

Copyright and Culture

A Qualitative Theory

Henry Fraser

D.Phil. Thesis in Law

Exeter College

University of Oxford

Abstract

Copyright is conventionally justified as an incentive to produce and disseminate works of authorship. I argue that we can justify and theorise copyright more richly, not least because empirical evidence does not support the incentive narrative.

Rather than focussing on quantitative matters such as the number of works incentivised and produced, we should consider copyright's qualitative influence on culture.

A threshold objection to such an approach is the risk of cultural paternalism: imposing one's own tastes and preferences on the public. I argue that this objection can be overcome. Rather than specifying paternalistic standards of merit for works, we can target the conditions under which the creation and consumption of works takes place.

With regard to these conditions, I advocate a two-tiered approach. Firstly, I adopt the following high-level principles: (i) that the conditions of creation and consumption of works should be conducive to democratic deliberation (*democracy*) and (ii) that they should facilitate the development of human capabilities (*autonomy*). Secondly, I propose that we pursue three mid-level objectives, which are helpful indicia of democracy and autonomy:

- a fair and wide distribution of communicative and cultural power (*inclusiveness*);
- diversity in the content and perspectives available to the public (*diversity*); and

- conditions that permit authors and users of works to engage rigorously with the conventions of the media in which they operate (*rigour*).

It is often said that copyright obstructs important qualitative objectives, like freedom of expression, and that we could better pursue these goals by weakening copyright and relying on non-proprietary alternatives. My approach produces a more optimistic view of copyright. The benefits of copyright's qualitative influence are too often ignored; while its negative influences are exaggerated. We should aim to optimise qualitative trade-offs produced by copyright rather than assuming that qualitative objectives are best served by weakening copyright.

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Responsibility for any deficiencies or errors in the thesis is, of course, mine.

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Introduction

0.1 A qualitative approach to copyright

0.1.1 Copyright and cultural policy

Copyright law is a tool of cultural policy. Copyright law regulates culture because it regulates the production and use of cultural artefacts. It allocates entitlements in relation to the use of what the law describes as works of authorship ('works'), including writings, music, visual art, drama, dance, and audio and visual creations.¹ It grants owners of copyright, usually authors and their commercial intermediaries, a right to prevent others from reproducing or publishing substantial parts of their works.² These proprietary, exclusive rights held by copyright owners impose constraints and duties on the world at large. Within the ambit of a copyright owner's exclusive rights, the public's rights to copy or communicate works is constrained by the wishes of copyright owners.

Copyright law also delimits the strength and scope of proprietary rights. It excludes certain aspects of works from copyright protection (ideas, facts, style, tropes, and genre, among others), allowing them to be used freely.³ It also permits

¹ In some jurisdictions, like Australia, copyright subject matter is divided into 'works' and 'subject matter other than works' *Copyright Act 1968 (Cth)*, Part III and Part IV. For convenience, I use 'works of authorship' or 'works' to describe all subject matter in which copyright subsists in the jurisdictions that I consider in this thesis: namely, Australia, Canada, England and Wales (the UK, for convenience), and the USA.

² See *Copyright Act 1968 (Cth)*, s31; *Copyright, Designs and Patents Act 1988*, s 2; *Copyright Act (R.S.C., 1985, c. C-42)*, s3; *USC 17*, §106. For convenience and clarity, I will refer to these Acts as the *Australian Act*, *UK Act*, *Canadian Act* and *US Act* respectively.

³ The seminal UK case on the idea-expression divide is *Donahue v Allied Newspapers Ltd* (1938) Ch 106. *Baker v. Selden* 101 U.S. 99 (1879) is the leading US case on the idea-expression dichotomy. See also Drassinower (2003) and Litman (1990), 981-991.

copying, modification and publishing to go ahead in some circumstances without copyright owners' permission.⁴

The effect of copyright's exclusive rights is to allow (some) works to be sold at a price higher than the cost of their creation. It does so by solving a so-called 'market failure' that obstructs the development of efficient markets for works. Works are, by nature, 'non-excludable'.⁵ It is difficult to prevent anybody from copying and distributing a work. If anyone can copy works, at a low cost, then the highest price that an author can charge for her work will be equal to the cost of creating a copy. That price is liable to be far lower than the cost of creation and dissemination, a cost which includes the cost of materials necessary for creation, as well as time and opportunity costs.

Figuratively speaking, copyright allows copyright owners to set up a gate in front of their work and charge a toll for entry. This remedies the 'non-excludability' problem. Copyright allows copyright owners to sell works for a price higher than the cost of the works' creation. It creates at least a possibility of return on investment in works, through the sale of copies of works, or trade in other rights to use and commercially exploit works.⁶

This particular alignment of possibilities co-ordinates investment in (what copyright law describes as) works of authorship and directs money and resources in the creative sphere. It determines to some extent who makes what works, for whom, and under what financial and material constraints. Much of what we think

⁴ See e.g. the 'fair use' exception in §106 of the US Act.

⁵ On the characteristics and consequences of non-excludability, see Bracha and Syed (2013), 1849ff.

⁶ Baumol (2011), 12; Landes and Posner (1989), 332.

of as culture – journalism, fiction and non-fiction writing, music, film, television, radio, and so on - is embodied in works. These expressions are the lens through which individuals and societies describe and understand themselves.⁷ Works offer a range of experiences, a range of perspectives, a range of opinion. Public discourse, ethical and political thought, and the expression of aesthetics is in great part to be found in works; likely more than in any other domain of life. Insofar as our opinions, opportunities to flourish, perspectives and choices are determined by anything other than our day-to-day experiences and conversations with our peers, they are determined by our engagement with works.

0.1.1.1 The public benefit

It is widely agreed in Anglo-Saxon jurisprudence that copyright is supposed to promote the public benefit.⁸ US jurists focus on a specific concept of benefit: ‘the progress of the useful arts and sciences’.⁹ It would therefore seem appropriate to consider whether copyright’s effects on culture, on public discourse, and on individual and collective deliberation, are beneficial or detrimental; conducive or un-conducive to progress or the public benefit. It is not conventional, however, to consider these matters from an explicitly *qualitative* point of view.

Instead, the traditional view is that copyright’s main contribution to the public benefit (or progress) is to incentivise the production and dissemination of works. In doing so, it is conventional to say, copyright must balance two

⁷ Cohen (2012), 5, 52-54; Benkler (2006), 298; Craig (2012), 6.

⁸ I will focus primarily on the US, the UK, Australia and Canada. I use ‘UK’ to mean the jurisdiction of England and Wales.

⁹ *United States Constitution*, Art I, s 8, cl 7.

competing goals. On the one hand, there is the goal of incentivising the production of works. On the other, there is a goal of ensuring that works may be widely accessed and enjoyed, not least because they provide raw materials for new works.¹⁰ This approach to copyright is known as the incentive-access paradigm.

The incentive-access paradigm is a *quantitative* theory of copyright. Its indicia of public benefit or progress (I will use ‘public benefit’ to encompass both) pertain to quantitative matters.¹¹ These include: the number of works produced; the extent of their dissemination, and the extent to which copyright produces economically efficient allocations of wealth and entitlements. These quantitative indicia may stand in as proxies for broader notions of benefit but there are few attempts in traditional copyright theory and jurisprudence to define them with much clarity.¹²

0.1.2 Key arguments

This thesis propounds a different approach to theorising copyright’s relationship to the public benefit. It puts forward a *qualitative* theory of copyright, which has three main threads. The first thread is a threshold argument. I argue (in chapter 1) that copyright’s benefits and detriments to the society are best understood in

¹⁰ See e.g. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002) FCA 187 at 182-183; *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 at [24], per French CJ, Crennan and Kiefel JJ.

¹¹ Progress connotes teleology, whereas benefit does not. However, since the incentive-access framing of copyright’s consequentialist goal is broadly consistent across Anglo-Saxon jurisdictions, I will use ‘benefit’ or ‘public benefit’ to encompass the US concept of progress. For interesting reflections on the idea of non-linear progress see Chon (1993); Beebe (2017).

¹² But see below n (46) and accompanying text for a gloss of the qualitative implications of the incentive-access paradigm.

terms of the law's influence on the quality and character of our culture and discourse, rather than in terms of the incentive-access paradigm. The second thread (in chapter 2) is a set of proposals about how to describe and evaluate this influence, without becoming a cultural paternalist; without, that is, imposing one's own tastes on the public. The third thread, and the main thrust of the thesis (in the remaining chapters), is an argument that a qualitative approach to copyright need not necessarily lead us inexorably toward copyright minimalism.

By copyright minimalism, I mean the view that copyright's strength, scope and duration ought to be kept at the minimum necessary level to incentivise the production and dissemination of works, because (among other reasons) it encroaches 'on the general freedom of everyone to write and say what they please.'¹³ Not all copyright minimalists are fundamentally opposed to copyright, but there has been, since the 1970s, a strain of copyright minimalism that doubts the need for copyright at all.¹⁴ The following quote from a paper by Professors Hunter and Lastowka, is a rather striking iteration of the radically minimalist attitude:

*The destruction of copyright industries would be a terrible thing if, and only if, they represented the sole means that creative content could be generated. As we have seen, however, amateur-to-amateur functions now provide individuals with the opportunity to express themselves, and society has already benefited greatly from this expanded content generation. The next few years promise to provide even greater opportunities for this sort of content. As a result, society as a whole is likely to be better off if we allow for widespread decentralization of all content functions.*¹⁵

¹³ Goldstein (2003), 11.

¹⁴ See e.g. Breyer (1970), which put the argument that copyright was not necessary in order to sustain book publication. More recently, Professor Raymond Ku has argued that copyright is unnecessary for the production of music recordings — Ku (2003). See also Nadel (2004); Frosio (2017).

¹⁵ Hunter and Lastowka (2004), 1018. My emphasis.

Hunter and Lastowka's assertion has three important aspects. One is that copyright is no longer necessary to incentivise the production of works. The second is that copyright is justifiable solely to the extent it operates as an incentive for works. The third is that alternatives to copyright, such as amateur expression and dissemination of content on the internet provide greater opportunities for self-expression and social benefit more generally than does copyright's organisation of creative activity. This outlook is not ubiquitous, but (as I will show in a literature review in chapter 3) it is commonplace enough in scholarship and popular culture to deserve a serious response.

My response would reject Hunter and Lastowka's view, but not completely. The first aspect of Hunter and Lastowka's argument is right. The evidence simply does not support the narrative that copyright is a necessary, *ex ante* incentive for creativity, without which works would be underproduced. If copyright is justified mainly on the basis that it is an incentive, and its incentive effects are in doubt, then it is hard to justify copyright at all. The inadequacy of the incentive narrative is therefore one of the reasons why I favour taking a qualitative approach to copyright. I will return to this point shortly below, when I deal with the threshold issues which must be resolved in order to put the main arguments of this thesis.

First, though, let me very briefly sketch out that main argument. I disagree with the position that copyright is only justifiable if it is proven to be a *sine qua non* incentive to authors and publishers of works (Hunter and Lastowka's second point). I also disagree with the implication that society would be better off if we allowed for widespread de-centralisation of the production of works, and relied on

networked, non-proprietary, 'peer produced' means of organising the production and dissemination of works (the third point).

Copyright may be justified more richly, by reference to its influence on culture and discourse. We can ask more than merely whether it successfully corrects the problem of underproduction of works. I am not the first to make this argument. Most notably, Professor Neil Netanel has offered a powerful account of copyright's role in sustaining positive conditions for democratic civil society and public discourse.¹⁶ According to Netanel, copyright has two main functions: a *production* function and a *structural* function. It performs the production function by supporting the production of a certain kind of works, namely professionally realised works of sustained authorship. Its structural function is to organise the production of works. It permits authors and publishers to rely on the market, rather than state subsidy or private patronage, for sustenance. This, he argues, has a beneficial effect on the quality of democratic public discourse because it facilitates independence from, and antagonistic engagement with, powerful state and private actors.¹⁷

If my narrow objective is to reject the 'if and only if' style of minimalism put forward by the likes of Hunter and Lastowka, my broader objective is to enrich and build upon Netanel's qualitative vision of copyright. More can be said about copyright's production and structural functions, but our vocabulary for describing their benefits is currently limited. That limitation is apparent in comparison with

¹⁶ Netanel (1996), Netanel (1998), Netanel (2000); Netanel (2000a); Netanel (2001); Netanel (2008).

¹⁷ Netanel (2008), 81ff; Netanel (1996), 288ff.

the vocabulary used to describe copyright's downsides, and to describe the benefits of alternatives to copyright made possible by the internet.

In spite of voices like Netanel's, the general impression one gets from copyright scholarship is that copyright's detriments outweigh its benefits fairly substantially. The general scholarly consensus is that public discourse, freedom of expression and imagination, and the vibrancy of our culture would all be better served by dramatically increasing access to works, and promoting a more robust 'public domain'. There is a considerable amount of optimism about the democratising possibilities of producing and disseminating works online, without interference or undue constraint by copyright. It is hard to avoid the impression that the more freely works can be accessed, used and shared, the better, fairer and more robust will be our culture.

This is an impression I would like to qualify and adjust. We should make a concerted effort, following Netanel, to understand copyright's qualitative influences in the same terms as we understand the benefits of access to works. We should develop a better vocabulary for describing the ways in which copyright qualitatively enhances public discourse, and may enhance individuals' experience of works and culture. We should also take a more judicious view of the limits of the internet as a tool for facilitating a free flow of works and information. In particular, we should be conscious of the power of a very small number of internet intermediaries, such as search engines and social networks, to influence and control the attention of the public.

This will enable us to see more clearly the relative benefits of a reasonably strong copyright. We can also better perceive the risks in relying merely on access

to works and networked technology as the main engines of culture and creative expression. Finally, we will be better equipped to make judgements about how best to calibrate copyright, even if we still take a somewhat minimalist orientation toward the law. I will therefore conclude this thesis by illustrating how my approach might inform the development of law and policy.

0.1.3 Why reject the incentive-access paradigm?

The incentive-access paradigm is the dominant approach to copyright law among policy makers and law reformers. It is also the dominant paradigm in copyright case law. Why depart from this paradigm and adopt a qualitative approach to copyright? Developing a qualitative theory of copyright would require us to form conclusions about qualities in works and culture that we would consider to be beneficial to the public.

There is a fairly powerful threshold objection to such an approach. It risks cultural paternalism. Copyright law should not allow judges, or anyone else, to impose their own tastes and preferences on the public. The appeal of the incentive-access paradigm is that it appears to keep copyright aesthetically neutral. The paradigm adopts, as a proxy for benefit, the volume of creative production and consumption: the number of works produced; the extent to which they are available to the public; and the extent to which they can be used as inputs for more production.

In chapter 1, I reject this justification for the incentive-access paradigm. While that claim of ‘aesthetic neutrality’ appears on its face an appealing justification for the incentive-access paradigm, I argue that we should reject it for

three reasons. Firstly, the evidence does not support the narrative that copyright produces an incentive effect upon authors, or upon the volume of creative production. The neutrality of the incentive narrative does it no good if copyright is not an effective incentive. Secondly, culture and works are important inputs into our individual and collective choices. It is therefore worthwhile considering carefully and explicitly how copyright influences culture qualitatively, rather than assuming that 'more' works will necessarily result in greater opportunities for society to benefit from works. Thirdly, copyright has an influence on culture that is unavoidable. Instead of merely affirming this qualitative orientation by silence, we ought to try to understand it more deeply, and shape it for the good.

Doing so requires us to formulate a clearer idea of specific qualitative outcomes that we wish to encourage (or at least avoid suppressing). It also requires us to consider more closely how copyright might bring these outcomes about, through its influences on the conditions of creative practice, and the consumption of works. The main purpose of this thesis is to formulate such qualitative objectives, and to evaluate various aspects of copyright law against them.

0.1.4 How to formulate qualitative goals that are not paternalistic

If we adopt an explicitly qualitative theory of copyright, how are we to avoid cultural paternalism? Chapter 2 deals with this question. It sets out two main strategies for avoiding paternalism and, using these strategies, sets out the qualitative principles and objectives that I espouse.

The first strategy is to avoid prescribing specific aesthetics or standards of merit. For example, I reject a proposal by Parchomovsky and Stein to tie copyright

protection more closely to the originality of any given work.¹⁸ We should avoid requiring that works conform to standards of merit or worth such as originality. The application of such standards gives policy makers and judges too much power to decide which works are worthwhile or valuable.

Instead, we should frame our goals in terms of high level values. We should think at a structural, systemic level, rather than at the level of individual works. I propose two high level values or principles, which ought to be relatively uncontroversial. I give them the labels *democracy* and *autonomy*. The principle of democracy holds that culture, and copyright's influence upon it, are beneficial when they promote productive democratic deliberation and discourse. The principle of autonomy holds that the public benefit lies in promoting the enhancement of individual autonomy, and the development and realisation of individual human capabilities.

In formulating the *democracy* principle, I draw on the 'deliberative' paradigm in political philosophy, and its adherents in copyright theory, such as Netanel, Professor Yochai Benkler and Professor Abraham Drassinower.¹⁹ In formulating the *autonomy* principle, I draw on the 'human capabilities' paradigm in development economics, and its counterpart in copyright theory found in the work of scholars such as Professor Julie Cohen, Professor Rebecca Tushnet and Dr Anne Barron.²⁰

¹⁸ Parchomovsky and Stein (2009), 13.

¹⁹ See e.g. Netanel (1996); Benkler (2006); Drassinower (2012).

²⁰ Regarding development economics, see e.g. Nussbaum, Sen and Sudden (1993); Sen (1999); Nussbaum (2011). Regarding copyright theory, see e.g. Cohen (2012); Tushnet (2007); Tushnet (2009); Barron (2012). Benkler (2006) straddles the democratic and human capabilities paradigm

The second strategy for avoiding paternalism is to formulate mid-level objectives that answer to our high level principles. I identify three such objectives:

- distributive justice in the distribution of power and opportunity to participate in culture (*inclusiveness*); and
- expressive diversity in the world of works, such that individuals have the opportunity to be exposed to a wide range of perspectives and aesthetics (*diversity*); and
- the cultivation of conditions in which authors have the substantive capacity to engage rigorously with the conventions of the form of expression that they are undertaking (*rigour*).

I deal with the first two in chapter 2, but consider the objective of *rigour* later, in chapter 4 in the clarifying context of copyright's production function.

We can mitigate paternalism here by justifying these mid-level objectives pluralistically. I will show that we can arrive at them (i) by reasoning from first principles; (ii) by critically analysing the law to identify its implicit qualitative priorities; and (iii) by drawing on related bodies of law that also regulate the organisation of cultural production, such as media ownership law, and media content regulation. In reasoning from first principles, I derive assistance from the deliberative and human capabilities schools, because it is from those schools that I draw the high level values in the first place. In critically analysing the law, I draw on Drassinower's work in particular, as a method for inducing functional objectives through structural and critical analysis.²¹ In drawing on media law for analogies, I

²¹ See e.g. Drassinower (2015), Drassinower (2012).

follow Benkler and Netanel, who each adopt principles of media law, and US First Amendment doctrine, to build their own ‘deliberative’ approaches to copyright.²²

0.2 Resisting the minimalist temptation

0.2.1 The temptation to minimalism

With our normative approach now sketched out, let us return to our main argument. Why is it important to clarify that a qualitative approach to copyright need not be a minimalist one? There is a number of reasons why it is tempting to adopt a minimalist outlook on copyright; even to assume that a qualitative approach to copyright must necessarily be minimalist. I explore them in a literature review in chapter 3, but let us preview some of them here.

Some measure of minimalism is already built into the incentive-access paradigm. It is conventional to assert that copyright’s strength, scope and duration should be kept at the minimum level necessary to achieve the proper incentive, not least because access to works is considered essential to the production of works in future; and also because copyright encroaches on freedom of expression.²³ If we take that view, and we are no longer certain that copyright actually provides that incentive, then it is hard to explain why copyright should persist at all.

A qualitative approach only seems to reinforce that sense. A review of the literature concerned with copyright’s qualitative influence—a movement in copyright theory that Chander and Sunder have aptly called a ‘cultural turn’—

²² Benkler (1999); Netanel (1996).

²³ See e.g. Breyer (1970), 321; Loren (2008), 11-12; Boyle (2000), 2012.

produces a strong impression that the balance of harms and benefits weighs on the side of expanding rights to access and use works, rather than on the side of maintaining exclusive copyrights.²⁴ It is easy to see how access to works promotes qualitative goals like freedom of expression, and harder to see how strong copyright helps. There is a prevailing sense that the internet democratises culture, allowing individuals to participate freely and actively; and that copyright is currently standing in the way of the cultural benefits to be derived from freer networked information economies.²⁵

Even where scholars like Netanel conceive copyright's benefits in qualitative terms, the need to pursue these benefits appears less urgent than the need to pursue freer use and sharing of works on the internet. Copyright's qualitative benefits—such as its role in liberating authors from patronage—are associated with copyright's facilitation of markets for works. But these markets come with their own problems. Copyright industries are characterised by supply side concentration.²⁶ Under the auspices of copyright a small, vertically integrated group of commercial intermediaries—publishers, record labels, film studios, and so on—has considerable power to mediate what comes before the public.²⁷ In doing so, they pursue commercial interests—such as the objective of appealing to a mass audience. There is a sense that these commercial interests are not always

²⁴ On the cultural turn, see Chander and Sunder (2013), 1398.

²⁵ For more details, see chapter 3.

²⁶ See e.g. Lessig (2004), 73.

²⁷ Towse (2006), 570.

compatible with (even directly opposed to) the public interest in a free, expressively diverse culture and discourse.²⁸

Articulating risk and reward in this way produces a particular orientation toward copyright. Minimalism has risen to prominence, not only in counter culture and progressive scholarship, but in the mainstream. For example, the Australian Productivity Commission said in its report on copyright:

Given the asymmetric nature of how [copyright] policy can be changed, the Commission considers it is appropriate to ‘err on the side of caution’ where there is imperfect information, and consciously set weaker parameters in the way that rights are assigned, used or enforced.²⁹

This is a government agency, framing copyright reform and minimalism as the sober and responsible outlook on copyright policy, with the implication that it is maintaining strong copyright that would be the riskier course. An array of recommendations for weakening copyright’s strength, scope, or duration follow from this framing.

On the more extreme end of the spectrum are assertions like Hunter and Lastowka’s that the destruction of the copyright industries would not ‘be a terrible thing’. But there are also more moderate recommendations. I consider three of them, initially in chapter 3, and then in chapter 7. Firstly, there is a recommendation to reduce copyright’s term to the minimum duration necessary to promote production of works. This is a quintessential minimalist argument, based on the incentive-access dialectic described above.³⁰

²⁸ See e.g. Benkler (2003), 1265.

²⁹ Australian Productivity Commission (2016), 73.

³⁰ See e.g. *ibid*, 130.

Secondly, it is common to recommend expansions to copyright exceptions and limitations. In fair dealing jurisdictions it is commonplace to recommend the introduction of more open-ended fair use exceptions. In fair use jurisdictions, it is commonplace to argue that a much wider range of uses of copyright works—for example all uses evincing an exercise of creative imagination—should be considered fair; or even that there should be a *prima facie* assumption of fairness that would need to be disproved by the copyright owner.³¹

Thirdly, a number of scholars make the intriguing recommendation of introducing liability rules.³² Liability rules are essentially rules that would permit certain reproductions and uses of works to proceed without requiring copyright owner authorisation, but subject to a compulsory payment.³³

0.2.2 Tempering copyright pessimism and digital optimism

I am not opposed to most of the recommendations above, however I do consider that the destruction of the copyright industries *would* be a terrible thing, regardless of whether copyright is necessary as an incentive for the production and dissemination of works. Copyright has qualitative benefits that are commensurable with many of the benefits associated with access to works. Moreover, the conditions produced by facilitating greater access to works on the internet have not fulfilled the promise ascribed to them. There are reasons to temper both the

³¹ See below n (429) and accompanying text. Regarding the creative imagination argument, see e.g. Rubinfeld (2002). Regarding *prima facie* assumption of fairness, see e.g. Bohannon and Hovenkamp (2010), 979ff.

³² See e.g. Netanel (2003); Fisher (2003), 199-258; Lessig (2004), 125.

³³ On the distinction between 'liability rules' and 'property rules', see Calabresi and Melamed (1972).

prevailing pessimism about copyright, and optimism about non-proprietary, networked information economies. Understanding these reasons informs our approach to the recommendations I have just laid out.

0.2.2.1 Elaborating on copyright's production function

We can expand on Netanel's vision of copyright's *production* function, by giving further consideration to the qualitative implications of copyright's role in providing funding for works. In chapter 4, I argue that we need not conceive that funding as a mere incentive. We can understand its benefits best if we adopt a third mid-level principle: one that also follows from first principles. That is the principle of rigour: conditions in which authors have the opportunity to engage rigorously with their milieu, whether that be a vocabulary of art, or whether that be rigorous discourse. We can think about copyright's production function in terms of how it affects the constraints of time, collaboration and resources under which works are created; and how that in turn creates opportunities for rigour.

Be that as it may, copyright's role in funding creative industries has a real bearing on the constraints under which creative projects are realised. Copyright funding supports structures that furnish at least some authors and their commercial intermediaries with money. It permits increases in, among other things: time invested into works, the quality, quantity and experience of participants in the creative process; and the quality and quantity of materials and equipment involved in the creative process. These things all enhance opportunities for authors to engage rigorously with the conventions of the genres in which they are active.

0.2.2.2 Taking a more judicious view of the networked information economy

We would also do well to understand the downsides of networked information economies. Chapter 5 explores some of these. There, I argue that, while the internet makes authorship and publication available to a wider range of people than ever before, it has not fulfilled its promise of democratising culture. Wealth, attention and communicative power are highly concentrated on the internet, in the hands of a new class of internet intermediary.

Moreover, we should be careful not to confuse freedom of access to (and sharing of) works with *profitless* dissemination of works. New ‘internet intermediaries’, such as search engines and social networks, profit enormously from the free distribution and sharing of works on their platforms. They extract valuable data about individuals, and they also profit from selling advertising—free works are vehicles for both activities. Whereas under copyright, we see a troubling asymmetry in bargaining power as between authors and commercial intermediaries, on the internet we see a different kind of asymmetry. As between copyright owners and internet intermediaries there is a ‘value gap’.³⁴ The lion’s share of the profits and commercial benefits derived from sharing of works goes to internet intermediaries.

As between internet intermediaries and internet users, on the other hand, there is a kind of ‘surveillance capitalism’ in play.³⁵ Jaron Lanier sums it up with

³⁴ This is the term used in an EU position paper, the *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*—COM(2016)593.

³⁵ This term was coined in Zuboff (2015).

characteristic wryness: ‘Sometimes information is supposedly free but people are subject to weird surveillance and influence with insufficient commensurate rights.’³⁶ Internet intermediaries use their influence over individuals to maximise the time they spend on the platform, to sell advertising, and in some cases, to sell personal data that permits third parties to secretly use powerful insights to influence individuals’ opinions, spending and political outlook.³⁷

I conclude from this that the parameters and constraints that apply on the internet are far from optimal for our mid-level objectives of diversity, inclusiveness and rigour; or the high level values of autonomy and democracy. We should not assume that free sharing of works on the internet is, by itself, the antidote to copyright’s shortcomings.

0.2.2.3 Elaborating on copyright’s structural function

Once we understand the downsides of the networked information economy, copyright’s structural function appears to somewhat better advantage. I elaborate on this point in chapter 6.

As I explained above, the right to prevent others from copying their works without authorisation is what permits copyright owners to charge a price for works. In other words, copyright creates a price mechanism, which facilitates markets for works. The markets that copyright creates give priority to one particular signal, in organising the allocation of resources in relation to works. That is the signal of audience demand, or willingness to pay. The way to profit

³⁶ Lanier (2014), 246.

³⁷ See e.g. Cadwalladr (2016).

from copyright is to find a paying audience for a work, so commercially-minded investors in works dole out their money with audience tastes in mind. Insofar as the signal of audience willingness to pay holds sway, there is a measure of inclusiveness in copyright's market arrangement. The paying public is included in the system through which decisions about how to invest and allocate resources in relation to works, are made. Those decisions, in turn, determine which authors and works are supported by resources that, generally permit those works to be realised more rigorously.

Of course, copyright markets are not perfectly efficient, and the relationship between supply and demand is distorted in various significant ways. Demand for any given work is not known in advance. Intermediaries like publishers, film studios and record labels play an important role in deciding which works go to market in the first place. This means they have considerable curatorial power over the contents and character of culture. Even so, their goal is generally to publish works for which audiences will pay. Past patterns of audience consumption therefore exert a real and meaningful influence on the patterns of intermediary investment.

Rather than merely generating obstacles to access to works, copyright's structural effects produce qualitative trade-offs. These trade-offs are not palpably worse than those associated with 'free' access to works in networked information economies. Take inclusiveness, for example (and let us be clear that I am sketching out an example here, not a comprehensive assessment of copyright's inclusiveness trade-offs).

In networked information economies we see gains in inclusiveness, insofar as individuals can create and publish works very cheaply, and are therefore less reliant on centralised information intermediaries like publishers. But there are also inclusiveness problems. Attention, wealth, and power to influence the public's engagement with works is highly concentrated among intermediaries of a different kind: internet intermediaries like search engines and social networks.³⁸ This power is often used to manipulate individuals without their knowledge, and to profit from this manipulation.³⁹ Real power to influence and shape culture is, in practical terms, not distributed in a very inclusive way.

In copyright-based markets the inclusiveness trade-off is this. On the downside, the power to publish commercially is fairly concentrated. Moreover, relying on willingness to pay as a signal to direct investment in works puts those who may be willing, but are not *able* to pay for works, at a disadvantage. On the other hand, there is a measure of simplicity (perhaps not quite symmetry) in the relationship between the commercial publisher and its customer. To be sure, there is marketing and manipulation, but the ultimate object is to satisfy the audience enough to extract a payment for the work. The commercial publisher is beholden to the public to that extent.

0.2.3 Practical implications of my qualitative approach

The brief sketch above shows that neither copyright markets, nor 'freer' networked information economies provides a perfect formula for inclusiveness, diversity or

³⁸ See e.g. Lanier (2014), 57-63.

³⁹ See e.g. Cadwalladr (2016).

rigour. As I will show, the same may be said in relation to all of our mid-level objectives. We should therefore temper both the widespread pessimism about copyright and optimism about internet-based alternatives. This does not necessarily lead us to oppose interventions, such as the expansion of fairness exceptions or the introduction of liability rules. It does, however give us cause to be cautious about dismantling or substantially weakening copyright. In other words, it gives us reason to reverse the orientation that would deem the weakening of copyright to be ‘erring on the side of caution’.

In chapter 7, I therefore argue that we should incorporate a richer assessment of copyright’s benefits into our assessment of qualitative trade-offs, and this should colour our approach to doctrinal recommendations, like the ones I have listed above (adjusting term, expanding fairness exceptions, and introducing liability rules).⁴⁰ I put off until then a detailed consideration of the doctrinal implications of my theory, but a few general comments on the subject are warranted here.

I am not merely offering an apology for copyright in its current state. There is real force to the critiques of expansionary copyright. But no arrangement for organising the production and dissemination of works, produces unmitigated benefits for inclusiveness, diversity and rigour. There are always trade-offs. Our goal should be to calibrate the trade-offs in order not only to correct problems with copyright, but also to deal with the challenges of the networked information economy. We should recognise that weakening copyright will not automatically produce qualitative improvements in culture. We should think about the

⁴⁰ See above n (32) and accompanying text.

‘structural’ pressures and parameters produced by any changes to the law, as well as the effects on copyright’s ‘production’ function.⁴¹ What kind of activity and work would become most profitable as a result of the adjustment to the law? Would conditions be conducive to diversity and rigour, or would the changes to the law simply reproduce problematic patterns of concentration of wealth and power?

Asking this last question also reminds us that there are limitations to what can be achieved by changes in a single body of law like copyright. Culture is complex and shifting and copyright law is only one of many influences upon it. Still, developing a fuller normative and descriptive theory of copyright, accounting for its influence on culture, can only help us. Indeed, it might provide us with overarching values that would allow us better to co-ordinate copyright law with other laws that regulate culture. In other words, it can help us to develop a coherent cultural policy. Best of all, it furnishes us with the tools to assess and adjust the law in a way that is principled, but also open to changes in the realm of culture.

⁴¹ See above n (17).

Chapter 1

A qualitative theory of copyright

1.1 Framing the public benefit

It is traditional to frame the question of public benefit in terms of the balance between the need to incentivise the creation of works, and the need to ensure that copyright does not unduly suppress access to works, or their use in future creativity.⁴² The idea is, copyright serves the public benefit when it strikes an appropriate balance between incentives and access. When the balance is right, an optimal number of works will be produced.⁴³ This is a quantitative conception of the public benefit.

This quantitative framing is based on three main premises. Lord Macaulay, famous for his 19th century parliamentary speeches on copyright, said:

It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated and the least objectionable way of remunerating them is by way of copyright.⁴⁴

The first premise is that the public is served by encouraging the creation of more works by way of copyright ('it is desirable that we have a supply'). The second premise is that those who create works and disseminate them to the public need an incentive to do so ('we cannot have such a supply unless men of letters are liberally remunerated'). The third is that copyright provides this incentive, or that it is the 'least objectionable way' of providing the requisite incentive.

In this chapter, I will challenge each of these three premises to make a broader point: we should not rely so heavily on the incentive-access paradigm. We

⁴² See e.g. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002) FCA 187 at 182-183; *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 at [24], per French CJ, Crennan and Kiefel JJ.

⁴³ Bohannon and Hovenkamp (2010), 927; Landes and Posner (2009), 23.

⁴⁴ Macaulay (1841), 346.

should instead adopt a more explicitly qualitative theoretical outlook. In each part of this chapter I will deal with a different set of reasons for doing so.

In part 1.2 I will deal with the first premise. I will consider the reasons why it is conventional to assume that the creation of more works is inherently beneficial to the public. In particular, I will deal with the matter of aesthetic neutrality: the notion that maximising production of works serves as a good proxy for the public benefit because it is an aesthetically neutral goal.

In part 1.3, I will deal with the second and third premises. Taken together, they posit that copyright is a necessary incentive for the production and dissemination of works. I will show that, in fact, the incentive narrative is not well supported by evidence. Neither evidence about the volume of production of works under the auspices of copyright, nor evidence about authors' motivations, nor evidence about the funding of the publication of works provides a particularly firm foundation for the incentive narrative.

Finally, in part 1.4 I will challenge the conventional outlook on copyright's aesthetic neutrality. Certainly, the test for copyright subsistence is relatively neutral regarding the aesthetic features of a work required to attract copyright protection, and there are good reasons for this. We should not, however, take this neutrality, nor the reasons for it, to mean that copyright law, as a whole, is neutral with regard to its influence on the quality and character of the world of works; nor indeed that it *should* be neutral. By looking at certain exceptions and limitations to copyright, I will demonstrate that copyright exhibits implicit preferences as to the quality and character of culture. Recognising these preferences is a starting point for a qualitative theory of copyright.

1.2 Aesthetic anxiety

1.2.1 More or better?

Let us begin with the first premise of the incentive narrative of copyright. The notion that it is desirable to encourage the production of more works is more often assumed than explained.⁴⁵ That is not to say there is no possible justification for this stance. Professor Michael Birnhack helpfully traces the rationale for maximising the production of works. The basic idea is that more works means more perspectives circulating in the ‘marketplace of ideas’, and therefore a greater likelihood of uncovering socially beneficial truths or aesthetic experiences.⁴⁶

This rationale (which Birnhack elucidates but does not adopt) does not explain with much clarity how number of works translates into quality. It posits the operation of a ‘marketplace of ideas’ but says little about its mechanics for selecting for truth or beauty. It seems to assume that the quality in works that benefits the public (whatever that quality is) appears more or less randomly; that the prospects of its appearance increase proportionately to the number of works; and that the public, provided the law permits sufficient access to works, will incrementally and collectively bring that quality to light.

In order to be persuasive, proponents of this ‘more is better’ approach would need to elaborate more clearly the mechanics by which the public, exposed to ‘more’ works, may be expected to find and cultivate the ‘better’ works. 10,000

⁴⁵ Drassinower (2011), 1878.

⁴⁶ Birnhack (2006), 66-68. See also Beebe (2017), 384 for another sceptical exposition of this ‘more is better’ position.

monkeys typing may eventually produce the works of Shakespeare, but simply adding to the number of monkeys in the hopes of accelerating the process seems a poor policy for furthering the public benefit through works. Copyright may indeed produce conditions in which diverse perspectives come to light, or works of some desirable quality proliferate. But I am not convinced that it does so simply by encouraging the production of more works. Copyright's influence on quality, and its role in facilitating the public's selection of works that might be publicly beneficial, needs deeper explication.

1.2.2 Aesthetic neutrality

There is something fuzzy, then, in the assumption that encouraging 'more' works, is inherently beneficial. That very fuzziness, however, is part of the appeal of the incentive narrative of copyright. Traditionally, courts, legislatures, and academics have avoided evaluating or attempting to influence copyright's qualitative influence. The quintessential declaration of neutrality is Justice Holmes', in the US case of *Bleistein v Donaldson Lithographing Co*:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation... At the other end, copyright could be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value-it would be bold to say that they have not an aesthetic and educational value-and the taste of any public is not to be treated with contempt.⁴⁷

⁴⁷ 188 US 239 (1903), 251-252. For an original and thoughtful analysis of how US courts came to distance copyright law from the idea of aesthetic 'progress', see Beebe (2017).

Broadly, the principles expressed in *Bleistein* hold true across Anglo-Saxon jurisdictions.

Copyright protection is ‘aesthetically neutral’ in the sense that no particular aesthetic quality or standard is required in order for copyright to subsist in a work. The quality or character of the work, or its formal features, does not really matter. What matters is the exertion of intellectual effort in expressing the work. The language describing this effort differs from jurisdiction to jurisdiction.⁴⁸ But in each case it is the effort that produces the work, rather than the quality of the work itself, that determines the question of copyright subsistence.

Judges are doubtful of their own ability to make competent decisions about the merits of creative material, especially artistic material. There is a sense that judgments about aesthetic or other merits of works are liable to be subjective; based on ambiguous criteria or personal bias; incompatible with the disinterest expected of the judiciary.⁴⁹ It would not do, so the argument goes, for judges to be seen simply to give reign to their elite tastes. Copyright might favour works compatible with judicial tastes, and provide insufficient protection for other works.⁵⁰

⁴⁸ In the UK: ‘skill, labour and judgment’ (*Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465) or ‘the author’s own intellectual creation’ (Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening* [19 July 2009] ECR I-6569, applied, e.g. in *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2012] R.P.C. 1). For the Australian standard—‘independent intellectual effort’—see *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA. For the Canadian test—intellectual effort that is not purely mechanical—see *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, 16 per McLachlin CJ.

⁴⁹ But see Beebe (2017), 317-375 for incisive commentary on the tension between elitism and anti-elitism in the judgment of Justice Holmes in *Bleistein*.

⁵⁰ Yen (1997), 248.

As Professor Julie Cohen observes, there is a normative puzzle facing the would-be judge of cultural value. On the one hand, there is the need to engage with culture on its own terms; on the other hand, the need to acknowledge that culture and cultural value are self-constructing and therefore contingent. Creativity and the culture in which it finds meaning and value, she says, are neither the product of individual creators nor social and cultural patterns alone, but rather dynamic interactions between them.⁵¹

Evaluating works in qualitative terms requires an engagement with what Habermas calls the 'lifeworld':

the web of intersubjectively-produced interpretive, evaluative and expressive frameworks that both enable what we experience as facts, norms and personal identities and make it possible to renew or to question these.⁵²

It is arguably not possible to make judgments about cultural products as a truly objective observer from outside culture.⁵³ Given the deep role of culture in self-expression and self-determination, to impose cultural standards and norms may interfere with individual autonomy and freedom of expression.⁵⁴

Like judges, academics have therefore, until recently, mostly eschewed prescriptions about qualitative outcomes for copyright. The confidence of the Enlightenment, and its universalising aesthetics, is long gone. Universalising narratives of linear progress have given way, for the most part, to philosophies of radical contingency. Copyright scholars, until fairly recently, seem to have been

⁵¹ See Cohen (2006), 138; Cohen (2007), 1183-1184; Cohen (2012), 24.

⁵² Barron (2008), 28, citing Jürgen Habermas, *The Theory of Communicative Action*, vol 2 (Cambridge: Polity Press, 1987).

⁵³ See, e.g. Geertz (1994); Cohen (2007), 1189.

⁵⁴ Benkler (2006), 298.

deterred by the spectre of making subjective judgments and the complexity of the systems of meaning in which such judgments must be situated.⁵⁵

This is why the incentive narrative is appealing. It appears to avoid problems of subjectivity and paternalism, in formulating an idea of the public benefit.⁵⁶ One does not appear a paternalist if one advocates the production of *more* works, or greater access to works, or greater efficiency and wealth maximisation in markets for works, and assuming this will then produce a nebulous qualitative good.⁵⁷ By contrast, navigating the reflexive web of subjective and inter-subjective value systems in order to reach a conclusion about what is a ‘good’ or ‘bad’ cultural outcome, or a good or bad aesthetic, is complicated, daunting, and fraught with risks of cultural dictatorship.

As I will show in the next part of this chapter, however, the apparent neutrality of the incentive-access paradigm is of little benefit if the follow-on assumption, that copyright is a necessary incentive, is not borne out by evidence.

1.3 A vulnerable incentive narrative

1.3.1 Copyright’s supposed incentive effect

Let us look more closely at the second and third premises behind the incentive-access paradigm: the supposition that the production and dissemination of works requires an incentive, and the assumption that copyright provides that incentive.

⁵⁵ Chander and Sunder (2012), 1411.

⁵⁶ Cohen (2000), 1800.

⁵⁷ Birnhack (2006), 68

Copyright's incentive is supposed to operate on two levels. Traditional arguments in favour of copyright tend to focus on incentive to authors. As we can see from the Lord Macaulay's quote above, it is 'men of letters' who need to be remunerated to promote the supply of good books. Anthony Trollope famously put it this way: "Take away from English authors their copyrights, and you would very soon take away from England her authors."⁵⁸ This view is echoed in early case law and taken up by polemicists in favour of copyright throughout its history: that creators of works (not just books), need an incentive.⁵⁹

A more nuanced view also takes into account the objective of encouraging investment by commercial intermediaries (publishers, film studios, record labels and so on) in the production and dissemination of creative material. These businesses are considered necessary for the dissemination of works. Before the internet, one would not, for example, expect a book that was not commercially published to achieve wide readership. Commercially producing and disseminating works, especially physical copies, involves a wide range of fixed costs, from editing and printing, to warehousing, marketing, distribution, and physical shelf-space. The human input as well as the materials and tools of mass production and dissemination have been, until recently, very expensive. The more complex version of the incentive narrative posits that copyright is not just a stimulus to authors, but also a system for helping commercial intermediaries to recover their costs and make a profit. The idea is that, absent copyright, rational commercial

⁵⁸ Davis (2002), 16; Trollope (2009), 68.

⁵⁹ See, e.g., *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201, per Willes J, 218.

intermediaries will under- invest in the production and dissemination of works with the result that works will be ‘underproduced’.⁶⁰

The incentive-narrative has a flip side. If works are worth incentivising, and their proliferation is inherently good and beneficial to the public, then it follows that there is a public interest in promoting their dissemination. There is a public interest in ensuring that copyright does not obstruct the process of getting works before audiences (readers, watchers, listeners and users). The incentive-access paradigm therefore deems it noteworthy that copyright increases the cost of accessing works, even as it provides a way of covering the costs of their production. This obstructs the public’s access to works. A need for access to works is therefore built into the incentive justification for copyright, on the basis that incentives to create are of more use if the fruits of creativity are enjoyed widely.⁶¹

Access to works is also a condition for future creativity. Creativity builds on existing works and ideas. New authors need to be able to access and use parts of existing works to create new works.⁶² Copyright increases the costs of ‘inputs’ into new works.⁶³ To the extent copyright prevents the free use of existing works without authorisation, new authors must either invest more time to avoid too closely reproducing existing material, or pay for what they take. Where copyright

⁶⁰ See e.g. Liebowitz (2005), 43; Liebowitz (1986), 184.

⁶¹ See Yoo, 228; Cohen (2000), 1801; L&P (2009), 20, 79; Sag (2006), 194.

⁶² For a seminal work on the inaccuracy of the myth of the ‘romantic’ author, creating from nothing, see Woodmansee (1984).

⁶³ See Arewa (2007), 481; Boyle (2002), 19; Elkin-Koren (2005), 380-384; Lemley (1999), 124; Craig (2012), 33.

obstructs such access and re-use, it is liable to offset any incentive effect with a simultaneous ‘chilling’ effect on future creativity.⁶⁴

It is therefore conventional to describe copyright’s role in terms of ‘balance’. The law is calibrated to balance the incentive effects of exclusive rights against the need for access to works.⁶⁵ The cost of access to works, and of creative inputs, it is thought, should be kept as low as is consistent with maintaining an incentive to create.⁶⁶ Certain elements in works—most notably ideas and facts—are therefore excluded from the scope of copyright protection.⁶⁷ The balance is optimised when any new work incentivised by copyright’s exclusive rights would decrease overall uses; or any new use permitted by limitations and exceptions to those rights would decrease the overall number of works.⁶⁸ Underlying the incentive-access balance, then, is the conviction that copyright protection *ought not to exceed the minimum amount necessary to incentivise creativity*.⁶⁹

With this in view, let us turn to the vulnerabilities of the second and third premise. The second premise is vulnerable to the extent evidence shows that the production of works does not require a monetary incentive. Again, neither evidence about the distribution of copyright returns, nor behavioural evidence

⁶⁴ Yen (1989), 397; Lunney (1996), 494; Boyle (2003), 44; Lange (2004), 466; Loren (2008), 13. See also *Warner Bros. Inc. v. American Broadcasting Co.* 20 F.2d 231 (2d Cir., October 6, 1983).

⁶⁵ For an authoritative work on the concept of balance and the public benefit in copyright, see Davies (2002), 7ff. Drassinower (2008b) also conducts a helpful review of the concept of balance in copyright jurisprudence. See also UK case of *Sayre v Moore* (1785), 102 E.R. 139 at 140. In the US, see e.g. *Feist Publication, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991). In Canada, see *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] S.C.C. 34 at 30-31. In Australia, see *IceTV* at [71]; ALRC Report , 18, 44, 58.

⁶⁶ Lunney (1996), 513.

⁶⁷ See n (3) on the ‘idea-expression’ or ‘idea-fact’ dichotomies.

⁶⁸ Brennan (2005), 81

⁶⁹ See e.g. Fisher (1997), 1249. See also Hargreaves Report, p.8.

about authors' motivations is consistent with conventional economic assumptions about copyright's role as a monetary incentive to authors. Moreover, there appear to be numerous alternatives to copyright for funding or otherwise sustaining many kinds of works, and their publication. The third premise is vulnerable to the extent that evidence either fails to show that copyright has an incentive effect; or shows that creativity may be incentivised by other means. As I show below in part 1.3.3, evidence as to copyright's effect on the volume of creative production and dissemination is uncertain and inconclusive.

