for at least 50 years after the death of the author is entrenched in the *Berne Convention*,<sup>83</sup> *TRIPs*,<sup>84</sup> and other

79 John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 53.

80 Rawls, *A Theory of Justice*, above n 4, 4, 60. (Rawls argues that 'the principles of justice are prior to considerations of efficiency and therefore, roughly speaking, the interior points that represent just distributions will generally be preferred'.)

81 Litman, 'The Exclusive Right to Read', above n 61, 34, 37, 43.

82 For an analysis of the strengths and limitations of international forum shifting to increase the force of copyright law, see Weatherall, above n 53.

83 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, [1901] ATS 126 (entered into force 5 December 1887) ('*Berne Convention*') art 7(1).

84 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPs Agreement*') art 12.

international instruments. These same instruments also entrench an ‘exceptions paradigm’<sup>85</sup> in the ‘three-step test’, where any derogation from the exclusive rights is only permissible where it is limited to ‘certain special cases’ that do not ‘conflict with [the rightsholder’s] normal exploitation’ and do not ‘unreasonably prejudice [their] legitimate interests’.<sup>86</sup>

Importantly, the international copyright system does use the distributive justice rhetoric within its baseline rules.<sup>87</sup> Article 7 of the *TRIPs Agreement* states that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, *to the mutual advantage of producers and users* of technological knowledge ...<sup>88</sup>

It might be possible to infer from this ‘mutual advantage’ language the existence of some commitment to distributive justice.<sup>89</sup> As we have seen, however, if it exists in theory, in practice, this commitment has not been fulfilled. A full recognition of the distributive justice perspective requires going beyond the baseline rules of copyright systems to considering users as integral part of the system and empowering them with solid right to access and reuse copyright works, and fully participate in knowledge and cultural lives.

The overtly owner-centred approach of international copyright law has come under substantial criticism. The recent Max Planck Declaration attempts to encourage a more generous reading of limitations and exceptions to owners rights under the three-step test,<sup>90</sup> noting that ‘there is no complementary mechanism prohibiting an unduly narrow or restrictive approach’.<sup>91</sup> The Declaration argues for a more expansive reading of the test, which would ensure greater protection for user interests. Crucially, the Declaration suggests that international copyright law should be interpreted in a way that ‘does not require limitations and exceptions to be interpreted narrowly’.<sup>92</sup> In this article, we follow the Declaration and suggest a thought experiment in examining how expanded permitted uses might remedy some of the distributive shortcomings of copyright.

85 Paul Harpur and Nicolas Suzor, ‘Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm’ (2013) 36 *University of New South Wales Law Journal* 745.

86 *Berne Convention* art 9(2); see also Martin Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004).

87 See generally Chon, above n 11.

88 *TRIPs Agreement* (emphasis added).

89 Chon, above n 11, 808.

90 A Declaration that was prepared under the auspices of the Max Planck Institute by a group of copyright experts from Europe. The purpose of the Declaration is to call for flexible reading of the three-step test in international copyright system so as to allow greater consideration of the interests of users of copyright materials: Max Planck Institute for Innovation and Competition, *Declaration: A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law* (1 September 2008) Max Planck Institute for Innovation and Competition, 1 <[http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/01\\_balanced/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf)>.

91 Christophe Geiger et al, ‘Declaration: A Balanced Interpretation of the “Three-Step Test” in Copyright Law’ (2010) 1 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 119, 119.

92 *Ibid* 120.

Broadly speaking, many common law jurisdictions have interpreted the exceptions to copyright in a narrow manner. In a series of decisions over the past decade, however, the Canadian Supreme Court has signalled an important shift in how that jurisdiction approaches the balance between author and user interests.<sup>93</sup> All jurisdictions agree that copyright should provide a core right to control commercial exploitation (the 'normal exploitation' of copyright works). The disagreement lies in different interpretations at the boundaries, in the scope of the limitations and exceptions to the author's core right. The Canadian approach picked up a strand of copyright theory that had been mostly dormant for a long time:<sup>94</sup> it recast the boundaries of copyright not as mere exceptions, but as positive 'users rights' that form a core part of the balance.

