

# 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.