If common assumptions about copyright's incentive effect are undermined in this way, then the purported benefits of exclusive rights in copyright are cast into doubt. Let us consider these vulnerabilities in more detail.

1.3.2 Evidence as to authors' and intermediaries' need for copyright

1.3.2.1 Evidence about wealth distribution

Do authors (I include creators of all kinds of works under this term) and commercial intermediaries (all kinds of publishers and disseminators) need copyright as an incentive? The evidence does not support this proposition. It is hard to reconcile evidence about the amount and distribution of wealth among authors with arguments that treat copyright, or even the broader prospect of financial return from works, as a blanket incentive to creativity. Authors on

average earn less than the general population.⁷⁰ The financial rewards of copyright primarily accrue to commercial intermediaries, rather than authors themselves.⁷¹

Only a small minority of authors reaches ordinary living standards from their copyright income.⁷² The income that is earned is heavily concentrated among few authors. It is well known that the creative sector is a ‘winner takes all’ economy.⁷³ The highest-earning 10% of authors receive a disproportionately large share of the total income earned in their market: between 60-80% in some creative sectors.⁷⁴ In other words, copyright only appears to provide support only for superstars, while most authors earn very little from their works.⁷⁵

Further, for most authors, copyright income is not the only, or even principal, source of income.⁷⁶ Take, for example, the total estimated population of 45,000 Australian professional artists, defined as those ‘operating at a level and standard of work and with a degree of commitment appropriate to the norms of professional practice within their artform’.⁷⁷ Professor Throsby found, in 2003, that 63% relied on ‘day jobs’ for income, with only 6% of total author income coming from

⁷⁰ Kretschmer et al (2010), 3.

⁷¹ Hunter and Lastowka (2004), 1024; Ginsburg (2002), 61-62; Litman (1991), 237-242; Lessig (2004), 26.

⁷² Kretschmer (2005); Kretschmer et al (2010), 62.

⁷³ Caves (2000), 73; Kretschmer et al (2010), 3; Towse (2002), 11; Cohen (1998), 52; Takeyama et al (2005), 47.

⁷⁴ Kretschmer et al (2010), 3, 41, 49, 67.

⁷⁵ Towse (2001); Kretschmer and Hardwick (2007); Marias (2014).

⁷⁶ Connolly and Krueger (2006) found that on average, over the 35 top musical acts that toured during 2002, less than 10% of income was generated by copyright royalty income, while 73% was due to concert earnings.

⁷⁷ Throsby (2003), 13, 37, 103.

copyright royalties or advances.⁷⁸ And the amount earned by authors from copyright seems to be shrinking rather than growing.⁷⁹

We cannot, therefore, expect rational would-be authors to create in the expectation of copyright earnings that would offset their creative costs, let alone furnish them with a living. Even assuming authors are romantics, with an overinflated sense of their ability to succeed and a high appetite for risk, the odds of a work's making a decent financial return are very long indeed. Production among lower earning authors would be unlikely to cease without the incentive of possible top earnings offered by copyright.⁸⁰ This may not be the case for authors who have already experienced commercial success, but these 'winners' make up a tiny minority among their peers. If copyright cannot provide a return for most authors, it is hard to argue that it operates as an *ex ante* incentive for authors in general.

1.3.3.2 Behavioural evidence

Even the assumption that authors are 'rational actors', responsive to monetary incentives, is problematic. Economic theory and modelling is a way of addressing empirical uncertainty. It operates by way of simplifying assumptions. In the case of creativity, however, simplifying assumptions about motivation are especially problematic. Economic models of creativity tend to treat motivation as exogenous,

⁷⁸ *Ibid.*

⁷⁹ The recent ACLS report on literary authors' earnings found that in 2005, 40% of authors earned their income solely from writing whereas in 2013, this dropped to 11.5%. They also found that average earnings of all writers fell in real terms by 28% since 2000.

⁸⁰ Kretschmer (2005), 994ff.

abstract, and constant.⁸¹ As Barron observes, the writer of potboilers, the poet, and the scholar are, in the conventional law and economics story of copyright, indistinguishable as economic actors.⁸² Simplifying models tend to assume copyright's incentivising effect is the same from one protected creator to another; and that the extent of the motivation in relation to any given type of work correlates with the extent of protection for the work.

If this were the case, we might expect works that receive the strongest copyright protection to be produced in greater numbers than other works.⁸³ A poem receives maximum protection from copyright law, because the verbal pattern is its key feature.⁸⁴ In comparison, features of novels like plot and character are less securely protected. Does this mean that the incentive to create poems is greater? Does it mean more poems are produced and commercially disseminated than novels?

Of course not. For one, there is not much of a market for poetry—at least in comparison with prose. In other words, consumer preferences have an important influence on the monetary return that their authors can expect.⁸⁵ Even without much demand, and without much expectation of monetary gain, poets seem to keep writing poetry: on blogs, privately, for magazines, for friends. A Google search for 'poetry blog' at the date of writing yielded more than one hundred million

⁸¹ On this subject see Tushnet (2009), 516, 520; Cohen (2006), 140; Horowitz (2009), 1498.

⁸² Barron (2008), 8.

⁸³ Professor CE Baker, for example, suggested that copyright's protection of expressive elements and absence of protection for facts favours an emphasis on presentation over facts in news media: Baker (1997), 326.

⁸⁴ Landes and Posner (2009), 95.

⁸⁵ I will explore the significance of this in chapter 6.

results. An economic theory focussed entirely on the assumed relationship between strength of copyright protection and creative motivation can neither explain why there is more prose written than poetry, nor why there is any poetry written at all in the absence of a robust commercial market for it.⁸⁶

Behavioural evidence suggests many authors in different media create without the realistic expectation of earning enough from their works to support them. Professor Caves famously described authors as being motivated by ‘art for arts’ sake’, rather than money, and a number of studies support that view.⁸⁷ It is unsurprising then that there is an oversupply of authors and creative works (relative to consumer demand), and that authors tend to have low earnings, and low bargaining power *vis-à-vis* commercial intermediaries.⁸⁸ This supports the conclusion that authors do not consistently respond to monetary incentives in the way conventional economic theory suggests.

A number of qualitative (interview and survey) studies, as well as some works of literary criticism, also indicate that authors claim to create for many reasons other than financial ones.⁸⁹ These reasons include:

- desire for fame, recognition, or to please an audience;⁹⁰
- the inherently rewarding experience of creativity;⁹¹

⁸⁶ Quiggin & Hunter (2008), 220; Tushnet (2009).

⁸⁷ Caves (2000), 4, 78. See also Breyer (1970), 311; Johnson (2012), 627; Fromer (2010); Mandel (2010), 285; Zimmerman (2011), 29.

⁸⁸ See e.g. Towse (2003), 11; Billiton and Cummings (2014); Watt (2010), 34; Kretschmer (2010), 66-67.

⁸⁹ But see Cowen (1998), 18 for an opposing view.

⁹⁰ See e.g. Breyer (1970), 312-314; Hunter and Lastowka (2004), 1023; Nadel (2004), 854; 325; Raban (2008), 2285; Landes & Posner (1989), 331 (describing prestige that translates into income).

⁹¹ Caves (2000), 4; Hunter and Lastowka (2004), 955; Tushnet (2009), 515.

- a sense of psychological or emotional compulsion to create or express something;⁹²
- a need to contest or engage with the cultural supremacy of existing works;⁹³
- a desire to communicate some information, perspective opinion or belief.⁹⁴

Among a group of authors interviewed in a study by Professor Jessica Silbey, very few expressed an interest in excluding others or extracting full value from users of their work.⁹⁵ In another, more informal study by the author Margaret Atwood, only two authors expressed an interest in making money when asked to explain why they write.⁹⁶ To the extent they were concerned about controlling the use of their works, they tended to value rights to protect the integrity of their work from undesirable modifications over the monetary rewards associated with copyright.⁹⁷

That authors create for many reasons does not ineluctably lead to the conclusion that monetary incentives are not important to authors. There are many famous and respected creators, including Bach, Mozart, Hayden, Beethoven, Charlie Chaplin, who admitted to being motivated by (even obsessed with) the prospect of earning money through their art.⁹⁸ By the same token, there are many people working in other, non-creative, professions who might claim to be motivated to work for reasons other than money. What is clear, nonetheless, is

⁹² See e.g. Tushnet (2008), 515, 535; Silbey (2015), 8; Silbey (2011), 2102, 2114.

⁹³ See e.g. Bloom (1973), 10ff; Cohen (2007), 1192.

⁹⁴ Loren (2008); Atwood (2002), xx-xxii.

⁹⁵ Silbey (2011), 2121.

⁹⁶ Atwood (2002), xx-xxii.

⁹⁷ Silbey (2011), 2122; Silbey (2015), 1,7.

⁹⁸ For a review of these creators' motivations, see Tyler Cowen, *In Praise of Commercial Culture* (1998), 18.

that creative motivation is complicated and multifaceted. The diversity of reasons for creating stands in opposition to unity of focus on economic motivation in the conventional incentive narrative.⁹⁹

1.3.3.3 Alternative ways to sustain publication

Even if it were conclusively shown that authors do not need copyright as a motivation to create, that would not by itself dispose of the ‘incentive’ justification for copyright. Granted, copyright rhetoric leans heavily on the figure of the ‘romantic author’, the ‘genius’; the lone inspired creator and her needs.¹⁰⁰ But even Silbey and Tushnet, who are sceptical about copyright as an incentive to creators, acknowledge its importance for commercial intermediaries and investors in works like publishers, film studios and record labels.¹⁰¹ Copyright is supposed to allow such intermediaries to recover their costs and make a profit.

Developments in technology have now, however, reduced or redistributed the cost of creation and publication of works. The tools for creating works—cameras, microphones, recording interfaces, computers, and film and music software are eminently affordable for ordinary individuals. Copyright minimalists cite highly successful music recordings made on \$50 budgets; and exceptional films made on tiny budgets.¹⁰²

⁹⁹ Silbey (2011), 2102.

¹⁰⁰ Woodmansee (1984).

¹⁰¹ Silbey (2011); Tushnet (2009), 516.

¹⁰² Re music, see Hunter and Lastowka (2004), 982. They give the example of Gary Jules and Michael Andrews’ cover of Tears for Fears ‘Mad World’. Re films, see Nadel (2004), 818.

It is not only creation of works that has become cheaper over time. Digital, networked technologies have drastically cut the costs of publishing and distributing works. The selection, production, dissemination and marketing of works is far cheaper than it has ever been in the past.¹⁰³ The internet makes everyone a potential publisher—‘everyone a pamphleteer’.¹⁰⁴ All that is needed to publish and distribute a work is to upload it to a website.¹⁰⁵ Nadel enthusiastically observes that online publishers are offering about 100,000 new titles a year at little cost under a print-on-demand system, even, he admits, if the lion’s share are not worth reading.¹⁰⁶ There is considerable optimism about the prospects of covering the now lower costs of production and dissemination without relying on copyright.

Insofar as certain costs of creation, publication, and even consumption are unavoidable (and some minimalists acknowledge this), proposals for managing these costs without copyright abound. Alternatives for managing cost fall into three categories: non-appropriation, indirect appropriation and direct appropriation.

Non-appropriation based alternatives to copyright are arrangements in which participants in creation and publication do not seek to recoup their costs by appropriating a return from every reproduction of their work. These alternatives include individual amateur production and collaborative peer production. Individual amateur production is possible when the costs of creation and

¹⁰³ Hunter and Lastowka (2004), 989; Nadel (2004), 820; Benkler (2006), 105; Ku (2002), 36.

¹⁰⁴ Kochan (2006), 99.

¹⁰⁵ Ku (2002), 31.

¹⁰⁶ Nadel (2004), 820.

publication are low enough that an individual can afford them without expecting a financial return, especially if the individual can rely on other income streams like full or part time work.¹⁰⁷ Fan fiction—a genre in which fans write stories using existing narratives and characters, and amateur blogs are oft-cited examples of flourishing amateur culture.¹⁰⁸

For projects where the cost is too high for an individual, networked peer production is an alternative to individual amateur production. Peer producers may collaborate actively, or may contribute separately but cumulatively to large projects. The success of open-source software projects like Linux—their ability to compete with proprietary software—has prompted considerable optimism about the prospects of completing large and complex works without the need to recoup participants' costs.¹⁰⁹

The term, 'indirect appropriability', has been used to describe the situation where a copyright owner appropriates a return from a person standing between her and a copier. An example is the journal publisher who charges a higher price for libraries' journal subscriptions on the assumption that the library's members will make multiple copies. I am using the term 'indirect appropriation' more broadly to describe a situation when copyright owners derive benefits or returns from factors that are not directly related to their control over copying. Examples include: network effects, brand value, live performance revenue and first mover

¹⁰⁷ Cowen (1998), 17.

¹⁰⁸ Re blogs, see; Benkler (2006), 214ff. Re fan fiction, see Tushnet (1996).

¹⁰⁹ See Boyle (2003), 45-49; Benkler (2002).

advantage.¹¹⁰ A combination of these (and other) factors seems to sustain the fashion, restaurant, comedy and drag queen businesses, none of which rely heavily on copyright.¹¹¹ A different kind of indirect appropriator is the academic who publishes not for money, but for career advancement.¹¹² Then there is advertising: rather than appropriating from users of a work, the funds come from those who value exposure to those users.¹¹³

Indirect appropriation can also be achieved through the sale of complementary products (e.g. merchandise) and services. Take, for example, cinema showings of films. In place of a barrier to reproduction is a barrier to the value-enhancing experience of seeing a film at the cinema. On top of that cinemas can appropriate higher return by selling food and drinks.¹¹⁴ Another example is the author who makes money from speaking engagements and book signing tours.

Next, there is the possibility of *ex post facto* payment for the enjoyment of works: scholars like Ku and Frosio have expressed considerable optimism about the possibility of a ‘tipping’ economy for music on the internet.¹¹⁵ Finally, I include prizes, grants and subsidies under the category of indirect appropriation, since they are means for creators and intermediaries to gain a benefit related to their work without relying on a market for copies of their works.¹¹⁶ There are also

¹¹⁰ Lemley (2009), 5.

¹¹¹ Hemphill et al (2009), 1447-1155; Sprigman and Raustalia (2006), re fashion; Fauchert and von Hippel (2008) regarding restaurants; Sarid (2014), regarding drag queens. Re comedy, see Sprigman and Oliar (2008).

¹¹² Landes and Posner (2009), 48.

¹¹³ Lemley (2009), 5.

¹¹⁴ See Nadel (2004), 828.

¹¹⁵ Ku (2002), 37; Frosio (2017); Nadel (2004), 837.

¹¹⁶ Nadel (2004), 848; Cowen (1998), 17.

alternative means of direct appropriation from copiers. One such means is the erection of barriers to copying using contract and encryption rather than copyright: the click-wrap licence for a digital work is the quintessential example of this.¹¹⁷

In short: much about mass producing and publishing works that used to require large investments backed by copyright funding is now cheap or free; and what does require funding may in many cases be funded by alternative means. The evidence does not seem to strongly bear out the second premise of the incentive narrative—the proposition that authors and publisher need copyright as an incentive to create.

1.3.3 Evidence about copyright's effects on the volume of creative production and dissemination

1.3.3.1 Uncertainty problems

What about the third premise: that copyright increases the volume of production of works? One of the biggest challenges to the incentive narrative of copyright is the lack of conclusive proof of copyright's incentive effect.¹¹⁸ It is still very difficult to determine conclusively whether exclusive rights encourage creativity or not.¹¹⁹

From a purely economic perspective, it is hard to determine whether welfare losses caused by exclusive rights in copyright outweigh their welfare enhancing incentive

¹¹⁷ Landes and Posner (2009), 41-42; see also Liebowitz and Watt (2006).

¹¹⁸ Litman (1990), 997.

¹¹⁹ Boyle (2003), 45. Landes and Posner (2009), 110

effect or vice versa.¹²⁰ At least one extensive review of empirical studies concluded that intellectual property rights offer a real, if limited, incentive to innovate in some industrial sectors.¹²¹ But many studies reach an opposing conclusion.¹²²

Just as copyright's effects on welfare and 'innovation' are uncertain, so too is it unclear whether strong or weak rights yield better economic returns for creators and their intermediaries. The optimal level of return for creators is also uncertain. One point of contention is the extent to which indirect appropriability—capturing profits or benefits by means more indirect than exclusive rights—may suffice to cover creators' fixed costs.¹²³ Another conjecture is that a larger, 'leaky' market in which copyright owners do not capture the value of every use of their material may be on the whole more profitable than a smaller controlled one.¹²⁴ Empirical studies are inconclusive on this point.¹²⁵

1.3.3.2 No reliable control scenario

Other than the difficulty of obtaining reliable data from a neutral source (there are serious biases and conflicts of interest to contend with) one of the key difficulties for empirical studies of copyright is the absence of a reliable control. It is hard to know for sure what would happen to creative production and dissemination absent strong copyright, because there is not much reliable data about that alternative

¹²⁰ Boyle (2000), 2012-13; Chon (2006), 2823.

¹²¹ Menell and Scotchmer (2005).

¹²² Ku et al (2009).

¹²³ See e.g. Varian (2000); Nadel (2004), 853ff.

¹²⁴ Boyle (2002), 19.

¹²⁵ Menell and Scotchmer (2005), 163. Regarding the 'leaky' music industry and music piracy, see Towse (2008), 13-14; Liebowitz (2005).

scenario.¹²⁶ Historical studies exist but they are of limited value. One study, for example, suggests that the number and quality of Italian operas increased with the introduction of copyright protection for that medium.¹²⁷ Professor Ginsburg, in her seminal comparison of American and French copyright rhetoric and history, adduced interesting evidence showing how the abolition of publishers' guild privileges to limit copying in revolutionary France coincided with a reduction in the production of sustained works, but a continuation in the publication of shorter works like pamphlets.¹²⁸

These are interesting revelations, but the drastic changes in copyright's subject matter of protection, in cultural preferences, and in the technologies of creating and disseminating works stand in the way of drawing contemporary analogies with much confidence. Opera is now a relatively stagnant art-form, appreciated by an elite minority, supported primarily by patronage and grants. Few could name a well-known opera written in the past 50 years. Printed pamphlets have been replaced by blogs and webpages. More broadly, it is difficult to account for the effects of digitisation or the internet on the production and consumption of works. Laws are never the only parameter of change, and differences between the past and present can be attributed to an almost infinite number of causes.¹²⁹

The upshot of these various empirical difficulties is that the case for exclusive rights in their present configuration, on the basis that they encourage the

¹²⁶ McGowan (2004), 14; Merges (2011), 145, 225; Samuelson (2004), 8-9.

¹²⁷ Giorcelli and Moser (2014).

¹²⁸ Ginsburg (1989), 1013

¹²⁹ Kretschmer (2010), 5.

production of works, or prevent their underproduction—is at best not proven. On one view, the absence of evidence might be grounds to refrain from any dramatic reduction in the scope or strength of copyright. But the same insufficiency of evidence might be grounds for weakening copyright, especially given the conventional wisdom that the scope and strength of copyright protection ought to be no stronger than necessary.¹³⁰

1.3.4 Implications

In light of all that evidence, it is very difficult to sustain claims to the effect that authorship would cease without copyright as an incentive. The incentive-access paradigm contains the seeds of its own dismantling. If we took seriously the claim that exclusive rights ought to be *no stronger than necessary* to encourage the production and dissemination of works, and available evidence indicates that a large number works may be created and disseminated with minimal or no copyright, then it would seem to follow that exclusive rights ought to be severely curtailed. I will return to this point in chapter 3.

1.4 Implicit qualitative priorities in copyright law

1.4.1 Reasons to take a more qualitative stance

The incentive-access narrative may appear to avoid problems of subjectivity and paternalism associated with positing qualitative goals for copyright. It is not,

¹³⁰ Landes and Posner (2009), 10; Nguyen (2010), 30.

however, well supported by evidence. We cannot fall back on its comforting appearance of aesthetic neutrality if we find that it is not a realistic way of describing or justifying copyright. Why not, then, take the risk of theorising copyright differently?

Daunting though it may seem, formulating qualitative objectives for copyright is not anathema. Nothing in foundational copyright jurisprudence demands neutrality regarding copyright's qualitative outcomes. On the contrary, early commentators and texts seem to emphasise qualitative concerns as much as quantitative ones. Lord Macaulay, whose summation of copyright's purpose I cited in chapter 1, speaks of securing a supply of 'good books'.¹³¹ The preamble to the Statute of Queen Anne (the UK's first copyright act) does not speak of encouraging creativity in general, but rather of encouraging 'learned men' to write 'useful books'.¹³² In the US, the constitutional language of progress is informed by references to 'learned men' and 'genius'. In each case, there is an adjective pertaining either to potential authors—'learned'—or to their works—'good' or 'useful'—which suggests a concern with the quality of works.

Moreover, we can, as I will show in the next chapter, distinguish between pursuing specific *aesthetics*—standards of beauty or merit pertaining to the work or the experience of the work—and the pursuit of qualitative outcomes. After all, the 'more is better' argument ultimately rests on the assumption that useful and beautiful works will emerge, provided we encourage the production of more works without regard to any given work's merits. There is a qualitative goal here—

¹³¹ See above n (44).

¹³² *Statute of Anne*, 8 Ann.

cultivating conditions in which useful and beautiful works come to light—even if the path to that goal is obscure. That qualitative goal, a goal pertaining to the conditions of creativity, is pursued through copyright’s aesthetically neutral subsistence test.

We can say, then, that despite the doctrine of aesthetic neutrality, copyright law is not actually neutral with respect to the qualitative, cultural outcomes that it is supposed to facilitate. In chapters 4 and 6, I will consider some of the ways in which copyright exerts wide reaching ‘structural’ influences on culture, its characteristics and qualities. But here, an example of implicit qualitative preferences in the law will suffice to make my point.

1.4.2 Critical analysis of fairness exceptions

A critical analysis of key exceptions and limitations to copyright reveals which qualities and activities in the world of works the law implicitly prioritises.

Exceptions and limitations to copyright either permit certain otherwise-infringing activities to proceed without the need for copyright owners’ authorisation, or they limit the cost of engaging in those activities. Activities subject to exceptions and limitations—criticism, review, satire, parody, quotation, educational activities, the collection and preservation of works by libraries and archives, reproduction of works for persons with a disability, and so on—enjoy preferential status and lower costs than other activities that fall outside the scope of exceptions and limitations. Exceptions and limitations therefore do not just serve to encourage ‘more’ works. They generate conditions in which certain activities, certain attitudes, certain

orientations toward works and culture proceed more easily than they otherwise would.

To consider the significance of how each exception and limitation to copyright works in each jurisdiction, beyond the very brief summary of approaches to exception and limitations above, is beyond the scope of this chapter. What is of primary interest to me is not these differences in detail, but rather the similarity in themes pervading regimes of exceptions and limitations. Doctrinal details may differ across jurisdictions, but basic policy concerns are very similar. There is a fair degree of consistency in relation to the kinds of activity that are subject to exceptions and limitations. Let us focus on one particular category of exception: what I will call ‘fairness’ exceptions for transformative works.

1.4.3 Transformative works exceptions privilege expressive diversity and inclusive dialogue

Both US fair use doctrine, and fair dealing doctrine in other jurisdictions, privilege the creation of ‘transformative works’—though the latter not as explicitly as the former. Let us start with fair use. The doctrine, like all of US copyright law, is animated by the constitutional imperative to promote progress in the arts and sciences. The ‘ultimate test of fair use . . . is whether the copyright law’s goal of “promoting the Progress of Science and useful Arts” . . . would be better served by allowing the use than by preventing it’.¹³³ By designating a use as fair, the court also designates it as conducive to progress. Analysing fair uses, therefore, allows us to draw conclusions about what ‘progress’ (public benefit) means in qualitative terms:

¹³³ *Castle Rock Entertainment Inc. v. Carol Publishing Group*, 150 F.3d 132 (2nd Cir. 1998) at 141.

in terms of the character and kind of works, activities and cultural conditions deemed to promote progress.

There are four 'fair use' factors that courts must consider in determining whether a use is 'fair'. These are:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.¹³⁴

The question of transformativeness comes up in dealing with the first factor.

According to the US Supreme Court in the seminal fair use case of *Campbell v Acuff-Rose*, the 'central purpose' of considering the first fairness factor is to see whether the new use is 'transformative'. If the use of an existing work has 'a further purpose or different character, altering the first with new expression, meaning, or message', and does not merely 'supersede the objects' of, or supplant, the original, then it is likely to be considered transformative.¹³⁵ The court reached this conclusion by synthesising *rationes* from various cases in light of a highly influential journal article by Judge Pierre Leval.¹³⁶

'New', in a fair use context, does not mean novel, innovative or original in an absolute sense. The referent for 'newness' mentioned in *Campbell* is not works in general—it is the work that is allegedly infringed. The court speaks of new expression, meaning or message not in the abstract, but by reference to the

¹³⁴ USC 17, §107.

¹³⁵ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), 579.

¹³⁶ See e.g. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562. Leval (1990), 111.

allegedly infringed work. The newness comes about because of an alteration to the existing work for a further or different purpose, or to create something of a different character. It is difference, rather than novelty, that counts.

The commitment to the principle of ‘transformativeness’ in applying the fair use exception is can therefore be understood as a commitment to what I would call *diversity*: the cultivation of diversity of aesthetics, insights, meanings, purposes and other characteristics of works. Of course, I am inducing consistency in the law with my mid-level principle of diversity (addressed in more detail in the next chapter), rather than describing an explicit principle in copyright jurisprudence. However, since fair use is ultimately enlivened by the objective of progress, we can conclude that the law implicitly recognises cultivation of diversity as an element in the cultivation of progress. This is clear from Justice Souter’s reasoning in *Campbell*:

Although such transformative use is not absolutely necessary for a finding of fair use, ... *the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.*¹³⁷

The addition to the cultural pool of different meanings, messages and aesthetics is a qualitative feature of ‘progress’. It is the addition of this new voice or perspective that is at the heart of the work’s ‘enrichment of society’.¹³⁸

Of course, other factors are at play in determinations of fair use—three others, to be precise. It is not enough that a work be ‘transformative’ (although a finding of transformativeness is very likely to lead to a finding of fair use).¹³⁹ That does not detract, however, from my fundamental point, which is that there is a

¹³⁷ *Campbell* at 379.

¹³⁸ Leval (1990), 1111

¹³⁹ See *Authors Guild Inc. v. HathiTrust et al.*, 755 F3d 87 (2nd Cir 2014), 100.

qualitative element to the fair use analysis, and that the analysis privileges expressive diversity through antagonistic engagement with existing works.¹⁴⁰

1.4.4 Parody, satire, criticism and review are ‘transformative’

Parody, satire, criticism and review tend in the US to be considered transformative, fair uses of copyright works. Fair dealing jurisdictions do not use the US language of transformativeness in dealing with these activities. They are however categories of fair dealing and they are uses that transform the expression, meaning, or message of the original work.¹⁴¹ We can therefore include them under the umbrella of transformative uses for the purpose of identifying the cultural qualities that fairness exceptions privilege.

What do parody, satire, review, criticism and news reporting have in common? They all involve the user bestowing ‘such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.’¹⁴² I have borrowed a phrase, here, from *Glyn v Weston*, a UK case preceding the introduction of the fair dealing for parody. That phrase was used in *Glyn* in relation to the question of prima facie infringement, rather than the application of any fair dealing exception, but is still an apt way to describe the nature of transformative uses like parody, criticism and review.¹⁴³ These activities

¹⁴⁰ Drassinower describes this characteristic of fair use as privileging ‘dialogue’: Drassinower (2008), 992.

¹⁴¹ See e.g. Australian Act, s 41A and 103AA; and s 41 and 103A.

¹⁴² *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 268 per Younger J.

¹⁴³ But note *Schweppes v Wellingtons* [1984] FSR 210, at 212, where Falconer J insisted that the question of whether a work was prima facie infringing turned on whether the defendant took a substantial part, rather than on whether he employed labour to produce something original.

involve commentary upon existing works and matters of public interest, including culture and politics. They require creative engagement with, and response to, existing works, and the production of an expressively different work. They produce a kind of discussion or dialogue.

The criticism and review exception in particular is broad.¹⁴⁴ It is interesting that criticism or review need not be fair and balanced in order to qualify as a fair dealing.¹⁴⁵ Nor does criticism and review need to pertain only to the expression or style of the reviewed work in order to qualify as a fair dealing. The critic or reviewer may also engage with the doctrine or philosophy underlying the work.¹⁴⁶ Those principles suggest that the law values dialogue in the form of critical engagement for its own sake.

Giving special status to the use of works for criticism, review, parody and satire—by making such uses fair dealings—facilitates a discourse which includes multiple, sometimes antagonistic, perspectives. It generates an entitlement on the part of users to use works in a way that results in new contributions to discourse and culture. That is an entitlement that, in Canada at least, rivals the copyright owners' exclusive rights.¹⁴⁷ To sum up, transformative exceptions, as well as serving *diversity*, implicitly privilege what I would call *inclusiveness*: the openness of the cultural landscape to dissent, dialogue and participation in discourse and culture. As I will show in the next chapter, these qualitative objectives make a good

¹⁴⁴ This is especially so in Canada. See *CCH Canadian Ltd. v Law Society of Upper Canada* (2002) FCA 187, [48].

¹⁴⁵ *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation PLC* (1993) 28 IPR 459, 468.

¹⁴⁶ *Hubbard v Vosper* [1972] 2 QB 84, 94.

¹⁴⁷ *CCH*, [48].

scaffolding on which to build a qualitative normative framework, because the law already prioritises them.

Chapter 2

Formulating qualitative goals

2.1 Qualitative approaches to avoid

The conventional justification for exclusive rights—that copyright serves as a necessary incentive for the production and dissemination of works—is not well supported by evidence. Moreover, we can see, even from a brief analysis of fairness exceptions, that copyright manifests qualitative priorities. If copyright is supposed to serve the public benefit, we should formulate a conception of benefit that explains these priorities, at the very least in order to evaluate them.

To assert this does not, however, free us of the problem of cultural paternalism. How should we go about formulating a normative framework? Let me begin answering that question by excluding one, rather tempting, but ultimately unsuitable approach. Intuitively, it would seem simple enough to pursue some aesthetic goal, or standard of merit. We would do so simply by calibrating copyright protection in such a way as to reward works that evince that aesthetic or standard. Professors Parchomovsky and Stein, for example, induce from the fact that copyright protects ‘original’ expression a goal of promoting originality in works. They therefore advocate stronger protection for works that are more original, and weaker copyright protection for works that are less original. Following the same reasoning, they propose that the more original a work, the stronger should be its immunity from being found to infringe copyright.¹⁴⁸ The result, they say, will be to incentivise works that are more original.¹⁴⁹

¹⁴⁸ Parchomovsky and Stein (2009), 19

¹⁴⁹ Parchomovsky and Stein (2009), 16-17. For a similar approach, which would put in place a higher originality standard, requiring some measure of departure from norms of expression in order to attract protection, see Miller (2009). I am not convinced that we get very far by requiring, rather than merit, ‘a departure from that which is conventional, routine or pedestrian’ (at 477). There still seems to be too much room for paternalism in determinations about what constitutes a departure

This kind of qualitative approach is doomed from the start, because it rests on the assumption that copyright works reliably and consistently as an incentive. I have shown this assumption is not borne out empirically.¹⁵⁰ As I pointed out in the previous chapter, poetry is less profitable than prose, but technically speaking, poetry is very strongly protected because copyright protects exact verbal patterns (the stuff of poetry) more strongly than things like genre, facts, plot (the stuff of prose). In this regard, poetry is more ‘original’ in Parchomovsky and Stein’s sense, than prose, and it is also protected more strongly than prose, and yet, copyright does not seem to meaningfully incentivise this highly ‘original’ form of expression.

The reason for this is that not all recipients of copyright protection benefit from it equally—in a financial sense, that is. More important than the bare fact of copyright protection or its strength is the relationship between copyright and commerce. The market for poetry is very small—so the value of copyright in poetry is also very small. The marketplace, and not the strength of copyright protection, has the largest bearing on whether the copyright in a work has commercial value.¹⁵¹ In light of that it would seem rather futile to spend time and resources on carefully tailoring protection based on the originality of each work.

Even if copyright were proven to be an effective incentive, I would still object to Parchomovsky and Stein’s recommended approach. It is dangerously susceptible to paternalism. Parchomovksy and Stein are fairly sanguine about the prospect of

from norms of expression. My broader arguments (below) about the risks of aesthetic bias in making judgments about the *degree* of originality of a work, as well as the importance of day to day commercial practice, are therefore relevant to Miller’s position much in the same way as they are to Parchomovsky and Stein’s.

¹⁵⁰ See above part 1.3.

¹⁵¹ Goldstein (2003), 4.

judges making determinations as to the level of protection afforded to any given work based on their assessment of its originality. They argue that making a judgment as to originality is not like making a judgment about the merit of the work—the kind of judgment of which Justice Holmes was so wary in *Bleistein*.¹⁵²

Moreover, they claim, courts are familiar with making judgments as to the originality of works. They contend that infringement suits require the court to identify original elements in works and decide whether the defendant appropriated original expression. They also contend that, when courts consider transformativeness in fair use cases, they assess the level of originality and creativity of the infringing work. This, Parchomovsky and Stein say, means that setting the level of copyright protection based on an assessment of the degree of originality of a work will not present courts with a new challenge.¹⁵³

This reasoning misconstrues the nature of the originality inquiry in the test for copyright infringement. It also misrepresents the evaluation of transformativeness in fair use cases. US courts, when inquiring into the matter of copyright infringement, are emphatically *not* making any assessment as to the *degree* of a work's originality. Rather they are contemplating only threshold issues. The following definition of originality from *Feist Publication v Rural Telephone Service* is instructive:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.¹⁵⁴

¹⁵² Parchomovsky and Stein (2009), 18

¹⁵³ Parchomovsky and Stein (2009), 17ff.

¹⁵⁴ 499 U.S. 340 (1991), at 346.

The court asks whether the part reproduced is a part that is ‘original to the author’ in the sense of being ‘independently created by the author (as opposed to copied from other works)’.¹⁵⁵ It asks whether the work has the barest creative spark, ‘no matter how crude, humble or obvious’.¹⁵⁶ Whether the work is ‘original’ in the vernacular sense (novel), however, is irrelevant, as is the degree of originality, beyond the requisite minimal creative spark.

What about transformativeness? Uses of works are ‘transformative’, and therefore more likely to be fair uses, if they convey new meaning, message or expression.¹⁵⁷ Once again, ‘new’, in a fair use context, does not mean novel or innovative. The referent for ‘newness’ is not works in general—it is the work that is allegedly infringed. The newness comes about as a result of an alteration to the existing work for a further or different purpose, or to create something of a different character. What is important is the difference between the second work and the first; not whether the second work is novel or original according to some absolute standard.

Assessing whether a defendant’s work is different to another work, or whether a part taken by a defendant is a part that the copyright owner did not copy from elsewhere, is different to assessing the degree of originality of a work. The former assessments can be made mechanically. A judgment of actual novelty or originality in the vernacular sense, by contrast, leaves considerable room for subjectivity.

¹⁵⁵ *Feist Publication, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), 345.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Campbell*, at 579.

Even with the currently low standard of originality, it seems fairly clear that judges' personal biases and aesthetics creep into their determinations on whether copyright subsists in works, or whether certain reproductions amount to infringements. Professor Fred Yen showed how judicial approaches in the US to various issues in copyright law are readily categorised according to differing (even opposing) theories of aesthetics.¹⁵⁸ Analysing leading US cases such as *Burrow-Giles Lithographic Company v Sarony*, *Alfred Bell v Catalda Fine Arts* and *Bleistein v Donaldson Lithographing Co*, Yen showed that important decisions on copyright subsistence (among other issues) could be categorised according to three different aesthetic theories (formalism, intentionalism, and institutionalism).¹⁵⁹ Yen goes further than merely demonstrating a clear recourse to aesthetic concepts in decisions regarding subsistence of copyright in works. He mounts a cogent demonstration of how courts have (unwittingly) espoused different and opposing combinations of these aesthetic theories in dealing with questions about subsistence of copyright, copyright in useful articles, and substantial similarity of allegedly infringing works.

If apparently neutral and mechanical evaluations leave room for aesthetic bias, we could expect even more subjective and biased judgments under Parchomovsky and Stein's regime. Parchomovsky and Stein's test would give judges too much cultural sway. The scope for judges' subjectivity and taste to

¹⁵⁸ Yen (1997). See also Walker and Depoorter (2015) for a more recent iteration of essentially the same argument.

¹⁵⁹ Yen (1997), 252-260. *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239 (1903); *Burrow-Giles Lithographic Company v Sarony*, 111 US 53 (1884); *Alfred Bell v Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951).

intervene would be uncomfortably wide. That courts' decisions could be guided by expert witnesses is of little comfort, given that they would still hold ultimate power to determine the strength and scope of protection in relation to any given work.

Parchomovsky and Stein's approach, in other words, does little to dispel the aesthetic anxieties I described in the previous chapter.¹⁶⁰ We can do better.

2.2.1 A focus on parameters and processes

Instead of focussing on particular standards or aesthetics at the level of works, we can change our focus. Professor Julie Cohen, in a series of important pieces, has argued that we can gain useful insights about copyright by contemplating broader cultural and institutional conditions and parameters.¹⁶¹ Cohen casts light on problems of contingency and subjectivity in evaluating culture, and suggest a way of accommodating them. She argues that creativity is the province neither of individual creators nor social and cultural patterns that produce culture, but rather dynamic interactions between them.¹⁶² Cultural processes, including the process by which norms and values (and aesthetics) emerge are positive feedback loops.¹⁶³

The inputs into these feedback loops include the self-interested actions of powerful institutional actors, the everyday practices of individuals and communities, as well as ways of understanding and describing the world that have

¹⁶⁰ For an interesting analysis of the various problems attendant on trying to set a standard of aesthetic merit for copyright subsistence, and additional reasons not to pursue such an approach, see Lavik and van Gompel (2012).

¹⁶¹ Cohen (2006), Cohen (2007), Cohen (2012).

¹⁶² Cohen (2007), 1153.

¹⁶³ Cohen (2012), 149.

complex histories of their own.¹⁶⁴ So, it is possible to say both that particular outputs represent valuable additions to collective culture and that their value is determined by underlying knowledge systems that are historically and culturally situated.¹⁶⁵

What we can aim to regulate, then, is essentially the conditions of the feedback loop. We can aim to regulate the sphere in which systems of knowledge and power interact, and in which authors and their commercial intermediaries experience the material realities of everyday authorship and business.¹⁶⁶ We would begin by taking notice of the ways in which copyright influences the material conditions under which authors create, and commercial intermediaries (such as publishers, record labels and so on) invest in works.

Fortunately, scholars of copyright are increasingly interested in qualitative questions like: who creates, what, why, for whom, under what conditions, and what is valuable about creativity itself? Professors Chander and Sunder aptly describe this change in pre-occupations as a ‘cultural turn’ in copyright jurisprudence.¹⁶⁷

Advocacy for any set of conditions over any other still involves a subjective preference for the former conditions. That means there is scope for bias and paternalism. Even so, an approach to copyright regulation that assesses benefits and detriments at the level of cultural conditions and parameters is less vulnerable

¹⁶⁴ *Ibid*, 26

¹⁶⁵ Cohen (2007), 1153; Cohen (2006), 147.

¹⁶⁶ Cohen (2012), 16.

¹⁶⁷ Chander and Sunder (2013), 1398.

to cultural paternalism. Less vulnerable, that is, than an approach which requires individuals or state actors to make judgments about the aesthetic merits of particular works. When making qualitative judgments about cultural parameters, the intrusion of subjectivity and taste is far more attenuated than it is in the assessment of individual works—for example, assessments of their originality or novelty. Focussing on parameters, not standards, is therefore an effective strategy for mitigating the problems of cultural paternalism.

What other strategies might we adopt? We can begin by seeking consensus about high level values and preferences. It is hard to accuse the consensus-seeker, who merely adopts widely agreed values, of cultural dictatorship. I will argue in the next part that certain high level cultural goals are fairly uncontroversial in Western liberal democratic culture, and certainly in copyright scholarship concerned with copyright's qualitative effects.

Another strategy for mitigating cultural paternalism is to link our preferences, with regard to the kinds of conditions in culture that we want, to these high-level values. We can formulate intermediate objectives, based on the chosen high level values. In parts 2.3 and 2.4, I will sketch out ways in which we can arrive at the following conclusion. In order for individual autonomy and collective deliberation to flourish, it is necessary to bring about cultural conditions in which:

- expression is diverse, and representative of varied and antagonistic perspectives, styles and voices (*diversity*); and
- the distribution of power to influence, and participate in, culture is inclusive and just (*inclusiveness*).

As I will show, it is possible to arrive at these mid-level objectives pluralistically. We can start from various normative and methodological standpoints, including by analysing copyright law itself; by analysing the scholarship of the cultural turn; by making a comparative analysis of media law more generally; and by reasoning from first principles about what is required in order to promote individual autonomy and effective democratic deliberation.

2.2 High level values

Across Anglo-Saxon and European cultures—Western, liberal democracies—certain values pertaining to discourse and culture have risen to pre-eminence. The cultivation of democratic discourse is a key goal for laws that regulate speech. Likewise, the cultivation of individual autonomy, and the facilitation of individual self-realisation and flourishing is a fundamental Western value: at the heart of the Aristotelean notion of ‘the good life’. These values are implicated and affected by the regulation of creativity. As Craig puts it:

Tied up in this process of intellectual creation, exchange, and response are various human ideals ranging from personal development and self-fulfilment to constitutional rights and the democratic ideal.¹⁶⁸

It therefore makes sense for a culturally and qualitatively oriented theory of copyright are therefore to be attuned to these values.

A critical analysis of cultural turn scholarship confirms the centrality of these values to qualitative, culturally oriented thinking about copyright. Two strains of cultural turn thinking about copyright and culture evince a commitment to these

¹⁶⁸ Craig (2012), 6.

basic values of deliberative democracy and autonomy. I will call them the democratic paradigm and the human capabilities paradigm respectively. There is some overlap between the two. For example, Yochai Benkler engages both individual autonomy and deliberative democracy in theorising copyright and the creative sphere. For the sake of clarity, however, it is helpful to summarise each separately.

2.2.1 The democratic paradigm

The democratic paradigm focuses on the significance of the public domain for public discourse and deliberation. It is best exemplified in the work of Professor Neil Netanel who developed an impressive theory of copyright's relationship to democratic civil society over the course of a series of articles beginning in 1996, and culminating in a book on copyright and free expression (*Copyright's Paradox*) in 2008.¹⁶⁹ The essence of Netanel's theory is that copyright's primary goal is, or at least ought to be, the support of democratic culture and that, as a consequence, it should answer to the demands of free expression, and not merely to economic objectives.¹⁷⁰

The democratic paradigm is rooted in what John Dryzek describes as a 'deliberative turn' in political philosophy¹⁷¹. The deliberative turn, though it finds voice in the work of numerous scholars with varying perspectives, is united by the

¹⁶⁹ See e.g., Netanel (1996); Netanel (1998); Netanel (2000a), Netanel (2001); Netanel (2003), Netanel (2008).

¹⁷⁰ Netanel (1996), 288.

¹⁷¹ Dryzek (2002). For a good overview of the concerns of the deliberative turn, see Hindman (2008), 268.

common assertion that democracy is not merely about aggregating preferences or interests by counting votes.¹⁷² Effective democracy requires a robust civil society in which citizens participate in democracy by engaging in discussion with their fellow citizens.¹⁷³ The roots of this school of thought reach back to the work of John Stuart Mill, who claimed that the clash and interaction between competing viewpoints was essential to deliberative progress, the uncovering of truth, and the testing of ideas.¹⁷⁴ More recently, and in the context of copyright jurisprudence, Dr Anne Barron has argued that a Kantian approach to copyright mandates the same objective: copyright should cultivate discourse of a kind capable of informing good democratic decision-making.¹⁷⁵

Whatever its source, the fundamental principle is that democratic decision-making will not be optimal unless informed by robust, pluralistic, inclusive civil society and public discussion.¹⁷⁶ This idea is seminal in Western democratic culture, and relatively uncontroversial. That is not to say it is immune to criticisms. For example, emphasis on deliberation, rather than merely aggregating preferences, expressed through votes, favours those most gifted in communication, and most capable of propagating their views.¹⁷⁷ The less educated, less vocal, and less wealthy lose out. Even so, the democratic paradigm is widely accepted. More

¹⁷² Hindman (2008), 10.

¹⁷³ Netanel (1996), 342-344.

¹⁷⁴ Mill (1869), 59. See Meiklejohn (1948) and (1961), arguing that free expression and free circulation of ideas is necessary in order for democratic deliberation to be informed by the best possible arguments and perspectives. Habermas work on the public sphere—e.g. Habermas (1989).

¹⁷⁵ Barron (2012), 13-14. See also Kant 'On the common saying: That may be correct in theory, but it is of no use in practice' in Gregor (1996), 295-304; Kant, 'What is Enlightenment?', in Gregor (1996).

¹⁷⁶ Sunstein (2009a), 26ff.

¹⁷⁷ See e.g. Berkowitz (1996), 36; Hindman (2008a), 18.

importantly, where copyright theorists do engage with qualitative matters, democratic paradigm concerns—particularly concerns about the role of free expression in democratic discourse—are predominant.¹⁷⁸

It is certainly much easier to argue that copyright ought to facilitate robust democratic deliberation, than to argue the contrary. The commitment to democratic deliberation is already, in any case, implicit in certain aspects of the law, as I showed in the previous chapter. Consequently, the claim that copyright ought to support democratic, deliberative culture (what Netanel calls ‘democratic civil society’) serves well as a high order, qualitative, foundational value for copyright, relatively free from the taint of cultural paternalism.

2.2.2 The human capabilities paradigm

Let me turn now to the matter of individual autonomy. Cultural conditions matter, not only because they affect our capacity to act effectively as a collective, but also because they affect individuals’ capacity to flourish. Cohen puts it this way:

The legal, technical, and institutional conditions that shape flows of information to, from and about us are of the utmost importance not because they promote free speech or free choice in markets, but because they shape the sort of subjectivity we can attain, the kinds of innovation that we can produce, and the opportunities for creation of political and ethical meaning that we can claim to offer.¹⁷⁹

If we accept that individuals’ views and choices are significantly determined by culture and its artefacts, we should try to promote cultural conditions conducive to

¹⁷⁸ See e.g. Benkler (2006); Benkler (1999); Craig (2012), 19; Goldstein (1970); Netanel (1996); Drassinower (2011); Drassinower (2008); Drassinower (2015); Lessig (2004), Tushnet Hugenholtz and Guibault, ‘Introduction’ in Hugenholtz and Guibault (2006); Netanel (1996), 283; Barron (2012).

¹⁷⁹ Cohen (2007), 5.

individual flourishing. Robust civil society and individual flourishing go hand in hand, but there is more to individual fulfilment than politics.