A copyright system designed to further distributive justice values should position users of knowledge and cultural products at the centre of the copyright structure, side-by-side with copyright holders. It should provide users with well-defined opportunities to see, read, hear, borrow, download, reverse engineer, imitate, share, imagine, criticise, experience, recreate and cultivate the knowledge and culture around them. The absence of users' rights language from the basic rules of the copyright systems contributes, as Julie Cohen argues, to 'shaping both its unquestioned rules and its thorniest dilemmas'.<sup>95</sup> Right holders ignore users 'as a matter of practice'.<sup>96</sup> One possible step to better situate users within the structure of copyright laws is to adjust the baseline rules from the vague language of 'striking a balance' between holders and the public interest to a language that recognises users' rights as an integral part of the copyright system, side-by-side with the rights of copyright holders.<sup>97</sup>

A just and balanced copyright system should accommodate and recognise the interests of both owners and users. To achieve this, we propose a conceptual shift by which the copyright system will be transformed from an author-centric system to a dual objective system,<sup>98</sup> that allows broad and wide distribution of opportunities to create and reshape knowledge and culture to the different segments of society. This conceptual shift would have the effect of transforming the legal status of permitted uses from mere exceptions that must be interpreted narrowly to protected legal rights. A growing body of literature within copyright theory supports such a shift based on the increasing judicial recognition of

93 Michael Geist, 'Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use' in Michael Geist (ed), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013) 157, 176.

94 See Patterson and Lindberg, above n 67 (arguing that copyright is, at its core, about the rights of users).

95 Cohen, 'The Place of the User in Copyright Law', above n 11, 347–8.

96 Ibid 373.

97 Ibid 374.

98 Cf Abraham Drassinower, 'Taking User Rights Seriously' in Michael Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 462, 467.



users' entitlements and users' role in the making of cultural goods in the digital environment as well as the modern concepts of distributive justice.<sup>99</sup>

In the sections that follow, we examine the ramifications of such a doctrinal shift on two current debates in copyright policy. The first issue concerns the ability of third parties to rely on limitations and exceptions to provide services to users. A commitment to distributional justice requires that user rights are actually exercisable, and this likely requires a shift in Australian doctrine to better enable third parties to assist users to gain access to, and benefit from, copyright material. Second, we suggest that enabling users in the face of inequalities in bargaining power likely requires ensuring that limitations to copyright are not excludable by contract. Finally, we address the question of fair use, and argue that distributive justice principles support the adoption of the ALRC's recommendations to introduce a fair use right in Australia.

### A *Third Parties and Users' Rights*

One possible outcome of shifting the status of users' entitlements from exceptions to rights is to support users' interests in allowing third parties to assist them to have access to copyright materials permitted by the law. In Canada, fair dealing has been viewed as a positive right, and this allowed the court to decide that a third party was legally entitled to exercise this right on behalf of users. In Australia, where the exceptions rhetoric remains dominant, it is difficult to reach a similar conclusion and treat users' entitlements as positive rights.

A decade ago, in a landmark judgment the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*<sup>100</sup> ('*CCH*') explicitly recognised the concept of users' rights. In considering 'fair dealing' in the Canadian *Copyright Act*, the Court stated that it is 'perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence.'<sup>101</sup> The Court referred to fair dealing as 'a user's right' which 'must not be interpreted restrictively'.<sup>102</sup> The Court quoted Professor David Vaver who had argued that '[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'<sup>103</sup> This means that permitted uses of copyright materials are to be given a broader and more generous reading and are not mere exceptions to exclusive rights.

99 See, eg, Patry, 'Limitations and Exceptions in the Digital Era', above n 65 (advocating a conception of fair use as a user right equal to the bundle of exclusive rights of IP owners); David Vaver, *Copyright Law* (Irwin Law, 2000) 171; *ibid*, 479; Cohen, 'The Place of the User in Copyright Law', above n 11, 347; Jessica Litman, 'Lawful Personal Use' (2007) 85 *Texas Law Review* 1871; Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 *Yale Law Journal* 535; Chon, above n 11; Kylie Pappalardo, *A Tort Law Framework for Copyright Authorisation* (PhD Thesis, Australian Catholic University, 2016) ch 3. See also Patterson and Lindberg, above n 67.