This is a key insight of the ‘human capabilities’ paradigm, developed in the field of development economics. The human capabilities approach is built on the work of Amartya Sen and Martha Nussbaum, who conceived the public benefit, especially in developing countries, in terms of the capabilities of individuals.¹⁸⁰ In turn, Nussbaum’s thinking is enlivened by an Aristotelian notion of ‘the good life’. According to Nussbaum, the extent to which an individual lives the good life is determined by the individual’s opportunities to realise their capabilities as a human to the fullest. Human capabilities analysis turns on the question: ‘what are people able to do and be?’¹⁸¹

Individuals’ beliefs, goals and capabilities are shaped by their capacity to engage with the cultural products they encounter.¹⁸² Consequently, a human capabilities approach does not accept the encouragement of ‘more’ works as copyright’s primary objective. Nor does it prioritise a diverse and robust public discourse only for the sake of democracy. Instead it asks how copyright might be calibrated in such a way as to facilitate conditions in which works and culture are of a character and quality that contributes to individual flourishing and self-realisation.

Similar to the democratic paradigm, the human capabilities paradigm does not, on its face, have an appearance of cultural paternalism, because its

¹⁸⁰ See, e.g. Nussbaum (2011), 4. Nussbaum (2003); Sen (1999).

¹⁸¹ Nussbaum (2011), 4.

¹⁸² Cohen (2012), 2.

fundamental values are fairly abstract and fairly uncontroversial. Nussbaum's paradigm relies on what she describes as 'partial moral conceptions' (a Rawlsian phrase).¹⁸³ These are high level values introduced without any specific grounding in metaphysics, but which are nonetheless sufficiently uncontroversial to be accepted for the purposes of directing policy at a high level. They are capable of being justified by varying fundamental philosophies.

Perhaps equally as characteristic of partial moral conceptions (and similarly to the values of the democratic paradigm) commitments to autonomy—to the individual's opportunity to fully realise her potential—are easily and intuitively agreeable, and rather difficult to oppose. It is hardly surprising that the human capabilities paradigm (or something like it) is widely subscribed among copyright theorists who concern themselves with copyright's qualitative outcomes.¹⁸⁴

Moreover, as with the democratic paradigm, there are features of the law capable of being explained as instances of the law's commitment to individual self-development and self-realisation. The most obvious example of this are the exceptions and limitations on copyright for educational or scholarly uses of works.¹⁸⁵ *Copinger and Skone James on Copyright*, for example, asserts that education is 'one of the clearest examples of a strong public interest in limiting copyright protection'.¹⁸⁶ One can give various reasons for this. Education is necessary to develop the skill base to support a flourishing economy. It increases

¹⁸³ Nussbaum (2003), 42.

¹⁸⁴ See e.g. Arewa (2007); Benkler (1999); Benkler (2006); Chander and Sunder (2013); Chon (2006); Cohen (2006), Cohen (2007); Cohen (2012); Lange (2003); Rubinfeld (2002); Tushnet (2009); Wong (2008).

¹⁸⁵ See e.g. Canadian Act 29.4-31.5.

¹⁸⁶ *Copinger and Skone James on Copyright* (7th ed), [9-107].

the amount of knowledge in a society. It is also necessary for the development of the skills required of citizens in order to participate in democracy (democratic deliberation). But the most direct effect of education and scholarship is to enhance the capabilities of the individuals who are educated, or who engage in study and research. I do not mean, here, to suggest that educational exceptions may only be justified on the basis of a commitment to individual self-realisation and autonomy. Rather, as with democratic deliberation, individual self-realisation is a value that can be readily ascribed to copyright, without a sense of radical intervention or paternalism.

2.2.3 Democracy and autonomy

We want copyright's influence on the world of works to be good for democratic civil society and individual self-development. I will use the label *democracy* as a shorthand for the former, and *autonomy* as a shorthand for the latter. I use each label in a very broad sense. Autonomy, for my purposes, means positive liberty. Autonomy is not only agency or 'freedom from' interference, but also substantive capacity: a 'freedom to' enjoy human capabilities to their fullest.¹⁸⁷ I am in alignment with Nussbaum in advocating a positive liberty concept of autonomy-as-self-realisation, rather than a concept of autonomy merely as agency or negative freedom.¹⁸⁸ As for 'democracy'—I use it to describe, broadly, the conditions in which democratic civil society and deliberative discourse can flourish.

¹⁸⁷ Regarding this concept of 'positive liberty', see Berlin (1969).

¹⁸⁸ See also Barron (2012), 8, 16. Barron builds on a Kantian foundation and helpfully charts the distinction between autonomy-as-positive-liberty and mere agency.

Autonomy and democracy are closely related. In both the democratic and human capabilities paradigms, the realisation and optimisation of human capabilities is of prime importance: it is just that one paradigm emphasises collective optimisation and the other individual optimisation. In any case, I will use ‘democracy’ and ‘autonomy’ throughout the remainder of this thesis to describe the fundamental values of the democratic paradigm and the human capabilities paradigm. These are values which encapsulate the notion of ‘progress’ (in the American context) and public benefit (elsewhere). They serve as richer high level objectives for copyright than mere expression maximisation.

2.4 Mid-level objectives—an inductive approach

2.4.1 Working at the normative mid-level

It is hard to decide whether a set of legal rules and principles is conducive to autonomy and democracy without considering intermediate factors. We need a sense of what parameters and conditions, what institutional and individual constraints, patterns and interaction, promote individual self-realisation and flourishing democratic civil society.

We need, in other words, something like (though not identical to) what Professor Robert Merges calls ‘mid-level principles’.¹⁸⁹ Drawing on the work of ‘principlists’ such as Coleman and Bayles, Merges’ maintains that various different theoretical accounts of copyright intersect at the stratum of mid-level principles. That is to say, while copyright might be justified in various ways, the practical

¹⁸⁹ Merges (2011), 8.

principles and concerns that follow from these various justifications tend to intersect. According to him most theories of copyright are produce the same principles for resolving any given conflict between interests or rights under the law.¹⁹⁰ Most theories, Merges argues, require, that copyright at the operational level, be governed by principles of non-removal, proportionality, efficiency and dignity in the operation and development of the law.¹⁹¹ Such principles intermediate between higher order normative commitments (like incentive, or access to works, or ‘just reward’ for labour) and detailed legal rules.

Just as Merges found consistency in the mid-level principles that follow from high level justifications of copyright, I argue that we can posit stable mid-level cultural objectives for copyright. We can arrive at them pluralistically. We can analyse the literature of the cultural turn in search of consistent values. We can extend our critical analysis of copyright law’s implicit priorities (similar to the analysis in the previous chapter of exceptions and limitations). We can make a comparative analysis of media law. And we can work from first principles of autonomy and democracy. Each of these approaches converges on two key mid-level principles. These are, basically, that (i) expressive diversity; and (ii) an inclusive distribution of power to shape culture and discourse, are essential conditions for autonomy and democracy.

Let me then, briefly sketch out each approach. In this part, I will focus on critical analysis—of the law, of cultural turn literature and of literature on media law. In the next part, I will elaborate the first principles approach.

¹⁹⁰ *Ibid*, 144-145.

¹⁹¹ *Ibid*, 10.

2.4.2 Diversity and inclusiveness: analogies with media law

Copyright is one among an array of laws that regulates the use and dissemination of media (works). We can, as Professors Benkler and Netanel show in a series of important articles, derive insights about how it might serve the public benefit by analysing other media laws, such as media ownership law.¹⁹² In media law, the distribution (and especially the concentration) of power over the informational and communicative sphere is a central concern. Media law cultivates a plurality of voices contributing to the cultural, discursive and informational environment, and diversity of perspectives available to the public. A commitment to plurality of voices is a commitment to an inclusive array of participants in the public sphere, and an inclusive distribution of communicative power. Prioritising diversity of content also prioritises expressive diversity.

In the US, the regulation of media ownership is conceived in terms of the first amendment to the US Constitution, which enshrines the right to freedom of expression. A leading case on the constitutional implications of media ownership law is *Associated Press v United States*.¹⁹³ According to the US Supreme Court in that case, media ownership laws are intended to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’¹⁹⁴ The case stands for the principle that concentration of communicative power in the hands

¹⁹² Benkler (1999); Benkler (2003); Netanel (1996).

¹⁹³ *Associated Press v. United States*, 326 US 1 (1945)

¹⁹⁴ *Ibid*, 20.

of private actors impedes the free flow of ideas. This, in turn, constrains free expression, a condition of deliberative democracy. Here is the crucial passage:

Surely a command that the government itself shall not impede the free flow of ideas does not afford non- governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.¹⁹⁵

Following this reasoning, US regulatory and antitrust policy in relation to media have traditionally been directed at securing a ‘diversity of voices’ structurally, by a range of different means, including regulating media ownership and regulating broadcast content.¹⁹⁶ A commitment to diversity of voices is, essentially what I would call a commitment to inclusiveness: to a cultural sphere that *includes* a wide range of contributors; and in which power and wealth are not excessively concentrated.

A commitment to the quality which I describe under my mid-level objective of ‘diversity’ is nested within the concern about concentration of media ownership (and therefore of communicative power). The sources of information, according to *Associated Press*, should not only be themselves diverse, but they should be ‘antagonistic’. Securing dissemination from ‘diverse... sources’ connotes a widespread distribution of opportunity and power to publish works—again, what I would call *inclusiveness*. The requirement that such sources be antagonistic connotes diversity of opinion, perspective and expression (what I call *diversity*).

¹⁹⁵ *Ibid.*

¹⁹⁶ Horwitz (2005).

To some extent, in the US, concerns about diversity have superseded concerns about concentration of ownership (inclusiveness) as the primary policy issue in media ownership regulation. Over time, and especially since 2003, the FCC has gradually adopted a more relaxed approach to media concentration, permitting concentration to increase where it considers that diversity is not adversely affected.¹⁹⁷ A vast scholarly literature has grown up around the question of the effects of industry concentration on diversity.¹⁹⁸ I will not attempt to resolve the question of how concentration and diversity are related. Suffice it to observe that the distribution of communicative power and expressive diversity are key concerns for media ownership law.

The UK, Australia and Canada do not share precisely the same constitutional background as the US. However, the objectives of media ownership and content regulation are broadly similar. The idea that media regulation ought to promote the proper functioning of the democratic public sphere is commonplace, alongside the idea that media regulation ought to promote market efficiency.¹⁹⁹ The former paradigm requires diversity of voices (inclusiveness) and diversity of content (expressive diversity; the latter, responsiveness to audience demand (another kind of inclusiveness, as I will elaborate).

¹⁹⁷ See *FCC's Review of the Broadcast Ownership Rules* (2017).

¹⁹⁸ See e.g. Baker (2007) and Baker (2002), which argued that media concentration interferes with free speech; Dowd (2004), arguing that concentrated ownership of media will tend to suppress diversity where production of works is centralised and vertically integrated, but that concentration is less suppressive of diversity when production of works is decentralised and outsourced along Post-Fordian lines; Horwitz (2005), arguing that diversity cannot be secured by controlling ownership alone. For a helpful overview of the literature on the relationship between concentration and diversity, see also Netanel (2008), 39.

¹⁹⁹ See e.g. Just (2009), 99.

Either diversity or inclusiveness or both are central concerns. The UK's media regulator, OfCom, described the role of UK media ownership law as follows:

Parliament has put in place media ownership rules for television, radio and newspapers. In the interests of democracy, their aim is to help protect plurality of viewpoints and give citizens access to a variety of sources of news, information and opinion.²⁰⁰

Media ownership regulation aims to promote 'plurality of viewpoints'—which I would categorise under the label of *diversity*—and give citizens a variety of sources of media—which I would categorise under my label of *inclusiveness*. To put it in my terms, the variety of sources correlates to the inclusiveness with which communicative power is distributed—the fewer the sources, the less inclusive the distribution of communicative power. We see a similar commitment to diversity and inclusiveness in the BBC charter, which regulates BBC's content requirements.²⁰¹

Similar goals pervade Australian and Canadian media ownership policy and jurisprudence. In Australia, the *Broadcasting Services Act 1992* places restrictions on media control and concentration. The Australian media regulator, ACMA describes the purpose of the regulation as 'to encourage diversity in control of the more influential broadcasting services.'²⁰² Diversity in control of communicative influence is a key element of what I call *inclusiveness*.

Canadian broadcasting law is particularly dedicated to expressive diversity. For example, the Canadian Television Policy places various duties on broadcasters

²⁰⁰ OfCom (2009), 1.

²⁰¹ See e.g. *Royal Charter for the continuance of the British Broadcasting Corporation* (2016), art 6(4), and art (14).

²⁰² ACMA (2017).

to promote diversity in their programming, and to propagate images and narratives that allow Canadians of all backgrounds to recognise themselves in mainstream television.²⁰³ Diversity and inclusiveness are linked here: diverse narratives are intended to include Canadians of all background in a sense of belonging and self-recognition. I will not comment here on whether these laws have been on the whole successful. It is sufficient simply to point out that media law in all these jurisdictions, as in the US, manifests a broad commitment to diversity and inclusiveness.

Copyright is capable of affecting speech, its diversity, and the distribution of communicative power in much the same way as media ownership and content laws. It ought therefore to be subject to the same scrutiny, and evaluated by reference to the same set of concerns.²⁰⁴ Benkler puts it this way:

At a minimum, laws intended to regulate or affect information production and exchange must account for their effects on the distribution of power among constituents of the regulated information environment.²⁰⁵

If the commitment to what I call diversity and inclusiveness is so important in media law, then those mid-level objectives ought also to be primary qualitative concerns for copyright.

²⁰³ (Public Notice CRTC 1999-97). See also Canadian Radio-television and Telecommunications Commission, 'Offering cultural diversity on TV and radio', 14/6/2017, accessed 14/6/2017.

²⁰⁴ See Netanel (2008), 218.

²⁰⁵ Benkler (1999), 385.

2.4.3 Inducing intermediate objectives from copyright law

We need not rely only on the priorities of media law in formulating mid-level objectives for copyright. A commitment to diversity and inclusiveness is in fact already implicit in copyright law. In chapter 1, I showed that transformativeness exceptions (in the class of fair use and fair dealing exceptions) answer both to the objective of cultivating difference and diversity in the world of works, and to the goal of ensuring an inclusive discourse, characterised by robust dialogue.

It is not only specific exceptions that evince qualitative preferences. Professor Abraham Drassinower has argued that a critical reading of copyright law *taken as a whole* reveals that copyright law's fundamental normative priority is 'communicative autonomy'.²⁰⁶ The rules regarding copyright subsistence, infringement and exceptions, he says, all give primacy to the protection of both authors' and readers' rights to communicate with the public on their own terms.²⁰⁷ To protect authors and users' mutual rights of communicative autonomy is to promote an inclusive distribution of communicative rights, privileges and powers. A commitment to communicative autonomy may therefore, using my lexicon, be understood as a commitment to inclusiveness.

The foundation of Drassinower's approach to copyright is a short essay by Kant on the wrongfulness of unauthorised publishing of works.²⁰⁸ For Kant, unauthorised publishing is wrong because it abridges the author's innate right to

²⁰⁶ See e.g. Drassinower (2003), for the first iteration of an idea that culminated in his recent book—Drassinower (2015).

²⁰⁷ Drassinower (2008), 203ff.

²⁰⁸ Immanuel Kant, 'On the Wrongfulness of Unauthorized Publication of Books' in Gregor (1996).

choose the terms on which she speaks to the public: the author's communicative autonomy. No one may justly compel the author to speak. An unauthorised publication of the author's work amounts to an unfair violation of her autonomy. It is an interference with the author's innate right to choose whether to communicate to the public.²⁰⁹

The basis for exceptions to this rule is, with typical Kantian symmetry, the reciprocal right of other people to communicate with the public. Where a person abridges, adds to, or revises a book so much that it can no longer be passed off under the name of the author, then a publication of that transformed work would not, for Kant, be an unauthorised publication. That is because the second author is carrying on a different 'affair' than the first. The transformative author is making a new communication to the public that does not represent the first author as speaking and does not interfere with the first author's agency. At the same time, using the first author's work is essential to the second author's communicative autonomy.²¹⁰

Drassinower argues that we can identify, by analysing copyright law, a commitment (like Kant's) to protecting the communicative autonomy of both authors and users of works. He considers himself not to be making a purely normative argument, but instead to be drawing out integral principles from copyright's doctrinal features. He describes this hybrid of normative and

²⁰⁹ Ibid, 8:79.

²¹⁰ Ibid, 8:86.

descriptive theory as a ‘critical theory of copyright’, or a critique of copyright on its own terms.²¹¹

Drassinower induces the primacy of communicative autonomy in copyright law from judicial reasoning regarding copyright subsistence (‘originality’), infringement (the ideas expression dichotomy and non-consumptive use doctrines) and exceptions and limitations (fair dealing). He explains the subject matter and scope of both authors’ rights, and the public domain, as integrated applications of a principle of communicative autonomy.²¹² He asserts that aspects of copyright law that depart from this principle, which otherwise unifies the law, are unjustified or unjustifiable.²¹³

What is meant by ‘public domain’ here? The public domain has been defined in various ways, but Benkler has described it as the range of uses of works that does not require copyright owners’ permission, and scholars like Boyle have adopted this as a working definition.²¹⁴ Drassinower adopts a similar conception. This version of the public domain can include works in which copyright has expired, as well as elements or uses of works which are not under the exclusive control of the copyright owner.²¹⁵

With regard to the subject matter of exclusive rights, Drassinower contends that copyright protects *authorship as such*, rather than works, or any particular

²¹¹ Drassinower (2015), 16, 17.

²¹² See Drassinower (2003), 15. Regarding the ideas/expression dichotomy, see Drassinower (2004). Regarding fair dealing and use exceptions, see Drassinower (2004), 469-470; Drassinower (2005), 472 ;and Drassinower (2008).

²¹³ Drassinower (2012), 2.

²¹⁴ Benkler (1999), 362; Boyle (2003), 61.

²¹⁵ Boyle (2003), 61.

characteristic of works. Whereas in patent law, novelty or innovation are the criteria for protection, communicating an old idea in one's own words is sufficient to attract the subsistence of copyright in those words. What copyright therefore protects about a work of authorship, according to Drassinower, is the 'sheer fact of its having been spoken'.²¹⁶ The element of authorship that attracts copyright subsistence is the 'speaking'—the rendering of ideas into expression. The author need not say something new: she must merely speak in her own words, and copyright will subsist.²¹⁷

By dint of similar reasoning, Drassinower makes sense of another fundamental doctrine of copyright law, including the ideas/expression dichotomy. The reproduction of mere themes, ideas or even methods associated with a work will not amount to copyright infringement. 'Where the defendant expresses an idea in his own words, the plaintiff cannot complain of a violation of her copyright because her own claim to copyright is but an affirmation that persons have a right to their expression.'²¹⁸ To use in one's own work ideas drawn from another's is necessary to exercise one's own expressive capacities.²¹⁹ To claim copyright in an idea, the plaintiff would have to assert that she but not the defendant has rights to express and communicate an idea. Drassinower therefore argues that the rules about copyright's scope and the scope of copyright infringement (independent

²¹⁶ Drassinower (2008a), 1007.

²¹⁷ Drassinower (2015), 59.

²¹⁸ *Ibid*, 69-70.

²¹⁹ *Ibid*, 69.

creation and the idea/expression dichotomy) protect *the right of past and present speakers to speak equally*.²²⁰

Drassinower thus makes sense both of subsistence of copyright, and limitations to copyright (the public domain), as instances of a broader move to protect individuals' rights to participate in public discourse on their own terms. Key to Drassinower's reasoning is the following statement in the Canadian Supreme Court case of *CCH v Law Society of Upper Canada* about the nature of exceptions to copyright.²²¹ CCH clarifies that fair dealing exceptions are not merely loopholes for getting around exclusive rights, but are rather equally central in the law. Chief Justice McLachlin said:

[T]he fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence...The fair dealing exception, like other exceptions in the Copyright Act, is a user's right.²²²

If fair dealing exceptions are users' rights, as integral to copyright law as owners' exclusive rights, then there is a certain elegance in treating the right and its limitation as iterations of the same principle.

The domains of the author and of the public, rather than being separate, opposed or dis-integrated, are, in Drassinower's account, integrated, consistent iterations of a single principle of mutual respect for authorship as communicative autonomy.²²³ If copyright protects the right to speak, it must necessarily protect the right to respond to preceding speakers, because speech by its nature is directed

²²⁰ Ibid.

²²¹ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339

²²² *Ibid*, at [48].

²²³ See e.g. Drassinower (2005), 468.

at an interlocutor and invokes a response.²²⁴ Limitations and exceptions thus appear as a condition of equality between authors. The public domain becomes a domain of fair interaction between existing and future authors; a domain for dialogue.

I think it is fair to describe Drassinower's objective of promoting equality of entitlement to communicative autonomy as an *inclusiveness* objective. Likewise, the idea that the law protects dialogue. Dialogue is by its nature, inclusive. It turns on including more than one participant in conversation. Drassinower's theory, in short, supports the idea that inclusiveness (a fair distribution of rights to participate in and shape culture and discourse) is an essential qualitative priority for copyright law.

2.4 Mid-level objectives—a first principles approach

2.4.1 Diversity from first principles

We have looked at two paths to the mid-level objectives of diversity and inclusiveness. These have both involved critical analysis of the law: first media law; then copyright law. It is also possible to arrive at the same intermediate objectives from first principles. Let us begin with diversity.

To realise her autonomy to the fullest, the individual needs to be able to conceive of the range of possible paths she might pursue, and the range of ways in

²²⁴ Drassinower (2015), 65.

which she and the world around her might develop. The choices she can make are constrained by the range of perspectives available to her.²²⁵ For an individual to author her own life in a fulfilling way, she needs to be presented with reasonably diverse choices; otherwise her self-authorship will be circumscribed by the mere lack of options that might suit her.²²⁶ Exposure to a diverse range of expression gives individuals the chance to perceive a broader range of possibilities that might apply to their own lives and choices, and also offers more points of comparison against which to measure their own choices.²²⁷ The circulation of diverse perspectives, works and ideas permits deliberation and imagination to be informed by due reflection on multiple perspectives, interests and opinions.

The very existence of expressive diversity also enriches and animates individuals' faculties implicitly. Individuals must decide what they like and do not; how to think and act, and in the very act of choosing between diverse options, they develop their own mental and moral faculties.²²⁸ Diversity means more choice, and more choice means more opportunity for individuality.

The deliberating collective is in broadly the same position. The more open its decisions to multiple perspectives and possibilities, the better formulated and richer they are capable of being.²²⁹ Members of a democracy will not do well if they

²²⁵ Benkler (1999), 382; Arewa (2007), 518; Boyle (2002), 25;

²²⁶ Benkler (2006), 150-151; Horwitz (2005), 5.

²²⁷ Netanel (2008), 38; Benkler (2006), 19, 22off.

²²⁸ Mill (2011), 81. See also Fisher (2004), 28.

²²⁹ Horwitz (2005), 5.

are unable to appreciate the views of their fellow citizens.²³⁰ Rawls explains the importance of including diverse participants in deliberative discussion as follows:

In everyday life, the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from the standpoint of others and the limits of our vision are brought home to us... The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.²³¹

The more diverse the perspectives given voice in discourse, the more democratic and robust will be the process of deliberation.²³²

On a subtly different note, constituents in a democracy need access to information and opinions that challenge the status quo.²³³ Exposure to a diverse range of ideas, especially ideas that differ from accepted wisdom, equips the polity with opportunities to pursue improvements in society, and to avoid stagnation or the entrenchment of inequality.

Diversity in discourse also guards against extremism, radicalism and violence. Where participants in discourse are exposed only to fairly homogeneous views, they are liable to gravitate toward ever more extreme versions of their initial opinions. Exposure to challenging (rather than affirming) viewpoints during deliberation, checks this tendency.²³⁴

²³⁰ Sunstein (2009a), xi.

²³¹ Rawls, *A Theory of Justice* 358-59 (1971).

²³² Fisher (2004), 28-31.

²³³ Benkler (1999), 379.

²³⁴ Sunstein (2002), 23, 28; Sunstein (2009); Sunstein (2009a), xi, 5, 6, 73; Sunstein (2011).

2.4.2 Inclusiveness from first principles

Like diversity, inclusiveness is essential for democracy. The inclusion of the public in culture and discourse is an inherently democratic virtue. For a democracy to function optimally, the public sphere must be capable of capturing the observations and opinions of the populus.²³⁵ The inclusiveness of culture and discourse, their openness to participation, is what makes it so capable. For individuals to flourish, they must be able to develop and test their opinions in the public sphere.²³⁶

Indeed, what I call inclusiveness closely resembles what others describe as ‘semiotic democracy’.²³⁷ Semiotic democracy obtains when individuals have the opportunity to participate in the cultural process of making meaning, and imbuing existing cultural artefacts with new meaning. Cultural materials, including works, become cultural morphemes: units of meaning. Cultural images have the power to shape selves and societies.²³⁸ The ability to use these morphemes affects individuals’ capacities to interpret and participate in culture and ultimately to exert an influence on it.²³⁹

Inclusiveness therefore also serves the high-level value of autonomy, because individuals experience the world through culture. In order to benefit from discourse and culture to the fullest, and flourish in the world, individuals need a point of access to this power. They need to be able speak back to the culture that

²³⁵ Benkler (2006), 182.

²³⁶ Barron (2012), 18-22. Horwitz (2005), 5.

²³⁷ See Fisher (2004), 28.

²³⁸ *Ibid*; Chander and Sunder (2012), 1407; Cohen (2012), 54.

²³⁹ Tushnet (2004), 545; Tushnet (2009), 539.

shapes them and their society; to play a part in shaping it.²⁴⁰ The more open to influence are cultural artefacts, the more robust can be the discourse surrounding them.²⁴¹ This creates a positive feedback loop for individual and collective flourishing.

Having more voice in culture also guards against both alienation and passivity. This is good for both self-realisation (autonomy) and collective self-governance (deliberative democracy). Passivity is inimical to autonomy and self-realisation. It is also insidious. Passivity in relation to culture and the arts, argues the neo-Marxist theorist, Lucien Goldman, too readily translates into passivity with regard to power structures in general.²⁴²

In short, participants in civil society and politics need exposure to the broadest and richest possible range of perspectives in order to form their views in a way that is truly free; and they need the opportunity to test their own opinions in the public form in order properly vet them. Both diversity and inclusiveness are fundamental to those processes.

2.4.3 Concluding comments on formulating qualitative goals

Let us sum up. We can mitigate the risks of cultural paternalism by adopting relatively uncontroversial high level values, and by setting our goals at the level of cultural conditions and parameters, rather than specific standards or aesthetics for

²⁴⁰ *Ibid*; Fisher III (1997), 1217; Coombe (1998), 84ff.

²⁴¹ Dworkin (1985), 153-57.

²⁴² Goldman (1976), 40, 48.

works. Autonomy and democracy serve well as high level values, because they are foundational to the liberal democratic outlook.

These values call for certain conditions in culture and discourse.

Inclusiveness in the distribution of communicative power and opportunity, along with expressive diversity are essential in order for individuals to realise their capabilities, and for discursive publics to deliberate effectively. We can therefore adopt inclusiveness and diversity as mid-level objectives in our quest to optimise cultural conditions for the flourishing of democracy and autonomy. Fortunately, inclusiveness and diversity are also recognisable as central values of media laws like media ownership and content regulation; and, if we follow Drassinower, as central to copyright law as well.

Chapter 3

Digital orthodoxy

3.1 Re-framing the copyright balance

3.1.1 Taking stock

I have staked out a normative framework: a set of values and mid-level objectives. Now it is time to begin evaluating copyright against that framework. This chapter is a literature review, setting out the state of scholarship concerned with copyright as an instrument of cultural policy. In particular, I want to capture the pervasive sense of scepticism among theorists of copyright concerned with its relationship to the quality and character of culture. I will highlight some important shortcomings and weaknesses of existing justifications for exclusive rights, and also give a sense of the persuasive force of copyright minimalism.

This will set up the following chapters, where I will consider whether the weakness of copyright justifications might be shored up somewhat; whether copyright's qualitative merits might be further and better elaborated; and how we might temper copyright minimalists' enthusiasm about non-copyright, internet-based alternatives for sustaining and organising the production and dissemination of works.

3.1.2 Literature review schema

Based on the current state of copyright discourse, it is difficult to justify exclusive rights in their current form, with their current scope, strength and duration. Some might say, indeed, that copyright in any form is hard to justify.²⁴³ That radical

²⁴³ See e.g. Frosio (2017).

minimalist position is understandable, if it is based on an overall impression of prevailing arguments about the relative merits of exclusive rights versus access to works.

As I will show in more detail in part 3.2, the arguments in favour of expanding rights to access and use works, and decreasing the capacity of copyright to constrain that access, are many, and they are powerful. Both conventional incentive-access theory and more recent cultural turn scholarship cogently lay out the role of access to works in maintaining and maximising the production and dissemination of works.

At the same time, arguments about copyright's suppression of these freedoms abound. They are often accompanied by optimism about non-proprietary, non-copyright structures for organising the production of works. By contrast, prevailing arguments in favour of copyright are fewer, less widely subscribed, more qualified, and therefore less compelling. The strongest and most common justification for exclusive rights—the 'knockout punch'—has hitherto been the incentive narrative. But in chapter 1, I illustrated the empirical weakness of that contention.

Consequently, the incentive narrative, on its own terms, seems to demand a dramatic weakening of exclusive rights in copyright. The essential proviso of the incentive-access paradigm is that copyright's restrictions on the use of works must be *no stronger than necessary* to incentivise the production of works, because restrictions on access exert a chilling effect on the use and re-use of works.²⁴⁴

²⁴⁴ See above, part 1.2.

Where it is not clear that there is any necessity for such restrictions, it is hard to justify their existence at all.

Part 3.3 is a review of three justifications for copyright that might serve as alternatives to the incentive narrative. It draws on Netanel's writings on copyright and democracy. I look firstly at a severely curtailed incentive argument, about what Netanel calls copyright's 'production function': supporting the production of 'sustained works of authorship'.²⁴⁵ Then, I turn to two 'structural' arguments. These are arguments about copyright's attenuated, but positive, influences upon the organisation of the production of works, and on cultural conditions more generally.

These arguments have real, qualitative substance. They articulate copyright's merits qualitatively, in terms of freedom of expression and democratic deliberation; objectives which, incidentally, are also capable of being articulated under the umbrella of my high-level values (autonomy and democracy); and my mid-level objectives (inclusiveness and diversity).

Even so, these justifications for copyright attribute to exclusive copyrights only qualified, contingent virtues. The source of copyright's virtues and its vices are the same. Netanel (among others) recognises that the very facilitation of market structures supposed to underlie copyright's structural benefits also produces problematic hierarchies of power and influence.²⁴⁶ These market hierarchies conspire to:

- concentrate communicative power; and

²⁴⁵ Netanel (2008), 81; Netanel (1996), 288; Ginsburg (1995), 1499.

²⁴⁶ Netanel (2000a), 1880.

- reward blandness in works.

These two points are at the heart of the two predominant qualitative critiques of copyright, which I will call the ‘concentration’ critique, and the ‘blandness’ critique. We can think of the former as a critique concerned with inclusiveness, and the latter as one concerned with diversity—though they are not articulated in precisely these terms.

Copyright’s virtues appear particularly wan in comparison with the perceived virtues of networked production and dissemination of works, sustained by means other than copyright. There is a great deal of optimism about the potential of the ‘networked information economies’ to sustain a flourishing world of works without copyright. I devote a brief section—part 3.4—to reviewing some of these optimistic views. They give the impression that non-proprietary alternatives to copyright are inherently more inclusive in their distribution of communicative power, and inherently better calibrated for diversity than copyright-based ones.

Consequently, it is hard to avoid a particular kind of framing of the copyright balance. On an impressionistic view of the literature, the need to stem the negative effects of market hierarchy, as well as copyright’s direct suppressive effects on free speech and the production of works, seems far more urgent than the need to preserve or promote copyright’s attenuated and problematic benefits. This framing has repercussions for the way in which practical recommendations for copyright policy play out. I will address a few such recommendations in the final part of this chapter, part 3.5.

3.2 Virtues of access

Over the past 20 years, scholarly emphasis on reducing the strength, scope and duration of copyright has gained momentum. It has been prompted by a steady expansion of copyright's strength and scope. Scholars have described copyright's expansion alternately as an 'enclosure' or 'propertisation' of the 'public domain' and have, in response, galvanised around discourses of 'anti-enclosure' or 'freedom in the commons'. Benkler, Lange, Lessig, Boyle, Netanel, Cohen, Beebe and others have cogently explained the importance of preserving from enclosure by proprietary copyright, a range of uses of works that does not require the authorisation of copyright owners.²⁴⁷ Let me sketch here, some popular arguments to this effect.

3.2.1 An incentive-access style argument

Some of the arguments in favour of expanding rights to access and use copyright works are framed in terms of expression maximisation. Essentially, scholars have built on the basic incentive-access insight that authors need to use at least some elements of old works as the raw materials for their new creations.²⁴⁸ The problem with excessive copyright protection, from the perspective of the cultural turn, is not merely that it increases the costs of inputs for creative works. It is that

²⁴⁷ Regarding enclosure and anti-enclosure, see e.g. Boyle (2000), 2009; Boyle (2003), 37. Re 'propertisation', see Barnheizer (2006); Litman (1990), 971. Re 'freedom in the commons' see Benkler (2003).

²⁴⁸ See above, text to n (62).

excessive constraints on the use of existing material are inimical to the creative process itself.²⁴⁹

The figure of the romantic author, creating out of nothing, is part of the rhetorical framework used to justify copyright, but cultural turn scholars have been at pains to show that this view of creativity is a myth.²⁵⁰ Authorship more closely resembles ‘a combination of absorption, astigmatism, and amnesia’ where the creator iterates an assimilated milieu.²⁵¹ According to this theory, ‘play’ is the defining characteristic of the creative process; and the defining benefit derived from works—both their creation and use.²⁵² Creativity needs unstructured space for play, serendipity and cross fertilisation.²⁵³

Cultural turn scholars re-conceive creative appropriation, borrowing, intertextuality, reworking, tinkering, derivation, and engagement with existing material, as central, rather than peripheral to creativity and the benefit that works offer to society.²⁵⁴ Overemphasis on narratives of incentive through constraint (exclusive rights), or on the transactability of copyrights, is liable to obscure, so the argument goes, the true nature of, and inherent value in, creativity.²⁵⁵ Professor Barton Beebe describes this inherent value as follows:

Pragmatist aesthetics asserts that the overriding value of the aesthetic is found not in objects but in practice, in human action and interaction. It is found not in inert “art products,” which “exist externally and physically . . .

²⁴⁹ Lessig (2004), 51; Elkin Koren (2005), 399.

²⁵⁰ Litman (1990), 969

²⁵¹ Litman (1990), 1010-1011

²⁵² Cohen (2007), 1192; Beebe (2017), 245ff.

²⁵³ Kurtz (2007), 1244.

²⁵⁴ Beebe (2017), 245ff; Arewa (2007), 525, 481, 505; Cohen (2006), 143, 146; Lessig (2004), 14; Coombe (1998); Elkin-Koren (2005) 378, Craig (2012), 33-35.

²⁵⁵ Beebe (2017); Tushnet (2009), 539; Loren (2008), 24. See also Elkin-Koren (2005), 399.

apart from human experience,” but in the dynamic experience of perceiving and creating aesthetic phenomena.²⁵⁶

The idea behind this ‘pragmatist aesthetics’ is that society benefits not from encouraging more (commodified) works, but from allowing everyone to enjoy the experience of creative play. Access to works, and more specifically rights to use elements of them, is on this view, fundamental to creative progress, while copyright incentives are at best peripheral.

3.2.2 The role of the public domain within democratic and human capabilities paradigms

Cultural turn scholars do not of course, rely only on expression maximisation arguments in favour of greater access rights. They argue that stronger rights to use works enhance culture qualitatively. Part of what is so unsatisfying about conventional incentive-access justifications of copyright is the infrequency with which its proponents explain precisely why maximising creative production is a good thing. I criticised the ‘marketplace of ideas’ argument in chapter 1, on the ground that it lacks mechanical detail.²⁵⁷ It does not make clear how the production of the largest possible number of works, filtered through the ‘marketplace of ideas’, leads to qualitative gains: for example, increases in diversity or inclusiveness. Indeed, as I will show in the next part, one of the key critiques of strong exclusive rights is that they only promote the production of a narrow and homogeneous range of works by an exclusive group of authors and intermediaries.

²⁵⁶ Beebe (2017), 245. Citations omitted.

²⁵⁷ See above, text following n (46).

Cultural turn arguments, by contrast, engage rigorously with the question of how access to works and a 'robust public domain' produce conditions which are good for culture and politics. These goods can be articulated in terms of my high-level objectives of autonomy and democracy, and mid-level objectives of inclusiveness and diversity, though different scholars use different terminology, and also differ in which among these values and objectives they prioritise.

One widely subscribed argument posits that access to works is a condition of access to knowledge, and therefore the opportunity to flourish.²⁵⁸ This is an *autonomy* or human capabilities argument. Access to knowledge, so the argument goes, depends on the free flow and distribution of works. The complementary conditions of free expression and access to knowledge, where they prevail, permit individuals to engage constructively with their culture and political discourse. This in turn facilitates self-determination and self-expression.

Access to knowledge (an inclusive distribution of opportunities to engage with culture) enhances individuals' capacity to feel, imagine and reason in a 'truly human' way.²⁵⁹ These are the conditions in which individuals and the democratic collective are most free to make informed choices, and to enjoy the experience of self-formation fully.²⁶⁰ Where copyright raises the costs of access to works, so the argument goes, it stands in opposition to free expression, access to knowledge, and their related benefits.²⁶¹

²⁵⁸ On copyright an access to information, see Wong (2008), 792ff; Arewa (2007), 487-491.

²⁵⁹ See Nussbaum (2003), 37-39.

²⁶⁰ Benkler (1999), 382 ff.; Fisher (1997), 1216-217. See also Wong (2008), 793.

²⁶¹ See Frosio (2017), 17ff for a review of access to knowledge arguments against copyright.

A subtler argument in favour of a robust public domain addresses the conditions in which cultural norms and values are negotiated and adopted. Among the key values that the public domain serves is the capacity of individuals and society as a whole to develop their values and aesthetics through a reflexive process of iteration, negotiation, and engagement.²⁶² Individuals, the collective, and the culture in which they engage all need to be capable of producing values against which to perpetually test their success. This is a justification of the public domain based on principles of semiotic democracy or inclusiveness.

The fundamental condition for the flourishing of an emergent cultural process is, according to Julie Cohen, space to ‘play’.²⁶³ Free play is, by Cohen’s lights, the essential feature of creative practice.²⁶⁴ Espousing freedom to play is a powerful manoeuvre for any qualitative theory of copyright, because it keeps that theory open to the dynamic ‘feedback loops’ of which culture is composed.

A commitment to play does not require anything of works themselves; only the conditions under which they are produced. So, for example, Professor Margaret Chon is able to formulate a concept of progress that answers to post-modern understandings of meaning and subjectivity. Rather than insisting progress be linear towards some specific endpoint, she conceives of it in terms of access to knowledge and the flourishing of different and changing points of view. Progress is served, for Chon, where there is space for plural perspectives to flourish.²⁶⁵

²⁶² Litman (1990), 967; Cohen (2006), 124.

²⁶³ Cohen (2012), 54: ‘Play is both the keystone of individual moral and intellectual development and a mode of world making, the pathway by which transformative innovation and synthetic understanding emerge.’

²⁶⁴ Cohen (2012), 54ff.

²⁶⁵ See Chon (1993-1994), 125ff.

Given the problems of cultural paternalism described in the preceding chapter, emphasising ‘play’ and ‘space’ is a canny move. Favouring a permissive over a prescriptive outlook gives proponents of the cultural turn room to manoeuvre. It allows them to acknowledge the reflexivity and contingency of culture, while at the same time providing a basis from which to make policy recommendations. If culture has only itself to draw on for notions of value, then the freedom for reflexivity is essential for culture to flourish. A robust public domain thus emerges as an essential condition of having a dynamic, self-evaluating culture.

A robust public domain is also important because individuals realise their autonomy in part through their opportunities to engage in a hands-on way with culture.²⁶⁶ New technologies of reproduction and sharing have expanded the opportunities for individuals to grow and learn through play: tinkering with existing works, and exercising their own creative imagination.²⁶⁷ If we assume that the most important priority is to cultivate individual capabilities, it seems to follow that being included in the world of creativity is a higher priority than the facilitation of commercial production of works, because it is actual participation that helps individuals to realise their imaginative and creative capabilities.²⁶⁸ This argument is, in essence, a slightly esoteric iteration of the first principles justification for inclusiveness, which I gave in the previous chapter. It presents a

²⁶⁶ Cohen (2012), 57.

²⁶⁷ Lessig (2004), 78

²⁶⁸ Tushnet (2009), 537; Cohen (2012), 57; Beebe (2017), 346, 390.

robust public domain as a necessary, perhaps even sufficient, condition for inclusiveness.

Rubinfeld and Lange, in separate articles, have both argued that users' interest in being able freely to use and recycle works, rises to the level of a *right* to freedom of imagination.²⁶⁹ Dr Breakey writes in slightly different terms, but with the same thrust.²⁷⁰ He contends that intellectual property rights like copyright must accommodate a competing right of intellectual liberty. These intellectual and imaginative freedom arguments are broadly consistent with the fundamentals of the human capabilities paradigm. The free exercise of creative imagination is an important capability.²⁷¹ Exercise of this capability is an important ingredient in individual flourishing.²⁷² It is also essential for the development of other capabilities, and a condition for being able to aspire to that development. The experience of being creative and participating in the creative world is a fundamental human pleasure. And that experience is, in the view of scholars like Rubinfeld and Lange, compromised if users cannot freely use copyright works without having to ask permission.²⁷³

At the same time, collective deliberation and culture as a whole is enriched by the inscription of new meanings on cultural artefacts. That inscription only happens when individuals can freely exercise their imaginations and expressive

²⁶⁹ See Rubinfeld (2002), 4-5; Lange (2012), 97.

²⁷⁰ Breakey (2012). See e.g. p133-134.

²⁷¹ Arewa (2007), 518

²⁷² Nussbaum (2003), 4; see also Rubinfeld (2002), 48.

²⁷³ Rubinfeld (2002), 38ff; Lange (2003), 476ff.

faculties.²⁷⁴ This is what I would call a *diversity* argument. There must be sufficient ‘space’, free of constraint over the access to and use of cultural materials, for the proliferation of diverse perspectives to thrive. Both the opportunity to express diverse and dissenting views, including through the use of existing works, and the free circulation and availability of such views, are essential to the deliberative and self-determinative process. Constraints upon free use of works are therefore seen as harmful to the extent they restrict individual opportunities to participate in culture and robust discourse.²⁷⁵

3.2.3 A rhetorical reversal

The public domain is conceived as the space in which diversity and inclusiveness are to be realised, and copyright as the obstacle to this realisation. Some minimalists have propagated an imagery of the public domain as an environment or resource to be protected, a commons to which ordinary ‘users’ of creative material have use rights or entitlements.²⁷⁶ Boyle, for example, describes the public domain as the ‘place we quarry the building blocks of our culture.’²⁷⁷ The metaphorical language of space and place, here, is intentional.

Rose argued that such rhetoric is necessary, much in the same way as it was necessary for environmental activists to propagate an imagery of the ‘the

²⁷⁴ Cohen (2012), 57; Beebe (2017), 245ff.

²⁷⁵ See generally Benkler (1999), 358; Birnhack (2006), 66-72; Lessig (2004), 22, 71; Tushnet (2004), 539; Wong (2008), 785-786; Samuelson (2006), 22.

²⁷⁶ See Boyle (2003), 71-73; see also Rose (2003), 87; Lessig (2004), 11.

²⁷⁷ Boyle (2003), 62.

environment' as a kind of ideal to be protected.²⁷⁸ Boyle sums up the import of such a manoeuvre:

We should exploit the power of a concept like the public domain both to clarify and reshape perceptions of self-interest. The idea that there is a public domain—a "commons of the mind"—can help a coalition to be built around a reframed conception of common interest. In the narrowest sense, that common interest might be the realization, spurred by greater attention to intellectual interrelationships, that the freest possible circulation of ideas and facts, is important to anyone whose wellbeing depends on intellectual innovation and productivity—that is to say, every citizen of the world.²⁷⁹

This appeal to nature is intuitively compelling, and it turns the conventional approach to calibrating copyright on its head.

Under the conventional framing of copyright, exclusive rights are the primary force behind copyright's benefits to the public, and any deviation from them requires justification. If we take the imagery of the public domain seriously, the opposite seems true. Benkler put it this way: 'If there is no public domain, freedom to speak is only a negative liberty, conditional on some intellectual ownership.'²⁸⁰ From this perspective, it is derogation from free access and use of works that requires special justification, not derogation from the exclusive proprietary control of copyright owners.²⁸¹ An open public domain is the norm, and property rights are an 'enclosure' of a space which should be common.²⁸² The public domain is aligned with freedom of expression, with the democratising of creativity, and copyright is re-conceived not as the engine of free expression, but as a constraint upon it. On

²⁷⁸ Rose (2003), 87.

²⁷⁹ Boyle (2002), 25.

²⁸⁰ Benkler (1999),

²⁸¹ Benkler (1999), 355ff.

²⁸² For examples of the rhetoric of enclosure, see Boyle (2002); Boyle (2003), Elkin-Koren (2005), 375; Lange (2003), 466; Littrell (2001), 216.

this view, it is not exceptions to copyright that are exceptional, and require exception justification, but copyright itself.²⁸³

Taken together, these arguments and this rhetoric, mean that any vindication of exclusive rights is already faced with an uphill battle. The next section looks at the problems with prevailing qualitative justifications for copyright.

3.3 Vices of exclusive rights

A conventional response to the rhetoric of ‘enclosure of the public domain’ might be to argue that in fact copyright incentives increase the size of the public domain, and therefore benefit everybody for whom the public domain is a resource.²⁸⁴ That is the ‘engine of free expression’ argument, encapsulated in the judgment of the US Supreme Court in *Eldred v Ashcroft*.²⁸⁵ As I showed in chapter 1, however, the evidence for that argument is not conclusive enough that courts or scholars can rely exclusively on it to justify strong copyright. Rather than treating copyright as the engine for incentivising the dissemination of knowledge, copyright minimalists increasingly see it as an obstacle.

Indeed, it is over-reliance on this incentive narrative that ironically makes copyright so vulnerable to minimalist critique. Recall the quote from Hunter and Lastowka, with which I began this thesis: ‘The destruction of copyright industries would be a terrible thing if, and only if, they represented the sole means that

²⁸³ Benkler (1999), 357.

²⁸⁴ See Birnhack (2006).

²⁸⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), 558 quoted in *Eldred v Ashcroft*, 537 U.S. 186 (2003), 7.

creative content could be generated.²⁸⁶ If copyright is only justifiable as an incentive, and it turns out that works are readily produced without copyright, then it is hard to continue to justify copyright.

Of course, there are other arguments on which proponents of strong copyright can fall back. But they do not have the rhetorical force of Trollope's epigram, "Take away from English authors their copyrights, and you would very soon take away from England her authors."²⁸⁷ These narratives are interesting and thought provoking, but they are less widely subscribed, and less compelling, on their face, than the rhetoric of the public domain. Let me trace out a few such justifications, along with some key objections and qualifications to them.

3.3.1 The production function

The first qualified justification for strong copyright turns on what Netanel describes as copyright's 'production function'.²⁸⁸ This is essentially a pared back version of the incentive argument. Rather than arguing that copyright is a *sine qua non* for the production of a socially beneficial number of works, Netanel expands on an argument by Professor Jane Ginsburg that copyright supports the production of 'sustained works of authorship'.²⁸⁹ Netanel's position is this: while copyright is not the only way of recouping investment in works, and many works would be produced in its absence, non-copyright alternatives are insufficient to sustain

²⁸⁶ Hunter and Lastowka (2004), 1018.

²⁸⁷ Trollope (2009), 68.

²⁸⁸ Netanel (2008), 81; Netanel (1996), 288

²⁸⁹ *Ibid.* Regarding 'sustained works', see Ginsburg (1995), 1499.

certain aspects of culture, such as independent, high quality news media.²⁹⁰

Copyright is a 'necessary, though not a sufficient, condition' for the production of such works, which are, in turn, an essential part of democratic discourse.²⁹¹

Ultimately, this is a qualitative justification for copyright: that copyright contributes to conditions conducive to certain qualitative traits in certain kinds of works. According to Netanel, a valid justification for copyright must demonstrate two things:

- (1) the copyright incentive generates the creation and dissemination of original expression over and above the rich array of speech that would be available even without copyright and (2) this additional, copyright-incentivized expression has independent First Amendment value.²⁹²

Translating this into the language of my mid-level incentives, a valid justification for copyright would have to show that copyright generates conditions in which there is more diversity and inclusiveness than would pertain without copyright.

Having asserted this, however, Netanel gives only a few examples of the ways in which copyright-based production produces works 'over and above' the array of speech that would be available without copyright. His main focus is commercial news media. He offers only the barest justification for copyright's role in influencing artistic expression.²⁹³

The work of other scholars might supplement Netanel's argument about copyright's production function, but only up to a point. For example, Lemley acknowledges that the extent to which copyright is necessary in relation to any

²⁹⁰ Netanel (2008), 87-88. Netanel (2001-2002), 29.

²⁹¹ Netanel (1996), 288, 347ff

²⁹² Netanel (2001-2002), 29.

²⁹³ But see Netanel (2008), 33, where he briefly notes that artistic expression is important in helping individuals and collectives to understand the world and make political decisions.

particular kind of work depends on ‘the economics of creativity in that industry.’²⁹⁴

Absent copyright protection, he says, movies would still be produced, but big budget blockbuster movies that require the investment of hundreds of millions of dollars would be unlikely to be produced.²⁹⁵

Merges goes further, arguing that there is a qualitative difference between derivative (amateur) works, such as remixes and fan-fiction, and more original, canonical, commercially produced works from which the former are derived. He claims that, while all works involve a degree of creative appropriation, originality drawing on ideas is to be privileged over originality drawing on fixed and final expressions.²⁹⁶ Merges concedes that originality is a socially constructed term, but insists that our society has so construed it to reflect what we value.²⁹⁷

These are intriguing arguments but they are rather tenuous. Netanel’s groundwork is vulnerable to the extent that it can be shown that there are alternative ways to sustain independent journalism and political commentary; or that the quality of media produced under different arrangements is superior; or that, qualitatively speaking, the benefits of reducing the power of independent copyright-funded media voices would outweigh the detriments. The next part of this chapter deals with claims of precisely this kind.

As for Lemley’s point, it begs the question: what precisely about blockbuster films is worth preserving, other than the mere fact of their difference from other

²⁹⁴ Lemley (2009), 5.

²⁹⁵ Ibid.

²⁹⁶ Merges (2011), 245-246.

²⁹⁷ Ibid.

works? Or to put it in terms of our mid-level objectives: does the benefit for diversity associated with that difference outweigh the potential diversity benefits of alternative arrangements? If the complete destruction of the blockbuster film industry led in some way to an increase in participatory culture, with tens or hundreds of new kinds of works coming into being, would that not be a net gain for diversity and inclusiveness?

Likewise, the virtues of the kind of ‘originality’ that Merges espouses are contingent, and asserted rather than demonstrated. Merges offers few reasons why original works are better than ‘remixes’. He simply asserts that our culture values a less derivative form of originality more highly. But this assertion runs up against our mid-level objective of inclusiveness. The large majority of works nowadays are produced by amateurs, and I have just reviewed at length the human capabilities and deliberative benefits of participation in culture. Why, then, should our normative and legal framework treat professional creativity as central, and amateur remix culture as marginal? What is missing from the ‘production function’ argument is a firmer sense of precisely what is good about copyright-funded creative production. I will attempt to fill this gap in the coming chapters.

3.3.2 The structural function—the ‘neoclassicist’ economics argument

The alternative to the ‘production function’ justification for copyright are justifications based on what Netanel calls copyright’s ‘structural function’: its indirect influence on the organisation of production of works, and the cultural

environment more generally.²⁹⁸ The most well recognised of copyright's indirect influences is its facilitation of markets for works, and rights to copy and use them. Structural theories of copyright focus on this market-making feature of copyright—considering its influences on culture at various degrees of attenuation.

The 'neoclassicist' approach to copyright, which draws on neoclassical and new institutional economic theories of private property, is one kind of structural justification.²⁹⁹ For neoclassicists, the objective of copyright is not merely to generate incentives to create works, but rather to generate market structures that *allocate resources efficiently*. An allocation which is 'efficient', in this paradigm, puts resources to their most socially beneficial uses.³⁰⁰

The neoclassicist view of copyright posits that property rights are essential for the efficient use of resources, and that the rights in works (to publish or copy them, for example) are just another class of resources to be allocated by markets.³⁰¹ According to Professor Demsetz, property rights facilitate the internalisation of harmful and beneficial effects of the use of a resource on the actor who makes decisions about its use—namely the owner of the property right.³⁰² These effects are internalised when benefit to the owner of the resource coincides with benefit to society; and when the owner suffers loss if the resource is used in detrimental

²⁹⁸ Netanel (2008), 81; Netanel (1996), 288.

²⁹⁹ Netanel (1996), 284. Netanel attributes this approach to scholars such as Paul Goldstein, Richard Epstein, and Frank Easterbrook.

³⁰⁰ For a seminal example of a neoclassicist approach, see Goldstein (2003); see also Gordon (1982). For a thoughtful review of neoclassicist literature, see Barron (2010), 14.

³⁰¹ Netanel (1996), 322.

³⁰² Demsetz (1967); Frischmann (2007).

ways. Internalising such ‘externalities’ aligns individuals’ interests with the public interest.³⁰³

I should clarify what I mean by ‘market’. Many processes of resource allocation that respond to some form of demand and reward might be described as markets. One could describe the dynamics by which patrons of the arts are matched with their protégés, for example, as a kind of market. When I talk about markets for works in this thesis, I am talking about the markets that copyright makes: consumer market for works, where consumers pay for a right to a copy of a work, or in some cases a licence to access or view a digital work; and also supply-side markets for the rights necessary to reproduce, publish, commercialise and distribute works.

The process by which such markets form goes something like this. Proprietary copyright allows the copyright owner of a work to exclude others from the use of the work, and therefore gives the owner a point of leverage to extract a price. This price mechanism puts in place a system of voluntary transactions. Those positioned to make a valuable use of a work must persuade the copyright owner to sell them the right to make that use. The right may be valuable to the transferee, because that transferee can extract more value from the resource than the transferor, by commercialising it in some way. It may also be because these transferees’ personal desire for the resource is such that they are willing to pay more for it than the transferor is willing to forgo to keep it. In sum, a copyright market is formed by a series of transactions, in which rights to access or use works

³⁰³ Epstein (2002), 515-16.

are transferred voluntarily to the persons to whom they are more valuable than the previous owner (provided the purchaser's willingness and ability to pay for the resource reflects the value he places on it).³⁰⁴

Professor Gordon gives a more concrete example of how market-based value maximisation operates, and one more specific to copyright. She imagines a group of film producers competing to purchase the right to make a film adaptation of a best-selling novel. The purchase price that each producer can offer depends on how much money she expects to make from the film, which depends on the extent to which audiences will want to see or own a copy of the film. The producer best able to satisfy audiences tastes (as measured by audiences' aggregate willingness to pay) will be able to pay the most for the rights. If this amount exceeds the amount the owner of the rights expects to make from them, the rational owner will sell to that highest-bidding producer.³⁰⁵

From a structural point of view, markets work as information systems that elicit particular data and facilitate the allocation of resources on the basis of that data.³⁰⁶ The data pertain to consumers' willingness to pay for resources and entitlements in relation to resources. Copyright, on this view, serves the public benefit by bringing about conditions in which economically rational management of expressive resources can take place.³⁰⁷ Profit maximising copyright owners,

³⁰⁴ Of course, willingness to pay is a constructed proxy for value and it does not take into account many matters: including the fact that a person may in fact value a resource very highly, but simply not have the money to pay the amount at which she values it. I consider the strengths and weaknesses of relying on willingness to pay as an evaluative standard in more detail in the coming chapters.

³⁰⁵ Gordon (1982), 1607.

³⁰⁶ See Benkler (2006), 142; Frischmann (2007), 21.

³⁰⁷ Barron (2010), 14.

furnished with extensive property rights, will sell the rights to develop and use works to those best able to satisfy public tastes.³⁰⁸ The idea is that consumer preferences can be relied upon to direct investment in the production and, perhaps more importantly, the management of works; and that the market's price mechanism facilitates the signalling of such preferences.³⁰⁹

On this view, without property rights, the price mechanism will not reliably come into play, and rights to works will fail to be transferred to their highest value uses.³¹⁰ Taken at face value, this calls for extremely extensive property rights, to permit the internalisation of all social benefits or instances of value derived from the use of works.³¹¹ Exceptions and limitations on copyright, in this paradigm, are justified only in clear cases of market failure: when markets fail to facilitate transactions of rights and works to their highest value uses, or copyright stands in the way of such transactions.³¹²

But how do we identify market failures or externalities? How do we decide whether market allocations align with our broader concepts of social benefit? It is hard to do so without recourse to a value system that is different from, and outside of, the price mechanism.³¹³ The essence of an externality is that its value or cost is realised outside of the system of market transactions.³¹⁴ The essence of market

³⁰⁸ Netanel (1996), 309.

³⁰⁹ See Barron (2010), 14.

³¹⁰ See, e.g., Frischmann (2005), 21.

³¹¹ Barron (2010), 14; Netanel (1996); Lemley (2004); Frischmann (2007).

³¹² Gordon (1982), 1614ff.

³¹³ See Barron (2008), 26.

³¹⁴ See Baker (1997) for an influential disquisition on various kinds of externalities which media markets fail to internalise.

failure is that a use of resources designated to be socially valuable—that a would-be transferee ought reasonably to value more than the current owner—is prevented from taking place because price systems do not properly reflect that social value.

Neoclassicism cannot by itself tell us how to identify or judge this disconnect. Frischmann lists a few socially valuable uses of works that are not captured by markets such as education, democratic discourse, and political participation, but does not offer any rationale as to how to weigh them against market outcomes.³¹⁵ In her article on market failure, Gordon relies on the incremental development of ideas of social value in fair use jurisprudence, in order to identify socially valuable activities—such as parody—that markets fail to facilitate.³¹⁶ Essentially, she relies on judges (and policy makers) knowing a market failure when they see one, rather than offering a principled theory of what makes a use ‘socially valuable’.³¹⁷

There is much to be said for an incremental, common-law style development of norms and values—and I have used this approach myself as one of the plural ways of justifying inclusiveness and diversity as mid-level objectives. At some point, though, conceptual clarity is to be desired. The theorist and policy maker stand outside the common law process. They need additional theoretical foundations for making value judgments, and the neoclassicist approach does not provide them with those foundations.

³¹⁵ Frischmann (2007), 22.

³¹⁶ See e.g. Gordon (1982), 1637ff for an analysis of the social value of parody.

³¹⁷ Note, however, that Gordon offers more principled, non-economic justifications of copyright exceptions elsewhere. E.g. in Gordon (1992), she argues that Lockean property theory requires that copyright owners recognise users’ needs to access and use works for future creativity. But these arguments are not articulated in terms of market failure.

3.3.3 The structural function—democratic civil society

Netanel's own structural justification for copyright is superior to the pure neo-classicist justification for copyright precisely because it offers a firmer foundation for making value judgments about market allocations. The foundation is based in the democratic paradigm. In an important series of articles beginning in the mid 90s, Netanel examined copyright's relationship to democratic civil society.³¹⁸ He argued that copyright markets may be evaluated by reference to their effects on democratic civil society. Where copyright markets enhance democracy, we may say that important externalities are internalised; where they undermine democracy, we can say they produce problematic externalities.

The value of copyright markets, for Netanel, is in sustaining an independent creative sector; independent, that is, of patrons and state subsidy. From an historical perspective, the advent of copyright contributed to the emergence of a print-mediated, public discourse.³¹⁹ Authors no longer had to rely on meeting the tastes of a small elite, and the market rewarded those who wrote for a broader audience.³²⁰ The fear of alienating a single powerful patron was of less concern, and this allowed greater scope for risk-taking.³²¹ Authors and publishers could be

³¹⁸ See e.g. Netanel (1996), Netanel (1998), Netanel (2000a); Netanel (2008).

³¹⁹ Netanel (1996), 354. Goldstein argued that 'copyright developed in the eighteenth century as a market alternative to royal sources of centralized influence': Goldstein (1994), 232.

³²⁰ *Ibid*, 356.

³²¹ Netanel (1996), 339.

more self-reliant.³²² Consequently, public discourse and democratic civil society could be more robust.

Further, the bare fact that the array of parameters for creative activity produced by copyright differs from the parameters that apply to creativity sustained by other means is a source of expressive diversity. Professor Yochai Benkler puts it this way:

Freedom inheres in diversity of constraint, not in the optimality of the balance of freedom and constraint represented by any single institutional arrangement. It is the diversity of constraint that allows individuals to plan to live out different portions and aspects of their lives in different institutional contexts, taking advantage of the different degrees of freedom and security they make possible.³²³

Diversity in the array of parameters under which creativity can take place serves autonomy, because it permits individuals choices at the organisational level; not merely at the level of the work.

It is not merely copyright's contribution to the diversity of potential organisational arrangements that serves democracy and autonomy. In facilitating markets, copyright also creates certain power structures: what Netanel calls 'market hierarchies'.³²⁴ These market hierarchies have their drawbacks, which I will consider shortly below, but let me first consider their advantages. Various market forces, including economies of scale, tend to lead to a concentration of power and resources in commercial publishers with a mass audience.³²⁵ This concentration

³²² Netanel (1996), 336

³²³ Benkler (2006), 145-146.

³²⁴ Netanel (2001), 29-31.

³²⁵ See parts 6.2 and 6.3 below for more on the mechanics of supply side concentration.

serves, in Netanel's view, as a kind of balance against the power of other important entities, including the state and wealthy corporations.

Firstly, the concentration of power in commercial media allows them to provide a forum for 'mediated deliberation'. Like the 'public domain', this is another kind of rhetorical space, in which individuals can obtain information and opinion from a class of experts and entertainers.³²⁶ The space, insofar as it is independent of government subsidy, can be an 'autonomous sphere of print-mediated citizen deliberation and public education.'³²⁷

Secondly, concentration and centralisation of audience attention, while not ideal from the perspective of inclusiveness, facilitates a measure of collaboration in discourse. Left to their own devices, individuals often gravitate, in their information environment, toward like-minded groups. When people only engage with like-minded others, they tend to amplify their pre-existing views, in a way that reduces the internal diversity of the group.³²⁸ This kind of polarisation homogenises expression not only within the group, but across groups, as a plurality of positions is reduced to balkanised poles.

The mediated forum provided by commercial mass media has the potential to unify public attention. Sunstein claims that the mass-mediated space operates as an 'architecture of serendipity'.³²⁹ Within this architecture are opportunities for constructive, discursive exchange. The commercial media can perform an agenda

³²⁶ Netanel (1998), 265-7

³²⁷ Netanel (2008), 92.

³²⁸ Sunstein (2009), 2ff.

³²⁹ Sunstein (2009a), 100; Sunstein (2009), 79ff.

setting function, whereby people with opposing viewpoints can at least agree the parameters of what they are talking about, and engage with each other on the issues of the day (as decided by the media).³³⁰ This kind of agenda setting helps meaningful deliberation, even subject, as it naturally is, to the biases of commercial publishers and media organisations.³³¹

Thirdly, and as a consequence of the two features described above, the institution of the commercial mass media becomes powerful in its own right, able to catalyse and embody public opinion in the face of powerful state and private actors.³³² The existence of a truly free and fearless press requires some degree of market hierarchy, in which there are not just individuals participating on their own account, but also 'bubbles of varied wealth and power'.³³³ Hierarchical and concentrated mass media are, on this account, worryingly powerful, but nonetheless a necessary evil because they represent a power base capable of challenging other nodes of concentrated power, like the state, and multinational corporations.

For all these reasons, Netanel argues that a copyright law which provides funds to copyright owners that exceed what is minimally necessary to 'incentivise' the production of works, is compatible with the democratic paradigm. Insofar as it supports an independent and empowered commercial media it can sustain a degree of openness and diversity in culture and discourse.³³⁴ Netanel focuses his

³³⁰ *Ibid.* See also Netanel (2000a), 1920-1921.

³³¹ *Ibid.*

³³² Netanel (2000a), 1920

³³³ Netanel (2000a), 1919-1920.

³³⁴ See Netanel (1998), 271; and Netanel (1996), 339-340.

arguments mostly on news media, but the same arguments might be made with respect to art. Indeed, he observes the capacity of art to influence culture and politics, albeit more indirectly than discursive works.³³⁵ The argument boils down to this: even if many works could be produced without copyright, it is still beneficial for democracy to fund some works with copyright.

3.3.4 Critiques of copyright's structural effects

The creative and cultural sphere is a domain of public communication, discourse, and meaning-making. The allocation of resources and entitlements in that sphere therefore allocate power to shape discourse, culture and meaning. In the creative sphere, to have money and rights to use and distribute works is to have cultural power. A person with money to spend on communicating in the public sphere has an advantage in both being able to shape that communication rigorously (more resources to commit to the work itself); and disseminate it (more resources to commit to distribution and marketing).³³⁶ Market processes thus play a role in determining not only what is spoken (what works warrant investment), but also who speaks (who can afford to speak), and for whom (who can afford to consume and re-use).

Copyright allocates resources and power in the cultural sphere, and shapes markets for works. Its facilitation of markets and market hierarchies is therefore a subject of ambivalence. Those very commercial forces that Netanel sees as

³³⁵ Netanel (2008), 33.

³³⁶ With regard to publishers' investment in marketing, and the enormity of marketing expenditures in determining the success of works, see Nadel (2004), 797.

potential sources of benefit for democratic deliberation are also capable of producing serious detriments.³³⁷ Essentially the problem is commerciality itself. The more expansive copyright protection becomes, the more it favours large commercial enterprises over independent minded contributors to culture; and profit maximisation over a disinterested promotion of democracy and autonomy. Netanel, Benkler and Lessig are the leading exponents of critiques of strong proprietary copyright along these lines. The critiques fall, broadly, under two main themes:

- concentration of communicative power, which is bad for inclusiveness;
- the predominance of commercial motivation and risk aversion, which is bad for diversity.

Let me elaborate on each critique.

3.3.4.1 The concentration critique

The concentration critique blames over-reaching copyright for a concentration of resources and power in the communicative, cultural sphere. According to this critique, copyright either causes this concentration or worsen its effects.

Copyright, so the argument goes, fosters large scale, mass market, commercial production by a small number of powerful corporations, at the expense of individuals.³³⁸ Copyright markets are thought to crystallise asymmetries of power over resources.³³⁹

³³⁷ This is part of what Netanel describes as 'copyright's paradox' in his book of the same name. See Netanel (2008).

³³⁸ Benkler, 358, 365-366, 370-374; Benkler (2003), 1265; Netanel (2008), 110; Lessig (2004), 10.

³³⁹ Benkler (2006), 143-144.

There are established patterns of copyright ownership, whereby copyright, especially in popular works, tends to be controlled by large media conglomerates, rather than individual authors.³⁴⁰ This is taken to indicate that copyright law enforces a cultural and industrial policy that privileges and empowers entrenched, powerful commercial entities at the expense of minorities, dissidents, and other disadvantaged or disenfranchised groups.³⁴¹ Much is made of the fact that the financial rewards of copyright primarily accrue to commercial intermediaries like publishers and distributors, rather than authors themselves.³⁴²

Cultural turn scholars sometimes frame the issue of concentration in terms of freedom of expression. Lessig complains of copyright establishing a 'permission culture'.³⁴³ There is a skew in control over the components of culture. Users and would-be creators find themselves in a position where they require the permission of large media conglomerates to express themselves. The result is, he argues, that cultural power is concentrated in a 'cultural nobility'.³⁴⁴

However the issue is framed, the problem boils down to one of inclusiveness: whether cultural power is distributed fairly. According to the concentration critique, the concentration of resources and cultural power has negative impacts on various levels. As between authors and publishers, publishers hold all the bargaining power.³⁴⁵ Insofar as authors rely on the resources of commercial

³⁴⁰ Loren (2008), 14-16.

³⁴¹ See, e.g., Computer and Communications Industry Association (2016), 6.

³⁴² See e.g. Ginsburg (2002), 61-62 on the subject of 'how copyright got a bad name.'

³⁴³ Lessig (2004), 82.

³⁴⁴ Lessig (2004), 10.

³⁴⁵ See Towse (2006), 576; Watt (2010), 34ff.

intermediaries to realise their creative ambitions, and to achieve a wide distribution, they are subject to publishers' influence. Their communicative autonomy is thus compromised.³⁴⁶

As for the relationship between copyright owners and users (who are also potential future authors), copyright owners' control over existing expression deepens the impact of this market based hierarchy.³⁴⁷ Wealthy commercial media businesses are at an advantage in obtaining and enforcing rights. Copyright industry incumbents can afford to enforce their copyrights through legal action; and can afford to pay licence fees when they need to use others' copyrights. Moreover, highly integrated media conglomerates will already have a large body of material over which they own copyright: and which they can therefore re-use without having to pay licence fees. The more extensive their commercial infrastructure (of marketing and market intelligence, for example), the greater their advantage in exploiting digital technology to engage in price discrimination and strategic product bundling.³⁴⁸

The same may not be said for newer entrants to the market, for whom search and transaction costs of licensing (not to mention the actual licence fees) may be prohibitive.³⁴⁹ Copyright causes these costs, and in this respect may be said to discourage diverse and robust engagements with existing material.

³⁴⁶ Barron (2012), 31.

³⁴⁷ Netanel (1996), 353-56; Netanel (2008), 144-147.

³⁴⁸ Elkin-Koren (2005), 384; Benkler (1999), 401-408, Netanel (2001-2002), 28. Netanel (2000a), 1912; Netanel (2001-2002), 28.

³⁴⁹ Benkler (1999), 410. See Elkin-Koren (2005), at 384, where she observes that this distributive effect hinders individuals engaging in creative activity.

Worse, the cost of enforcing copyright is likely to be beyond the means of small-time authors and publishers.³⁵⁰ The asymmetry in enforcement power only compounds the advantage of larger, more established copyright businesses. Big commercial intermediaries are well positioned to ensure they make money from their copyright; independent authors are not. The upshot is that inclusiveness and diversity are likely to suffer, since one specific group (large scale media producers, ownership of which is highly concentrated) enjoys a substantial advantage over the rest of the potentially communicating public.³⁵¹

Overall, concentration of cultural power is bad for autonomy and democracy. Where power to participate in culture is too concentrated, civic and personal deliberation—autonomy and self-realisation in general—are stunted as a result. There will be insufficient perspectives, and insufficient opportunities available to individuals to participate in discourse and culture.

As for direct suppression of speech, powerful and wealthy organisations find themselves in a position where they can use (or attempt to use) copyright enforcement as a way of directly censoring their competitors and opponents. Large players in the content industry, Lessig argues, may use the law to suppress the development of new forms of creativity.³⁵²

There is a number of cases in which powerful corporations have attempted to silence critical or subversive voices through copyright infringement claims. Most well known among these are the *Air Pirates* case and a series of copyright suits by

³⁵⁰ Netanel (2008), 119ff

³⁵¹ Netanel (2001-2002), 28.

³⁵² Lessig (2004), 10.

the Church of Scientology. In the former, the Disney corporation successfully claimed that a comic strip in which famous Disney characters were depicted engaging in sexual and other ‘deviant’ acts, infringed Disney’s copyright.³⁵³ The Church of Scientology used copyright law to sue various individuals, and even internet service providers (with varying degrees of success) in relation to the inclusion of Scientology materials and documents in various critical books, articles and websites.³⁵⁴

3.3.4.2 The blandness critique

The second theme of ‘structural’ critiques of copyright—the ‘blandness critique’ relates to the quality of the cultural landscape. The essence of the blandness critique is that copyright, by sustaining a market-based, proprietary model of organising the production of works, fosters production by commercial producers with commercial—rather than creative or aesthetic—objectives.³⁵⁵ Towse puts it this way:

[T]he copyright system relies heavily upon the market to make works available, thus leaving the choice of which works and which artists to promote in the hands of the commercial enterprises in the cultural industries. These industries are dominated by oligopolistic international corporations that are run in share-holders’ interests, not those of the cultural policy of any given country.³⁵⁶

³⁵³ *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (1978).

³⁵⁴ See *New Era Publ'ns Int'l. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989); *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q.2d (BNA) 1569 (E.D. Va. 1996); *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1366–67 (E.D. Va. 1995); *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 923 F. Supp. 1231, 1231, 1246, 1248 (N.D. Cal. 1995).

³⁵⁵ See, e.g. Benkler (1999), 358, 365–366, 370–374; see also Netanel (2008), 162.

³⁵⁶ Towse (2006), 570.

The commercial incentives supported by copyright are aligned with mass market production and distribution, and that produces certain aesthetic biases.

There is a sense, in copyright scholarship, that these commercial biases are opposed to diversity. At best, the market cannot be relied on as the sole mechanism for determining what works are culturally, socially or politically valuable.³⁵⁷ At worst, this sentiment manifests as a rhetoric in which ‘commercial’ is a byword for (mass produced, homogeneous) trash, that lulls the public into passivity. This ‘mass culture critique’ strongly pervades mid-20th century aesthetics.³⁵⁸ It is powerfully exemplified in the work of Adorno and Horkheimer. Here is a sample of their withering view of mass culture: “Movies and radio need no longer pretend to be art. The truth that they are just business is made into an ideology to justify the rubbish they deliberately produce.”³⁵⁹ Following Adorno and Horkheimer, Benkler expresses concern about the politically and culturally anaesthetising effect of the products mass culture.³⁶⁰

Commercial entities reliant on copyright seek to market their works to the largest possible audience.³⁶¹ To appeal to such an audience, there is a pressure for publishers to invest in ‘lowest common denominator’ fare. Baker called this the ‘Baywatch effect’, whereby investment is directed disproportionately toward works

³⁵⁷ Cohen (2000), 9.

³⁵⁸ For a helpful gloss of the mass culture critique, see Gans (1974), Chapter 1.

³⁵⁹ Adorno and Horkheimer (2009), 71. For other seminal examples of this ‘mass culture’ critique, see Jacobs (1961).

³⁶⁰ Benkler (2003), 1265.

³⁶¹ Netanel (2008), 137.

that are homogeneous, uncontroversial, and bland as possible, and therefore liable to be palatable to the largest possible audience.³⁶² The effect is to reduce diversity.

There is also a concern that large media organisations are liable to promote works which support the status-quo power structures under which they have flourished, rather than to promote a more robust discourse in which dissenting view points, and competing power structures, receive due scope and attention.³⁶³ Money invested disproportionately into mass market fare, is directed away from more diverse content, or content that might appeal to minority taste cultures. Minorities, by their nature, constitute a smaller market than the mass market, so there is less of an incentive to meet their tastes.³⁶⁴ Market structures underwritten by copyright will tend to devalue minority tastes, as well as the scholarly, the avant-garde, and the challenging, in favour of 'standardised, mass produced infotainment'.³⁶⁵

Ultimately the blandness critique boils down to the claim that the quality and diversity of works suffers under the structures of production fostered by copyright, because novel, challenging or unconventional works do not sell well to a mass market. Commercial incentives cause publishers (who hold the cultural power, under the auspices of copyright) to invest excessively in bland, homogeneous content. Rather than producing responsiveness to consumer demand, it appears that copyright underwrites a market that is selective in its

³⁶² Benkler (1999), 411; Benkler (2003), 1265; Netanel (2000a), 1922.

³⁶³ Benkler (1999), 379-380.

³⁶⁴ Tushnet (2007), 115. See generally Baker (1998).

³⁶⁵ Cohen (2000), 9.

responsiveness. This characteristic of commercial markets is a serious obstacle to the neoclassicist argument in favour of strong copyright. If only a certain kind of demand directs copyright business' behaviour, it is no longer tenable to claim that copyright markets can be relied on to promote diversity.

3.3.5 Qualified virtue

There is an ambivalence to the 'production' and 'structural' justifications of copyright. The very market structures supposed to be beneficial for democratic civil society are also liable to centralise communicative power (which is undemocratic), and suppress diversity (which is bad for deliberation). Scholars defend and criticise copyright in the same breath. Take, for example, this comment from Netanel in an article which is actually intended as a defence of market hierarchies:

In performing its watchdog and discourse-enabling functions, the commercial media skews as well as narrows public debate... Media's skewing also grows out of market dictate, both real and perceived.³⁶⁶

In the literature that adopts a qualitative, cultural orientation toward theorising copyright, a vindication of access rights and the public domain characterised by great conviction and passion stands alongside a narrative about copyright's merits that is, at best, ambivalent. The contrast is striking and has, by itself, a kind of rhetorical force.

³⁶⁶ Netanel (2000), 1922.

3.4 Optimism about alternatives

3.4.1 Participation (inclusiveness) and diversity

It is commonplace to assert that digital technology and the internet can sustain the production of a great many works without copyright. The selection, production, dissemination and promotion of works is far cheaper than it has ever been in the past.³⁶⁷ The costs of production and distribution are now so low as to make it possible for everyone to create and publish works.³⁶⁸ Much that could previously only be achieved by professional authors, backed by commercial publishers, can now be achieved by amateurs.³⁶⁹

A favoured example of the successes of non-proprietary, ‘peer production’, is that of the networked production of open-source software and wikis.³⁷⁰ Works that are modular and highly granular are well adapted for collaborative, networked production. Modularity is the characteristic of being divisible into separate parts, which can be worked on independently by separate creators. Granularity has to do with the size of the parts: the more granular, the less time and effort required to complete a module. If modules are granular enough, the opportunity and resource costs of working on a given module will be low.

That means that many contributors can collaborate, each contributing a small effort, to put together large and complex works. Boyle observes that open-

³⁶⁷ Hunter and Lastowka (2004), 989; Ku (2003); Lemley and Weiser (2007); Nadel (2004), 820; Benkler (2006), 105. See Productivity Commission (2016), 109; Ku (2002), 37.

³⁶⁸ Ku (2002), 31; See generally Hunter and Lastowka (2004), especially 1017.

³⁶⁹ Hunter and Lastowka (2004), 1028.

³⁷⁰ See e.g. Benkler (2006), 5; Boyle (2002), 20.

source, peer-produced software often outdoes proprietary software because of its capacity for iterative problem solving, flexibility and adaptation.³⁷¹ To take another example, Wikipedia, with its participatory production model, is far wider in scope, and has much more content, than a traditional encyclopaedia. While it may sacrifice the authority of recognised experts, its self-correcting character and its networked reach give it a high statistical probability of being accurate.³⁷² It is common to generalise from the success of wikis and open source software, and make the broader contention that non-proprietary, networked organisation can supplant proprietary-copyright businesses in the production of complex creative objects.³⁷³

It is not merely the capacity of digital technologies to facilitate some satisfactory volume of creative production that generates such widespread optimism. There is also a widely-held view that internet culture is freer, more participatory, more affirming of individual autonomy and self-expression, and more capable of delivering greater diversity, than the mass media structures that preceded it.³⁷⁴

Enhancements in diversity and inclusiveness would seem to follow automatically from enabling a broader range of citizens to engage actively in the public sphere.³⁷⁵ Tushnet, for example, is very enthusiastic about the

³⁷¹ See e.g. Boyle (2002), 24.

³⁷² Shirky (2008), 116-117; Anderson (2006), 68.

³⁷³ See e.g. Boyle (2003), 45-47. See also Hunter and Lastowka (2004), 1017; Ku (2002), 37; Frosio (2017), 32ff; Smiers and van Schijndel (2009), 65.

³⁷⁴ See e.g. Benkler (2006), 464-465. See also Hunter and Lastowka (2004), 1028.

³⁷⁵ Lessig (2004), 47.

democratising influence of fan fiction on pop culture.³⁷⁶ Fans of films, novels and TV produce countless derivative stories, exploring the fictional universes and characters that fascinate them. Other scholars celebrate the unprecedented capacity of young people to tinker with digital technologies to make new kinds of works like YouTube videos, ‘vines’, machinima and the various products of ‘remix culture’.³⁷⁷ If digital technology makes the production and dissemination of works easier and cheaper, it seems to follow that the technology will enhance diversity and inclusiveness, merely by virtue of allowing more people to create more works.

Then there is the fact that ‘peer produced’ works tend not to be subject to the same array of commercial pressures and constraints as commercially produced works.³⁷⁸ Such works are likely to contain content or perspectives that the market would not produce or sustain.³⁷⁹ The networked information environment diversifies the sources of, and motivations behind, works.³⁸⁰ Motives and work types may range from pure play, to committed, collaborative networked production.³⁸¹ The diversity in forms of expression, motivations and perspectives bring new meaning and nuance to individuals’ and societies’ understanding of events and subjects, which is good for both autonomy and democracy.³⁸²

³⁷⁶ Tushnet (1996); Tushnet (2009).

³⁷⁷ See e.g. Anderson (2006), 64; Lessig (2004), 23-24, 47.

³⁷⁸ Tushnet (2007), 111. See also Elkin-Koren (2005), 386.

³⁷⁹ Tushnet (2007), 111; Benkler (2006), 167; Hunter and Lastowka (2004), 989.

³⁸⁰ Benkler (2006), 162.

³⁸¹ *Ibid*, 152

³⁸² Lessig (2004), 21.

3.4.2 Disintermediation of selection and filtration

The other advantage of networked production and dissemination is its capacity for so-called disintermediation. Previously, consumers had to rely on a fairly centralised structure for choosing works. Intermediaries would choose what to publish, and critics would pass judgment on published works. Online, the selection and filtration of works—the decisions about which works are ultimately distributed to consumers—may be dis-intermediated and decentralised.³⁸³

Networked technologies have the capacity to harness information about audience preferences to filter and select works for audiences and users without relying on either the price system or a managerial structure for coordination.³⁸⁴

Search engines and recommendation applications aggregate data about user preferences with regard to works, and deliver information to users on that basis.³⁸⁵ Google, for example, works through a recursive algorithm, called PageRank. The algorithm ranks search results on the basis of, among other things, site popularity as measured by hyperlinks. The number of inbound hyperlinks is a crucial determinant of a Web page's visibility.³⁸⁶ Sites that receive a lot of links from other sites are ranked higher in search results than those with fewer links.³⁸⁷ Other search engines tend also to use some measure of aggregate popularity to rank search results.³⁸⁸ Tools like this (including online review pages, search engines,

³⁸³ Elkin-Koren (1996), 217. ; Elkin Koren (2005), 384; Benkler (2006), 74.

³⁸⁴ Benkler (2006), 63.

³⁸⁵ *Ibid*, 173-175.

³⁸⁶ Hindman (2008), 42.

³⁸⁷ *Ibid*, 42-44.

³⁸⁸ *Ibid*.

wikis, and social networks) bolster consumers' capacity to filter vast amounts of information about what works might satisfy them without relying on traditional intermediaries.³⁸⁹

This puts selection and filtration of work on a basis that appears, on its face, far more decentralised and democratic than in the era of mass media. Previously, the public relied very much on commercial intermediaries to select and curate works for publication and dissemination. Now, the public can play a more active role in selecting content, with search engines either giving weight to individuals own past consumption behaviour, or the consumption behaviour of peers.³⁹⁰ That would appear to be an overwhelmingly positive development, in terms of inclusiveness and diversity. It also seems to obviate the need to sustain commercial intermediaries, with copyright, for the sake of their role in selecting and publishing works.

3.4.3 The 'watchdog' structural function

From Netanel's point of view, one of the key qualitative tests of non-copyright means of production, is how they fare in performing a fourth estate or watchdog function. He is doubtful that peer produced media can match copyright-based mass media on this front.³⁹¹ Benkler, on the other hand, has throughout most of his career been more optimistic.³⁹²

³⁸⁹ See Benkler (2003), 1257-58; Hunter and Lastowka (2004), 984; 993-995; Nadel (2004), 832.

³⁹⁰ Benkler (2006), 253.

³⁹¹ See generally Netanel (2001).

³⁹² In a recent New York Times article, Benkler is interviewed about his current work

With regard to Netanel's agenda setting function, Benkler argued in his highly influential 2006 book, *The Wealth of Networks*, that networked filtration and search mechanisms find a good balance between sustaining a shared and salient discourse and avoiding excessive, centralised control. The link structure of the internet, he claimed, makes it likely that any given site is likely to be only a small number of clicks away from a site that is visible from a large number of other sites. These nodes form the backbone of common materials, observations and concerns. This guards against polarisation, and provides sufficient common ground, he claims. At the same time, fora for political discourse, such as the 'blogosphere' are far more accessible for comment and contribution than newspapers and other mass media.³⁹³

As for the watchdog function, Benkler was confident (in 2006 at least) of the capacity of networked and peer produced media to outdo traditional media.³⁹⁴ He gave numerous examples of blogs and networked movements having successfully raised political awareness, especially with regard to scandals—such as the Diebold Election Systems scandal in the US.³⁹⁵ Distributed models of investigation and analysis can, Benkler argues, produce a salient and powerful citizen-driven information environment.

Moreover, they are, according to *The Wealth of Networks*, more resistant to control and commercial pressures. Consequently, the blandness problem is less pronounced in networked peer production. The question that drives peer

³⁹³ Benkler (2006), 255-256, 266.

³⁹⁴ See also Hunter and Lastowka (2004), 956.

³⁹⁵ Benkler (2006), 228, 263.

producers is not, according to Benkler, ‘What will sell?’, but rather, ‘What do I care about most now?’³⁹⁶ The parameters and constraints that apply to commercial publication—such as the need to attract a paying audience—are less prominent; while intrinsic motivations and true political and civic concern have free reign. Even the mobilisation of attention does not, he argues, require the application of money. Consequently, commercial motives have less scope to exert a corrupting influence on networked peer production.³⁹⁷ This puts peer-produced scrutiny over politics at an advantage over traditional media scrutiny.

It is possible that Benkler may retreat from this position. A recent article in the *New Yorker* briefly addresses research that he is currently doing. Some of the discussion quoted in suggests that he may now acknowledge that the internet is less de-centralising, dis-intermediating or participatory than he claimed in his 2006 book.³⁹⁸ A 2017 article in the *Columbia Journalism Review* that he co-wrote also found that certain right wing media systems were highly centralised, although the authors argued that it was not the internet as a technology that was responsible for fragmentation of discourse or polarisation and concentration of attention.³⁹⁹ In any case, the 2006 book remains useful exemplar of the copyright pessimist/internet optimist perspective.

To sum up that perspective, it is has, for years, been trite to say that the decentralisation of the production of works and information through networked technologies promises improvements in the diversity and inclusiveness of the

³⁹⁶ Benkler (2006), 259-260ff.

³⁹⁷ *Ibid*, 258-259.

³⁹⁸ Hylton (2017).

³⁹⁹ Benkler et al (2017).

cultural environment. The networked sphere is considered by many to be more participatory, more accessible, less susceptible to money and therefore more open, diverse and inclusive than the copyright-mediated sphere. It is an environment in which individuals can be active rather than passive; and in which information can be freed of the control and influence of commercial players, and commercial imperatives. It is widely accepted that these factors remedy many of the flaws associated with commercial media, with wide reaching benefits for individual autonomy and democratic discourse.⁴⁰⁰

3.5 A new orthodoxy

3.5.1 The framing of benefits and detriments

It is hard to resist the impression that justifications for copyright are rapidly losing ground in the face of cultural turn advocacy for the public domain, and ‘networked peer production’: the creation and dissemination of works, without reliance on copyright, by individuals and groups, using the internet. Arguments in favour of access to works, and organising the production of works without reliance on proprietary rights have a pair of knockout punches: freedom of expression, and the democratisation of expression. Would-be defenders of copyright, on the other hand, can no longer rely on what used to be its knockout punch: the incentive narrative.

⁴⁰⁰ Benkler (2006), 130-133; Benkler (2003), 1248-9, 1265; Elkin-Koren (2005), 387. For a useful review of opinion to this effect, see Netanel (2000).

The fundamental proviso of the incentive narrative is that copyright ought to be no stronger than necessary to serve as an incentive. The imperative to constrain copyright appears only stronger and more urgent when we take into account the virtues of the public domain, and non-proprietary production described above. Ironically, it is the conventional account of copyright's benefits, as much as newer accounts of its detriments, that leaves copyright so vulnerable to criticism. If the strongest argument in favour of copyright is that it facilitates the production of creative works by funding the activities of commercial intermediaries in the 'copyright industries', and there are other, more socially beneficial ways of performing the same functions; if the incentive benefits of copyright are unproven, and its cultural detriments are pressing: then why maintain copyright at all?

Even adopting the view (as Netanel does) that copyright is more than a mere incentive, it is hard to advocate copyright's benefits with the urgency with which we criticise its detrimental effects. It is hard to see how copyright's market-making function produces diversity, especially in the face of the concentration and blandness critiques. It is hard to grasp the argument that copyright supports diversity by sustaining one among a diverse array of constraints under which creativity proceeds—in this case, the array of constraints associated with commercial mass media. It is also hard to appreciate the benefits of copyright's role in supporting a very powerful and centralised commercial media. To paraphrase Hunter and Lastowka, it is hard to conceive the harm done (if any) by undermining the commercial structures that copyright has hitherto supported.⁴⁰¹

⁴⁰¹ *Ibid.*

3.5.3 The trope of ‘overreaching’ copyright

How does copyright minimalism fare in comparison to justifications for copyright?

It is a much easier position to adopt. It is easy to imagine the diversity of works produced, or made available, through networked peer production and selection. It is easy to comprehend, intuitively, the odium associated with copyright’s direct and indirect intrusions upon freedom of expression. It is easy to conclude that the democratising effects of networked peer production are an ideal antidote to the problems of market hierarchy. As a consequence, a new digital orthodoxy has developed in opposition to the incentive-access paradigm.⁴⁰²

The sense that arguments in favour of curtailing copyright are stronger than arguments in favour of maintaining or expanding it is only heightened by a widespread belief that the rhetoric of the incentive narrative, and other rhetoric about authors’ rights, are dishonest; that expansions in copyright are driven by cynical and greedy commercial intermediaries, without regard to the interests of authors or the public.⁴⁰³ More than 40% of EU citizens, when asked who benefits the most from IP protection, mention large companies and famous artists.⁴⁰⁴ Copyright is often perceived as a mechanism to the advantage of large, impersonal, commercially oriented corporations⁴⁰⁵.

⁴⁰² See Lanier (2014), 197.

⁴⁰³ See, e.g. Senftleben (2014), 15: where he argues that rhetoric about authors rights concealed self-interested motives of commercial publishers. See also Towse (2008), 8-9; Hunter and Lastowka (2004), 1024; Ginsburg (2002), 61-62.

⁴⁰⁴ OHIM Report (2013), 66.

⁴⁰⁵ Geiger (2015), 3; Ginsburg (2002), 61. For a balanced consideration of the effects of lobbying on copyright policy, see Farrand (2014).

A kind of melodrama has taken root in popular culture (and in some corners of academia, with the state and the copyright industries playing the villains. They are rent-seekers, suppressing the free flow of knowledge and freedom of expression and imagination for selfish, mercenary ends. They are the foil for the liberating heroes. The heroes are the providers of internet-based services, like social networks and search engines, along with the heroic amateur producers of content, empowered by the internet and its innovators.⁴⁰⁶ The quintessential expression of this melodrama is John Perry Barlow's *Declaration of the Independence of Cyberspace*, which begins with this bombastic admonition:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.⁴⁰⁷

Barlow continues in much the same vein, casting opponents of copyright and other forms of internet regulation as revolutionaries akin to America's founding fathers.⁴⁰⁸

Lest this seem an outdated, or frivolous example, we can still find the same kind of rhetoric in academic works.⁴⁰⁹ In a recent law journal article, for example, Dr Frosio described copyright industries as 'gatekeepers', scrambling to keep in place their privileges, intent on 'taming limitless power' with 'artificial scarcity' to keep in place a 'dialectic of penury'.⁴¹⁰

⁴⁰⁶ See Lanier (2014), 196ff, for a wry exposition of this popular narrative. For an earlier gloss on cyber utopian claims, see Netanel (2000).

⁴⁰⁷ Barlow (1996).

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Frosio (2017).

⁴¹⁰ *Ibid.*, 4. For a review of similar rhetoric, see Keen (2015), 140ff.

In this climate, copyright piracy is sometimes seen as an act of rebellion against corporate greed, and copyright enforcement as a kind of tyranny.⁴¹¹ Copyright's validity is nowadays so much in question that the ALAI—a body which played an instrumental role in the development of international copyright treaties and the global spread of copyright—held a congress this year with the title 'Copyright—to be or not to be'.⁴¹² We can comfortably assume that the ALAI came down on the 'to be' side, but the fact that they should choose such a title for their conference is an indication of how besieged proponents of strong copyright currently feel.

Even more moderate and even-handed critics fit fairly comfortably within the digital orthodoxy. Netanel, so articulate in communicating copyright's beneficial structural effects, thinks that copyright is straying from its status as an engine of free expression, and that it tends to stifle expressive freedom.⁴¹³ Its 'ever more bloated scope', he contends, 'seems far to exceed that which would be necessary or desirable to further copyright's role in supporting an independent media without unduly hampering expressive diversity.'⁴¹⁴

Benkler is more optimistic about the democratising and diversifying capacities of networked peer production and distribution.⁴¹⁵ He does not go so far as to suggest a 'zero protection policy', but echoes the view that 'enclosure' of the

⁴¹¹ Garon (2002-3), 1282.