100 [2004] 1 SCR 339.

101 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, 364 [48].

102 *Ibid*.

103 *Ibid* 364–5 [48], quoting Vaver, above n 99, 171.

While it is still too early to tell, this shift in Canadian jurisprudence could be a key part of increasing the distributive fairness of copyright law.<sup>104</sup> At the time, Myra Tawfik stated that:

by introducing the language of user rights and by adopting a broad and expansive interpretation of 'fair dealing' the Supreme Court has shifted the locus of analysis away from the preeminence of the copyright interest. What is therefore being advanced is equality of treatment of both rights-holders and users in which neither interest takes precedence over the other.<sup>105</sup>

In the decade since *CCH*, the Canadian Supreme Court has followed and expanded the users' rights approach in several other copyright cases.<sup>106</sup> Fair dealing, as a user right, now 'is rooted in and shaped by the purpose of the *Copyright Act*'.<sup>107</sup> From these judgments it is possible to extrapolate that the purpose of the Canadian *Copyright Act* can be construed as not only to reward and protect rightsholders, but also to contribute to the empowerment of users with more access to works and a 'vibrant public domain'.<sup>108</sup>

The Canadian jurisprudence throws the approaches of other common law courts into sharp relief. Other jurisdictions have not viewed the exceptions to copyright particularly broadly. Australian courts continue to view exceptions to the rights of copyright owners as relatively limited in scope.<sup>109</sup> The distinction is most clearly seen in the ability of third parties to assist users in exercising their fair dealing rights. The key outcome of *CCH* was that 'a person does not authorize infringement by authorizing the mere use of equipment that could be used to

104 Despite the fact that in *CCH*, the Canadian Supreme Court used the terms 'exceptions' and 'users' rights' interchangeably, Canadian IP commentators considered it a fundamental shift in copyright discourse in Canada. For instance, Abraham Drassinower notes that the decision reflects the principles of justice and fairness by incorporating the interests of users within the copyright agenda: Drassinower, 'Taking User Rights Seriously', above n 98, 479; see also Daniel J Gervais, 'Canadian Copyright Law Post-*CCH*' (2004–05) 18 *Intellectual Property Journal* 131, 157. Another commentator noted that '*CCH* dismantled the view that the protection of author rights was the only or best way to protect the public interest in copyright, confirming that user rights require equal consideration with owner rights': Sara Wei-Ming Chan, 'Canadian Copyright Reform — "User Rights" in the Digital Era' (2009) 67 *University of Toronto Faculty Law Review* 235, 246. See also Myra Tawfik, 'International Copyright Law: W[h]ither User Rights?' in Michael Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 66, 85.

105 Myra J Tawfik, *International Copyright Law and 'Fair Dealing' as a 'User Right'* (April – June 2005) UNESCO Web Archive, 6 <<http://unesdoc.unesco.org/images/0014/001400/140025e.pdf#nameddest=140025>>.

106 Geist, 'Fairness Found', above n 93, 178–80.

107 Graham Reynolds, 'Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada's Copyright Pentology' in Michael Geist (ed), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013) 1, 31.

108 Ibid 35.

109 See, eg, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 145 FCR 35, where the rights of 'criticism and review' and 'news reporting' were so narrowly curtailed that they could not clearly be relied upon by a satirical current affairs program. The result was a clear case where a licence would not be granted but copyright continued to restrict speech and innovation: see Nicolas Suzor, 'Where the Bloody Hell Does Parody Fit in Australian Copyright Law?' (2008) 13 *Media & Arts Law Review* 218; Michael Handler and David Rolph, "'A Real Pea Souper": *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381.

infringe copyright'.<sup>110</sup> The Canadian Supreme Court explained that “[r]esearch” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained, and is not limited to non-commercial or private contexts.<sup>111</sup> Under Australian law, by contrast, focus is on the motives of the copier, not the ultimate end user. In the older case of *De Garis v Neville Jeffress Pidler Pty Ltd* (*‘De Garis’*),<sup>112</sup> the Federal Court of Australia came to the opposite conclusion to that which the Canadian Supreme Court would later reach, and held that a person could not rely upon the ‘research and study’ exception when they were making copies on behalf of someone else. The commercial nature of the press-clipping service in question meant that it was not itself engaging in research, with the result that end-users who would be engaged in research could not as easily gain access to the materials.