⁴¹² *Copyright—to be or not to be*, ALAI Congress 2017, accessed 13/3/17 from <<http://alai2017.org>>.

⁴¹³ Netanel (2008), 106-107. See also Netanel (2001-2002), 27.

⁴¹⁴ Netanel (2000a), 1927.

⁴¹⁵ See Benkler (2006), 292-293.

public domain on the whole diminishes expressive freedom, diversity and inclusiveness.⁴¹⁶ The thesis of his influential 1999 article was that:

Only an increase in the public domain—an increase in the range of uses presumptively privileged to all—generally increases the freedom of a society’s constituents to communicate. Enclosure, by contrast, redistributes freedom.⁴¹⁷

Freedom seems, by these lights, to be on the side of a weaker copyright.

By 2006, when he published *The Wealth of Networks*, he seemed to have softened his position somewhat. There he acknowledged the benefit of sustaining commercial copyright-based production for the sake of maintaining a diversity of constraints under which the production and consumption of works may take place.⁴¹⁸ He has also recently acknowledged some of the problems in the patterns of attention on the internet—problems of the kind I will address in chapter 5.⁴¹⁹ But he does not yet seem to have retracted his opinion as to the superiority of non-copyright based, networked production, over copyright-market based production and dissemination persisted. He says:

By creating sources of information and communication facilities that no one owns or exclusively controls, the networked information economy removes some of the most basic opportunities for manipulation of those who depend on information and communication by the owners of the basic means of communications and the producers of the core cultural forms. It does not eliminate the possibility that one person will try to act upon another as object. But it removes the structural constraints that make it impossible to communicate at all without being subject to such action by others.⁴²⁰

⁴¹⁶ Benkler (1999), 401-402

⁴¹⁷ *Ibid*, 393.

⁴¹⁸ See above n (323).

⁴¹⁹ See Hylton (2017), where Benkler seems to acknowledge, for example, that, with respect to some news events, the internet has amplified and circulated stories from the mainstream, rather than opening pathways for diverse voices.

⁴²⁰ Benkler (2006), 465.

The framing here is clear, binary, and characteristic of digital orthodoxy.

Strengthening of copyright constrains freedom. Weakening it, and relying on internet based alternatives (considered ‘decentralising, globalising, harmonising and empowering’), enhances freedom.⁴²¹

3.5.3 Practical implications

The practical implications of this framing are wide reaching, and there is not space here to consider them all. It is, however, possible to address a few interesting recommendations that follow from it. The general point of consensus among proponents of the cultural turn is that it is necessary to reverse the trend of copyright expansion: at the very least to halt it; but more often than not, to wind back the strength and scope of copyright. Some scholars even advocate the abolition of copyright.⁴²²

At the very least, there is a sense that weaker copyright is less risky as a form of information policy than strong copyright. Recall the quote from the Australian Productivity Commission, mentioned in the introduction:

Given the asymmetric nature of how policy can be changed, the Commission considers it is appropriate to ‘err on the side of caution’ where there is imperfect information, and consciously set weaker parameters in the way that rights are assigned, used or enforced.⁴²³

This sentiment produces an array of recommendations for weakening proprietary copyright, and I will consider three classes of recommendation here.

⁴²¹ Negroponte (1996).

⁴²² See e.g. Smiers and van Schijndel (2009), 21: ‘There are too many objections to copyright to maintain the system.’ See also Skaldany (2008).

⁴²³ Australian Productivity Commission Inquiry (2016), 73.

3.5.3.1 No more than necessary—term

The incentive-access approach operates on the proviso that copyright protection ought to be no stronger, longer, or wider than necessary to incentivise works.

Some scholars concerned with copyright's negative impacts on freedom (or inclusiveness or diversity) therefore recommend tailoring copyright's strength, duration and scope based on the extent to which it operates as an incentive.⁴²⁴ For example, it is common to recommend a reduction in copyright term, or to argue against term extension.

Take the *amicus curiae* brief by 17 economists in *Eldred v Ashcroft*. The economists argued that a retrospective term extension (adding twenty years to a term already lasting 50 years after the death of the author) was unjustifiable because it could not increase incentives for authors in relation to works already published. Further, it would only have a negligible effect on the present discounted value of expected copyright revenues from the extra 20 years, and would not therefore meaningfully increase future authors' incentives either.⁴²⁵

To take a more recent example, a review of copyright law by the Australian Productivity commission placed considerable weight on statistics compiled by the Australian Bureau of Statistics about the average commercial life of various works. For many categories of works, the average commercial life of works was between 2

⁴²⁴ See e.g. Loren (2008); Sterk (1996), 1205. Differing slightly in detail, each argues that the works of authors who are not motivated by copyright ought to receive weaker copyright protection—a subjective approach to incentive. See also Lemley (2009), 5; Nadel (2004), 853—who favour a more 'objective' approach, based on whether works are capable of being funded by other means or not.

⁴²⁵ *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). Brief of George A. Akerlof et al. as Amici Curiae in support of Petitioners at 12, *Eldred v. Ashcroft*, No. 01-618. See also Productivity Commission (2016), 89, 128 for similar reasoning.

and 6 years. The Productivity Commission concluded from this that copyright's current term is therefore decades longer than necessary.⁴²⁶

3.5.3.2 Expanding fairness exceptions

Recommendations to expand copyright exceptions seem to follow from the framing that aligns access to works and a 'robust public domain' with diversity and inclusiveness. Broadly, such an approach would prioritise individual and collective interests in the public domain over copyright owners' interests, and other interests associated with copyright protection (whether they be incentive interests, or civil society interests of the kind articulated by Netanel).⁴²⁷

The sense that inflexible copyright constrains expressive freedom played a part in the Australian Law Reform Commission's recommendation (approved by the recent Productivity Commission report) to introduce a broad US style fair use in Australia, to replace a set of narrow fair dealing exceptions.⁴²⁸

A more radical step would be to flip the onus of proof in relation to the fairness of uses of copyright material. Arewa argues that authors should have to prove uses to be unfair in order to demonstrate copyright infringement, instead of defendants being required to prove that the use falls under a fairness exception.⁴²⁹ Bohannon and Hovencamp argue that the copyright owner should need to prove harm to her *ex ante* incentive in order for a use of a work to be held to infringe

⁴²⁶ ABS, cited in Australian Productivity Commission Inquiry (2016), 130.

⁴²⁷ See Lange (2003), 469; Hunter and Lastowka (2004); Frosio (2017).

⁴²⁸ ALRC Report, (2013), 87ff; Productivity Commission (2016), 123.

⁴²⁹ See Arewa (2007), 553.

copyright.⁴³⁰ Netanel offers a slightly less radical proposal. That once a copyright defendant shows a 'colourable claim of fair use', the burden of proving that the use is unfair should pass to the copyright owner.⁴³¹ Each variant of this approach would (to differing degrees) discourage copyright owners from suing for licensing fees in relation to markets which they either did not contemplate when creating their works or have not exploited themselves.

Another similar approach, favoured by scholars like Lange, and also Rubinfeld, adopts a different baseline: freedom of imagination. Lange and Rubinfeld, in separate articles, argue for the recognition of a positive user right of freedom of imagination.⁴³² Creative appropriation, Lange argues, should be presumptively privileged in every instance: rising to the level of an affirmative user right. A fair use defence to copyright infringement would be withheld only in cases where there was no creative exercise of imagination in the second work at all.⁴³³

Lange, extremely optimistic about the democratising power of the internet, has no hang-ups in moving the whole apparatus of identifying or weighing commercial harm to the margins of his analysis. Copyright cases concerned with the use of existing works ought to turn primarily on questions of imaginative freedom. They should not, he argues, give primary concern to the negative effects on the economic value of an antecedent work, although in some cases, he

⁴³⁰ Bohannon and Hovenkamp (2010), 979.

⁴³¹ Netanel (2008), 192ff.

⁴³² Rubinfeld (2002), 4-5; Lange (2003). See also Breakey, who argues for the recognition of a similar right of intellectual liberty: Breakey (2012), 148.

⁴³³ Lange (2003), 480. Rebecca Tushnet notes, however, that even pure copying may sometimes be the most accessible means for some individuals to exercise their imaginative faculty: Tushnet (2004).

concedes, ‘equitable provision for sharing the proceeds of such exploitations would follow’.⁴³⁴

Netanel takes a similar, but more moderate stance. Mere exercise of imagination would not, under his approach, produce a fair use. He does contend, however, that we should place transformativeness, rather than harm to the copyright holder’s market, at the centre of the fair use analysis.⁴³⁵ This is consistent with the framing that treats the curtailing of copyright as the cautious, sober option; and the enforcement of proprietary rights as the overreaching one.

3.5.3.2 Liability rules—permitted-but-paid use

That brings me to the most moderate position on the spectrum of recommendations—one which favours the application of liability rules instead of property rules.⁴³⁶ That would entail an adjustment to copyright owners’ rights so that they would be entitled to a fee or (in some cases) damages for unauthorised uses of copyright works, rather than a right to enjoin them outright. Users would then have rights to use works without copyright owners’ permission, but in some cases, they would have to pay for the use, either directly or indirectly. Ginsburg helpfully describes liability rules as instituting ‘permitted-but-paid’ uses.⁴³⁷

⁴³⁴ Lange (2003), 479.

⁴³⁵ Netanel (2008), 192.

⁴³⁶ On the nature of ‘liability rules’, see Calabresi and Melamed (1972).

⁴³⁷ Ginsburg (2014), 1384.

Netanel, Lessig, and Fisher have each proposed liability rule regimes, with differences in detail, but broadly similar outlines.⁴³⁸ On one end of the spectrum would be what Netanel describes as ‘judicially crafted compulsory licences’.⁴³⁹ These would involve two main departures from the current approach to copyright: firstly, the abolition of statutory damages; and secondly, a requirement that injunctions only be awarded where they are strictly necessary and suitable. In the US, for example, statutory damages of up to \$150,000 may be awarded in respect of a copyright infringement.⁴⁴⁰ The result is wildly disproportionate and punitive damages bills for defendants.

As for injunctions, Netanel’s approach would bring the principles regarding injunctions more closely in line with US patent law—and some copyright cases already seem to follow this recommendation.⁴⁴¹ In *EBay v Mercexchange*, the US Supreme Court warned against awarding injunctions for patent infringements without due consideration. The court made clear that injunctions are a discretionary remedy, and should only be awarded where the plaintiff can demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent

⁴³⁸ Lange and Arewa also contemplate possibility of compensating users through liability rules. See e.g. Arewa (2007), 554; Lange (2003), 479.

⁴³⁹ Netanel (2008), 197.

⁴⁴⁰ The basic level of damages is between \$750 and \$30,000 per work, at the discretion of the court. Plaintiffs who can show wilful infringement may be entitled to damages up to \$150,000 per work. US Act, § 504.

⁴⁴¹ See below, text to n (881) on the adoption of *EBay* principles in copyright cases.

injunction.⁴⁴² Creating a higher bar for the award of injunctions in copyright cases would push copyright in the direction of a liability rule. It would lower or remove the expectation that infringements would be summarily enjoined, and lead owners and users to expect damages as the more likely remedy. The result would be something resembling a judicially administered liability rule.

On the other end of the spectrum of possible liability rules is what Fisher describes as a ‘governmentally administered reward system’.⁴⁴³ Netanel, Fisher and Lessig offer proposals that differ slightly in detail, but are broadly similar. Netanel first proposed a levy for peer to peer sharing of recorded music. Under his system, businesses providing the physical and digital means for sharing copyright works would pay a levy, which would then be distributed pro rata to copyright owners, based on the extent to which their works were shared.⁴⁴⁴ Non-commercial sharing would be free for the user, but paid for by the businesses profiting from users’ non-commercial uses, such as internet service providers, providers of internet connectivity hardware and so on.

Fisher expanded on Netanel’s recommendation, and offered various alternatives for bringing to fruition a liability rule for all kinds of works (not just recorded music).⁴⁴⁵ For example, he contemplated the levy also applying in relation to creative or derivative uses of works, so that creative appropriation could be free to the user, but the levy revenue derived from the derivative work would be

⁴⁴² 547 U.S. 388 (2006)

⁴⁴³ Fisher (2004), 202.

⁴⁴⁴ See Netanel (2003).

⁴⁴⁵ Fisher (2004), 199-258.

split between the owner of the original work, and the owner of the derivative work.⁴⁴⁶ Lessig closely follows Netanel and Fisher's proposals, but adds the caveat that the law should revert back to a proprietary copyright if it could be shown that the new arrangement 'harmed' creative industries.⁴⁴⁷

3.5. 4 The balance of harms and benefits directs practical recommendations

The examples of practical recommendations outlined above follow from a particular framing of the relative balance of harms and benefits of copyright. The recommendation to reduce copyright duration follows from a sense that copyright is not an effective incentive, and that the harm caused by current copyright to expressive freedom (and more broadly, diversity and inclusiveness) is the mischief most urgently in need of remedy. The recommendations to expand fairness exceptions follow from a sense that the greatest benefit to be derived from works comes from unconstrained, imaginative engagement with works by users, and from the impression that any need to sustain copyright's market-making function must be secondary to the goal of maximising imaginative engagement.

The recommendations to introduce a liability rule represent a more moderate form of copyright minimalism. These recommendations are based on an attempt to balance two competing interests. On the one side is the need to mitigate concentration communicative and cultural power that is compounded by exclusive

⁴⁴⁶ Fisher (2004), 204ff.

⁴⁴⁷ Lessig (2004), 125.

rights. On the other side, the liability rule approach recognises the worth in preserving a copyright-based stream of income for authors and publishers, and preserving copyright's structural function, even where copyright protection exceeds the bare minimum necessary to sustain creative work. It is awareness of this side of the balance that prompts Lessig to observe that liability rules could potentially 'harm' copyright owners. Lessig adverts to the difficulty of calculating the proper measure of 'harm', but dismisses the issue. He says, 'the difficulty of making that calculation would be outweighed by the benefit of facilitating innovation.'⁴⁴⁸

Lessig's intuition about harm is important. The evaluation of any of these recommendations depends on making a difficult calculation about the balance of harms and benefits. In order to make such a calculation, we need to refine our understanding of harm and benefit in copyright. We need to consider whether the balance of harms and benefits on which each recommendation is premised stands up to scrutiny. In the next chapter, I will begin that process of normative and descriptive scrutiny.

⁴⁴⁸ *Ibid.*

Chapter 4

Rethinking copyright's production function

4.1 Reframing benefits and harms

In the first part of this thesis I set out a normative framework for theorising copyright, based on a synthesis of cultural turn norms. I developed a theory of copyright's mid-level qualitative objectives. I argued that these objectives follow logically from a commitment to high level values of autonomy and democracy; and that they are also consistent with the objectives that inform other areas of cultural regulation, such as media ownership and content laws. Finally, I reviewed the ways in which culturally oriented accounts of copyright have described copyright's qualitative harms and benefits, in comparison with the qualitative possibilities of alternative ways of organising creative work, such as networked peer production.

In this second half of the thesis, beginning with this chapter, I propose to apply and refine the normative framework that I have developed. I will argue that the ways in which harm is conceived in cultural turn literature neither account sufficiently for the detrimental parameters and constraints that tend to apply in networked information economies; nor acknowledge copyright's benefits with sufficient force. Building on Netanel's defences of copyright on qualitative, cultural grounds, I will argue here that cultural turn literature tends to understate copyright's merits and overstate its detriments.

Recall Netanel's criteria for justifying copyright. A convincing justification would need to demonstrate that copyright (i) produces works that are 'over and above' the works that would be produced without copyright; and (ii) that these works have independent 'first amendment value'.⁴⁴⁹ The first limb demands a

⁴⁴⁹ See above n (292) and accompanying text.

richer elaboration of what about copyright protected works might be ‘over and above’ works produced under other arrangements. The second limb requires further explanation of how copyright’s influence on works serves democratic discourse and autonomy.

Based on Netanel’s reasons alone, it is rather difficult to justify copyright protection of any works except for commercial news media. He acknowledges that works of fiction or art may be subtle but powerful vehicles for attitude change or reinforcement, or that they may challenge accepted modes of thought.⁴⁵⁰ But he does not explore the structural benefits of sustaining art by way of copyright in depth. He does not give much attention to the reasons why copyright-funded art should be considered especially democracy (or autonomy) enhancing, or why it might produce expression that is ‘over and above’ what might be produced absent copyright, or under the auspices of different arrangements. It is only the role of copyright in supporting news media that he justifies with any degree of comprehensiveness.

Without a clearer sense of the role of art, and the role of copyright in organising its production, and influencing its quality, it is too easy to dismiss copyright’s impact on the art world. It is too easy to gloss over the significance of financial losses suffered, or financial gains won, by authors or publishers of fictional or otherwise artistic categories of works.

Netanel would, of course, have us take into account structural harms that might result from weakening copyright too much. But structural harms are not

⁴⁵⁰ Netanel (1996), 350.

immediately salient. The erosion of the class of independent authors creating sustained works of authorship, for example, is rather hard to measure and easily misses notice. Such detriments to society might be written off, if cast into balance against the broad inclusiveness (free expression) gains supposed to come from removing the requirement of permission to use works. The advantages of this trade-off would appear even greater if the volume of works produced were shown to increase as a result of the application of a liability rule (or some other minimalist proposal). The temptation would always be to prioritise an increase in the volume of works (of any kind) produced, over concerns about maintaining sustained works of authorship.

In order to fully appreciate the ways in which an erosion of that structural effect might be harmful, we would need a sense of what about such sustained works merits particular concern, beyond the mere fact of their difference from other kinds of works. Building primarily on Netanel's work, I will enumerate more ways in which copyright's production function and structural function may support democracy and autonomy.

In this chapter, I will focus on copyright's production function. The conventional incentive narrative of copyright describes the funding provided by copyright as beneficial insofar as it encourages the production of works. However, since copyright does not appear a 'necessary', *ex ante* incentive for the production of many works, justifications of copyright based on its production function are hard to maintain. The point that I want to reinforce in this chapter, though, is that we can understand copyright's production function qualitatively, and not just quantitatively.

We are not confined to contemplating only whether copyright is necessary to produce some particular number of works. We should think in terms of attenuated influence: firstly, copyright's influence on the conditions under which works are produced; and secondly, the likely influence of such conditions on the nature and character of works. By doing so, we find ways to get beyond the objections to the production function argument that I raised in the previous chapter; and to demonstrate more forcefully how copyright's qualitative effects measure up to the two limbs of Netanel's test. We find ways, that is, to articulate what it is about works funded by copyright—about high cost works like blockbuster films, or Merges' 'original' (as opposed to 'remixed') works—that is 'over and above' other kinds of works, and how that serves democracy and autonomy.

In order to properly appreciate this quality, however, it is necessary to add to the set of mid-level qualitative objectives that I have advocated. The bare fact of works, in aggregate, being diverse, or being drawn from an inclusive base of authors, is important for democracy and autonomy. Yet it is perfectly possible for a body of works to be very diverse, to have an inclusive and wide array of origins, and still to be perfectly meaningless and useless. An extreme example of this might be the works produced if every individual in the world created 10 pages of gibberish. These works would be diverse, and they would be produced by the most inclusive possible group of authors, and yet they would offer little to the public in the way of benefit. In order for the benefits of diversity and inclusiveness to be realised, something more is needed.

Part 4.2 sketches out what that 'something more' might be. Drawing on Dr Anne Barron's Kantian theory of copyright, and her advocacy for a particular

quality of 'tolerance' in discursive works, along with a brief sketch by Professor Terry Fisher of a quality that he describes as 'richness', I attempt to outline a third mid-level objective. It is an objective relating to the quality of works themselves, and I use the label 'rigour' to describe it. A mid-level objective of rigour requires us to pursue conditions and parameters in the cultural sphere that are conducive to rigorous engagement with the conventions of any given genre of work. I will elaborate on what I mean by this in part 4.2.

Once it is understood that rigour has a bearing on the extent to which works facilitate individual autonomy and deliberative democracy, it is easier to appreciate the merits of copyright's production function. I attempt to sketch them out in part 4.3. I show that, whether necessary as an incentive or not, copyright furnishes authors and publishers with resources to invest in the production and publication of works. Of course, the significance of copyright funds—their amount, the ways that they are used, and their impact on these three mid-level phenomena—differ from industry to industry, medium to medium and author to author. Even so, it is possible to make some broad generalisations, which add important qualitative dimensions to our understanding of copyright's production function. While every work is different, it is fair to say that the availability of copyright funding generally tends to help authors to realise works with more rigour than they otherwise might.

4.2 Rigour: a third mid-level objective

4.2.1 An implicit acknowledgement that the quality of works matters

One of the most powerful critiques of copyright's structural effects, addressed in the previous chapter, is the blandness critique. Critics contend that copyright underpins certain dynamics of commercial production and dissemination that favour homogeneous, bland, 'lowest common denominator' fare over more stimulating or challenging kinds of material, such as *avant garde* or scholarly works.⁴⁵¹

Homogeneity is a problem that manifests not at the level of individual works, but across multiple works. It is a function of the sameness of many works, taken together. It can be understood in terms of the mid-level objective of diversity, or even inclusiveness. We may legitimately be worried about the fact that the authors whose work dominates our culture are too similar or have too much in common; or we may worry that the body of works in circulation does not expose the public to a sufficiently wide range of expression and perspective to helpfully inform their choices.

Blandness (or the fact that a work has qualitative characteristics that make it appeal to the lowest common denominator) is a problem of a different character. To describe a work as 'bland', or to dismiss it as 'lowest common denominator' fare, does not really mean the work fails a diversity or inclusiveness test. Indeed, if

⁴⁵¹ See above n (365) and accompanying text.

a work appeals to the lowest common denominator, we might say that it represents the public taste rather inclusively. But critics take blandness to be a bad thing. Implicit in the blandness critique is the idea that the quality of works themselves matters; not merely their difference from one another, or the breadth of their provenance.

The blandness critique is not just a qualitative critique—about the qualitative conditions in culture that might be good for individuals and society. It is an aesthetic critique and it implies the application of a certain kind of aesthetic judgment. I use the word aesthetic, here, to describe a concern with those features of works which influence individuals' intellectual and emotional faculties when engaging with the work. An aesthetic critique is, by this definition, concerned with the ways in which the formal qualities and characteristics of works affect individual experience, whether through discursive or artistically expressive means.

If certain characteristics in works, such as blandness (or whatever it is that fits them to appeal to the 'lowest common denominator') are undesirable, then it follows that there must be some opposite aesthetic characteristic which is desirable. What is this quality? On what basis might we justify pursuing or validating it?

To single out any particular aesthetic or standard in works comes, as I showed in part 2.1 with a risk of cultural paternalism—and this was one of the reasons I gave to pursue qualitative objectives associated with cultural conditions, rather than aesthetic objectives concerned with the merits of individual works. Perhaps this is the reason why most of the critical reflection on qualitative characteristics of works themselves is negative. Critics point out what is wrong

with works now, but seem hesitant to offer a firm view on what aesthetic quality would be superior.

Fortunately, as I showed in chapter 2, there are ways of mitigating the problem of cultural paternalism. The same kinds of manoeuvres that permit us to advocate diversity and inclusiveness can also help us to justify a goal of rigour. We need not adopt a particular standard of rigour in order to cultivate it. We can take a pluralistic approach, pursuing qualitative parameters and conditions that are conducive to creative rigour, whatever the formal aesthetic goals of the artist, or tastes of her audience.

4.2.2 The Kantian first principles justification for ‘tolerance’

One justification for promoting expressive diversity is that the range of works and perspectives available to individuals determines to some extent the range of choices that they perceive in their own lives.⁴⁵² This affects their capacity to realise their capabilities and their autonomy. I propose to conduct a similar exercise, describing how the quality of individual works (rather than broader qualities in culture like diversity and inclusiveness) might affect individual capabilities. In doing so, Dr Anne Barron’s Kantian copyright theory, along with some noteworthy comments about art by Professor Terry Fisher, provide helpful starting points for discussion.

Let me begin with Barron, since her aesthetics is rather more comprehensively worked out than Fisher’s. Barron is, like Drassinower, another

⁴⁵² See Benkler (2006), 151.

Kantian copyright theorist. Her Kantian framework imparts a new perspective on copyright's aesthetic priorities. Scholars like Cohen subordinate most aesthetic objectives under the concept of play.⁴⁵³ The idea is that freedom to play is propitious for more innovative and interesting creativity. Barron has a different approach. She is willing to place positive demands upon creators. She demands more of creators than that they merely be free to play as they wish.

Barron wants the world of works to enhance individual autonomy. Her vision of autonomy is close to the human capabilities ideal. It involves not only an absence of undue constraint, but also a positive realisation of capabilities. What is different about the Kantian approach is this emphasis on moral and intellectual capabilities.⁴⁵⁴ Action that is conditioned by passive acquiescence to irrational impulses is not, on the Kantian view, truly autonomous or free.⁴⁵⁵ Kantian autonomy is not only freedom of choice, but also freedom from passivity and irrationality. Kantian autonomy involves realising the capacity to make good choices based on reasoned morality.⁴⁵⁶

⁴⁵³ See above n (252) and accompanying text.

⁴⁵⁴ Barron (2012), 9. The writings Barron draws on include: Kant, 'What is Enlightenment' in Gregor (1996); Kant, 'On the common saying: That may be correct in theory, but it is of no use in practice' in Gregor (1996); Kant, 'Groundwork of the Metaphysics of Morals' in Gregor (1996), 73 (4:421) and Kant, 'Metaphysics of Morals' in Gregor (1996), 387 (6:230-231).

⁴⁵⁵ Kant, 'Metaphysics of Morals', 388 (6:231); Barron (2012), 9-11.

⁴⁵⁶ Specifically, Kant's universal principle of right requires that an individual's choices be capable of coexisting universally with others' freedom of choice: Kant, 'Groundwork of the Metaphysics of Morals', 4:421-4:424. His categorical imperative requires that if the reasons for an action were translated into a rule—the 'maxim' according to which the action is taken—that rule could be universally applicable. Kant, 'Metaphysics of Morals', 6:230-231. Essentially, the universal principle of right requires that actions be universalisable while the categorical imperative requires that reasons for actions be universalisable. For a helpful summary of these two concepts, see Barron (2012), 10-11.

Democracy is, for Barron, a connected goal. From her Kantian perspective, democracy is essentially a kind of collective self-realisation. The realisation of individual and collective potential depends on mutually reinforcing democracy and autonomy. The individual must develop a capacity for moral and intellectual self-restraint, and the cultural and political environment must be of a character that facilitates this kind of individual self-development.

The key to this reflexive process of 'collective emancipation' is reasoned public discourse.⁴⁵⁷ Barron envisions a virtuous cycle, in which the individual enhances her capacity for moral autonomy through public discourse, and the discourse is in turn improved by the enhancement of its individual participants. Individual autonomy in the exercise of rational and communicative faculties is made possible by a culture of rational dialogue. The rationality of public discourse is augmented when communicative autonomy is universally protected. The public then benefits from the insights of more 'enlightened' individuals.

Moreover, the individual communicator's awareness that she is communicating publicly, to a rational public, encourages more reflexive and careful thinking. Barron calls this quality of thinking 'tolerance'. Tolerance, for her, means open-minded subjection of one's own thinking to rational and moral scrutiny, and to the consideration of alternative points of view.⁴⁵⁸

In a sense, Barron turns conventional concerns with constraints on freedom of expression on their head. According to her theory, the extent to which individuals and society may realise their potential is *constrained* by the quality of

⁴⁵⁷ Barron (2012), 13, 18. Kant, 'What is Enlightenment', 18 (8:36-8:37).

⁴⁵⁸ Barron (2012), 20.

discourse. And the quality of discourse depends on more than just freedom (to play). Indeed, some constraints on expressive freedom, imposed from within and without, are, in her view, more conducive to autonomy than would be a total lack of constraint.

4.2.3 Building on the idea of tolerance to get beyond discursive aesthetics

The key point that I take from Barron's work is that the quality of works circulating publicly bears on the extent to which public discourse is autonomy or democracy-enhancing. The objective is for the enlightenment of some authors to rub-off, not for the irrational or intolerant many to drown out the enlightened few. Individual enlightenment and collective emancipation are not furthered, Barron argues, by unconstrained speech that is, for example irrational. Collective emancipation requires communication to be tolerant. Barron's idea of tolerance is essentially a notion of intellectual rigour. For collective emancipation to work, authors must cultivate a willingness to test their thinking against alternative points of view, and to subject it to rational and moral scrutiny.

Barron is remarkable in espousing a particular idea about what constitutes 'good' culture, beyond inclusiveness and diversity. Her view of tolerance, however, represents rather a narrow view of how works might enhance individuals' capabilities. In her piece on communicative autonomy, she is preoccupied with discursive or political faculties and capacities, much as Netanel is preoccupied with

copyright's relationship to commercial news media.⁴⁵⁹ There is, however, more to self-realisation the faculty for critical thinking and rational discourse.

Tolerance is a kind of discursive rigour; a richness and openness of critical thought. Why not adopt a broader concept of rigour or richness? Rigour need not be limited to the rational or discursive. At this juncture, the concept of 'richness', espoused by Fisher provides a helpful supplement to Barron's thinking. In a thought-provoking article, Fisher sketched out a list of features of a 'just and attractive culture' that copyright law ought to accommodate and support.⁴⁶⁰ One item on the list is 'rich artistic tradition'.⁴⁶¹ Fisher, leaning on Dworkin, frames the concept of 'richness' in terms broadly compatible with human capabilities discourse:

the more complex and resonant the shared language of a culture—including, above all, its "vocabulary of art"—the more opportunities it affords its members for creativity and subtlety in communication and thought.⁴⁶²

Fisher did not elaborate further on the idea of 'richness', but I will try to flesh out what I think he was getting at. Let us leave aside for the moment the issue of cultural paternalism in imposing such an objective—I will deal with it shortly below.

One might interpret the passage I have just quoted merely to be another call for diversity, but there is more to it than that. Barron, with 'tolerance', recognises that there is something essential in works individually, and not merely in their

⁴⁵⁹ But see Barron (2002) on copyright law and visual art – it is only in the Kantian piece that she retains the narrow focus on discourse rather than art.

⁴⁶⁰ Fisher (1997), 1203.

⁴⁶¹ Fisher (1997), 1216ff.

⁴⁶² *Ibid.*

plurality and difference from one another, that affects individuals' growth and experience. Fisher, with 'richness', does the same. But rather than talking about a discursive rigour, Fisher is talking about an artistic rigour.

Fisher is interested in complexity and subtlety in aesthetic and communicative experience. He is claiming that such complexity and resonance affords heightened fulfilment, heightened realisation of individual capabilities. The complexity of a 'vocabulary of art' has to do with the conventions and formal devices through which expression is mediated, and not merely the variety of works through which one may derive one's artistic vocabulary. It has to do with shared language, not diffusion or differentiation of languages.

Richness involves engagement with artistic and discursive conventions and attention to the formal features of works. Dworkin, from whom Fisher derived the idea of richness, said: 'the possibilities of finding value in a particular kind of representation or isolation of objects depend upon a shared vocabulary of tradition and convention.'⁴⁶³ Garnham and Williams, pioneers in the disciplines of media cultural studies, make a similar point. They observe that, in order to enjoy a work of art:

specific competences are required, that is to say a knowledge of the codes specific to a given art form, competences that are not innate but can only be acquired either through inculcation in the setting of the family through experience of a range of artistic objects and practices and/or through formal inculcation in school.⁴⁶⁴

We can construct a concept of aesthetic value that is based on the extent to which a work brings such competences to bear (both in its author and reader). This

⁴⁶³ Dworkin (1985), 224-5.

⁴⁶⁴ Garnham and Williams (2003), 54.

concept of value is not absolute. It is culturally conditioned, but it is not undermined by the contingency of taste or other cultural institutions or value-systems. Indeed, it valorises the very experience of engaging with culture's contingent elements: conventions, tropes, genre, artistic and literary devices.

To summarise: there is something fulfilling and edifying about deploying one's cultural sensitivities to engage with shared artistic vocabulary. That fulfilment is heightened by the complexity and depth of the vocabulary; and sometimes by an appreciation of the finesse with which the vocabulary is used. That which is 'rich' or enriching is the intellectual and aesthetic *rigour* demanded by the engagement with such conventions, either creatively (by authors) or interpretively (by users).

4.2.4 Rigour as a cognitive aesthetics

I would therefore espouse a value of rigour that is a composite of Barron's discursive virtue of 'tolerance' and Fisher's aesthetic virtue of 'richness'. It is rational rigour that makes discursive works tolerant, and aesthetic rigour that makes artistic works rich. My idea of rigour even carries some echoes of Kant's own aesthetics (which the copyright Kantians do not consider in much depth). For example, Kant describes the exercise of aesthetic judgment as the 'free play' of faculties of imagination and understanding. This is an aesthetics with which Barron might have fruitfully supplemented her concept of tolerance.⁴⁶⁵

⁴⁶⁵ See Kant (1914), §9. On the place of 'free play' in Kantian aesthetics, see also Ginsborg (2014).

It should be clear that rigour is conceptually close to the concept of play that Cohen and other cultural turn scholars advocate. Advocates of play think that there is enrichment and fulfilment to be had in engaging actively with the vocabulary of art manifest in works. They think this fulfilment is born of freedom: the removal of constraints upon how individuals may engage with that vocabulary.⁴⁶⁶

To advocate rigour is to agree that such engagement is fulfilling, but to insist that the quality of the vocabulary of art itself, and not merely the freedom of the engagement, bears on the degree of fulfilment experienced. This is the crucial point: the extent to which play is enriching depends upon conditions under which play takes place, not only the extent to which individuals can play or not. *The degree to which play is conducive to self-realisation, is constrained by the rigour of the vocabulary of art that is available for individuals to play with.*

What I am advocating here is a kind of ‘cognitive’ aesthetics for copyright, somewhat tempered by pragmatism. Hutter and Shusterman—synthesising key concerns of a number of aestheticists, including Kant, Beardsley, Dickie and Adorno—explain the ‘cognitive’ value of art in these terms:

Even if we dismiss the notion of a special form of truth that is accessible only through artistic means, art has undeniable value in effectively communicating a wide variety of truths and in honing our symbolic skills of conveying and processing very subtle forms of information... The very appreciation of form and meaning is an exercise whose practice enhances our cognitive skills and our proficiency in symbolic processing.⁴⁶⁷

⁴⁶⁶ See above, n (252) and accompanying text.

⁴⁶⁷ Hutter and Shusterman (2006), 198.

A human capabilities outlook on the world can very well accommodate such an aesthetics because both are concerned with the optimisation of individual experience through the engagement and development of human capabilities.

Where does the pragmatism fit in? A cognitive aesthetics need not be unitary or absolute. What is relevant in a cognitive aesthetics of ‘rigour’ is the simple fact of an art work’s engaging the application of a critical or judgmental faculty. Adorno would say, ‘What works of art really demand from us is knowledge or better, a cognitive faculty of judging justly.’⁴⁶⁸ I reject the requirement that judgment be just. From a human capabilities perspective, only the exercise of the cognitive faculty of judging (or playing) is important, not the justice of the judgment.⁴⁶⁹ Let me elaborate on this point by considering the differences between my objective of rigour, and ‘high culture’ aesthetics.

4.2.5 Distinguishing rigour from high culture aesthetics

In positing rigour as my third mid-level qualitative objective for copyright, I may seem to be invoking so-called ‘high culture’ values. High culture aesthetics tend to emphasise careful attention to formal features of works, and not merely to the substance of what is conveyed.⁴⁷⁰ Advocates of high-culture values tend also to disapprove of the venal, the obvious, the vulgar: and more generally, of mass culture. They are not content with work that merely conforms with the status quo.

⁴⁶⁸ Adorno (1984), pp. 18-21.

⁴⁶⁹ For an interesting argument in favour of adopting a pragmatist aesthetics for copyright, centred on the fulfilment individuals experience through free creative play, see Beebe (2017), 245.

⁴⁷⁰ On this subject, see e.g. Gans (1974).

On the right, proponents of high culture values have lamented that popular culture, driven by dictates of commercial media, passes over that which is fine and refined, in favour of ‘lowest common denominator’ fare, designed to maximise audience numbers and profit. The result, according to them, is that culture becomes crass, bland, and less conducive to its consumers’ aesthetic enrichment.⁴⁷¹

On the left, critics of mass culture have identified the same blandness, but tend to view it through a political lens. The problem, according to them, is that mass culture is produced by commercial entities who have a vested interest in preserving the status quo.⁴⁷² The powerful apparatus of commerce anaesthetises the populus into passive consumption, and (ultimately into a generalised political passivity) with bland, ubiquitous and unchallenging cultural fare. This undermines autonomy and political progress toward a more egalitarian state.⁴⁷³

The inverse implication is that the encouragement of active engagement on the part of the consumer is good for both individual (autonomy) and collective (democracy) self-realisation. It is rewarding to the individual because it is empowering. It is good for society because the active, autonomous citizen is more likely to make positive contributions to society (or for radical leftists—towards a revolution).

The critique from the left and the right recall the blandness critique of copyright. It is interesting how closely these arguments relate to broad human capabilities thinking. The idea that individuals benefit from active, rather than

⁴⁷¹ See e.g. Leaves and Thompson (1973).

⁴⁷² Note, there are strong echoes of this critique in Benkler’s work on copyright, and I will engage these more closely in chapter 6.

⁴⁷³ See e.g. Marcuse (1979); Goldman (1976), 40, 48.

passive engagement with culture is consistent with arguments I glossed in chapter 3, especially the priority of play in the cultural turn. A commitment to enhancing self-realisation and development can accommodate high culture values to some extent.

Certainly, a large part of education in literature, music, visual art and other art-forms involves an accumulation of basic cultural capital through the study of canonical works, whose relevance is determined by educational and cultural experts. There is some measure of consensus among educators and educational institutions that exposure to canonical, 'high culture' works, and training in the vocabulary of art in which they are expressed, is a worthwhile endeavour and an important element in education and self-development.⁴⁷⁴ The notion that more difficult or complex works might be more fulfilling to individuals than simpler or more bland ones is not radical.

All of that notwithstanding, I do not espouse high culture values without qualification. Despite their similarities, adopting rigour as a mid-level objective for copyright is not tantamount to adopting high culture aesthetics. The high culture narratives, both from the right and left, are culturally paternalistic. For the left, the paternalism resides in the idea that exposure to high culture is necessary to inspire individuals to act politically. I am not convinced that passivity and escapism are always opposed to self-realisation, or even to political engagement. It is hard to say whether uncritical enjoyment of bland fare might not, after all, be restful and

⁴⁷⁴ Lewis (1990), 11.

revitalising. The escape provided might be the very thing required to energise individuals to pursue self-realisation, or political engagement, in other domains.

For the right the problem is snobbery. Bourdieu famously pointed out that high culture standards of taste are constructed by an educated and powerful class. Enjoyment of high culture works demands the accumulation of cultural capital—education and training in the shared vocabulary of certain art worlds. That accumulation tends to be reserved to a privileged class. As a result, elite taste standards tend to serve the purpose of enforcing or bolstering the elite's privilege. Denying the vulgar, the banal, the coarse is a way of affirming the superiority of those who enjoy the refined, the rarified, the sublimated.⁴⁷⁵ This surely does not advance the cause of improving the populus through exposure to refined and challenging works.

On a more general note, we should be cautious about permitting cultural dictatorship through law. Trying to enforce high culture values on the public through copyright law, whether for right-wing Leavisite, or left-wing revolutionary reasons, would be a troubling endeavour. Barron, rightly, will not countenance prohibition of non-tolerant speech, or the enforcement of a standard of tolerant speech.⁴⁷⁶ The potential benefits for collective emancipation are in this instance outweighed by the direct suppression of autonomy.

Enforcing a standard of rigour that only valued high culture works would also run up against other mid-level values to which I am committed. Diversity would

⁴⁷⁵ See e.g. Bourdieu (1984), 7. For an interesting analysis of how to align copyright with Bourdieu's cultural theory, see Senftleben (2014).

⁴⁷⁶ Barron (2012), 29.

suffer if only one cultural standard were enforced. As for inclusiveness, a strict commitment to high culture standards would be liable to exclude from culture anyone who could not, or did not wish to, communicate in the artistic vocabulary of high culture.

Even if the law could guarantee a proliferation of high culture, it does not follow that such a culture would enhance democracy or autonomy for all. Levels of cultural capital, as a matter of fact, differ. Even if educational opportunity were equally available to all (it is obviously not), not every person shares the same capacity to learn and accumulate cultural capital. And even assuming equal levels of cultural capital in the public, tastes naturally differ. What is stimulating or autonomy-enhancing for one person, or one group, will not necessarily be experienced as such by another.

In any case, culture is very difficult to control, especially unilaterally. Ultimately, the law, especially copyright law, is limited as a tool of cultural policy. Tastes and values differ, and culture is, as I have already emphasised, composed of competing validating institutions. Attempting to enforce only one—and a narrow one at that—is not only misguided, but also likely impossible. It is inconsistent with the subtle concept of culture elaborated in the cultural turn (see chapter 2) to think that merely altering one or a few inputs into the multivariant ‘feedback loop’ of an ever-emergent culture can effect a unilateral change, or yield one clear cultural standard.

Does this mean rigour must be abandoned as a mid-level principle? I do not think so. What is needed is a concept of rigour that does not privilege the tastes of one particular group to the exclusion of others. Rigour needs, in other words, to be

conditioned by the goals of diversity and inclusiveness. It may be, as Professor Herbert Gans intimates, that works which require the accumulation of a deeper or subtler cultural capital are in the end more satisfying to their audiences—but only to those who have the relevant cultural capital.⁴⁷⁷ The way to solve this problem is by acknowledging, in our concept of rigour, a plurality of tastes and validating institutions.

In a society, which is democratic and heterogeneous, there is not a single culture with singular conventions and a single artistic vocabulary. There are, in fact, many aesthetic groups with their own standards and conventions. Gans calls them ‘taste cultures’.⁴⁷⁸ Bourdieu uses the term ‘field’ to describe a creative domain with its own hierarchies of power and taste.⁴⁷⁹ Within each taste culture or field, there are standards of good or bad, and within each taste public there tends to be a similar hierarchy of consumers, from ‘buffs’, who are most familiar with the shared artistic vocabulary, down to more passive consumers.⁴⁸⁰

The shared language of a taste culture need not necessarily demand highly refined and complex modes of expression in order to permit scope for rigour. Gans points out, for example, that while westerns (cowboy films) may not belong to the domain of high culture, those who enjoy westerns can identify good and bad ones.⁴⁸¹ High culture critics and commentators may have a more sophisticated

⁴⁷⁷ Gans (1974), 125-126.

⁴⁷⁸ Gas (1974), 115ff.

⁴⁷⁹ Bourdieu (1996). See also Hesmondhalgh (2006), 212.

⁴⁸⁰ See Caves (2000), 185-1887.

⁴⁸¹ See Gans (1974), 58, 117. Actually 40 years on from Gans’ book, some westerns are seen as classic works of cinema and have achieved an almost canonical status. For example, the iconic Western, *High Noon*, was, in my final year of school, a set text for English Literature Extension 1 in the New

vocabulary in which to communicate their aesthetic concerns than the average western fan. But that does not mean that western fans do not have aesthetic concerns or sensitivities. What makes a western rigorous is the way in which it engages the vocabulary of art pertinent to its genre: cinematography, production design, editing, plot, acting and so on. To put the point more generally, evaluation of rigour must always take into account the specific taste-culture into which a work is received.

Rigour, inclusiveness and diversity are, then, closely connected and mutually reinforcing. Diversity and participation complement rigour, because without them, users of works cannot really experience rigour within a taste culture that suits them. But rigour also complements participation and diversity. Without rigour, wide participation and diversity might yield a wide variety of works, by a wide variety of speakers, which are, nonetheless, not satisfying or stimulating to audiences.

4.2.6 Placing rigour on the same footing as inclusiveness and diversity

I have described the aesthetic experience that I think is socially valuable. How do we translate this into a mid-level objective for copyright? Let me try to answer that question by connecting rigour with the high-level value of autonomy. In order for a mid-level objective of rigour to answer to the high-level value of autonomy, two things are required. Firstly, a work's author and its audience must both have some

South Wales Higher School Certificate. We studied it alongside the Jacobean *Revenger's Tragedie* by Cyril Tourner, in a unit on the conventions of revenge tragedies.

awareness of the shared language and vocabulary of conventions in which the work is expressed and situated. Secondly, conditions must be such that an author has a chance to engage rigorously with that language, that vocabulary, and those conventions.

If we comprehend these two things when we designate rigour as a mid-level value, then the fact that rigour pertains to aesthetic matters, whereas diversity and inclusiveness do not, does not matter quite as much. We find ourselves dealing with the same kind of relationship between copyright and the public benefit, whichever of the three mid-level objectives we advocate. We are making the kind of move needed to avoid cultural paternalism. We are taking an interest in how copyright affects the parameters and conditions under which creative activity happens, rather than trying directly to impose some particular standard of merit.

4.3 The production function revisited

4.3.1 Why money matters

Just because creativity would not come to a grinding halt without injection of copyright funds, it does not follow that no resources are necessary for creative culture to be good for autonomy and democracy. In contemplating copyright's relationship to the public benefit, we are not confined to thinking only about how many works are produced. We can think also about the conditions under which works are produced, and the likely influence of such conditions on the nature and character of works.

If we adopt rigour as a third mid-level objective for copyright, it is easier to appreciate the benefits of copyright's production function. To adopt a mid-level objective of rigour is to pursue conditions that facilitate authors' rigorous engagement with the vocabulary of art that is pertinent to their work. Once it is understood that rigour enhances individuals' experience of works, we see that copyright's production function may be publicly beneficial, even if the creation and publishing of many works does not require the support of copyright.

For one, advances in technology do not reduce or eliminate the costs of many different kinds of works. Open-source software—a favourite example of successful 'peer produced', non-proprietary works—does well, not because there are no costs involved, but because networked production distributes costs so widely as to make the cost incurred by each creator-participant relatively low.⁴⁸² But not all works are amenable to being divided into granular modules, completed through the efforts of a decentralised network of contributors.

At a certain point, works and their component parts are not sufficiently granular that they can be produced by amateur contributions alone. The larger, the more linear, the more integrated (as opposed to modular) and complex a work, the higher are likely to be those costs, and the higher the need for some degree of centrality in controlling their production. Benkler is an enthusiastic advocate of the power of open-source, networked, modular production, but he is quite clear that this kind of production falters as soon as the modules involved in the work get too large. He cited, for example, a case of peer produced textbooks, where the

⁴⁸² See Benkler (2006), 100-103

work required to produce chapters and chapter sections appeared to exceed the level of contributors' commitment.⁴⁸³ If textbooks are not divisible into sufficiently granular modules, surely the case for networked peer production of complex, linear, non-modular, recursive, integrated works like novels through networked peer production is weaker still. In such cases, distributed contribution may not be a virtue at all, because it may compromise the coherence of vision and control needed to execute the work.

Some works are simply more expensive to produce than others. Oil paintings are evidently costlier to make than, say, blogs. More importantly, *resources make a difference to the quality of works*. An amateur creator with limited funds is not on the same footing, when it comes to her power to realise her creative ambitions, as an established commercial publisher, or even a professional creator with independent copyright funds, or the support of a commercial intermediary. Likewise, an author or publisher's ability to participate in and influence culture may be limited by the resources available to him. The availability of resources is also liable to influence the reach of published works. To put it another way, 'published' does not mean 'read'.⁴⁸⁴

Money still matters a great deal even if it may matter less than it has in the past. It matters for qualitative outcomes, in terms of rigour, the distribution of communicative power, and the diversity of the cultural landscape. While some costs are reduced by digital technologies of creation and distribution, many very

⁴⁸³ Benkler (2006), 102.

⁴⁸⁴ For interesting analyses of expenditures on marketing works, for example, see Nadel (2004), and Elberse (2013).

important costs of creating works remain, regardless of technological advances. These are costs that have nothing to do with the incentive of authors, and everything to do with the material conditions and resources required to execute certain kinds of works to a certain standard.

Both the time expended on many works, and the resources necessary to realise them with rigour, are costly, regardless of the productivity advances offered by digital technologies. Let me, then, consider the qualitative import of these two kinds of inputs into the creation and publication of works: creative inputs of time, and what Caves might call the more 'humdrum' inputs of resources (not to mention the cost of the time of non-creatives involved in the creation and publication process).⁴⁸⁵

4.3.2 Creative inputs

Creative endeavours tend to require an investment of time on one time scale or another (I will explain what I mean by timescale a little further below). Time spent on works comes with an opportunity cost: of foregone earnings, or at the very least of foregone pleasure from other activities. While amateurs may be able to spend a reasonable amount of time on works for pleasure, the amount of time they can spend will always be limited by the need to earn a living. Of course, there may be amateurs who have an independent living without needing to work, but to rely on such creators to produce the stuff of our culture comes with problems of its own, which I will explain shortly below.

⁴⁸⁵ Caves (2000), 4.

The direct time-cost of creative work is liable to be quite high, especially in the case of sustained works of authorship like novels, plays, feature length films, television shows, music albums, and so on. Any such work usually takes a long time to realise, even to the lowest standard of rigour.

Let us imagine I want to produce a 'single'—a recording of a 3 minute pop song—in the most inexpensive way: by recording and producing it with a single guitar in accompaniment, on a laptop computer in my bedroom. First, I have to write the song. Assuming the song just 'comes to me', I may get it done in a few hours. More likely, I will need to work at it for a few sessions of 2 to 3 hours (speaking from experience, some songs have in fact taken me 10 to 12 such sessions, or more to write). Then I need to make sure I can play it through from start to finish without errors, under the pressure of recording conditions, with a microphone right in my face, and an imperative to keep my guitar very still to avoid making extra noise or hitting recording equipment. Again, this practice will take at least a few hours—likely spread over a few days.

Only after many hours am I even ready to record. And recording is not just a matter of playing the song through, although in some cases I may record 'live' for effect. More likely, I will record the vocal and instrumental tracks separately. The chances of my performing to my satisfaction on the first 'take' (the first time recording each instrumental and vocal part) are low. I may need about 10 to 12

takes to get each part right—this is, according to one expert, about the average for most musicians, although some may require many more takes.⁴⁸⁶

I will want to ‘comp’ (compile) the best parts of each instrumental and vocal track from each take into a single track—this is a painstaking task, even with digital editing tools for cutting, pasting and cross-fading. I will also need to mix and master my song. I will have to listen to the song through multiple times, fiddling with gain, volume and the mix of frequencies on each vocal and instrumental track to ensure all the parts blend; and then adjusting the volume of each track in relation to each other, and the volume of various bandwidths of frequency (various ranges of bass, middle, and treble tones) on the combined master track until the blend and tone are to my satisfaction.

The point is, there are many time-consuming steps involved even in this kind of ‘bedroom’ production. Technology may increase my productivity somewhat: I can record, save, cut and paste from different takes, and edit more easily in modern digital formats than I could if I were working with tape. But the purely creative elements of the work—writing the song, polishing my performance, making comping decisions, mixing and mastering until I have the sound I desire—all this takes... as long as it takes.

Baumol describes the consequences of this characteristic of creative work as ‘cost disease’.⁴⁸⁷ While technological advances have increased productivity in many fields of labour and endeavour, the rate of increase in productivity in creative work

⁴⁸⁶ See Neal (2015). The article claims that Michael Jackson sometimes took more than 40 takes, and compiled the results together to get the final product, while Christina Aguilera’s song ‘Here to Stay’ was compiled from 100 different takes.

⁴⁸⁷ Baumol (1966); Caves (2000), 229; Heilbrun (2011), 67.

has not matched other fields. At a certain point, creative work reduces to human, imaginative or analytical, endeavour. Technology may make certain technical activities a little faster (it is easier to edit a digital 'wav' sound file than to physically cut and paste tape). But technology will not speed up my internal aesthetic or rational processing very much. Ultimately, thinking and imagining, and then getting down to the creative work of expressing thoughts and imaginings, just takes time.

The richer and more complex the work, the more time it will tend to take to execute. The longer and more sustained the effort required to sustain the work, the more helpful funding will be and the less likely an author will be to have sufficient free time to make such an effort without funding.⁴⁸⁸ Few write a great novel overnight, let alone in a year of full time work. A common factor among many great authors' daily routines is the large amount of free time they took to allow their creative processes to play out.⁴⁸⁹ The rigour born of free time, and working time, exacts a hefty opportunity cost.

The process of review and revision is once again liable to be time-consuming. To the extent the rigour is realised through various kinds of collaborative quality control, time demands will be greater still. Developing ideas, discussing, working, reworking, workshopping, experimenting, organising collaborators, practising (where performance or recording is involved), editing and polishing: all of these tasks also involve a significant expenditure of valuable time. The more dependent on pure human effort, judgment and time consuming deployment of technical

⁴⁸⁸ On copyright's role in supporting sustained authorship, see Ginsburg (1995), 1499.

⁴⁸⁹ Currey (2013).

skill, the more pronounced the impact of cost disease, and the greater the opportunity cost of creating such a work will be.

The workings of copyright publishing markets reflect this. It is common for commercial intermediaries intending to publish the work of an author to obtain the copyrights they require by offering an advance as part of the deal with the author. In exchange for a copyright licence or assignment, music publishers usually advance musicians a sum of money to cover the opportunity cost of time spent on writing, reviewing, editing (or in the case of music) developing, 'demo-ing', arranging, recording, mixing and mastering—not to mention the costs of resources and materials which I will discuss in more detail below.⁴⁹⁰

Of course, there are outliers. I assumed, for convenience, a scenario above where a song just 'came' to me as a hypothetical songwriter. It is common to describe the experience of creating in terms of sudden inspiration. But what does it really mean for a songwriter to say that he was suddenly struck by inspiration, or that the song was a gift from the muses? Should we only take into account the 20 minutes it took to summon forth a marvellous song and scrawl it down on the back of an envelope? Of course not. Songwriting (or scriptwriting, or the writing of poetry or prose or academic writing or film directing or cinematography) is a skill like any other. It takes time to develop. The flash of inspiration is usually a product of many years of skill development in the past. This is what I meant above when I mentioned that the investment of time in creative endeavours occurs on more than one time scale. There is the time scale of the work—the amount of

⁴⁹⁰ Passman (2011), 79-81.

opportunity cost and time expended on creating a particular work. Then there is the time scale of the career—the amount of time spent cultivating technical skill and experience. And that skill development is not just confined to a phase of training and education. It happens in great part on the job, as in any field of endeavour.

There must surely be a correlation between the amount of time spent developing the skills involved in creating various works, and the rigour with which those works are executed. That may be an imperfect correlation. There may be creators who lose their spark after an initial flurry of work. Samuel Taylor Coleridge famously struggled to write poetry in his later years.⁴⁹¹ Or there is the composer, Johann Sibelius, who, having established himself with a comfortable income, produced nothing in the last 30 years of his life.⁴⁹² So time doesn't always produce better quality, and money does not always cause authors to spend more time on works.⁴⁹³

Even so, we take it for granted in other fields of endeavour that experience correlates to some degree with the quality of work. Of course, a highly intelligent newcomer in some field of work may outdo a seasoned veteran who lacks focus or drive. But generally speaking, intelligence and drive being equal, experience counts. As Keen puts it,

Becoming a doctor, a lawyer, a musician, a journalist, or an engineer requires significant investment of one's life in education and training, countless auditions or entrance and certifying exams, and commitment to a career of hard work and long hours. A professional writer spends years mastering or refining his or her craft in an effort to be recognized by a

⁴⁹¹ Paley (2011), 5ff.

⁴⁹² Grimley (2004).

⁴⁹³ On the subject of comfort and wealth disincentivising authors, see Nadel (2004), 814

seasoned universe of editors, agents, critics, and consumers, as someone worth reading and paying attention to.⁴⁹⁴

A clever 5-year-qualified lawyer can charge a higher hourly rate for her work than a clever 2-year-qualified lawyer at the same firm. Their clients know that the more experienced lawyer will probably produce better, more reliable, rigorous work. Likewise, authors will generally hone their skills with time and experience.

For every Coleridge or Sibelius there is, perhaps, a Mary Ann Evans: better known by her *nom de plum* of George Eliot. Eliot spent the ten years from the mid 1840s until the mid 1850s writing and editing for periodicals. One Eliot scholar observes that Eliot's reading and writing of periodical prose in that decade helped to supply her with characters, metaphors and themes for her fiction, which she began writing in 1856 as a seasoned 37-year-old.⁴⁹⁵ Her long apprenticeship working on periodicals helped her to refine and develop (what I would call) her 'vocabulary of art' which is where rigour finds expression.

Her development did not stop there. She wrote short stories for 2 years, before publishing her first novel, *Adam Bede* in 1859.⁴⁹⁶ *Middlemarch*, arguably her greatest novel (and perhaps the greatest novel in the English language) was her 7th and she began it at around the age of 50, with around 23 years of experience as a professional writer under her belt.⁴⁹⁷ Eliot's blooming was magnificent, but it was hard won and gradual. This is perhaps what Merges was gesturing toward in the

⁴⁹⁴ Keen (2007), 63.

⁴⁹⁵ McCormick (1986), 57.

⁴⁹⁶ Eliot (1858). The short stories were published in *Scenes of a Clerical Life* (Edinburgh and London: William Blackwood and Sons, 1858).

⁴⁹⁷ Mead (2014), 16. Virginia Woolf described *Middlemarch* as 'one of the few English novels written for grown-up people. Woolf (1925), 166ff.

passage I quoted above in part 3.3. To vindicate copyright on the basis that it sustains a creative infrastructure that supports the development of creative professionals' talents, is to say that this process helps in the cultivation of more rigorous, intriguing, compelling and fulfilling vocabularies of art in the world of works.⁴⁹⁸

Eliot is an apt example here, not only because her skills were developed within institutional structures supported by copyright (the periodical industry), but also because Eliot supported herself with her copyright royalties for many years.⁴⁹⁹ Indeed, Eliot was the first major English writer to receive a royalty contract, rather than merely a one-off fee, and she got it in 1860 for her second novel, *Mill on the Floss*, after the success of *Adam Bede*.⁵⁰⁰ The royalties from her successfully selling novels, and the publishing deals she settled for new novels, furnished her with the financial stability to keep writing, and to keep spending time on her writing. Regardless of whether the money served as an incentive to keep writing, or whether Eliot wrote for the love of it, the money sustained the conditions in which it was possible for Eliot to continue writing and developing her craft.

4.3.3 Humdrum inputs: personnel and equipment

The point of the Eliot anecdote is to highlight copyright's capacity to exert a particular kind of institutional, structural influence on the world of works. Here,

⁴⁹⁸ Merges (2011), 292-3, see also 247.

⁴⁹⁹ Cowen (1998), 63.

⁵⁰⁰ Caves (2000), 59.

we come up against the fluid boundary between what Netanel described as copyright's production function and its structural function. The income derived from copyright underwrites a great and complex commercial infrastructure. This casts a different light on the figures often cited to articulate the economic value (in the hundreds of billions) of the 'copyright industries'.⁵⁰¹ It is all very well to talk of an industry worth billions in the abstract. But it is important to keep in mind the ways in which that wealth is invested, and the workings of the institutions in which it circulates. Perhaps creators are not a scarce resource, given so many create for creation's sake, but talent is rather more scarce.

The money made by copyright industries is money that can be invested in the nurture of talent. Again, Keen is articulate on this subject:

Nurturing talent requires work, capital, expertise, investment. It requires the complex infrastructure of the traditional media—the scouts, the agents, the editors, the publicists, the technicians, the marketers. Talent is built by the intermediaries. If you “disintermediate” these layers, then you do away with the development of talent too.⁵⁰²

Copyright money makes possible payment of advances and royalties by commercial intermediaries to authors whose past market performance indicates that such an investment is low risk.⁵⁰³ I will address the distributional consequences of this qualification—the mitigation of risk in investment based on past market performance—in more detail in chapter 6. The point for now is that copyright's production function supports an institutional cultivation of talent over

⁵⁰¹ See e.g. *Creative Industries Mapping Document* (2001), which states that creative industries in the UK contribute £112.5 billion to the economy and employ over 1.3 million people; and that exports of creative products contribute to around £10.3 billion and account for 6% GDP.

⁵⁰² Keen (2007), 30.

⁵⁰³ On royalty and advance structures in publishing contracts, see Caves (2000), 57ff.

time by commercial intermediaries, who have a commercial interest in building a career for the authors in whom they invest.⁵⁰⁴

Keen's point, above, also highlights the fact that copyright funds do not just sustain authors themselves. There are many other functions involved in the selection, development and publication of works, performed by non-creative or 'humdrum' functionaries. Such work includes 'A & R' (responsible for cultivating Artists and Repertoire), editing, and promotion and marketing. According to a recent report by a recording industry group, for example, record labels spent 27% of their revenues on finding and developing artists, and marketing them, with the typical cost of 'breaking' an international artist in a major market such as the US or UK ranging from \$US 0.5 million to US \$2 million.⁵⁰⁵ The time of the functionaries who perform this work is generally not available for free. 'Humdrum' inputs into creative work are less inclined to work 'for art's sake'. Copyright is an important source of the revenue that permits commercial intermediaries to invest in talented 'humdrum' staff and contractors, who in turn help them to invest in talented authors. Technology may make publishing cheaper, but to reach a large audience with a high quality product is still expensive.

It is not just publication that is expensive. Some works, like podcasts and blogs have very low material costs, and because many (though not all) are records of *ex tempore* expression and casual conversations, they tend not to involve a high

⁵⁰⁴ Caves (2000), 61.

⁵⁰⁵ IFPI Report (2016).

time cost.⁵⁰⁶ But many works, in spite of technological advances, still require expensive materials in order to be created to the highest standard of rigour. The fact that works like films, music and journalism may sometimes be produced cheaply does not mean that they are *best* (most rigorously) produced at a low cost.

Take news content, for example. Investigative journalism of the kind provided by television news and current affairs shows and newspapers, is expensive. It demands investment in travel, in investigation, in complying with journalistic constraints regarding sources, in corroborating reports by sources, in checking facts, in editing and copy-editing, in settling layout, in producing shows to a broadcast standard (in the case of television) and so on. In other words, journalistic *rigour* demands a rather high financial outlay.⁵⁰⁷

In a book published in 2008, Hindman helpfully gathered together some data about the operating expenses of newspapers. He cited the New York Times Company's annual report, which explained that the company's main expenses were employee related, as well as raw materials.⁵⁰⁸ For another large news group, Knight Ridder, printing and distribution only amounted to about a third of their US \$2.51 billion in operating costs for running 32 daily and 65 non-daily newspapers in 29 markets. Whether their readers are online or offline, newspapers still have to pay reporters, editors, janitors, office and secretarial staff; they still require offices,

⁵⁰⁶ The extent to which podcasters need to spend time preparing for podcasts -e.g. reading the work of a prospective interviewee and preparing questions and arguments—depends of course on the nature and format of the podcast.

⁵⁰⁷ For some helpful commentary on the costs of high quality investigative journalism, see Keen (2007), 30.

⁵⁰⁸ Hindman (2008), 87-88

desks, computers and telephones.⁵⁰⁹ While their distribution costs might be reduced as a result of the internet, newspapers are still a labour-intensive industry. A large amount of human creative labour is required for high quality, rigorous journalism, so new distribution media hardly do away with problems of cost disease. High quality journalism still needs money, even if it is possible to produce a large amount of pseudo-journalistic content on a low budget.

Now, Benkler was (and may be still) very enthusiastic about the potential of blogs and other forms of internet publishing to turn citizens from consumers into producers of news and opinion media.⁵¹⁰ Certainly, blogs and podcasts are an example of a field in which it is possible to find high quality content produced without commercial investment. But blogs tend not to carry deeply investigative or analytical content, although there are some exceptions to this rule.⁵¹¹ Even where blogs are produced with a high investment of time and resources, it is important to keep in mind where the resources come from. Bloggers are often academics (supported by university funding) or journalists (supported by copyright industry income from other sources) or professionals (lawyers, consultants etc.) who use blogging as a form of business development.⁵¹² The calculus of covering opportunity costs of time spent on works, and of time spent on the accumulation

⁵⁰⁹ *Ibid.*

⁵¹⁰ See Benkler (2006), 11, 14. But note his more equivocal tone on the subject in a recent interview in Hylton (2017)—he does not seem to have gone back on his view that the internet enhances participation; but is perhaps more tentative in his conclusions about whether this produces good follow-on effects.

⁵¹¹ Take for example *TechCrunch* <<https://techcrunch.com>>, which began as a blog about dot com start-ups on silicon valley, and is now a leading source of technology news.

⁵¹² Hindman (2008a), 15.

of experience still applies in some measure even to amateurs like bloggers.

Copyright plays an important role in covering those costs.

It is also worth mentioning that a similar dynamic applies in the world of open-source software, a medium often treated as a kind of proof of concept for the efficacy of non-proprietary, networked peer production. Take Linux, the most famous example of open-source software that competes with, or even outdoes, proprietary software. Most volunteer contributors to the Linux project are not altruistic amateurs following their passion. Rather, they are employees of technology and software companies, which reportedly invest considerable resources into supporting the Linux project—because Linux is useful to them.⁵¹³ Many of these companies produce and market proprietary software. In other words, the resources that they invest into Linux are ultimately derived from copyright. Copyright funds the businesses that support the coders who create the open-source code.

The story of rigour in music follows a similar pattern to journalism. Any musician with a modicum of ability can now make an EP using Apple's clever and intuitive 'Garage Band' software and a cheap microphone in the bedroom. But the standard to which musicians can realise their creative visions, and explore the vocabularies of tone, harmony, melody, instrumentation, and rhythm pertinent to their genres, will be influenced by the availability of resources, including time, money, equipment and collaborators. Speaking from my own experience as a semi-professional musician, let me briefly convey some of the costs that might be

⁵¹³ See Barnett (2017), 4, citing the Linux Foundation.

involved in music recording: expenditures liable to increase the quality of a recording.

The union rate for hourly pay to a musician in the UK is £120 for 3 hours (3 hours pay being the minimum call rate).⁵¹⁴ Good recording studios usually employ 2 sound engineers per session, who charge between £50 and £250 per day.⁵¹⁵ Then there is the producer. Few producers even dealing with small-time groups would produce an LP record to a standard of ‘radio quality’ for less than a £2,000 flat fee, and a small percentage of royalties on record sales.⁵¹⁶ Then there is the studio equipment. A single microphone of very high quality for recording vocals may cost more than £2,000 (as a rule of thumb, the fidelity of a recording microphone correlates with cost). Complex recordings, especially where drums are involved may use more than 10 microphones.⁵¹⁷ Then there is the cost of musical instruments, the sound desk, digital and analogue effects plug-ins, studio monitors, cables, soundproofing, and ultimately mixing and mastering (all of which may be enhanced by investment in high quality equipment.) These

⁵¹⁴ Musicians Union, ‘BPI MU Agreements’, accessed 26/9/16 from <http://www.musiciansunion.org.uk/Home/Advice/Recording-Broadcasting/Session-Musicians/TV-and-Film-Agreements/AGre/BPI-MU-Agreements>. Really good musicians who are in demand are likely to charge more. Moderately complex instrumentation might involve about 6 instruments—so the cost of musicians alone for even a one hour recording session will be about £620.

⁵¹⁵ See www.soulsound.co.uk, an agency for sound engineers.

⁵¹⁶ Around 3 to 5% is common: McDonald (2016). According to one website, music producers may earn between £20,000 and £1,000,000 per year, depending on their status. See [www.http://www.payscale.com/career-news/2007/02/music_producer_](http://www.payscale.com/career-news/2007/02/music_producer_), accessed 5 November 2016. Another music business website -Salmon (2008) -puts the upper limit payment to a superstar producer for a single track at £80,000, with high-end producers earning, more commonly, somewhere between £2,000 and £10,000 per track, and lower end producers earning around £300 to £1000 per track.

⁵¹⁷ At the time of writing, there is an AKG C12VR vocal microphone advertised on a music equipment website for £4,048.98: https://www.thomann.de/gb/akg_c12vr.htm?gclid=CjwKEAiAgavBBRCA7ZbggrLSkUcSJACWDexAFknulyXv42hIr3_YueMy6mosHjblOndQToE6H_KVRoCgzDw_wcB accesses 15 November 2016.

resources will not be available to any but the richest bedroom producers—a fact with repercussions for inclusiveness, which I will discuss below. The upshot is, for professional quality recording, musicians still usually need to go into the studio, at a cost of at least £500 per day.⁵¹⁸ It is not unusual to spend more than £10,000 to produce high quality album.

Expenditure of time and money, as a rule, improves the rigour and quality of a recording. Time spent with musicians, producers and musical directors collaboratively workshopping, refining and rehearsing a song will likely iron out awkward, inelegant or unoriginal elements. The accomplishment and experience of the musicians themselves will tend to affect the expressiveness and accuracy and overall ‘tightness’ of the recorded sound, and their fees will reflect this. The more time available for rehearsal and recording, the higher the chance of capturing their best performance. An accomplished producer will bring to a recording project a unique familiarity and fluency in the various musical and technical vocabularies with which the record might engage; as well as a sense of the fashionable ‘sounds’ of the day. Sound engineers and, of course, recording equipment, will affect the fidelity and tone of the recording itself. Mixing and mastering engineers bring out the very best in tone and soundscape.

The upshot of all of this is simple. Where insufficient resources are available to cover the cost of the time, musicians, equipment and recording expertise required, musicians must compromise on rigour. It is wonderful that ordinary

⁵¹⁸ Lamont (2014). According to one site, the famous Abbey Road studios charge £5,000 per day for their small studio, £12,000 for their large studio, and £20,000 for their orchestral studio: <<http://www.perception-uk.com/client-portfolio/uk-and-ireland/abbey-road-studios.aspx>> accessed 10 November 2016.

individuals can now enjoy the exciting and rewarding process of recording music, and sharing their creations. But there are few, if any, bedroom recordings that can compete with high quality, professional studio recordings.

4.4 Compromising the production function has qualitative consequences

4.4.1 A note on the production function and rigour

I do not intend, with the above, to contest the oft-made claim that it is *possible* to produce high quality journalism, or music, or literature (or whatever other kind of work you like) under significant constraints of time or costs. It is not that, without money, without copyright's funding parameter, creativity would simply cease.

Clearly, even without a reliable way to recoup the cost of their creative time, some creators would still invest large amounts of time on creativity (although the question of who could afford to do so and for whom they were creating has implications for inclusiveness and diversity).

Nor do I intend to claim that the connection between money and rigour in the execution of a work is absolute. Shortage of time or money is not a guarantee of poor quality; nor is the availability of money a guarantee of rigorous creativity. Caves, for example, conducted a fascinating study of the phenomenon of 'ten ton turkeys'—films which attracted enormous investment, but which were critical and commercial flops.⁵¹⁹ The poet TS Eliot famously refused the patronage of his

⁵¹⁹ Caves (2000), 137.

friends and worked full time as a bank clerk, confining his poetic endeavours to his spare time, yet he is one of the most famous poets of the 20th century.⁵²⁰ And ironically, the same Anthony Trollope who said, ‘Take away from English authors their copyrights, and you would very soon take away from England her authors,’ did not himself rely exclusively on copyright.⁵²¹ He was a full-time post office bureaucrat, and is credited with introducing free standing post boxes to Britain.⁵²²

Be that as it may, on a structural level, copyright’s rule in funding creative industries has a real bearing on the constraints under which creative projects are realised. Netanel defends copyright on the basis that it affords a class of authors and publishers a measure of independence. What I have done here is to describe in more detail the qualitative import of that independence, and of copyright’s role in facilitating ‘sustained’ creative effort.

Copyright funding supports structures that furnish at least some authors and their commercial intermediaries with money. It permits increases in (among other things):

- time invested into works, because money can help to cover opportunity costs;
- the quality, quantity and experience of participants in the creative process, because money sustains the existence of creative infrastructure and a professional creative class over the long term;

⁵²⁰ Cohassey (2014), 30.

⁵²¹ Davies (2002), 16; Trollope (2009), 68.

⁵²² Royal Mail Group (2015).

- the quality and quantity of materials and equipment involved in the creative process, because good equipment usually costs more than bad equipment.

Money does not prescribe or guarantee those outcomes, but it permits them to play out. It gives them scope.

Pursuing the mid-level objective of rigour means trying to cultivate conditions which facilitate rigorous engagement with works' vocabularies of art. It would seem that copyright's production function answers to that objective. Here then is one reason not to adopt the minimalist tailoring principles I described in the previous part. If we reduce copyright protection so that it is available only when it is a strict *sine qua non* for the creation of some class of work, or for the incentive of some class of author, we reduce or remove a source of funding, and compromise on rigour. Even if it were proven that other forms of funding might produce a reasonable amount of funding for works, not all sources of funding are equal. Other means of funding works may produce less money, or simply be less efficient.⁵²³

4.4.2 A note on inclusiveness and diversity

I have been focussing here mostly on the relationship between the production function and rigour. It is also worth noting that the production function affects

⁵²³ On this subject, see Barnett (2017), 19. See e.g. Towse et al (2008), 12-16 for a helpful review of the literature on the subject of indirect appropriation, and the effects of file sharing and other forms of copying on revenues from the exploitation of copyright works. See also Liebowitz (2016), who concluded that the majority of studies on the subject support a conclusion that the decline in sound recording sales can be explained by the growth in digital file-sharing.

diversity and inclusiveness. I mentioned above that the expense of high quality recording equipment meant that it was available only to the wealthiest of 'bedroom' producers. I observed that this had repercussions for inclusiveness. Insofar as there is *any* external source of funding available to authors, be it patronage, advertising or copyright, it diffuses communicative power somewhat. If self-funding is the only source of funding, those with more money or time on their hands are at an advantage when it comes to their capacity to produce works.

Copyright, by increasing the pool of funding available for works, levels the playing field somewhat—or at the very least contributes to that levelling. It permits people outside the independently wealthy class, or those whose work appeals to wealthy fans willing to pay a premium to sustain their favoured artists, to grasp some of the levers to rigour described above. Insofar as authors or creators make money from copyright, or find support from copyright industries, they get access to more time, better equipment, better collaborators and so on. So, funding increases the range of people able to execute their creative visions to a high standard. This by itself is a payoff in inclusiveness.

The obvious payoff is the liberation of at least some authors from patronage. Another payoff would likely be an increase in the volume of professional work, in comparison with amateur work. The relative proportion of each presumably changes in some way loosely proportionate to the amount of money available to fund works. More money available may loosely expected to generate more professional work.

Then there is the likely increase in the proportion of people in the class of full-time authors who are not independently wealthy. The experience of the

independently wealthy and those who are not independently wealthy is likely to be different. That difference is likely to be reflected in their works. It is not that those without independent wealth could not have created any works at all without external funding. Rather the funding would permit them to execute to a higher standard, and probably also reach a wider audience. Copyright's production function, by bringing in this class of less-wealthy authors, would likely increase the total diversity among rigorously executed, professional works.

On the other hand, the funding parameter may generate countervailing pressures against diversity. Tushnet and others observe that grass-roots, amateur authorship tends to have a different character to funded work; and part of what causes that difference is the fact that the amateur is not, comparatively, as accountable as the professional.⁵²⁴ Rarely will an author receive funding of any kind (whether from copyright or another source) without either having met some expectation of the person or people providing those funds, or taking on an expectation as to what they will achieve.

That pressure of expectation may stifle natural, creative playful impulses, and encourage a risk-averse outlook. What counts as a risk will, of course, depend on what the funder perceives as risky; what the funder feels would and would not be a value-for-money proposition. A patron of the avant-garde would be unlikely to look on 'low-brow' works favourably, just as a commercial investor might be averse to works which appeal only to a very tiny niche audience.

⁵²⁴ Tushnet (2007), 113.

The funding parameter I have been discussing might therefore simultaneously exert pro-diversity and anti-diversity pressures. On the whole, though, it seems to me that the availability of funding is more conducive to diversity than not, simply because authors are not *required* to accept or seek out funding. The existence of funding does not preclude the existence of a class of grass-roots, amateur authors, nor indeed does it prevent the independently wealthy from creating. If anything, it widens and broadens the class of people who spend time on creativity, and opens up greater possibilities for at least some creators. Here, I think, I am in agreement with Netanel's essential point about copyright's production function—supporting the production of sustained works of authorship—and also one of its structural functions, in freeing at least *some* authors from dependence on their own wealth, or on patronage of one kind or another.

4.4.3 Structural considerations

I have been arguing that copyright's production is important because it furnishes authors (either directly, or through the investment of copyright-funded commercial intermediaries) with time and resources to execute their creative ambitions rigorously. We might object to this justification by pointing out that copyright is not the only way to fund works. I have pointed out that alternative forms of funding, such as advertising, may on the whole produce less revenue than copyright. Moreover, even if other forms of funding might produce an equal amount of income, surely removing a source of income such as copyright from the

pool of possible income sources would reduce the net amount of funding available for works. But neither of these points entirely disposes of the objection.

To advocate a reduction in the formal constraints imposed by copyright is to advocate the application of alternative constraints. Merely prioritising freedom to 'play' does not guarantee that the constraints under which this play occurs will not, in the end, be more restrictive upon autonomy and democracy than the constraints that come with market arrangements. The ways in which resources are distributed under any given arrangement are likely to have a qualitative influence. Resources enhance communicative power, and permit scope for certain kinds of rigour. The distribution of such resources, and the logic and parameters that govern their distribution are liable to influence the character and quality of the creative sphere.

Whatever source of funding we rely on, we must keep in mind that it will tend to come with its own set of institutional and cultural constraints, and its own conditions and parameters that affect the quality and character of works funded by it. In the next chapter I am going to consider in detail the qualitative influence of the dynamics of the internet and the free circulation of works in 'networked information economies'. This will set the scene for a comparative analysis of the constraints and parameters that apply under the less 'free' formal arrangements that pertain under proprietary copyright.

Chapter 5

The romance of the public domain

5.1 Tempering the melodrama

In chapter 3, I described the general framing of copyright's merits and detriments, in comparison with the merits of non-copyright based production and dissemination of works on the internet as a 'melodrama'. In this story, proprietary copyright serves corporate greed at the expense of a free culture, suppressing free expression and imagination; enriching and empowering commercial publishers; and 'locking down' culture. The villains are the self-serving copyright industry corporations who advocate proprietary copyrights for their own profit; the heroes, the facilitators of sharing and remixing culture, 'disrupting' these bloated incumbents. According to this melodrama, policy decisions about copyright law seem to fall into a stark binary. Either they serve mercenary commercial interests by fortifying or expanding exclusive rights in copyright proprietary domain, or they serve 'cultural' interests by fortifying the public domain and aiding 'digital democracy'.

Given the richness of the justifications for a strong public domain and for strong rights to access and use existing works, and the relative paucity and ambivalence characterising the justifications for a strong copyright, it is hard not to be sympathetic to this narrative. However, its rhetorical force does not make it right.

The previous chapter, and the remaining chapters of this thesis, are intended to temper that melodrama somewhat. In the previous chapter, I attempted to supplement and build on Netanel's 'production function' justification for copyright. I explained some of the ways in which copyright's production function

is qualitatively important. This ought to bolster our appreciation of copyright's qualitative merits (which should make it a little harder to treat copyright as the villain).

In this chapter I will begin elaborating on Netanel's idea of 'structural function'. I pointed out, in concluding the previous chapter, that weakening copyright is liable to bring into play a new set of structural incentives. I called into question the presumption that merely enhancing freedom to 'play' with works will necessarily bring about conditions that are substantively better for diversity, inclusiveness and rigour. In this chapter I will build on that point, with two arguments intended to complement my outline of the benefits associated with copyright's production function.

Firstly, I will challenge the argument that copyright 'locks down' expression—with bad consequences for inclusiveness and diversity.⁵²⁵ It is often argued that powerful copyright owners use copyright censor forms of expression which challenge their cultural status (for example, critical or parodic works). It is evident that copyright owners may sometimes try to suppress uses of works that are simply unpalatable to copyright owners. Even the threat of litigation by stifle free expression. However, I am sceptical about the extent to which this kind of constraint on expression chills creativity. There are reasons to suppose that copyright 'censorship' is not as dramatic as some accounts might lead us to believe, and I consider some of these in part 5.2 below. This is another challenge to the characterisation of proprietary copyright as 'villain'.

⁵²⁵ See e.g. Lessig (2004), 79.

Secondly, and at more length, I challenge the 'heroic' characterisation of access to works, the public domain, and so-called digital democracy on the internet. This narrative tends to romanticise the extent to which networked culture and peer production 'democratise' culture. It also understates the risks and detriments associated with networked production and dissemination of works. On closer examination, many of the constraints and parameters that apply in networked information economies seem just as bad for free expression and 'free culture' (in my terms—inclusiveness, diversity and rigour) as the constraints associated with copyright-based mass media.

Part 5.3 therefore cautions against romanticising the internet and the public domain as a matter of principle. Parts 5.4 and 5.5 then outline some of the particular problems with the selection and dissemination of works on the internet. Part 5.4 deals with problems in the distribution of attention and wealth on the internet. These are essentially inclusiveness problems. Part 5.5 looks at the consequences of networked selection and filtration for diversity and rigour, taking particular account of the ways in which these processes exert negative effects on diversity and rigour. With this more critical view of alternatives as point of comparison, we will be better placed to perceive some of the advantages of copyright-based structures—qualified and attenuated though those benefits may be.

5.2 A more judicious view of copyright's suppressive effect

5.2.1 Describing copyright as censorship is exaggeration

While copyright may burden free expression to some extent, it is an exaggeration to say that corporate copyright owners have 'locked down' free expression.⁵²⁶ We can start with an oft-quoted statement from *Eldred v Ashcroft*.⁵²⁷ In that case, Justice Ginsburg pointed out that the US first amendment right to free speech does not protect the right to make other peoples' speeches. Copyright owners cannot prevent individuals from expressing opinions, advocating political positions and speaking in public. It is only where reproduction of works comes into question that copyright may exert a suppressive effect on speech.

Copyright's capacity to burden expression is further limited by exceptions and limitations like the fair dealing and fair use exceptions. Granted, these exceptions do not always come to the rescue of inclusiveness. Tushnet points out that some individuals, in some circumstances, may need to rely on using existing works, even to the point of exact and extensive reproduction, in order to express themselves.⁵²⁸

We also see the limits of fairness exceptions in recent music copyright cases. For example, in the high profile case of *EMI v Larrikin* the full Federal Court of Australia held on appeal that a quotation of a musical motif from the popular

⁵²⁶ For the most influential iteration of this 'locking down' argument, see Lessig (2004).

⁵²⁷ 123 S. Ct. 769 (2003), [221].

⁵²⁸ Tushnet (2004), 538. See also Netanel (2008), 181.

children's song 'Kookaburra sits in the old gum tree', in a pop song, 'Land Down Under', was a copyright infringement.⁵²⁹ In another music case, the US case of *Williams v Bridgeport*, the court held that the pop song 'Blurred Lines' substantially reproduced the Marvin Gaye song, 'Got to give it up', by virtue of various similarities including the drum beat and an instrumental groove.⁵³⁰

These decisions are examples of courts misunderstanding musical conventions. Musical quotation, and play with generic themes and conventions such as beats, instrumentation, timbre, texture melodic themes and chord progressions are key elements of the vocabulary of art proper to pop music.⁵³¹ They may well have a chilling effect on some musical expression.

Nonetheless, the prospects for appropriative expression are not as grim as some minimalist copyright literature might suggest. The results of cases like *Larrikin* are regrettable, but not so far-reaching in their implications as to support a claim that copyright amounts to a form of censorship. It is all very well to worry about copyright-based censorship in the abstract, but what is actually happening in reality? Finding conclusive empirical data about copyright's role in suppressing expression—even instances of verbatim reproduction of the kind raised by Tushnet—is as hard as finding conclusive evidence that it operates as an incentive.⁵³²

⁵²⁹ *EMI Songs Australia Pty Ltd v. Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47.

⁵³⁰ *Complaint for Declaratory Relief at 4, Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752

⁵³¹ See e.g. Arewa (2006); Davis (2015).

⁵³² Tushnet (2004), 538.

As a matter of impression, though, it does not appear that expression that relies on existing copyright material is being very heavily burdened.⁵³³ For one, it seems that US courts are coming around the idea that, in some circumstances, even verbatim copying may be considered to be ‘fair’ for the purposes of fair dealing. In the world of the visual arts for example, US courts have recognised conventions of appropriation art allow for verbatim copying to convey new meanings, messages, aesthetics—and therefore for pieces of appropriation art to be transformative fair uses.⁵³⁴

Critics of copyright sometimes point to a series of copyright suits by the Church of Scientology as instances where copyright owners sought to suppress the use of their works because they found it unpalatable.⁵³⁵ Yet these cases do not seem to have deterred Louis Theroux from releasing a hit documentary recently, peppered with excerpts and footage from Scientology materials.⁵³⁶ The makers of that film seem to have executed a note-perfect fair use and fair dealing strategy, using quotation, parody, satire, research, study, education and criticism in equal measure.

The success of that film ought also to remind us that the leading case on fair dealing in the UK (which has heavily influenced courts in Australia and Canada) is, after all, a case about Scientology: *Hubbard v Vosper*.⁵³⁷ In that case, the defendant

⁵³³ But see *Izundu* (2017) for the claim that some record labels are imposing requirements on their signed artists to list their influences.

⁵³⁴ See e.g. *Cariou v. Prince*, 714 F. 3d 694 (2d Cir. 2013)

⁵³⁵ See above n (354) and accompanying text.

⁵³⁶ Theroux and Dower (2016).

⁵³⁷ *Hubbard v Vosper* [1972] 2 Q.B. 84.

successfully relied on fair dealing, having been sued for copyright infringement by L Ron Hubbard, the founder of Scientology himself, in order to try to suppress criticism of his cult. That attempt at censorship failed, and it is telling that the case became the leading English case on fair dealing. Saying that copyright law has permitted powerful groups to ‘lock down’ culture is rhetorically stimulating, but it overplays copyright’s suppressive effects.⁵³⁸

5.2.2 The role of enforcement costs

In any case, we need to look at day to day practice, as well as law. It is not just the formal allocation of user entitlements (such as the ‘user rights’ upheld by fair dealing exceptions) which sustain a measure of inclusiveness under copyright. Those formal rules also interact with the practical realities of copyright ownership and cultural exchange.

Take the example of the *Air Pirates* case—another popular example of copyright’s purported role in censorship of free expression.⁵³⁹ Disney took umbrage to depictions of Disney characters such as Mickey Mouse in lurid and pornographic scenarios in a satirical comic strip, and sued successfully for copyright infringement.⁵⁴⁰ But a Google search for ‘Mickey Mouse porn’ ought to alleviate the anxieties of those wringing their hands about the suppressive effects

⁵³⁸ Regarding the ‘lock down’ claim, see Lessig (2004).

⁵³⁹ See above n (353) and accompanying text.

⁵⁴⁰ *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (1978).

of the *Air Pirates* case. I entered those search terms, and got 700,000 results.⁵⁴¹

How much more Mickey Mouse porn would be needed for us to be satisfied that expression of this kind was not being suppressed?⁵⁴²

Evidently, copyright enforcement is not ubiquitous—far from it. Professor Merges writes of copyright owners choosing to ‘waive’ their rights, and of the right to waive being an essential feature of an exclusive, proprietary right in the first place.⁵⁴³ Tushnet, a passionate advocate for user generated content, concedes that copyright’s real world burden on free expression is quite low, in comparison to the formal restraint imposed by the law, because copying by ordinary people is usually beneath copyright owners’ notice.⁵⁴⁴ Sag describes copyright as having low ‘doctrinal efficiency’, because of this disconnect between the scope of formal rights, and the extent to which they can be readily enforced, or relied upon as a credible threat in order to extract licensing revenue.⁵⁴⁵ And Barnett, in a recent article noted that many copyright owners even waive their rights to notice and takedown procedures against YouTube under the US DMCA in exchange for a share of advertising revenue.⁵⁴⁶

⁵⁴¹ Google,

<https://www.google.co.uk/?gfe_rd=cr&ei=KBgfWPvVOKHS8AeYspS4Dw#q=mickey+mouse+porn>, accessed 6/11/16.

⁵⁴² Granted, I have argued that the quality of works, and not only their quantity, matters. There may be a rigour downside insofar as Mickey Mouse porn is only realised to an amateur standard. That said, the narrower point that I am making here still stands: copyright is not really ‘locking down’ lurid or grotesque engagements with the Disney canon.

⁵⁴³ Merges (2011), 196, 227.

⁵⁴⁴ Tushnet (2004), 586.

⁵⁴⁵ See Sag (2006), 224.

⁵⁴⁶ Barnett (2017), 10.

To describe this pragmatism with regard to copyright enforcement merely in terms of waiver of formal rights, or low doctrinal efficiency, however, does not quite capture the practicalities of copyright enforcement and commercial strategy. Enforcement of copyright costs money, and it does not ingratiate copyright owners with the public. Copyright owners must decide whether the cost of pursuing enforcement (taking into account the risk of a suit being unsuccessful, or running up against a defence like fair dealing, or simply of alienating potential customers) is outweighed by the potential benefit of a finding of infringement.

The benefits of such a finding may be direct or indirect. Direct benefits encompass things like damages: the direct monetary reward at stake in a suit. Indirect benefits will encompass the potential commercial value to be extracted from sales and licence fees as a result of the threat of enforcement. In assessing these benefits and costs, copyright's interaction with commerce comes into play.

Here, then, is a counter to the critique that copyright overreaches, by regulating works produced in a non-commercial context with rules that ought to apply only in commercial ones.⁵⁴⁷ In practical, real-world terms, the likelihood of enforcement outside of a commercial context is very small. Take, for example, copyright in emails. Many emails will be protected by copyright as literary works, even though the authors of such emails don't usually intend to publish or commercialise them. But what is the harm in having copyright apply there? Most people are very unlikely to enforce the copyright in any email they send, because, firstly they are unlikely to obtain damages sufficient to offset the cost of

⁵⁴⁷ See Loren (2008), 17.

enforcement (no direct benefit to enforcement); and secondly, controlling the reproduction of the email will generally not yield any commercial value (no indirect benefit). In any case, damages will tend to correlate with the perceived harm to the copyright owner caused by the loss, so direct and indirect benefits are closely connected.

The exception, of course, is the US, where an absurdly inflated sum of up to \$150,000 in statutory damages may be awarded in respect of each infringement.⁵⁴⁸ The size of potential damages is clearly intended to operate partly as a threat to induce users of copyright material to pay licensing materials. It also lowers enforcement costs by allowing copyright owners to bypass the step of proving actual harm. This kind of reduction in costs might be relevant to large commercial copyright owners, but it would still not make copyright enforcement affordable for most independent authors and small businesses owning copyright. In other words, it does little good for inclusiveness, and does much harm. This statutory damages provision should be repealed, and more scope left for courts to award damages more proportionately.⁵⁴⁹

All of that notwithstanding, waiver of copyright is common even in the US. Whatever their stance in the past, many copyright owners now actively encourage creative engagement by fans with their works.⁵⁵⁰ Some businesses like Blizzard (the

⁵⁴⁸ The basic level of damages is between \$750 and \$30,000 per work, at the discretion of the court. Plaintiffs who can show wilful infringement may be entitled to damages up to \$150,000 per work. *US Act*, § 504.

⁵⁴⁹ See above, n (440) and accompanying text. For another proposal to reform this remedy, see Samuelson and Wheatland (2009).

⁵⁵⁰ For a fascinating piece on the relationship between owners of copyright 'franchises' and fans, and the way in which control over shared meanings is contested and managed between fans and copyright owners, see Lindsay (2014).

creators of the online game, *World of Warcraft*) go so far as to provide fans with ‘fan site kits’—materials to allow fans to build fan websites.⁵⁵¹ Businesses like these have probably realised that their overall relationship with their market and fans is not improved by an aggressive copyright enforcement strategy.

The calculus underlying the waiver of copyright is as important as the capacity for waiver itself. Professor David Lindsay reports that owners of copyright ‘franchises’ like Mickey Mouse or Star Wars make a broad commercial calculation, and work out that, on the whole, they profit from engaging audiences in an ‘exchange of meanings’⁵⁵² Even where large statutory damages might be available to them, they choose not to sue for them, finding it more profitable to cultivate audience engagement, even if this sometimes means waiving copyrights. This leads Lindsay to the following insight. Copyright is, in this context, best seen as a form of leverage used by copyright owners to exert some control over the shared meanings associated with their works, to ensure they remain profitable, rather than as a blunt instrument simply used to suppress user expression.⁵⁵³

To sum up, the practical parameters under which authors, publishers and users make day to day decisions about creating, disseminating and using works, are as important as copyright law’s formal allocation of rights and entitlements— or rather the law is only one element among these parameters. In formally allocating entitlements, the law is only as constraining on free expression (and

⁵⁵¹ See <<http://eu.blizzard.com>>.

⁵⁵² Lindsay (2014), 66.

⁵⁵³ *Ibid*, 73.

therefore inclusiveness and diversity) as the exigencies of the real world allow it to be.

5.2.3 Freer copying and dissemination on the net

If we think about copyright's purported expansion in practical terms, the narrative of expansionary copyright is less clean cut. In spite of supposedly expansionary copyright law, internet culture is generally characterised by a freer use and circulation of works, and less extensive and powerful enforcement of copyright, than older models of copyright-mediated mass culture. That is the very reason copyright minimalists are so enthusiastic about networked information economies.

Other than the fundamental limitations of copyright law, described above, there are numerous reasons for this. One reason has to do with digital technology and networked communication. Producing, copying and disseminating works has never been easier or less costly.⁵⁵⁴ Norms about copying and sharing are also looser and copyright piracy is widely considered to be ethically acceptable.⁵⁵⁵

But let us focus on enforcement again. The character of the internet and digital technology compounds the issue of enforcement costs. Systems for licensing and enforcing copyright have not kept up with the technologies of copying and dissemination. It is far more difficult, time consuming and costly to obtain a licence to copy works than it is simply to copy them. The transaction costs of licensing private or non-commercial copying, or mass digitisation, or other

⁵⁵⁴ See Anderson (2009) (examining the rise of business models which give products and services to customers for free, often as a strategy for attracting users and relying upon other sources of revenues).