After *CCH*, the Federal Court of Australia was again presented with an opportunity to interpret copyright law in a situation where a third party was making copies on behalf of users. In *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (*‘Optus TV Now’*),<sup>113</sup> Optus provided a cloud-based service that enabled users to record free-to-air broadcasts on a remote server, for later access at their leisure. The Full Federal Court found that Optus was itself also a ‘maker’ of these copies, and as such, could not rely on the exception to copyright that its users would have been able to.

These cases reflect a clear difference between a right and an exception. Under the *CCH* doctrine, users have a positive right to engage in research and study, and this is sufficient to enable the court to come to the conclusion that a (non-profit) library could carry out copying on a user’s behalf and still fall within the exception. The Australian doctrine prohibits this analysis, particularly for profit-making enterprises: in both *De Garis* and *Optus TV Now*, the dominant purpose of the intermediary was interpreted as to make a profit, not to help users exercise their rights. Reviewing the law, the ALRC came to the conclusion that some greater ability for third parties to assist users in relying on the exceptions to copyright was required, but stopped short of clearly endorsing third party use as a desirable basis upon which to exclude liability.<sup>114</sup>

There is good reason to think that treating the boundaries of copyright as users’ rights could restore some balance between the competing interests of rightsholders and users. Viewing exceptions as rights (which the ALRC did not do)<sup>115</sup> would likely encourage innovation and investment in more services designed to help users access copyright material. This is likely a good thing: just as a right is worthless if not enforceable, it has little substance if not exercisable. The full effect of such a change is not immediately clear, but appears to be worth investigating in future work.

110 *CCH* [2004] 1 SCR 339, 342.

111 *Ibid.*

112 (1990) 37 FCR 99.

113 (2012) 201 FCR 147.

114 ALRC, above n 1, 178 [7.40]–[7.42].

115 *Ibid* 49 [2.45].

## B Contracting Out

In many cases, current copyright regimes allow copyright holders to override the legislative balance between owner and user interests by contractual terms that exclude the application of exceptions to copyright infringement. Because consumer copyright contracts are marked by a significant power imbalance, this ultimately tends to thwart the balanced structure of the copyright law by allowing common contracting practice to favour one group over the other. It limits the already limited zone of free use for users and adds more powers to the already powerful right holders. This result seems to contradict the basic tenets of distributive justice.<sup>116</sup> In this section we argue that the conceptual shift of users' permitted uses from exception to rights implies that we should place limits on the contracting out of these permitted uses and thereby increase the fairness of the copyright system.

Copyright holders resort to contract law to impose restrictions on users to use or exploit intellectual goods which users have paid for.<sup>117</sup> Owners of intellectual goods, particularly software and E-books,<sup>118</sup> often draft adhesion contracts which contain provisions that compel their customers to waive some of the permitted uses granted to them under copyright law.<sup>119</sup> The holders of copyright impose 'take or leave it' conditions that oblige their customers not to, for example, copy the program or resell it to third party.<sup>120</sup> These types of conditions obscure the purpose of the permitted uses under copyright law such as first sale right and the right to make a backup copy or copying for archival purposes.<sup>121</sup>

We argued above that users' interests in current copyright systems are subjugated to the interests of copyright holders. Common contractual practices grant right holders even more powers to restrict the ability of users to rely on the limited statutory exceptions to access and reuse copyright works. These contractual practices exacerbate the unfairness of the copyright system.