⁵⁵⁵ Garon (2002), 1282.

copying activities facilitated by digital technology and networked communication are prohibitive. It is also incredibly difficult to keep track of unauthorised copying and enforce copyright when the technologies of copying and publishing are ubiquitous.⁵⁵⁶ Finally, developments in copyright law itself have contributed to the increase in freedom to copy and disseminate works on the internet.

In other words, the narrative of expansionary copyright is not a complete one. Copyright strength and scope has shrunk along some dimensions, even as it has expanded along others. This has made enforcement of copyright against internet intermediaries like Google, Facebook, and YouTube more difficult and less certain. I use the term ‘internet intermediaries’ in contradistinction to ‘traditional’ intermediaries: those older copyright-based, ‘hard copy’ businesses like book publishers, record labels, and film studios and distributors.

Two developments in the law have played a central role in weakening copyright on the internet. Firstly, the doctrine of transformative use in US fair use jurisprudence has expanded to encompass uses that produce new modes of digital distribution rather than new works. Secondly, case law and the enactment of safe harbour regimes have together reduced the extent to which internet service providers may be liable for facilitating the copying and dissemination of copyright works.⁵⁵⁷ Let us consider each development in turn.

⁵⁵⁶ On the subject of ‘market failures’ in mass licensing on the internet, see Ginsburg (2014).

⁵⁵⁷ For US cases limiting the scope of ancillary liability for providing the means for copyright infringements, see e.g. *Sony Corp of America v Universal City Studios Inc.*, 464 US 417 (9th Cir 1984); *MGM Studios Inc. v Grokster Ltd*, 545 US 913 (US 2005).

5.2.3.1 Expansion of transformative use

In a series of cases dealing with various forms of digital copying and distribution by internet service providers, US courts have expanded fair use exceptions, by broadening the ambit of what is considered ‘transformative’, and attributing greater significance to a finding that a use is transformative.⁵⁵⁸

There are four ‘fair use’ factors considered in determining whether a use falls under the fair use exception:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.⁵⁵⁹

Since the US Supreme Court’s decision in *Campbell*, the question of whether the use is ‘transformative’ plays a large role in applying the first factor. If the use of an existing work has ‘a further purpose or different character, altering the first with new expression, meaning, or message’, and it does not ‘merely supersede the objects’ of the original, then it is likely to be considered transformative.⁵⁶⁰

Transformative uses may be divided into two categories. Firstly, there are uses that result in the production of transformative works: new works of authorship that incorporate part of the copyright work. Ginsburg describes these as ‘productive uses’—and I have described them in chapter 1 as ‘transformative

⁵⁵⁸ *The Authors Guild et al. v. Google, Inc.*, 804 F.2d 202 (2d Cir. 2015); *Authors Guild Inc. v. HathiTrust et al.*, 755 F.3d 87 (2nd Cir 2014). and *Perfect 10, Inc. v. Amazon.com, Inc., Ag.com Inc. and Google, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁵⁵⁹ USC 17, §107.

⁵⁶⁰ *Campbell*, 579.

works' uses.⁵⁶¹ Secondly, there are uses that permit works or parts of them to be copied unaltered, and distributed or further used in a new way: for example, to enable a new business model, or a new way of disseminating works in furtherance of social benefits like education. These uses do not necessarily transform the work itself, but rather transform the public's capacity to access the work, or the purpose to which a work is put. Professor Samuelson describes this latter category of transformative uses as 'orthogonal', and Professor Ginsburg as 'redistribution' fair use.⁵⁶² I will adopt Samuelson's 'orthogonal use' label.

Orthogonal uses have been established as transformative uses only relatively recently. In a 1998 decision, the US 2nd Circuit Court of Appeals decided *Infinity v Kirkwood*.⁵⁶³ In that case, the respondent provided a service that enabled subscribers to listen, for a fee, to radio broadcasts in remote cities. The appellant was the copyright owner of some of these broadcasts. The respondent claimed that the use was transformative, and at first instance, the court agreed. The court reasoned, however, that 'difference in purpose is not quite the same thing as transformation', and that transformativeness was the key to the first fair use factor.⁵⁶⁴

The respondent also claimed that users of the service transformed the broadcasts by using them for their factual content, rather than entertainment content, and that this was also a transformative use for the purposes of the first fair

⁵⁶¹ Ginsburg (2014), 1383.

⁵⁶² Samuelson (2009), 2544; Ginsburg (2014), 1389.

⁵⁶³ *Infinity Broadcast Corp. v. Kirkwood* 150 F.3d 104 (2nd Cir 1998).

⁵⁶⁴ *Ibid*, 108.

use factor. The court rejected this argument, pointing out that even if subscribers' uses were transformative, they were not in issue. The question is whether the defendant's use was itself transformative.⁵⁶⁵ The implication of the ratio is that orthogonal uses are not, as a general rule, transformative.

However, US courts seem to have departed from the approach in *Infinity*. Three fair use cases—*Perfectio*, *Hathitrust*, and *Googlebooks*—have had a significant effect on two aspects of the law:

- the way that transformativeness is conceived and assessed; and
- the way that a finding of transformativeness informs consideration of the other fair use factors.

In *Perfectio Inc. v Amazon.com Inc.*, the US 9th Circuit Court of Appeals held that Google's display of thumbnail images, linking to pages on which those images were displayed, was a transformative use of the copyright works embodied in the images.⁵⁶⁶ The court held the use was transformative because the purpose of the original photos was 'aesthetic', whereas the search engine used the image as a pointer directing a user to a source of information.⁵⁶⁷ The fact that, in making this use, the search engine reproduced the whole image did not prevent the use from being considered transformative.⁵⁶⁸

Nor did the commercial profitability of the use lead the court to give particular weight to the fourth fair use factor: the market harm factor. Google's use

⁵⁶⁵ *Ibid.*

⁵⁶⁶ 508 F (3d) 1146 (9th Cir 2007).

⁵⁶⁷ *Perfect 10*, 1165. In reaching this conclusion, the court essentially applied *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–22 (9th Cir.2003), an earlier decision of the same circuit of the court of appeals.

⁵⁶⁸ *Perfect 10*, 1165

of the images directed users to websites which had purchased advertising space through Google's AdSense offering. The websites displayed infringing images. Google's AdSense program was, at the time of the first instance decision in *Perfect 10*, worth \$630 million: 46% of Google's total revenues.⁵⁶⁹ Strangely, the court described Google's use of the images as having only a 'minor commercial aspect'.⁵⁷⁰ It went on to conclude that the mere commerciality of Google's use could not be presumed to amount to market harm to the copyright owner, because market harm cannot be presumed in cases of transformative use. The lack of a finding on the question of whether users actually downloaded images from Google for which they would otherwise have had to pay led the court to hold that potential harm to Perfect 10's market 'remains hypothetical'; and the market harm factor therefore did not favour a finding of fair use.⁵⁷¹

In the *Hathitrust* case, the US Second Circuit court found that the unauthorised mass digital copying of entire books, conducted on behalf of a group of libraries for the purpose of data mining the full text, was a fair use.⁵⁷² The data mining permitted the full text of books to be searchable. The court considered that output to be transformative, even though it was necessary to reproduce books in full, and unchanged, in order to produce that output.⁵⁷³

In a similar turn to the *Perfectio* case, the *Hathitrust* court elided consideration of the first and fourth fair use factors somewhat. The *Hathitrust*

⁵⁶⁹ *Ibid*, 1166.

⁵⁷⁰ *Ibid*.

⁵⁷¹ *Ibid*

⁵⁷² *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

⁵⁷³ *Ibid*, 97.

court's finding on transformativeness heavily influenced its findings with regard to effect on the market for, or potential value of, the copyright work. The court held that market harm is limited to market substitution. It went on to reason as follows:

In other words, under Factor Four, any economic “harm” caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.⁵⁷⁴

The finding of transformativeness more or less disposed of the question of market harm.

The 2nd Circuit Court of Appeals decided the *Googlebooks* case according to a line of reasoning similar to the *Hathitrust* decision. Google's unauthorised mass reproduction and digitisation of library books for the purposes of creating a searchable database, which produced text ‘snippets’ in response to user searches, was also held to be transformative.⁵⁷⁵ The court held the use of the works for a new *purpose*—enabling text search—was transformative in the sense intended by the court in *Campbell*.⁵⁷⁶ In other words, the court drew an equivalence between transformation of purpose and transformation in aesthetics, meaning or message. The transformativeness was more or less dispositive of the fair use question, even though Google, arguably had commercial motives, different from the purely educational motives of the copiers in *Hathitrust*.

Googlebooks and the other decisions indicate that a finding of orthogonal transformative use will tend to impact very significantly the analysis of other fair

⁵⁷⁴ *Ibid*, 99.

⁵⁷⁵ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), cert. denied sub nom. *The Authors Guild v. Google, Inc.*, 136 S. Ct. 1658, 194 L. Ed. 2d 800 (2016), hereafter, ‘*Googlebooks*’.

⁵⁷⁶ *Googlebooks*, 216.

use factors, particularly the fourth factor. They do away with the principle from *Infinity* that difference in purpose is not the same as transformation.

Even more firmly than *Campbell*, they establish that even verbatim copying, with a commercial motive, and the potential for enormous profits, may be considered fair use if it is an orthogonal use. The fourth fair use factor requires courts to have regard to the effect of the use upon the potential market for or value of the copyrighted work.⁵⁷⁷ But the *Hathitrust* court treated transformativeness as almost tantamount to finding that a use does not cause cognisable market harm.⁵⁷⁸ According to *Hathitrust*, a finding that a use is transformative is almost tantamount to a finding that the use does not supersede the purposes of the original, and that tends to dispose of the question of market harm. The court said (in relation to the first fair use factor), “There is no evidence that the Authors write with the purpose of enabling text searches of their books. Consequently, the full-text search function does not supersede the objects of the original creation.”⁵⁷⁹ The court went on as follows:

the full-text search function does not serve as a substitute for the books that are being searched. Thus, it is irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under factor four only when the use serves as a substitute for the original and the full text search use does not.⁵⁸⁰

⁵⁷⁷ USC 17, §107.

⁵⁷⁸ See Sag (2012) ,99.

⁵⁷⁹ *Hathitrust*, at 97.

⁵⁸⁰ *Hathitrust*, at 100.

The reasoning is, if the allegedly transformative work does not supplant the original work, it is not competing in the 'same' market, so there is no cognisable market harm.

The *Googlebooks* case retreated slightly from this approach. The court noted that even if the purpose of copying is for a valuably transformative purpose, the product of the transformation might still be a market substitute for the copyright work. However, it emphasised the principle from *Campbell* that the more transformative the use, the less likely it is that the copies generated by way of the use will serve as a substitute for the copyright work, and the less likely will be a finding of market harm.⁵⁸¹ The *Googlebooks* court concluded that Google's use could not rightly be considered to produce true market substitutes for copyright works, *even if some sales would be lost* as a result of snippets being available.⁵⁸²

What is consistent across all three cases is the implication that copyright owners' markets might not be considered to be 'harmed' by a copier who copies the works wholesale, for profit, without paying, provided the copying permits the works to be used in an orthogonally 'transformative' way. This theme rests on two key propositions. Firstly, market harm is limited to market substitution: capturing part of a market that the copyright owner would otherwise have profited from, and indeed intended to profit from. Secondly (though perhaps this is not the ratio of *Googlebooks*), a transformative work cannot, by its very nature, substitute for the

⁵⁸¹ *Campbell*, 591; *Googlebooks*, 214.

⁵⁸² *Googlebooks*, 223.

work which it transforms.⁵⁸³ Both of these assertions represent a significant shifting of the fair use calculus in favour of orthogonal users.

The third proposition is that commerciality (even very profitable use) is of far less weight in the fair use calculus than transformativeness; and the more transformative the use, the less important will be commerciality. This principle was established in *Campbell*, overturning the dictum from *Sony v Universal*, that commercial uses of works are presumptively unfair.⁵⁸⁴ However, the three orthogonal use cases seem to render commerciality of ever less importance in the fair use calculus. Where there is no significant market substitution, it seems US courts will not give much weight to the commerciality of the purportedly fair use—even where there is very considerable potential profit involved. The court in *Googlebooks* said:

we see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use.⁵⁸⁵

Even very profitable uses of works by powerful and dominant corporations like Google may be considered fair use if they are orthogonal uses.

Treating orthogonal use as transformative, and transformativeness as outweighing or determining matters of market harm and commerciality, dramatically expands the scope of fair use exceptions. This development not only

⁵⁸³ See Ginsburg (2014), 1399-1400 for a fine analysis of the development of transformativeness doctrine, and its elision of the first and fourth fair use factors. She writes: 'attaching the "transformative" label to the use will determine the outcome of the market harm inquiry: if the market is "transformative," there is no cognizable harm because impairment to a transformative, as opposed to a traditional, market doesn't count. Thus, if the use is "transformative," the four-factor statutory test effectively reduces to a single factor.'

⁵⁸⁴ *Campbell*, 584; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), 451.

⁵⁸⁵ *Ibid*, 219.

furnishes the public with increases in opportunities to access works, but also has broader structural implications. In all three cases, the perceived social good associated with the orthogonal use, and the unwillingness to make the public pay for making such a use, was enough to transfer the initiative into the hands of the internet intermediaries.

The cases, taken together, tend to transfer entitlements and resources toward internet intermediaries (such as search engines, social networks and other like applications), increasing their cultural power relative to copyright owners, as well as other copyright users. Libraries, for example, have to buy books in order to lend them to the public. Google, by contrast, is now not required to pay for their copying of books in order to render them searchable to the public.⁵⁸⁶ The result is that Google is at a structural advantage to libraries (and everybody else), when it comes to copying works.

5.2.3.2 Reduction in liability for internet distribution

Other developments in the law also serve to expand the cultural power of internet intermediaries relative to copyright owners. In Australia, Canada, the UK and the US, authorising or facilitating copyright infringement is itself an infringement of copyright (though the precise naming of the infringement differs depending on specifics and jurisdiction).⁵⁸⁷ However, the liability of internet intermediaries for this kind of infringement is somewhat limited.

⁵⁸⁶ Ginsburg (2014), 4011.

⁵⁸⁷ Australian Act s36 and 101. For an analysis of liability for 'authorising' a copyright infringement, see *University of New South Wales v. Moorhouse* (1975) 133 CLR 1. See s16(2) of the UK Act. In US, third parties may be subject to vicarious or contributory liability in relation to infringements that they facilitate in some way. In the US, see *Fonovista, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th

Firstly, the law of authorisation liability or secondary liability has not developed in such a way as to facilitate the enforcement of copyrights against the providers of services used by the public to share and copy works without authorisation. Chief Justice French, and Justices Crennan and Kiefel of the High Court of Australia put it this way:

the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the Bit Torrent system.⁵⁸⁸

Details differ across jurisdictions, but the generalities are similar. It is very difficult and costly for internet intermediaries to keep track of copyright infringements on their services. The scale of infringement is vast, and the services can usually be used for activities that are non-infringing as well as infringing. It is therefore very hard for copyright owners to make out the requisite level of knowledge or control on the part of internet intermediaries for authorisation liability or secondary liability.⁵⁸⁹ In these circumstances, finding secondary (or authorisation) liability is problematic and clumsy. So, for example, the US Supreme Court held that the provision of a file sharing service or technology that is capable of substantial non-infringing uses will not attract secondary copyright liability, unless the service actually induces copyright infringement.⁵⁹⁰

Cir. 1996) re vicarious liability and *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) re contributory liability.

⁵⁸⁸ *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16, [79].

⁵⁸⁹ For example, in Australia, even having knowledge that infringement is likely to occur and the power to take steps to prevent it from occurring does not necessarily amount to authorisation of infringement. See *Nationwide News Pty Ltd v. Copyright Agency Ltd* (1996) 65 F.C.R. 399 (Fed. Ct.)

⁵⁹⁰ *MGM Studios Inc. v Grokster Ltd*, 545 US 913 (US 2005). See also *Sony Corp of America v Universal City Studios Inc.*, 464 US 417 (9th Cir 1984).

Secondly, so-called ‘safe harbour’ provisions give internet intermediaries an additional layer of protection against authorisation liability or secondary liability. The details of safe harbour provisions differ from jurisdiction to jurisdiction, but as with authorisation or secondary liability, the broad outline is similar. Such provisions, of which the US DMCA provisions are most well-known, absolve various internet intermediaries—ranging from providers of internet connectivity in some jurisdictions, to providers of actual online services—from liability for infringing activity taking place on their services or platforms, provided those intermediaries comply with a specified notice and takedown regime.⁵⁹¹ The notice and takedown regime requires them to remove infringing content from their platforms or services, or in some cases block infringing users, on receipt of takedown notices in proper form from rights holders.⁵⁹²

5.2.3.3 The upshot

Despite differences across jurisdictions, two things are clear. Firstly, the number and scope of unencumbered zones in which internet intermediaries may facilitate sharing and copying of works, without accruing liability, has grown, even as copyright has ‘enclosed’ certain other rights to use works (e.g. the right to

⁵⁹¹ § 512(c) of the US Act enacts safe harbours in relation to a number of internet services, including hosting and caching. The safe harbour in Canada applies to network services and information location tools (*Canadian Act*, s 41.25. In Australia, the safe harbour is limited to carriage service providers: providers of actual internet connectivity (*Australian Act*, Part V, Div 2AA). In the UK, the safe harbour applies to ‘service providers’: a definition that encompasses services that process and store data (*UK Act*, s97A; *The Electronic Commerce (EC Directive) Regulations 2002*, reg 2).

⁵⁹² For a case on the proper application of the notice and takedown regime in the US, see e.g. *Viacom International Inc. v YouTube Inc.*, 676 F (3d) 19 at para 39 (2d Cir 2012) [Viacom] In Australia, the *Roadshow* case is the leading case.

‘communicate’ a work to the public).⁵⁹³ For example, rather than expanding the power of copyright owners to ‘lock down’ culture, the new recognition of orthogonal uses as transformative tends to expand the power of internet intermediaries. This outcome is not consistent with the narrative that copyright is on a purely expansionary trajectory.⁵⁹⁴

Secondly, the growth of zones of unencumbered use of works has contributed significantly to an online environment in which it is possible for internet intermediaries to develop profitable business models based on facilitating free access to, or sharing of works.⁵⁹⁵ Limitations on secondary liability enhance the opportunities for internet intermediaries to profit from facilitating the sharing of works by their users.⁵⁹⁶ YouTube, a dominant online video service, relies heavily on the safe harbour for content sharing platforms established by §512(c) of the US Copyright Act.⁵⁹⁷ The Google Books application depends entirely on fair use. Facebook, and many other portals for sharing or ‘posting’ content online, are well served by the *Perfectio* ratio regarding thumbnails. That decision can be interpreted to support the practice of ‘embedding’ content through framing or

⁵⁹³ See e.g. *UK Act*, s 20, which proves for the communication right.

⁵⁹⁴ Safe harbours do not only expand these unencumbered zones. See chapter 7 for an analysis of the ways in which safe harbour regimes may chill expression by individual users.

⁵⁹⁵ See Pesach (2017), 238 ; Barnett (2017). In this vein, note also the development of the Canadian exception for non-commercial user generated content (*Canadian Act*, s29.2) as well as the development of the principle that fair dealing exceptions are integral to copyright, rather than subordinate to exclusive rights, articulated in *CCH Canadian Ltd. v Law Society of Upper Canada* (2002) FCA 187. We can also observe a European parallel to *CCH* in cases such as *Case C-314/12 UPC Telekabel Wien v Constantin Film Verleih*, at [41] and [63], where the CJEU emphasised the need to balance the rights of copyright owners, internet intermediaries, and internet users. For an interesting article on treating user rights as integral to copyright, see Geiger (2015).

⁵⁹⁶ But see Lemley and Reese (2004), 1348ff for a helpful review of cases in which copyright owners have successfully pursued online intermediaries for facilitating infringement.

⁵⁹⁷ Pesach (2017), 239.

linking—a practice that is not widely different from embedding thumbnails.⁵⁹⁸ So far as any online service provider facilitates the posting or sharing of infringing content on its service, it is immune from liability (in the US at least) to the extent its service may legitimately be used for non-infringing purposes, and it complies with applicable notice and takedown regimes.

As I will show in parts 5.4 and 5.5, the free circulation of content on a platform can be parlayed by canny internet intermediaries into commercial value and profit. But first let me deal with the tendency of copyright minimalists to construct a ‘romance of the public domain’.

5.3 Freedom is relative

Copyright minimalists rightly criticise conventional narratives of copyright for leaning too heavily on a fictitious concept of creativity described as the ‘romantic author myth’. This is a mythology in which the author, a romantic figure, creates out of nothing, by divine inspiration, as it were. One strain of copyright minimalism has been devoted to showing the ways in which this mythology is wrong.⁵⁹⁹ Ironically though, copyright minimalism itself often takes on a mythologising aspect—what Chander and Sunder describe as a ‘romance of the public domain.’⁶⁰⁰

There is a tendency to overstate the potential of a reduction in the strength of copyright to generate a ‘robust’ public sphere, and to right the perceived wrongs of

⁵⁹⁸ *Ibid.*

⁵⁹⁹ See e.g. Craig (2012); Woodmansee (1984); Arewa (2006).

⁶⁰⁰ Chander and Sunder (2013), 1398.

copyright-based, mass-mediated culture. There is a tendency to assume that freedom—to play, to imagine, to criticise—will, by itself, lead organically to better discourse and a higher degree of self-realisation and self-expression among individuals.

Netanel's sceptical response to cyber-utopian claims about cyberspace self-governance and content production stands out as an exception to this general tendency.⁶⁰¹ Benkler also acknowledged that there is a degree of contingency to his claims about the advantages of networked culture. He admitted that the constraints and parameters applicable to non-proprietary creativity and networked culture may change for the worse. With considerable foresight, he even contemplated the possibility of certain internet services like Google becoming so powerful as to raise the prospect of a new kind of mass media model. He was, however, fairly confident that the pattern of information flow in digital networks is more resistant to the application of centralised control or influence than was the traditional mass media model.⁶⁰² Even in recent comments, in which he acknowledges the internet's role in the rise of extreme ideologies, he is equivocal in his criticism:

You could say that if it translates into denigration of minorities, it's antidemocratic. But as long as you are focused on the question of 'Do you have an intensely engaged minority able to clarify its message so clearly that it can contest politically in a way that it couldn't before?' then it's a democratizing effect.'⁶⁰³

He still emphasises the democratising effect of the internet, albeit less forcefully than before.

⁶⁰¹ See Netanel (2000).

⁶⁰² Benkler (2006), 261.

⁶⁰³ Y Benkler, quoted in Hylton (2017).

These exceptions notwithstanding, digital optimism is the orthodoxy in copyright scholarship. But an extensive public domain coupled with a networked communication environment is not the be all and end all of good culture. We need to remember that a large public domain (a large range of activities in relation to works which does not require permission) is not automatically a 'robust' public domain. Freedom from the constraints of copyright is not a sufficient condition for a culture that enhances individual flourishing or effective, robust, respectful deliberation (what Barron might call 'tolerant' discourse). Formal freedom to participate in culture, or to use works in doing so, does not guarantee actual participation and inclusiveness. Freedom to access diverse works does not necessarily result in widespread opportunity to access to diverse works. Freedom to innovate, or to use existing works, may be a necessary condition for playful, innovative, and rigorous creativity; but it is not a sufficient condition. While freedom facilitates democracy, freedom is not by itself democracy. Though individuals need a degree of freedom to realise autonomy, freedom is not the same as autonomy.

By the same token, the imposition of formal constraints does not necessarily, on the whole, detract from positive liberty.⁶⁰⁴ Individuals' and society's capacity to translate formal freedom into substantive autonomy and democracy depends on contextual factors. The extent to which individuals can exploit their freedom to speak, to participate in culture and discourse, and to use works to empower

⁶⁰⁴ Lemley and Volokh (1998), at 187-188 point out that the impositions of some burdens on free speech through law may have a net effect of enhancing speech.

themselves depends on their knowledge, wealth, opportunity and power.⁶⁰⁵ It depends on the extent to which their cultural context and the configuration of constraints and parameters in their environment has permitted them to develop capabilities.

Benkler appreciates this point better than most. He is at his most impressive when dealing with the relationship between freedom, constraint and autonomy. He makes the important point that freedom is relative. Individuals are always constrained by circumstances, no matter how formally free. He writes,

If we accept that all individuals are always constrained by personal circumstances both physical and social, then the way to think about autonomy of human agents is to inquire into the relative capacity of individuals to be the authors of their lives within the constraints of context. From this perspective, whether the sources of constraint are private actors or public law is irrelevant. What matters is the extent to which a particular configuration of material, social, and institutional conditions allows an individual to be the author of his or her life, and to what extent these conditions allow others to act upon the individual as an object of manipulation.⁶⁰⁶

Constraint of some kind is inevitable. It is not only the formal constraints imposed by laws such as copyright that may have follow on effects on individuals' capacities to achieve their full potential. The substantive distribution of power and privilege, especially the power to communicate and exert cultural influence, may constrain or enhance autonomy just as much as formal prohibitions on certain kinds of speech.⁶⁰⁷

When we assess the merits of alternatives to copyright for organising the production and dissemination of works, we need to consider the constraints and

⁶⁰⁵ Chander and Sunder (2004), 1341.

⁶⁰⁶ Benkler (2006), 141.

⁶⁰⁷ See e.g. Yoo (2005), 674.

parameters that apply. We ought not assume that a particular arrangement for producing or disseminating works is more free, or more conducive to any of the mid-level or high level objectives I have been discussing, merely because the *legal* constraints associated with copyright do not apply. If copyright is not dictating the dynamics according to which power, resources and influence are distributed, it is likely that some other constraints, parameters and pressures will come into play.

That there are alternative ways of sustaining creativity absent copyright does not, by itself, tell us much about whether we need copyright or not. To assess the merits of any given arrangement for producing and disseminating works, then, we need to give careful attention to the parameters, constraints and pressures that come with that arrangement.⁶⁰⁸ We must not overlook the possibility that non-copyright alternatives may carry costs that exceed, or at least equal, the costs imposed by copyright.⁶⁰⁹

⁶⁰⁸ See Barnett (2017), 11: 'A priori it is impossible to assess whether the relaxation of IP protections, and the resulting commodification of the relevant pool of informational goods, is likely to result in net positive welfare effects without considering the relative efficiency characteristics of alternative revenue-capture mechanisms that firms will adopt in response.'

⁶⁰⁹ Barnett (2015), 28.

5.4 Distribution of communicative power and attention on the internet

5.4.1 As with copyright's structural benefits, the virtues of the internet are also contingent

Let us, then, pay careful attention to the parameters, constraints and pressures that apply in relation to networked culture. Let us consider the trade-offs associated with online spaces in which works circulate, relatively free from the constraints of copyright. Benkler, writing in 2006, was cognisant of the need to assess the benefits and costs of copyright, and networked alternatives or organising the production and dissemination of works, even-handedly, and according to the same standards. He admitted that the question of whether a property based system or non-property system for the management of any given resources provides greater 'freedom' in some aggregate sense is not, a priori, determinable. It depends on the characteristics of the resource, and the rules and parameters of the institutional arrangements under which the system proceeds.⁶¹⁰ Even so, he seemed fairly confident that non-proprietary, peer produced, and networked communication structures were, at that time, more inclusive, and expressively diverse than the hierarchical media structures underwritten by copyright.⁶¹¹

Benkler was, however, open to the possibility that changes in the conditions and parameters characterising our networked environment might require a change

⁶¹⁰ Benkler (2006), 145-146.

⁶¹¹ Benkler (2006), 255-256, 260-261, 266.

in assessment of the merits of that environment.⁶¹² Unfortunately, his caveat about the contingency of his assessment of the networked environment has proven all too prophetic.⁶¹³ There are many reasons to temper the now-orthodox enthusiasm about the networked culture, uncoupled from strong copyright.

Before I lay some of them out, let me be clear: I do not intend to dismiss the virtues of the internet wholesale. Rather, my intention is to temper excesses of optimism that might lead to an unbalanced view of the merits of a copyright-free networked culture, relative to the copyright system. The cyber-utopian vision of a vibrantly democratic, inclusive, expressively diverse internet, delivering accurate information, high quality discourse, and rigorously and richly realised art, is inspiring. It is not, however, an accurate description of the reality of the majority of internet users' experience at this moment.

Networked technologies open up the potential for wonderful increases in diversity and inclusiveness, but we should remember that there are no guarantees that this potential will be realised. As I will show below, the economics of the internet tend to concentrate wealth and communicative power as much as, if not more than, the economics of copyright-funded mass media. Andrew Keen, a vociferous critic of cyber-utopianism, puts it this way: 'distributed technology doesn't necessarily lead to distributed economics and the cooperative nature of its technology isn't reflected in its impact on the economy.'⁶¹⁴ The political economy of the internet affects the distribution of communicative power (inclusiveness), and

⁶¹² See above n (602) and accompanying text.

⁶¹³ See Benkler's comments in Hylton (2017).

⁶¹⁴ Keen (2015), 33.

the diversity and quality of works. The organisation of networked communication distributes wealth, resources and communicative power, and this has follow on influences on the creation of works. Let us explore some of the most striking among these influences.

5.4.2 As in mass media settings, attention is also highly concentrated on the internet

Individuals benefit from the increase in opportunities to explore their creative faculties, and in the sense of being a more active participant in culture and society. That the basic cost of making a contribution to culture, or engaging in satisfying and meaningful creative activity, has been lowered is, by itself, a good thing for inclusiveness. Active participation in culture is more achievable than ever before.

That benefit does not, however, necessarily translate into an increase in the inclusiveness or diversity of the body of works that reaches individuals. Nor does the high rate of participation necessarily mean that the power to exert a meaningful influence on culture and discourse is distributed broadly or inclusively. Almost anyone can publish an opinion or other kind of work without much difficulty, but these contributions will not carry much influence if the public sees only a tiny fraction of them.⁶¹⁵

Ironically, the very lack of intermediating gatekeepers, the very size of the internet, the very multitude of works disseminated digitally, necessitates new forms of intermediation. It is necessary to use various forms of filtration to reduce the

⁶¹⁵ Hindman (2008), 56

number of works to which an individual is exposed to a manageable level. Benkler and others have lauded the democratic character of networked tools for selecting and filtering works.⁶¹⁶ Rather than commercial copyright businesses deciding what is published and brought to the attention of the public, search engines and social networks use algorithms to track user preferences and behaviour, and deliver results based on the so-called 'wisdom of the crowd'.

Search engines like Google's, for example, use an algorithm to rank web pages in their search results based on, among other things, the number of incoming links to that page.⁶¹⁷ The algorithm is recursive, so that links from pages that have, themselves, a higher number of links, weigh more heavily in deciding the ranking of the linked page in search results.⁶¹⁸ This supposedly democratises the selection of works, and the decisions about which works to give attention to. We might expect this to be good for inclusiveness.

The problem is, both the distribution of user traffic (page views by users) and links follows a power law distribution.⁶¹⁹ The probability of having a large number of links is inversely and exponentially proportional to the number of links. The probability of having a high number of links is low; the probability of having a very high number of links is extremely low. The probability of having a low number of links is high, and the probability of a very low number of links is extremely high.

⁶¹⁶ See above, part 3.4.

⁶¹⁷ I will discuss below some other very material features of such algorithms, but for now let us stick with this simplified description.

⁶¹⁸ Levy (2011), 22.

⁶¹⁹ This pattern was recognised fairly early, for example in the work of Huberman et al. (1998).

The curve describing such distributions is said to have a 'long tail'.⁶²⁰ In practical terms, on the internet, the power law distribution means a very small number of sites end up with an extremely high number of links and visits, and a very large number of sites end up with an extremely small number of links and visits.⁶²¹

The promise of the 'long tail' was that it would have something for everyone—this was the thesis of an influential book by Chris Anderson.⁶²² Trends in the distribution of attention on the internet do not, however, seem to have borne out the initial optimism about the long tail. Even Anderson seems to have reconsidered the matter somewhat. In an article co-written with Wolff, published some time after his influential book, he cites statistics from Compete, showing that the top 10 Web sites accounted for 31% of US page views in 2001, 40% in 2006, and about 75% in 2010.⁶²³ In the realm of political websites, in relation to any given political issue, one study from 2008 showed the top ten sites to account for more than half of the total links. The top fifty sites accounted for 3 to 10% of the total sites in their respective categories, but in every case they attracted the vast majority of inbound links.⁶²⁴

Benkler, drawing on studies by Pennock, Dresner and Farrell, and others, argued that attention and link distribution did not always follow an exponential curve. There were, he said, 'clusters of moderately read sites' providing 'platforms for vastly greater numbers of speakers than were heard in the mass media

⁶²⁰ Anderson (2006).

⁶²¹ Hindman (2008), 42; Benkler (2006), 243.

⁶²² See e.g. Anderson (2006). Benkler (2006), 242.

⁶²³ Anderson and Wolff (2010).

⁶²⁴ Hindman (2008), 49

environment'.⁶²⁵ Particularly salient to civil society—this was the distribution to be found among political blogs.⁶²⁶ In any case, even where power law distributions applied, Benkler saw an advantage in networked selection and filtration of works (in comparison with old mass media approaches to selection), insofar as selection did not occur at a single point of control (such as in the offices of a commercial publisher or film studio. In principle, he saw this arrangement as being more inclusive and open to diversity than traditional copyright-market based arrangements.⁶²⁷

Hindman's more recent work contradicts this conclusion.⁶²⁸ Having conducted his own study of the distribution of attention online, and reviewed the literature on the subject, Hindman reported that audience share among online media sites is not more equal than in print media. The top twenty online news outlets, he found, had more of the online market than they did in print media. Particularly telling was the drop in audience share for media organisations in what he categorised as the 'middle class'—outlets ranked 21-500 in terms of their readership:⁶²⁹

Outlets ranked from 101 to 500 account for 35 percent of print newspaper readership, but only 22 percent of readership for media sites. And while papers below the top 500 represent only 9 percent of the nation's print circulation, 21 percent of media site visits go to outlets ranked 500 or below.⁶³⁰

⁶²⁵ Benkler, *ibid.*

⁶²⁶ Benkler (2006), 251.

⁶²⁷ Benkler (2006), 254, 271.

⁶²⁸ Note also that Benkler's recent comments in Hylton (2017) suggest, but do not confirm, that he may also revise his views on this matter.

⁶²⁹ Hindman (2008), 94.

⁶³⁰ *Ibid.*, 92-93.

Overall concentration, he found, was similar on the net and in traditional media. The difference was that online attention was more fragmented than it was among traditional media.⁶³¹ In other words, the long tail does not, by itself, undo hierarchies of communicative power.

Indeed, fragmentation of attention into the long tail seems to exacerbate concentration problems. Professor Anita Elberse's recent book on blockbusters suggests that attention in the long tail is ever more diffuse, while blockbusters receive an ever more concentrated proportion of the public's attention.⁶³² For example, of 8 million digital music tracks sold in 2011, approximately 94% sold fewer than 100 copies, while 32% sold only one copy. Compare this to 2009, when 6.4 million tracks were sold, of which 93% sold fewer than 100 copies, and 27% sold only one copy; and again to 2007, where 3.9 million digital tracks were sold, with 91% selling fewer than 100 copies, and 24% selling only one copy.⁶³³ The trend is fairly clear. The short head is getting shorter and fatter and the long tail, longer and thinner.

It follows logically that the redistribution and fragmentation of attention into the long tail comes at the expense of 'middle class', moderately sized media producers.⁶³⁴ The problem is not only that winners take all. It is that both the 'losers' (for want of a better word for members of the fragmented long tail) and 'winners' draw attention away from the class of professional and competent, if not

⁶³¹ Ibid. Benkler's recent comments in Hylton (2017) suggest a rapprochement with Hindman.

⁶³² Elberse (2014).

⁶³³ Elberse (2013).

⁶³⁴ Hindman (2008a), 15.

extravagantly successful, authors and publishers of works. This shrinking ‘middle class’ would include precisely the kind of independent denizens of the media world whom Netanel considered so important to democratic civil society.⁶³⁵ There is a loss for inclusiveness in the erosion of this middle class. It would appear that rigour also suffers, insofar as middle-class professionals were supplanted by long tail amateurs with less experience and time for their work.

To sum up: the increased capacity for individuals and groups to participate in discourse and culture on the internet has not translated into the general public’s being exposed to a more inclusive or expressively diverse culture. Indeed, a winner take all pattern, much like the patterns for which copyright-based markets have been criticised, consistently describes the distribution of *attention* on the web, even if the distribution of *contribution* has widened as a result of digital and networked technologies.⁶³⁶ Google’s CEO, Eric Schmidt, described the trend in this way:

I would like to tell you that the internet has created such a level playing field that the long tail is absolutely the place to be, that there's so much differentiation... Unfortunately, that is not the case... In fact, it is probable that the internet will lead to larger blockbusters and more concentration of brands.⁶³⁷

Networked information economies have not corrected copyright’s inclusiveness problem.

⁶³⁵ See above n (319) and accompanying text.

⁶³⁶ Keen (2015), 7, 36, 43ff

⁶³⁷ Eric Schmidt, quoted in Manyika (2008), 136-138.

5.4.3 The dynamics of filtration concentrate attention

The concentration of attention on the internet that I have been describing is closely connected to the dynamics of online filtration and selection. There are three very important things to note about these dynamics. Firstly, the internet does not seem to have displaced the role of commercial media organisations in selecting and filtering content. This was Netanel's concern, as early as 2001: that consumers would still need assistance in evaluating the quality and credibility of information and its providers; and that they would therefore need to rely on filtration and accreditation tools similar to those operating in the mass media.⁶³⁸ Consequently, media sources that were dominant before the internet also tend to dominate on the internet, even if users' searches for information are mediated by applications such as search engines or social networks.⁶³⁹

Secondly, the dynamics of filtration themselves tend to compound existing concentrations of attention. Recursive filtration algorithms operating on search engines and social networks quickly generate a hierarchy of visibility on the internet. Heavily linked sites will appear higher in search results on search engines, will therefore attract more views and links, and (assuming a route to monetising views such as advertising) will gain access to more resources.⁶⁴⁰ The reason for this is that search rankings have considerable influence over the way in which internet users direct their attention. The evidence that search engine users rarely look beyond the first few results yielded by any given search, let alone the first page of

⁶³⁸ Netanel (2000), 477.

⁶³⁹ Hindman (2008), 62.

⁶⁴⁰ Hindman (2008), 55,72, 93.

results, is overwhelming.⁶⁴¹ One recent review of literature on click-through rates on search engine results found that, on average, 29.6% of searchers select the first result displayed, 13.1%, the second result, 9.2%, the third, with a decreasing percentage down to the tenth result.⁶⁴² In sum, sites that win attention will tend to increase the attention they gain, and sites which attract little attention will be ever more unlikely to attract more.

Thirdly, the attention-concentrating dynamics of networked filtration and work-selection are further compounded by the concentration of the means of filtration. The trope of the liberated individual ‘surfing’ the web on her own terms is outdated. Most internet activity is mediated through key applications which aggregate and distribute works in one way or another: most notably search engines, and social networks.⁶⁴³ The ownership of internet intermediaries is highly concentrated and vertically integrated.⁶⁴⁴ Likewise, supply in various key application niches (video on demand, audio streaming, news, etc.) is highly concentrated. Economies of scale, power law distributions of attention, and above all, network effects promote winner-takes-all outcomes among internet intermediaries.⁶⁴⁵

Whatever its causes, concentration of market power in dominant internet intermediaries is evident from figures on viewership, market share and advertising

⁶⁴¹ Numerous studies arrive at materially the same conclusion, using different methods. See e.g. Höchstötter et al (2009), 1796–1812; Hotchkiss et al (2005); Keane et al (2008); Chitika (2013).

⁶⁴² Hodgdon (2015).

⁶⁴³ See Anderson and Wolff (2010).

⁶⁴⁴ Hindman (2008), 93.

⁶⁴⁵ Barnett (2017), 2. On the workings of network effects with regard to internet applications, see Lanier (2014), 161ff.

investment share on the internet. In 2015 Google held a market share of 68% of the general purpose search engine market.⁶⁴⁶ In some markets like Spain and Italy, it controls more than 90% of search.⁶⁴⁷ In the same year, Google's subsidiary, YouTube (used by more than 59% of U.S. smartphone users) dominated the online video portal market.⁶⁴⁸ In 2016, Facebook was used by almost 78% of U.S. smartphone users.⁶⁴⁹ In the same year, 63% of US smartphone users logged into Facebook an average of 8 times per day.⁶⁵⁰ As at January 2017, one statistics analysis site had Facebook at 87% share of the UK social network market.⁶⁵¹

Another 2015 study by internet analysis website, Parse.ly, found that between them Facebook and Google accounted for 81% of traffic to the Parse.ly network of media sites, with 43% going through Facebook and 38% through Google.⁶⁵² It is also telling that Facebook and Google (taken together) accounted for 75% of new spending on online advertising in 2015. In the US, 85 cents of every dollar spent on digital marketing went to the two companies in the first quarter of 2016.⁶⁵³ The willingness of advertisers to commit the overwhelming majority of their online budget to these two platforms is a striking indication of the extent to which Google and Facebook monopolise internet users' attention.

⁶⁴⁶ comScore (2016).

⁶⁴⁷ Sullivan (2013).

⁶⁴⁸ comScore (2016).

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Chaffey (2017).

⁶⁵¹ Statista (2017).

⁶⁵² Parse.ly (2015).

⁶⁵³ Garrahan (2016).

This dominance, coupled with the dynamics of search and filtration described above, places an enormous wealth of communicative and cultural power into the hands of Google and Facebook. Facebook works on a business model where developers build applications *within* the Facebook platform, ultimately controlled by Facebook.⁶⁵⁴ Google manages both traffic and advertising and has cemented its monopoly over internet search.⁶⁵⁵ It uses this dominance to push other products and services within its portfolio.⁶⁵⁶ It is hard to imagine a scenario further from the cyber-utopian vision of decentralised digital democracy, characterised by yeoman-publishers combining their communicative powers over open networks.

5.4.4 'Free' distribution of works contributes to the internet's distributive justice problem

We have considered the distribution of communicative power as between internet intermediaries. What about the distribution of power as between internet intermediaries, copyright owners, and users of works? In the networked environment both copyright owners and users tend to cede communicative power and resources to dominant internet intermediaries: especially search engines and social networks. To be sure, when an internet user gains a right or capacity to access or use content without the need to pay or ask copyright owners for permission, the individual generally gains in communicative power. Likewise, when ordinary

⁶⁵⁴ Anderson and Wolff (2010).

⁶⁵⁵ Foster and McChesney (2011), 5.

⁶⁵⁶ In the EU, Google is currently facing a potential fine for using its dominance in the search market to build its Google Shopping service. See Toplensky (2017).

individuals find themselves able to publish works easily and inexpensively. But the very exercise of that power benefits dominant internet intermediaries like Google and Facebook; perhaps even more than the individual user.

As Lanier points out, the removal of barriers to copying leads to a proliferation of businesses online that profit from selling services about information, rather than producing and selling information itself. Third parties pay to manipulate the online options that appear in front of people from moment to moment.⁶⁵⁷ On the internet, 'If you're not paying for something, you're not the customer; you're the product being sold.'⁶⁵⁸ Providing free (frictionless) access to works and engaging user attention allows internet intermediaries to profit from the user-as-product in two main ways.

Firstly, user attention is itself a valuable commodity. Intermediaries can sell advertising on the basis of page 'views' or 'eyeballs'. Works, on the internet, are used as vehicles for attracting user attention.⁶⁵⁹ Internet intermediaries trade in that attention, and information about it. So, when an individual takes advantage of her power to access works freely while using an application on which those works are available, the intermediary that runs the application parlay this into profit. Any single view (access to a page or work by a user) is in this sense valuable for its own sake.

Secondly, a user's engagement with a work, whether by clicking through to a link to see the work, a 'share', a 'like', or some other use is valuable as a 'signal'. For

⁶⁵⁷ Lanier (2014), 199.

⁶⁵⁸ Andrew Lewis, cited in Pariser (2011), 21.

⁶⁵⁹ See Wu (2016).

search engines and social network application providers, ‘Every action a user performs is considered a signal to be analysed and fed back into the system.’⁶⁶⁰ By aggregating signals and using big data analysis tools, internet intermediaries can make predictions about users, which can then be used to target further content and advertising. This capacity to target content helps internet intermediaries to keep user attention fixed in the network. The capacity to target advertising makes advertising space on the internet intermediary’s platform more valuable, and gives the intermediary an advantage relative to competitors who do not have access to the same signals about users.

By providing free access to works, the internet intermediary maximises its user base, and its capacity to sell advertisements and valuable data. Take Google, whose business model Barnett describes as follows. Google distributes informational assets (search results) to individual users at zero price. In doing so it obtains data about individuals, which it sells to advertisers. It maximises revenues by driving down its input costs (the cost of analysing web pages, and providing links to them). This in turn maximises the Google user base, which enhances the power and value of Google’s data set and data analysis. Internet intermediaries like Google have an interest in being able to copy works in the course of analysing and ranking them, and in being permitted to provide links to works, without paying the copyright owners of those works. This is largely what allows them to run a profitable data-analysis and ad-selling business.⁶⁶¹

⁶⁶⁰ Mayer-Schönberger et al (2013), 113. See also Keen (2015), 58.

⁶⁶¹ Barnett (2017), 9.

Not only is the provision of free access to works lucrative for dominant internet intermediaries; it also gives them a stunning amount of communicative and cultural power. That power is, in some ways, power *over* the user. It is power that allows internet intermediaries and their customers (such as advertisers) to manipulate and target internet users in ways that the users are not aware of.⁶⁶² It is hard to fully comprehend the extent of the power of data aggregation, but a few examples help to give a sense of it.

Signal analysis by internet intermediaries produces incredibly detailed information about individual users. For example, using only Facebook 'likes', researchers in one study were able fairly reliably to 'model' the latent traits of 58,000 volunteers, including traits such as sexual orientation, ethnicity, religious and political views, personality traits, intelligence, happiness, and substance addiction, among others.⁶⁶³ Another study indicated that Facebook was able both to predict user emotions based on data analysis, and manipulate emotions through the newsfeed.⁶⁶⁴ Worse, most users, even fairly sophisticated ones are not aware of the extent to which data is collected about them, and used to tailor information and advertisements that is presented to them, or to influence their behaviour.⁶⁶⁵

Users arguably receive some value in return for this very dramatic imposition upon their agency. They get access to the intermediary's network and the content on it; as well as its functionality. But much of the input of value of that network comes

⁶⁶² See Lanier (2014). See also Vaidyanathan [2007], 1219. On user lack of awareness of the way in which data analysis works, see Tufekci (2015), 209, 215.