The permitted uses are part of the structure of copyright law. They are the mechanisms by which users of copyright materials participate in making and remaking culture. Their purpose is to balance the interests of copyright holders

116 Cf J W Carter, Elisabeth Peden and Kristin Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 46.

117 Litman, *Digital Copyright*, above n 16, 182.

118 Michael Seringhaus, 'E-Book Transactions: Amazon "Kindles" the Copy Ownership Debate' (2009) 12 *Yale Journal of Law and Technology* 147, 172–5, 207.

119 Mark A Lemley, 'Intellectual Property and Shrinkwrap Licenses' (1995) 68 *Southern California Law Review* 1239, 1239.

120 For instance, under Title 17 of the *United States Code*, the right to resell is regulated under § 109 (first sale doctrine) and the right to copy for private purposes is regulated under § 117 (essential step defence). Commentators on the US copyright law criticise allowing copyright holders to insert provisions in a contract to override the first sale doctrine or essential step. Brian W Carver argues that if it is hard to imagine allowing copyright holders to compel users to waive their fair use rights under contractual arrangements, '[c]ourts would reach better results if they thought of § 109 and § 117 as specific fair uses': Brian W Carver, 'Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies' (2010) 25 *Berkeley Technology Law Journal* 1887, 1949.

121 *Ibid* 1946–8.

and copyright users. If the permissions to override the permitted uses by contractual arrangements remain strong, the predictable result is that users are likely to be further disempowered with respect to rightsholders.

In order to ensure that balance is respected within copyright, we suggest that a fundamental change in the language used within copyright law may be required. If we take seriously the claims of distributive justice, there is good reason to think that the permitted uses of copyright material should be seen as mandatory legal rights that are not amenable to exclusion by private ordering.<sup>122</sup> Treating permitted uses of copyright works as positive rights, rather than mere exceptions, is likely to make user interests more prominent within the copyright structure. As the Canadian experience has demonstrated, this conceptual shift ensures that these limitations are more likely to be seen as an integral part of copyright, designed to promote fair access to content. Contractual arrangements that undermine the integrity of this structure, therefore, should be prohibited. We think that this shift in our normative vision of users' interests is likely more compatible with the values of distributive justice, as it reduces the concentration of powers that copyright holders enjoy under the current copyright regime.

In Australia, the ALRC recommended that limitations on contracting out should not cover all the interests of users. It should only apply to a core set of 'exceptions for libraries and archives' and the current set of exceptions 'for research or study, criticism or review, parody or satire, [and] reporting news', as well as the new proposed exception for quotation.<sup>123</sup> The ALRC does not consider the broader uses that would be covered by an open-ended fair use exception.<sup>124</sup> The ALRC justified this approach by arguing that the exceptions in relation to libraries, archives and fair dealing 'promote important public interests'.<sup>125</sup> However, it is at least arguable that these 'exceptions' form part of the public interest consideration and other broader considerations such as education and personal and transformative uses should also be included.

It is clear that the ALRC relied on the utilitarian justifications to reject extending limitations on contracting out to protect all users' interests in the copyright system. Explicitly, the ALRC recognised that the results of utilitarian balancing could not be known at this stage — and that contracts that exclude user interests may actually be beneficial for users in terms of lower prices or other more favourable terms.<sup>126</sup>

Efficiency and utilitarianism may ultimately justify limiting contracting out. The evidence is not clear. Certainly, there is good reason to think that allowing copyright contracts to override the broader set of exceptions could harm users. This includes but is not limited to uses by or on behalf of people with disabilities, as

122 Pascale Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights' (2013) 26 *Intellectual Property Journal* 1, 38–42.

123 ALRC, above n 1, 446 [20.54].

124 *Ibid.*

125 *Ibid* 446 [20.56].

126 *Ibid* 449 [20.73]–[20.75].

well as users who may engage in transformative uses or uses for non-commercial purposes in general. All those users can benefit from the free flow of information in ways that promote public welfare.

Ultimately, however, the utilitarian analysis again seems to be indeterminate. Here we argue that the law should err on the side of promoting fairness by empowering users to access and reuse knowledge and culture. It is in precisely this situation, where the utilitarian balance is unclear, where a distributive justice analysis is useful. Where the ALRC did not find sufficient evidence to justify broad prohibitions on contracting out of copyright exceptions, we reach the opposite conclusion: given the inequity in the current system with regard to user interests, in the absence of a clear consequentialist outcome, we should err on the side of protecting user interests. The distributive justice argument — as presented above — aims to adjust our conceptual understanding of copyright's permitted uses by limiting the practices that lead to the concentration of powers in the hands of copyright holders. According to this view, then, we suggest that the permitted uses should be considered as strong boundaries that delineate the scope of the copyright owner's exclusive rights. The circumvention of these uses by contractual arrangements, according to this view, may or may not be beneficial, but certainly is not fair if it marginalises users and adds more powers to right holders.

### **C A Fair Use Right**

While a broader interpretation of existing exceptions could help provide more opportunities for users under Australian law, it likely will not go far enough. Australia's fair dealing exceptions and other excluded uses are structured as limited exceptions, and drafted in a way that is highly specific. In its recent review of copyright exceptions, the ALRC concluded that this approach was unduly restrictive of users' interests. The fair dealing exceptions and other limitations are limited to a small subset of socially valuable purposes, and drafted in a way that encourages a narrow interpretation. The ALRC ultimately recommended replacing these exceptions with an open-ended 'fair use' provision.<sup>127</sup>

The property-based structure of copyright laws concentrate, at the hands of rightsholders, the power to control culture and creativity. Rightsholders have very strong incentives not to cede this control in favour of socially desirable uses of knowledge and cultural products. A public fair use right, to the extent that it makes a difference, does so by empowering users to engage widely with culture and creativity in socially beneficial ways without having to ask for permission from the rightsholders. This right is constructed to stand as a counterpart to the bundle of exclusive rights of the rightsholders so that users have a mechanism to

127 Ibid 87, 122.

represent their interests in the same way the concept of exclusive rights represents the copyright holders.<sup>128</sup>

The adoption of a public fair use right may expand avenues to empower users with the sufficient legal capacity to access knowledge and culture, and participate in their creation. This, in turn, contributes to reducing the concentration of knowledge and cultural resources, and promoting the inclusion of users of intellectual products and thereby increasing the distributive fairness of the copyright system.<sup>129</sup>

We live in a world of unparalleled democratic creativity where millions of people create, produce and distribute in socially desirable ways. In copyright law, users need to be allowed to interact with already-existing copyright expressions in different ways: to read, listen and view, transform, make a copy, sell a copy, criticise, parody or quote and so on. Copyright has to be based on principles that consider this and allow for the redistribution of the opportunities to access and play with culture, particularly when the public interest so dictates.

In the overwhelming majority of domestic copyright laws, users are granted a specific list of ‘exceptions’<sup>130</sup> to permit certain unauthorised uses when there is no conflict with the author’s opportunity to exploit his or her work and when such uses do not unreasonably prejudice the legitimate interest of the rightsholder.<sup>131</sup>

128 Haochen Sun, ‘Fair Use as a Collective User Right’ (2011) 90 *North Carolina Law Review* 125, 129–30 (Sun argues that fair use in copyright law should not be regarded as a mere individual right enjoyed by each user separately, rather, it should be perceived as a protector for the public interest and therefore as a collective public right).

129 Cf Chon, above n 11, 836.

130 See generally Ruth L Okediji, ‘The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries’ (Issue Paper No 15, International Centre for Trade and Sustainable Development, March 2006). The most typical example of an extensive list of permitted uses is Article 5 of the *Council and Parliament Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (‘*EC Information Society Directive*’). The said directive contains 21 ‘exceptions’ to copyright infringement. These ‘exceptions’ permit various uses ranging from ‘temporary acts of reproduction under Article 5(1), the private copying exception under Article 5(2)(b) of the Directive, exceptions for the benefit of libraries, educational establishments, archives and museums under Articles 5(2)(c) and 5(3)(n), the exception for the purpose of reporting of current events under Article 5(3)(e), the limitations for quotation, criticism and review under Article 5(3)(d) and the parody exception under Article 5(3)(k)’: Commission of the European Communities, *Report to the Council, the European Parliament and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, SEC(2007) 1556 (30 November 2007) 3. For a comparative study between the *EC Information Society Directive* art 5 and 17 USC § 107, see Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7, 9<sup>th</sup> sess (5 April 2003) 72–3.

131 Since the Stockholm Conference in 1967, the international copyright system, namely the *Berne Convention*, requires member states to adhere to certain criteria before introducing any restrictions to the copyright holder’s set of exclusive rights. These restrictions are known as the three-step test (‘TST’). The TST simply puts three conditions that legislatures have to consider before introducing any right to the users, namely, the new user’s right has to be confined to a specific case, ‘does not [contradict] a normal exploitation of the work and does not unreasonably prejudice the legitimate interests’ of the right holder: Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Center for Copyright Studies, 2002) 22 quoting *Berne Convention* art 9(2).

There is no inherent problem with this so long as the status of the permitted uses is shifted from 'exceptions' to rights, as discussed above.

However, the fairness of copyright could be increased if users of copyright are granted a public fair use right as 'part of the overall design' of copyright law.<sup>132</sup> A right that equips users with flexibility so they can quickly respond to changes in their cultural medium, without waiting for governments to legislate permitted innovation,<sup>133</sup> could potentially increase their ability to access and participate in the progress of their cultural medium.<sup>134</sup>

Fair use as a public user right has the potential to include larger groups within society in the ongoing process of creativity and cultural production.<sup>135</sup> And as such, the distributive justice analysis suggests that it should not be structured as a tolerated departure from the grand conception of exclusive rights,<sup>136</sup> but as a mechanism to prevent the concentration of knowledge resources and achieve distributive justice in terms of reallocating opportunities to produce creative works that are of value to society.

#### IV CONCLUSION

A fair copyright regime distributes the fundamental rights and duties of copyright holders and users in a different manner from the dominant copyright systems. A fair copyright regime is not only designed according to economic considerations but also in a form that does not lead to the excessive concentration of private powers or impinge on the equality of opportunity. A fair copyright system, we propose, must be designed and enforced so that users of copyright materials are not marginalised and disadvantaged but are empowered to participate more fully in their social, cultural, and economic lives.<sup>137</sup>

We use the theory of distributive justice to argue that a more expansive interpretation of the limits of copyright may result in a more fair copyright system. We suggest first that a relatively simple shift in mindset, from viewing the limits of copyright as limited exceptions to positive rights of users, is likely to go a long way to addressing some of the more pronounced inequities of the copyright system. This shift, we argued, will better position users within the copyright structure and increase its fairness. From this starting point, we then examine three discrete areas of current policy debate in Australia. First, we suggest that this conceptual shift provides a clear justification to reform the law to allow third parties to assist users to practice their rights and gain access to content. Second, we argue that it is likely desirable to increase users' freedoms

132 Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105, 1110.

133 Patry, 'Limitations and Exceptions in the Digital Era', above n 65, 9.

134 Sun, above n 128, 172.

135 Cf *ibid* 129–30.

136 Leval, above n 132, 1110.

137 Cf Lateef Mtima and Steven D Jamar, 'Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information' (2010) 55 *New York Law School Law Review* 77, 108.



to interact with copyright content which they have already paid for by limiting copyright holders' powers to exclude permitted uses by contract. Finally, we think that introducing a fair use right is likely to enhance the distributive equality of Australia's copyright system. We suggest that the principles of distributive justice provide some guidance to the political impasse that currently characterises substantive copyright reform. In cases where we do not have the data to evaluate the consequences of potential reform for the utilitarian copyright balance — such as the introduction of fair use — the distributive analysis could prove useful. In particular, we think that a focus on equality indicates that it should be desirable to curtail the property rights of copyright owners in order to secure greater power for users and reusers of copyright material — which lends support to the ALRC's recommendation to introduce a broad, open-ended fair use exception.