⁶⁶³ Kosinski et al (2013).

⁶⁶⁴ Choudhury et al (2013). For a summary of the experiment, see also Booth (2014).

⁶⁶⁵ Tufekci (2015), 208-212.

from authors and publishers of works, and from users, rather than from the network provider. As a net proposition, the value derived from authorship and use of works flows toward internet intermediaries, and away from authors, publishers and users (who are also often authors of a kind, because they constantly produce and publish content such as photographs, comments and status updates). The cumulative gains in internet intermediary power offset, to a considerable degree, users' gains in communicative empowerment.

Barnett has argued that internet intermediaries have deliberately undertaken a strategy of 'rent shifting', appropriating revenues that might otherwise have gone to copyright owners. Internet intermediaries, he says, use three strategies to make money from the free distribution of works.⁶⁶⁶ Firstly, they may choose to acquire or develop content which they then disseminate for free. An example of this is Facebook and Instagram's strategy of publishing user-generated content (such as photos and status updates) on their networks. Another is Google's provision of ranked search results for free.

Secondly, internet intermediaries may adopt a *laissez faire* approach to copyright infringement by users on their platforms.⁶⁶⁷ Much user generated content driving traffic to YouTube in its early years was copyright infringing.⁶⁶⁸ As for Facebook, the platform adopts a studied indifference to the uploading of infringing videos. According to one study, of the 1000 most popular Facebook videos of Q1 in

⁶⁶⁶ Barnett (2017), 9.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Green (2015).

2015, 725 were re-uploaded onto Facebook from another platform without copyright owners' permission. These 725 videos drew 17 billion views in that quarter.⁶⁶⁹

The distinction between indifference to unauthorised copying, and encouragement of it, becomes rather blurred once we understand something about Facebook's ranking algorithm. The algorithms governing the appearance of content in users' Facebook news feeds tends to place videos in Facebook format higher in the feed than videos embedded from other sites.⁶⁷⁰ In other words, the user who wishes to boost her online profile has an incentive to copy popular or interesting videos across to Facebook format and share them, rather than embedding videos from other platforms like YouTube. If the video were embedded in its native format, the person who posted it would receive advertising revenue from the views. But a video copied into Facebook format without authorisation might be viewed thousands, millions, even billions of times on Facebook without the copyright owner receiving any revenue. Copyright owners can apply to have such videos taken down using a notice and takedown procedure, but by the time the process is complete, the video's moment in the sun may have passed, and the potential revenue to the copyright owners from the views will have been lost.⁶⁷¹

Finally, intermediaries can actively seek to weaken the strength and scope of copyright, or make its enforcement more costly or uncertain. For example, in the *Viacom v YouTube* case, the plaintiff's statement of undisputed facts quoted from an

⁶⁶⁹ Green (2015).

⁶⁷⁰ In a nutshell—Kurzgesagt (2015).

⁶⁷¹ *Ibid.*

email from an executive to the Google chief executive.⁶⁷² The executive recommended that Google 'pressure premium content providers to change their model towards free' and said that Google 'may be able to coax or force access to viral premium content'. Google, he said, could 'threaten a change in copyright policy' and 'use threat to get deal sign-up'.⁶⁷³ That suggests a conscious strategy of undermining copyright owners, but it is hard to judge how representative these statements are of the intentions of internet intermediaries in general.

Perhaps intentions are beside the point. More important are the realities of how the removal of constraints on the copying and dissemination of works relate to the political economy of the internet. It is clear that highly concentrated centres of communicative power like search engines and social networks (particularly Google and Facebook), profit from 'free' circulation of works, arguably much more than users profit from frictionless use of works. Zero price distribution of works, and dominance of the online information sphere by a handful of internet intermediaries, seem to go hand in hand.⁶⁷⁴

5.4.5 A concentration critique for the internet

It ought to be clear that the dynamics of the distribution of attention and power on the internet belie the 'romance of the public domain'. The internet's contribution to increases in inclusiveness and diversity in the production of works is undeniable.

⁶⁷² *Viacom International, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103

⁶⁷³ Davidson (2017).

⁶⁷⁴ Barnet (2017), 2.

Yet these gains in inclusiveness and diversity on the production side are offset by some countervailing anti-inclusiveness and anti-diversity dynamics.

Widespread participation in creation and publication is no guarantee that individual members of the public are likely to see and engage with an inclusive and diverse array of works. Indeed, the wider the participation and the more works in circulation—the more pronounced will be the effects of filtration. The more works there are, the more individuals rely on filters to manage the finite attention which they may give to works. And on the internet, the trend is toward concentration of attention.

This concentration of attention tends to concentrate wealth and communicative power in the hands of dominant internet intermediaries. Established incumbents tend to profit and gain in communicative reach. Independent, medium-sized authors and publishers tend to lose out, as the long tail diffuses whatever attention is not concentrated on the top few works or sites. The biggest winners are the internet intermediaries who monopolise and monetise attention to derive valuable signals and advertising revenue.

In these conditions, widespread sharing and publication of works (a wider ‘public domain’ as it were) compounds that concentration of attention and communicative power. Where content circulates freely, without a charge for access to works, internet intermediaries like search engines and social networks make money by selling user attention to advertisers, and accrue power and wealth by analysing the ‘signals’ derived from internet users’ engagement with works. This seems little better than the concentration of resources and communicative power supposed to characterise copyright industries.

5.5 Concentration and blandness (again)

5.5.1 Problems with networked filtration dynamics

One might take the optimistic view that concentration of attention on applications like Google and Facebook is no cause for concern. One reason to take such a view is that, in spite of the dominance of players like Google and Facebook, alternatives exist. Users are free to seek out works elsewhere. Copyright owners are free not to publish their content freely on those dominant platforms.

Another reason is that dissemination of works through internet intermediaries is not, as Benkler points out, subject to selection and filtration of works at a single point of control. The processes determining what content such platforms furnish to users—using algorithmic, networked selection and filtration—are to some extent directed by users' own choices and preferences, rather than determinations by intermediaries about any given work. One might therefore argue that users' communicative power, and the *inclusiveness* and openness of online culture to their concerns, does not suffer all that badly as a result of the concentration of attention described above.

There are good reasons to take a more pessimistic view, however. While both copyright owners and users are, in form, free to seek or publish works outside applications, in practice, network effects mitigate against this. Knowing that more than half of Americans get their news through Facebook, a publisher of news content would be ill advised to eschew the platform. Likewise, knowing he is likely to access a great deal of news content for free on Facebook, and having also come to

rely heavily on Facebook to keep in touch with friends, even to the point of losing their contact details, a user has little prima facie incentive to go elsewhere for news.⁶⁷⁵

As for the claimed superiority of networked filtration on the basis that it does not have a single point of curatorial control, things are not quite so simple. Benkler's claim was that:

the networked public sphere enables many more individuals to communicate their observations and their viewpoints to many others, and to do so in a way that cannot be controlled by media owners and is not as easily corruptible by money as were the mass media.⁶⁷⁶

This claim may have held true in 2006, but it is nowadays rather suspect. The prospect of direct interference, at a single point of control, with users' information streams is no longer as unlikely as it may once have seemed.

Secondly, even where the information presented to users is an 'organic' product of networked filtration, and reflects information aggregated user preferences rather than curatorial decisions by intermediaries, other troubling dynamics of filtration and attention maintenance come into play. These include filter bubbles, group polarisation, self-perpetuating clickbait preference patterns, targeted propaganda, and the proliferation of so-called trolling and extreme expressions on the internet. Let me first deal briefly with the point about centralised control, before I explain these dynamics in more detail.

⁶⁷⁵ On 'punishing' network effects of this kind, see Lanier (2014), 161ff.

⁶⁷⁶ Benkler (2006), 11.

5.5.2 Direct interference in work selection

Conventional wisdom depicts filtration algorithms as passive vehicles, simply giving effect to users' fully autonomous choices and preferences. As a matter of fact, however, the operations of algorithmic filtration are fairly opaque. This makes sense, since a successful ranking algorithm is a valuable trade secret. The perception, however, that filtration on social networks or search engines is truly 'organic' can be misleading and extremely disempowering to users.

A scandal involving Facebook's 'trending' news stories application illustrates the point well. Facebook's trending news section was supposed merely to reflect organically whatever news stories users were sharing. In May 2016, however, it came to light that members of Facebook's news team were manipulating and partly curating the 'trending news' module.⁶⁷⁷ Facebook's curation involved injecting stories of its own news team's choosing, rather than stories that were organically trending. It also involved suppressing, or demoting, stories which were deemed to have too strong a conservative bias.⁶⁷⁸ In some cases, allegedly, after a topic was injected 'artificially' into the news feed by Facebook staff, it picked up 'organically' and became the number one trending news topic on Facebook.⁶⁷⁹

This kind of news curation seems very similar to the kind of centralised selection and control supposed to pervade conventional copyright-based media. A select group of professionals, occupying a more or less unassailable point of control, exercise great power over the contents of culture and discourse. The difference is,

⁶⁷⁷ See e.g. Hoyle (2016), 26; Thelma (2016); Osofsky (2016).

⁶⁷⁸ Nunez (2016); Nunez (2016a).

⁶⁷⁹ Nunez (2016).

traditional news media do not pretend merely to be presenting an organic report generated by users' search and viewing behaviour; and few, if any, traditional news media reach billions of viewers or readers.⁶⁸⁰

5.5.3 Problematic filtration dynamics

Even if direct curation by human agents did not occur, it is far from clear that networked filtration, mediated by algorithms, lives up to cyber-utopian expectations. The virtue of networked filtration is that it is supposed to disintermediate the curation and selection of works. It is supposed to give effect to the preferences of individuals, and helpfully order information by aggregating such preferences. This would seem to be the epitome of inclusiveness, autonomy and democracy: where the collective actions of unconstrained, autonomous individuals, rather than the self-interested curatorial decisions of commercially minded traditional intermediaries, determine what works are visible to any given member of the public. Individuals would seem, under this set of arrangements, to be better situated to author their own lives and choices (a benefit for autonomy).

In reality, however, the logic of filtration on search engines and social networks is opaque. It is mostly concealed from the public. Individuals have little knowledge or control of the criteria by which applications like Facebook or Google filter, rank and present information to them.⁶⁸¹ Networked hierarchies of information distribution are subject to a range of powerful, invisible pressures, many of which are troubling in their implications.

⁶⁸⁰ Ingram (2016).

⁶⁸¹ Pariser (2011), 10, 106.

One problematic pressure has to do with the ways in which search engine and social network algorithms are calibrated to produce ‘relevant’ content for their users. The objective of networked filtration is to present to users (whether of search engines or social networks or other forms of information intermediation) content and results which are relevant to them. In the face of a huge proliferation of content online, the way in which internet intermediaries have attempted to solve this problem is through a process of personalisation.

The relevance of any given ranking in a news feed or search results page is not determined only objectively—by reference to aggregated preferences of the public as a whole. It is also determined by an approximation of the subjective preference of the user. Users’ past viewing and search behaviour is, as mentioned above, analysed as a signal. Applications like search engines and social networking sites aggregate data about users with similar signal patterns and attempt to predict preferences based on that analysis.

In 2009 Google changed its search algorithm so that it now tailors search results based on signals and data gathered about the individual conducting the search. The import of the change can be summed up with the following example. A search for ‘proof of climate change’ might turn up different results for an environmental activist and an oil company executive.⁶⁸² The oil executive might see results tending to play down climate change; the activist, results tending to assert its importance, and prove its existence. Different individuals, in other words, are presented with different information purporting to be factual and true.

⁶⁸² Pariser (2011), 3.

Facebook's algorithm for ranking results in account holders' news feeds, Edgerank, also uses personalisation.⁶⁸³ There are some differences between the way in which personalisation is tailored on Facebook, Google and other intermediary platforms. The biggest platforms are, however, broadly similar in one important way. Results are tailored for 'relevance' to individual users, based on past signals such as views, 'likes', searches, buys, and language used on the platform and related applications.⁶⁸⁴

It is not clear to me that this kind of personalisation is empowering to individuals. On the contrary, it seems to give internet intermediaries considerable power over individuals (a reduction in autonomy). The author and businessman Eli Pariser popularised the term 'filter bubble' to describe the characteristic of the internet whereby search engines and social networks algorithmically tailor content to maximise each individual user's attention.⁶⁸⁵ The filter bubble is a space in which individuals are cordoned off from whatever information is deemed irrelevant to them by the algorithm that is personalising their information stream. Pariser writes,

When you enter a filter bubble, you're letting the companies that construct it choose what options you're aware of. You may think you're the captain of your own destiny, but personalization can lead you down a road to a kind of informational determinism in which what you've clicked in the past determines what you see next.⁶⁸⁶

⁶⁸³ For details on the differences between the ranking algorithms of Google and Facebook, see Pariser (2011), 37ff.

⁶⁸⁴ *Ibid*, 2.

⁶⁸⁵ *Ibid*.

⁶⁸⁶ *Ibid*, 16.

More troubling still is the fact that individuals tend not even to be aware of the extent to which the information presented to them is personalised.⁶⁸⁷ This outcome is even less inclusive than the mass media model, and liable to reduce the diversity of the range of works to which individuals are exposed.

Individuals' general lack of agency in the filtration process is not the only troubling feature of the 'filter bubble'. As I explained in the preceding part of this chapter, works are powerful tools for engaging the attention of the public, and data about that attention is packaged and used to sell advertising.⁶⁸⁸ Indeed, the key objective of internet applications such as Google and Facebook is to maximise user time on their apps. The lion's share of their other business objectives—collecting, analysing and selling valuable data, selling advertising, and so on—are dependent on keeping the attention of as many users as possible, for as long as possible, on their application.⁶⁸⁹ Works and content displayed to users therefore become both vehicles for advertising, and for collecting the data used in targeting that advertising.

This has significant repercussions for the parameters under which works are produced, funded, and displayed (ranked) in users' networked information streams. The kind of attention that is of interest to internet intermediaries and their customers (advertisers and sometimes political organisations) is not necessarily the kind of attention which conduces to users' self-realisation, or productive participation in democratic deliberation. Nor does internet intermediaries' quest for

⁶⁸⁷ On this general lack of awareness, and the lack of transparency regarding the mechanics of filtration, see e.g. Oremus (2016); Pasquale (2010).

⁶⁸⁸ See Keen (2015) 117.

⁶⁸⁹ See Bosker [2016]; Harris (2017).

attention through curation of filter bubbles seem optimal for cultivating rigour, diversity and inclusiveness in works.

In analysing data about video views, Facebook counts the ‘view’ at the three second mark (whether or not the viewer has even turned on the sound).⁶⁹⁰ This bespeaks an intention to divert attention momentarily, either to register a ‘view’ that triggers payment by advertisers, or in fact to display an ad, rather than presenting something of enduring interest to a user. The signals that likely interest the profit-minded internet intermediary are signals about what will attract a click or a view from a user, not signals about the quality of the users’ experience once the click has been made. Internet intermediaries make money distracting and maintaining user attention long enough to elicit a datum about consumption preferences or to present an advertisement, and then distracting attention again with some new stimulus. Businesses like Google and Facebook therefore have strategies consciously and carefully designed to cultivate user addiction to their application.⁶⁹¹

Pariser points out that our responses to content presented in news feeds and other similar ranked presentations of works and information, tend to be driven by impulse. We are, he points out, naturally predisposed to be attracted by certain stimuli. Where works are about sex, power, gossip, violence, celebrity, or humour, we are likely to read them first. This is the content that makes it most easily into the

⁶⁹⁰ Green (2015).

⁶⁹¹ For a list of psychologically manipulative strategies used to maintain and direct user attention, see Tristan Harris (2016); Recode Staff (2017).

filter bubble.⁶⁹² Works which most readily feature in social networking news feeds are those works which stimulate outrage.⁶⁹³

Such content would seem as suitable a candidate for the blandness critique about the proliferation of lowest common denominator fare, as anything presented by mass media. The metric of what we read first, or click on most often, though, provides suppliers with a fairly skewed picture of our tastes.⁶⁹⁴ Incentives seem to align with presenting users with content of a kind that they already like, or have already liked, rather than more challenging or interesting fare. This is bad for rigour and diversity—indeed it would seem to be calibrated to cultivate the opposite qualities. The structural incentives bear against introducing individuals to diverse works, or challenging (rigorous) content.

Another problem with the filter bubble is that it contributes to polarisation in discourse and culture. Professor Cass Sunstein has explained that, where members of a group begin with broadly similar views, interaction within the group tends to galvanise members toward more extreme iterations of the view they initially took.⁶⁹⁵ For example, a group of people who are opposed to the minimum wage are likely, after talking to each other, to be still more opposed. People who believe global warming is a serious problem are likely, after to discussion to insist on ever more severe measures to prevent global warming. People who take the opposite view, if they only talk to like-minded ‘climate change sceptics’, are likely to become more

⁶⁹² Pariser (2011), 18, 32, 127.

⁶⁹³ Tristan Harris, in Harris (2017). See also *Recode* Staff (2017).

⁶⁹⁴ Harris (2017).

⁶⁹⁵ See e.g. Sunstein (2009), 3.

stridently opposed to measures taken to mitigate climate change.⁶⁹⁶ Sunstein charts out various psychological and sociological reasons for this shift toward extremes, but those details are beyond the scope of this thesis.⁶⁹⁷

The point is, when deliberation and discussion are confined into groups of like-minded people via filtration, chances of polarisation of views are very high. Filtration algorithms on social networks such as Facebook tailor users' newsfeed's based on their past behaviour, and the past behaviour of their 'friends', and tend to corral them into groups of like-minded people, who post and share content with which they tend already to agree.⁶⁹⁸ Indeed, presenting users with increasingly extreme iterations of an argument or viewpoint that they have initially engaged (by viewing a video, say) has proven a highly effective strategy for maximising user time on social networks. Social network algorithms appear, in fact, to be calibrated to take users through this escalation/polarisation process.⁶⁹⁹

In order for deliberative discourse to avoid the trap of polarisation, deliberators need exposure to, and engagement with, others who do not share their views. De-centralised filtration and selection of works does not seem to provide this exposure. It has not fulfilled its democratising promise. Even if there are very diverse works available in principle, and even if participation in culture and discourse is easy, the promise of diversity and inclusiveness are not necessarily fulfilled in terms of individual experience. The dynamics of algorithmic, 'peer

⁶⁹⁶ Sunstein (2002).

⁶⁹⁷ For more, see Sunstein (2009), 40ff.

⁶⁹⁸ Facebook's feed places more emphasis on the signals of the user's 'friends', while Google is more targeted around the user's own past signals. See Waters (2017); Sunstein (2009), 24; Viner (2016). But see Conover (2011).

⁶⁹⁹ Tufekci (2017), 271. See also Tufekci on

mediated' filtration tend to polarise discourse, and to reduce individuals' experience of diversity and inclusiveness in the world of works.⁷⁰⁰

5.5.4 Dynamics of grass-roots production and dissemination are not unqualifiedly good for culture

A number of scholars make much of the fact that works produced through grass-roots engagement, without commercial motivation, tend to differ significantly from works produced under conventional commercial publishing arrangements.⁷⁰¹

Benkler points out that, in the case of amateur contributions to culture, decisions about what to publish do not start from a manager or editor's judgment about what would be relevant and interesting to many people without alienating too many others. It starts with the question, 'What do I care about most now?'⁷⁰² Tushnet makes a similar point, arguing that amateur creation and dissemination of works is driven by desire and passion, rather than commercial considerations.⁷⁰³ With this difference in motivation, will tend to come different kinds of works. There is a gain in expressive variety that comes from an increase in the production and dissemination of non-commercially motivated creation of works (*diversity*); a potential gain in intensity of expressive experience (*rigour*). The inclusion of those impassioned 'voices' into culture and discourse (*inclusiveness*) is generally a good

⁷⁰⁰ Pariser (2011); Sunstein (2002), 22.

⁷⁰¹ Tushnet (2007), 111. See also Elkin-Koren (2005), 386. See also Netanel (2008), 40, on the advantages of 'non-market speech'

⁷⁰² Benkler (2006), 260.

⁷⁰³ Tushnet (2009).

thing. But it is not *always* a good thing, nor is it good in every way for autonomy and democracy.

Let me give, here, a few examples of how online dynamics of desire—dissemination and publication according to what users care about most—may work against diversity, inclusiveness and rigour. These examples are rather dramatic, and of course, one might offer a number of examples of beneficial outcomes of desire-based amateur publication and dissemination online. For example, the ease of podcasting has led to an explosion of creativity and high quality audio content. Twitter has permitted new forms of political mobilisation and information sharing, allowing coordinated challenges against powerful state actors.⁷⁰⁴ Blogs have helped to supplement the watchdog role of the media, making important scandals known to the public.⁷⁰⁵ Fan fiction has allowed ordinary individuals to challenge conventions of gender, sexuality and power by re-imagining works of pop culture.⁷⁰⁶

If we are arguing by example and anecdote (and this seems very common in arguments celebrating networked information economies) we ought to make sure we are as cognisant of the gloomy and discouraging examples as of the inspiring ones. Peer to peer collaboration, as I said above, works for some kinds of works, and may be less effective for others. In some cases it is inimical to inclusiveness, diversity and rigour. For example, early in the second Iraq war, the *Los Angeles Times* attempted to crowdsource an editorial—a ‘wikitorial’ on the conflict. Arguments between those with opposing viewpoints quickly descended into

⁷⁰⁴ Tufekci (2017).

⁷⁰⁵ Benkler (2006), 228. 263; Hindman (2008a), 1.

⁷⁰⁶ Tushnet (1996).

‘flamewars’. Ultimately the publication forked the debate into two separate sides, each side deliberating only with its own members.⁷⁰⁷

The result was, in effect, to polarise the two sides, excluding each from the perspective of the other—a total failure of inclusiveness and diversity. As for *rigour*, I will not venture a firm opinion on what makes an editorial ‘rigorous’. It seems fair to say, however, that conditions in which ad hominem vitriol and straw man arguments win out over reasoned opinion are not conditions conducive to a rigorous editorial oeuvre.

Ease of publication online is liable to amplify the voices of those who are most passionate, and most prolific in their output; but not necessarily the most truthful, or the most rigorous. In a 2016 article in *The Atlantic* about racist extremism on the internet, one interviewee pointed out,

Racist propagandists have motivation to put that stuff [white supremacist propaganda] out... The anti-Semites can flood an area and there’s no contradictory evidence. There aren’t people out there trying to prove that Jews aren’t running the government.⁷⁰⁸

The example of anti-Semitism above is not arbitrary.

Carole Cadwalladr, in an article in the Guardian from April 2016, reported a disturbing feature of Google’s autocomplete function for search terms entered into its search engine. Typing the words ‘are jews’ resulted in her being presented with a series of ‘autocomplete’ options to search. Among these was the phrase, ‘are jews evil’. On the first page of search results produced in response to this phrase, 9 out of

⁷⁰⁷ Thornhill (2017).

⁷⁰⁸ Khazan (2016).

the 10 pages were anti-Semitic, conveying such sentiments as this (taken from the top ranked result):

Jews today have taken over marketing, militia, medicinal, technological, media, industrial, cinema challenges etc. and continue to face the worlds [sic] envy through unexplained success stories given their inglorious past and vermin like repression all over Europe.⁷⁰⁹

It is easy to see how this skewed set of results might follow as a consequence of giving effect to grass-roots search, linking and viewing preferences. People who are not inclined to be anti-Semitic are likely never to enter a search query like, 'are Jews evil'. They are equally as unlikely to enter a search term that might exert an opposing force on Google's search algorithm, for example, 'are Jews good'. Nor are ordinary people generally motivated to the same degree as anti-Semites to create web pages dedicated to extolling the virtues of the Jewish people and culture. Google search results are therefore dominated by the extreme views of those perverse enough to give their attention to writing and reading anti-Semitic content in the first place.

The extent to which a person is motivated to create or disseminate or view a work absent commercial incentives (Benkler's 'what do I care most about now?' factor) is not itself a measure of the work's social or cultural value. One may be simultaneously passionate and ignorant, passionate and bigoted, passionate and manipulative. Or one might simply be motivated by mischievous or anarchic impulses—as, it seems, is the now infamous class of amateur content creators, known as internet 'trolls'.⁷¹⁰ The broader point is, dynamics of group polarisation,

⁷⁰⁹ Cadwalladr (2016).

⁷¹⁰ On the negative effects of trolling on diversity, inclusiveness and rigour—and especially on the participation of women in online fora—see Buckels et al (2014), 97-102; Hess (2014); Keen (2015), 150; Farhad (2014).

combined with the dynamic whereby online forums tend to amplify the voice of the vociferous extremist and conceal the opinion of the quiet moderate. This is obviously bad for all three of our mid-level objectives.

It also permits falsehood and conspiracy to spread very quickly online which is evidently bad for rigorous, civil discourse.⁷¹¹ Pariser claims that online filter bubbles help falsehoods and misconceptions about various material facts to persist in the face of contradictory proof: for example, the widespread belief that former US president, Barack Obama was a Muslim and not a US citizen spread ‘virally’ via peer to peer sharing, rather than through conventional copyright-media.⁷¹² The viral spread of other such falsehoods and conspiracy theories—the ‘Sandyhook conspiracy’, ‘flat earthers’, the moon landing hoax, ‘anti-vaxers’, ‘Pizzagate’—has now become a well-known online phenomenon.⁷¹³ It is hard to imagine such notions being credited in any but a select few commercial newspapers with wide circulation. In non-commercial, non-copyright-based online fora, where the ‘what do I care about now’ factor dominates, by contrast, conspiracy theories are commonplace.

The concentration of attention on Google and Facebook, combined with the insights available from extensive analysis of users’ data, makes those platforms and their users particularly vulnerable to dissemination of falsehood.⁷¹⁴ In a study published in 2016, 9 out of 10 US adults said they were affected by so-called ‘fake

⁷¹¹ Sunstein (2009), 120

⁷¹² Pariser (2011), 89.

⁷¹³ See e.g. Lemann (2016); Paxman (2017); Romein (2016); McGeough (2016).

⁷¹⁴ However, regarding Facebook’s recent efforts to tackle fake news, see e.g. Murgia and Kuchler (2017).

news'.⁷¹⁵ 23% say they have shared a made-up news story online – either knowingly or not.⁷¹⁶ 64% of participants in a Pew survey said that 'fake news' had caused 'a great deal of confusion' about facts of current events.⁷¹⁷ It is as easy to publish and disseminate false information online as it is to publish the truth—perhaps easier, because publishing falsehood does not require the deployment of any resources to investigate the truth.⁷¹⁸

5.4.4.2 Propaganda

I mentioned in the previous part the power of internet intermediaries with big data sets and powerful analytical tools to understand and influence their users. Given that power, it is hardly surprising that political entities have entered the fray and attempted to exploit that power. Pariser interviewed an un-named propaganda expert who hinted at the possibility of manipulating social networks and search engines to propagate state-based propaganda.⁷¹⁹ Governments or political groups seeking to suppress or influence information flows find themselves in a game of 'one stop shopping': by targeting users through powerful internet intermediaries they can exert great reach and influence.⁷²⁰

This is now no longer a hypothetical issue. In a series of important investigative news articles, Carole Cadwalladr recently documented the role played

⁷¹⁵ Romei (2016); Barthel et al (2016).

⁷¹⁶ Barthel et al (2016).

⁷¹⁷ *Ibid.*

⁷¹⁸ Viner (2016).

⁷¹⁹ Pariser (2011).

⁷²⁰ Pariser (2011), 44.

by social media propaganda campaigns, targeting users through big data analysis, in both the recent US presidential election and the UK 'Brexit' referendum.⁷²¹ An organisation called Cambridge Analytica was involved in both the 'leave' campaign, and Donald Trump's campaign for presidency. Cambridge Analytica analysed data from social media profiles, and helped to target campaign messages based on the results of its analysis.⁷²²

Recall, Facebook could manipulate its users' emotions through the news feed. It is therefore hardly surprising that Amy Wigmore, Leave.EU's communications director, said that Facebook likes were the campaign's most 'potent weapon',

Because using artificial intelligence, as we did, tells you all sorts of things about that individual and how to convince them with what sort of advert. And you knew there would also be other people in their network who liked what they liked, so you could spread. And then you follow them. The computer never stops learning and it never stops monitoring.⁷²³

The particular political entities involved here are less relevant than the means of spreading their influence. Wigmore is describing the subjugation of individual autonomy, the invisible manipulation of individuals' information sphere, by powerful political actors who know much more about the individuals than the individuals know about them. It is hard to imagine a scenario in which communicative power was more asymmetrically distributed.

Digital orthodoxy imagines the networked communication environment, unencumbered by restrictions on copying and communicating works, as a highly inclusive digital democracy, characterised by a level communicative playing field,

⁷²¹ Cadwalladr (2017). See also Cadwalladr (2017a).

⁷²² Cadwalladr (2017).

⁷²³ Cadwalladr (2017).

and populated by individuals whose consumption of works, and contributions to culture are autonomous and self-actualising. Benkler advocated the cultivation of a cultural production and exchange system that is 'as unconstraining and free from manipulation as possible'.⁷²⁴ The reality of online politics and communication is dystopian by comparison.

5.5.6 A more judicious view of 'free culture'

It is not my intention, in describing some of the more dystopian features of the networked communication environment, to write off its benefits entirely. Clearly there are benefits to facilitating wide, low-cost participation in culture and discourse, and in disrupting existing mass market structures of communicative power. There are more works in circulation, and more people who can create, access them and use them, more easily (more *inclusiveness*). People are contributing to culture and discourse for more diverse audiences, and with a wider range of motivations (*more diversity*). The internet has made it easier to aggregate modular contributions into useful open-source works (a *rigour* win).

I can hardly imagine researching and writing this thesis without Google's remarkable search engine, its Google Scholar application, and its Googlebooks collection. I also came across many helpful news articles that I would otherwise never have seen in my Facebook news feed. Internet intermediary applications have undoubtedly helped me to be more rigorous in my research and writing. And I have wholeheartedly taken to free-to-access podcasts for information and entertainment.

⁷²⁴ Benkler (2006), 299.

The podcast medium has given birth to a new form of intellectually rigorous work—the long form podcast—which allows more scope for reasoned discussion than any other audio format of which I am aware. I consider podcasts to be a revolutionary and positive development in the cultural landscape; and the podcast is a medium that does not appear to require copyright for the sustenance of its quality. This is all to the good.

But the point I want to make is that the benefits of the networked communication environment are (like the democracy-enhancing features of the copyright-mediated communication sphere) qualified and contingent. They are not guaranteed and universal. Creating conditions in which copyright is harder to enforce, and copying and sharing proceeds more freely, does not by itself prevent concentration of communicative power and attendant qualitative problems.

Chapter 6

Copyright and the distribution of cultural power

6.1 Revising the structural justifications for copyright

This chapter is about copyright's structural function. Copyright influences the organisation of production and consumption of works, and therefore the distribution of communicative power. In my gloss on theories of copyright's structural function I described two 'structural' justifications for copyright, and pointed out their shortcomings. Let me briefly recapitulate here.

'Neoclassicist' theories treat copyright as a tool for facilitating efficient markets for works, as well as markets for rights to use works. The structural objective of giving copyright owners property rights in their works is to permit them to 'internalise' externalities arising from the use of works, and therefore encourage efficient allocations of resources in relation to works. The idea is that copyright permits markets to direct investment in the production and, perhaps more importantly, the management of works, efficiently. The objective is for rights to works to be transferred to their highest value uses.⁷²⁵

The neoclassical account tends not to elaborate on the extent to which copyright markets really approximate a standard of efficiency, nor what this approximation of efficiency (such as it is) means in qualitative terms. It is left to critics of market hierarchy to fill in the picture of how copyright distributes wealth and communicative power, and how this affects culture. Neoclassicist arguments are also inherently incomplete. They acknowledge that copyright exceptions are

⁷²⁵ See above part 3.3.2.

necessary in cases where markets fail. But, identifying market failure with a consistent, principled approach (rather than by way of ad hoc incremental judgments) requires us to take into account theories of public benefit and social value that are separate from, and outside of market evaluations. This leaves the neoclassicist ill equipped to weigh up trade-offs in choosing market and non-market options for allocating entitlements and resources.

Netanel's democratic paradigm is a more holistic structural justification. The democratic paradigm furnishes him with a principled framework for weighing up alternatives, and allows him better to compare the structural merits and demerits of copyright's organisation of the production of works to those of networked information economies. It permits him, for example, to explore the benefits for democratic civil society of copyright market hierarchies.

Neither the neoclassicist nor the democratic account, however, seems able to convey copyright's structural merits with anything like the force with which copyright's detractors convey its demerits. Copyright market hierarchies concentrate communicative power (the concentration critique), and encourage risk averse investment strategies that favour bland, homogeneous works over more challenging fare (the blandness critique). The problems identified by the concentration and blandness critiques seem to far outweigh copyright's structural benefits.

Both structural accounts stand to be enriched by engaging more closely with the dynamics of copyright-based markets, and parsing the concentration and blandness critiques more carefully in light of that engagement. As Nicholas Garnham, a pioneer of the discipline of cultural studies, put it,

[M]ost people's cultural needs and aspirations are being supplied by the market as goods and services. If one turns one's back on an analysis of that dominant cultural process one cannot understand either the culture of our time or the challenges and opportunities which that dominant culture offers to public policy makers.⁷²⁶

Market structures inevitably exert their own qualitative pressures on creative practice and creative conditions. They generate a set of institutional, cultural and material parameters under which creativity takes place. It is not enough merely to describe the dynamics of an idealised market for works—as neoclassicists tend to do; nor to write off the influence of copyright commerce as inherently opposed to our aspirations for a culture that best serves democracy and autonomy. We need to think more broadly and ask: to whom do copyright markets allocate communicative influence, opportunity and power; why; and what are the qualitative consequences of this allocation?

Part 6.2 establishes a framework for answering these questions. It parses more closely the neoclassicist claim that copyright based markets encourage authors and publishers to be responsive, in their investments of resources, to consumer demand. It sets out a simplified account of how responsiveness to demand affects the allocation of communicative and cultural power. It also sketches the significance of this distribution in terms of the mid-level principles of inclusiveness, diversity and rigour. I begin with this simplified (and therefore imperfect) account because it affords us conceptual clarity, and a firm stepping point for more nuanced and qualified descriptive analysis.

⁷²⁶ Garnham (1987), 55.

We do need to make qualifications, however. The concentration and blandness critiques demonstrate that copyright markets do not create a straightforward and 'pure' relationship between consumer demand and resource-allocation.

Concentration of market power, economies of scale, and risk management strategies all exert distorting effects on copyright market allocations.

Nevertheless, our analysis ought not stop at the point of identifying and acknowledging these distortions. They may be problematic, but they are not necessarily fatal for our mid-level objectives. Corporatised production and dissemination of works by vertically integrated mass media businesses, underwritten by copyright, is by no means a utopian outcome. But, since alternatives such as non-proprietary, networked production and dissemination of works also come with their own problems, it is worth reconsidering the benefits and detriments of copyright's imperfect distributive and qualitative effects.

Part 6.3 attempts such a reconsideration. It acknowledges the extent of concentration of wealth and power in commercial publishers, and identifies some of its causes. It qualifies and adds detail to the simple account of copyright as a tool for connecting the supply of works with audience demand. It explores features of markets of works such as demand uncertainty, and the ways in which they attenuate the relationship between audience demand and investment in works.

I argue that even though this relationship is attenuated, audience willingness to pay for works still plays a real and important role in the distribution of communicative power and resources. In copyright-based markets, money and communicative power still flows, broadly speaking, to authors and publishers who bring to market work that is capable of extracting payment for access from

audiences. There is a kind of inclusiveness in this arrangement, albeit an imperfect one.

Moreover, this is precisely the kind of inclusiveness that is conspicuously absent in those online environments of which I was so critical in the previous chapter. Neither copyright-based production and dissemination, nor the 'free' distribution of works on the internet is free from supply side concentration. But the signals which direct the selection of works—the processes determining which works are conspicuous to the public—are not the same for copyright-based businesses as they are for free-content based, online businesses like social networks. In a system in which copyright 'constrains' free access to works—in which users need to pay for access to a copy, or a right to share—one must actually provide works for which audiences are willing to pay. On social networks, by contrast, one may profit simply by distracting attention briefly, to extract a data point or sell an ad. There is some merit, in other words, to the dynamics of preference-signalling in copyright markets, especially considered in comparison with the dynamics of key online communicative environments in which copyright does not predominate, and culture is, in form at least, more free.

Chapter 6.4 contends with the blandness critique. It acknowledges some of the forces that push in the direction of blandness and lowest-common-denominator fare. But it also brings into consideration some opposing forces, and reflects on some of the merits that flow from them. I focus in particular on the trade-offs associated with blockbusters: their proclivity toward blandness, but also the reasons why they may escape this trap; and how blockbuster dynamics may even favour certain kinds of rigour.

6.2 Markets as qualitative value systems

6.2.1 Copyright's market objective is a qualitative objective

Parchomovsky and Stein (among others) argued that the rules regarding copyright subsistence indicate that copyright's qualitative objective has to do with the cultivation of 'originality' in works, since it is originality that attracts copyright protection.⁷²⁷ Drassinower, by contrast, emphasised how minimal the originality standard is. He induced from this low standard a commitment in the law to communicative autonomy. All that is required for copyright to subsist is basically that the author speak in her own words. Accordingly, Drassinower concludes that copyright is concerned with the author's right to speak in her own words, which is to say, her communicative autonomy.⁷²⁸

But another induction is also plausible. By stipulating that there is no standard of merit for copyright subsistence, beyond the lowest threshold of creativity, copyright law imports a different set of standards. It is a set of standards and values that operates at a degree of remove from copyright subsistence.

Copyright facilitates the qualitative outcomes that follow from having a market for works, because the low standard of subsistence permits markets to determine whether copyright rewards any given work or author.

That is not especially apparent in English, Canadian or Australian jurisprudence, where judges tend not to explore the policy reasons for copyright's

⁷²⁷ See above n (148) and accompanying text.

⁷²⁸ See above n (212) and accompanying text.

low originality threshold. Judges will say, for example, that ‘literary’ in the term ‘literary work’ does not import a standard of literary or artistic merit, but they will not explain why.⁷²⁹ In the US, however, the policy behind the rule lies closer to the surface. Given that the standard for subsistence in the US agrees broadly with the other jurisdictions (insofar as actual merit is not a requirement for subsistence of copyright in works), US jurisprudence is capable of explaining the qualitative implications of the subsistence standard across jurisdictions.

We are now equipped to re-engage and reconsider the claims of copyright’s aesthetic neutrality introduced at the beginning of this thesis. Here again are Justice Holmes’ oft-cited reasons in *Bleistein* for rejecting judicially determined standards of merit for copyright subsistence:

At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value -- it would be bold to say that they have not an aesthetic and educational value -- and the taste of any public is not to be treated with contempt.⁷³⁰

And here is a similar statement from *Mitchell Bros. Film Group v Cinema Adult*

Theater:

Congress has concluded that the constitutional purpose of its copyright power, “[t]o promote the Progress of Science and useful Arts,” is best served by allowing all creative works (in a copyrightable format) to be accorded

⁷²⁹ See e.g. *Walter v Lane* [1900] A.C. 539, at 552 per Lord Davey: ‘Copyright has nothing to do with the originality or literary merits of the author or composer.’ See also *University of London Press Ltd. v. University Tutorial Press Ltd* [1916] 2 Ch. 601, 608 per Peterson J; *Hollinrake v Truswell* [1894] 3 Ch. 420 at 424; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 WLR 273, 291 per Lord Pearce; *Exxon Corporation and Others v Exxon Insurance Consultants International Ltd* [1981] 1 W.L.R. 624, 633.

⁷³⁰ *Bleistein v. Donaldson Lithographing Co.* 188 U. S. 239, 251-252 (1903).

copyright protection regardless of subject matter or content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward.⁷³¹

If we consider copyright in terms of its structural effects, and not merely its formal allocation of entitlements, we are able to appreciate the qualitative priorities implicit in even the apparently neutral test for subsistence.

The quotes above from *Bleistein* and *Mitchell* indicate that the test for copyright subsistence manifests two implicit qualitative norms. One has to do with evaluation, the other with allocation of resources. Let us start with evaluation. The conceptual foundations of both economics and culture both have to do with notions of value.⁷³² In *Wealth of Nations*, Adam Smith summarised the evaluative properties of the market in this way:

But it is not easy to find any accurate measure either of hardship or ingenuity. In exchanging indeed the different productions of different sorts of labour for one another, some allowance is commonly made for both. It is adjusted, however, not by any accurate measure, but by the higgling and bargaining of the market, according to that sort of rough equality which, though not exact, is sufficient for carrying on the business of common life.⁷³³

Willingness to pay for a work or a right in relation to a work is a proxy for the value of that work or right, at the very least in direct use-value terms.⁷³⁴ In other words, the marketability of a work (consumer willingness to pay for a work) has a qualitative significance. In rejecting judicial determinations of worth, we are not forced to conclude that copyright law can have no aesthetic outcome or leaning.

⁷³¹ *Mitchell Brothers Film Group and Jartech, Inc. v. Cinema Adult Theater, A/k/a Cinema 69, et al.*, 604 F.2d 852, 855 (5th Cir. 1979).

⁷³² Throsby (2001), 14

⁷³³ Smith (1776), 52.

⁷³⁴ Throsby (2008), 78.

The point is not that there is no way of valuing creative works at all. Rather, Justice Holmes is deferring to the taste of the consuming public: what Gordon calls ‘the marketplace criterion of consumer demand’.⁷³⁵ Judges may try to neuter their own aesthetic judgment, but in doing so, they give precedence to the collective aesthetic judgment manifest in the market for works. The consuming public, according to this vision of copyright and the public benefit, determines what works should be rewarded. The public, rather than the court, is the arbiter of which works, or more accurately which allocation of copyright funds, best serves the public interest (or ‘progress’ in the USA).⁷³⁶

This brings us to the second qualitative norm. Market evaluation goes hand in hand with allocation. The public taste not only plays a role in attributing value to works (*Bleistein*). It also, simultaneously, determines who is rewarded (*Mitchell*). Not all authors benefit equally from their copyright.⁷³⁷ The worth of copyright to an author depends on the choices of the consuming public. The law’s commitment to aesthetic neutrality in assessing copyright subsistence therefore reflects the following, qualitatively oriented principle. The market affords a less expensive, more democratic and more reliable way to determine whether an allocation of resources in the creative sphere (‘reward’) is beneficial to the public, than does judicial deliberation.

⁷³⁵ Gordon (1982), 1637

⁷³⁶ Gordon (1982), 1609.

⁷³⁷ See part 1.1 for a discussion of the distribution of author income. I also discuss this distribution in the next part of this chapter (4.3).

6.2.2 Updating the neoclassicist paradigm—markets and inclusiveness

Let us reframe what I have just said in terms of our strategies for pursuing normative outcomes without falling back on paternalism. Let us, in other words, think about the processes, conditions and parameters in the creative sphere that copyright generates. By creating a price mechanism, copyright facilitates markets. In doing so, copyright generates conditions and parameters in which market processes play a key role in evaluating works; and directing the distribution or allocation of funds in the creative sphere. We can build on this insight to make some refinements to the neoclassicist approach to copyright.

The idea animating the neoclassicist paradigm is that society benefits when copyright facilitates markets that efficiently allocate resources and rights to access and use works. Copyright serves the public benefit, according to that view, by enabling resources to be allocated to their ‘highest value’ uses in relation to works. But, recalling an objection raised in chapter 3, this approach reaches an impasse when market valuations are inconsistent with other appraisals of social value—for example, the social value that human capabilities theorists attribute to active engagement with works.⁷³⁸

Neoclassicists like Gordon and Goldstein are, in principle, open to limiting copyright, and applying exceptions, in such cases of market failure. But neither offers a principled theory of what amounts to a socially valuable use, such that a failure of copyright to facilitate the use would amount to a market failure. A use is

⁷³⁸ See above, part 2.4.2.

deemed under Gordon's account to be socially valuable if a purchaser and owner would have, or ought to have transacted, but for some failure.⁷³⁹

We can be more specific than this. Acknowledging that copyright's purpose is to facilitate markets for works is not, as some might contend, merely to accede to the commoditisation of creativity; and to unquestioningly treat the market as the arbiter of the value of cultural artefacts.⁷⁴⁰ It is possible both to argue that there is benefit in copyright's facilitating market evaluations and allocations with respect to works; and to acknowledge that market evaluations are imperfect and problematic. Rather than contemplating merely whether copyright generates economically efficient outcomes, we should reframe our inquiry. We should consider whether market evaluations and allocations, however efficient they may be, produce conditions that are more or less conducive to rigour, inclusiveness and diversity than alternatives. Let us begin with some observations on inclusiveness.

Copyright's doctrine of aesthetic neutrality is, as I have just said, calculated to prevent judicial tastes from distorting the operation of markets. Judges' stance of aesthetic neutrality is intended to keep open the scope for operation of the allocative and evaluative dynamics of those markets—to allow them to operate on as wide a range of works as possible. In other words, copyright's facilitation of markets is not intended simply to distribute cultural power as between judges and the public.

⁷³⁹ Gordon (1982), 1652.

⁷⁴⁰ See e.g. Beebe (2017), 380. He argues that *Bleistein* wrongly sets commercial value as the index of 'progress' or public benefit.

Here the neoclassicist outlook is instructive. The point of copyright's creating a market, under neoclassicist view, is to make producers and suppliers of works responsive to consumer/audience demand. The idea is for consumers to have some measure of power over the contents and direction of culture, exercised by signalling their willingness to pay (or not) for certain works. This is the central qualitative characteristic of efficient markets for works. Consumer willingness to pay for works should influence the profile of works in production.

Let me begin by offering a simplistic explanation of why copyright-based markets might empower the public, assuming for the moment that copyright markets do approximate economic efficiency. This is an assumption I will break down shortly below, but for now it is helpful in establishing a few basic points about the general orientation of copyright-based markets to our three mid-level principles.

Under the copyright system, the way for authors and commercial intermediaries to make money is to produce and disseminate works for which audiences are willing to pay. Audiences' willingness to pay will depend very much (though perhaps not entirely) on the qualitative features of the work.⁷⁴¹ The extent to which works satisfy audiences tastes depends on the way in which they deploy their vocabulary of art or discourse. So, in an efficient market for works, audience tastes will influence the way in which authors and producers of works deploy their vocabularies of art. In an efficient market for works, the public's aggregate

⁷⁴¹ There may be reasons to consume a work other than an actual desire to enjoy it, but I will not discuss them here. See e.g. Caves (2000), chapter 10, on works as 'social goods' which individuals consume in order to conform socially.

willingness to pay for works ought to direct the allocation of resources in the creation and distribution of works.

The 20th century's great prodigy of the cinema, Orson Wells, described the influence of the audience on filmmakers in this way:

We must not forget the audience. *The audience votes by buying tickets.* An audience is more intelligent than the individuals who create their entertainment. I can think of nothing that an audience won't understand. The only problem is to interest them. Once they are interested, they understand anything in the world. That must be in the feeling of the moviemaker.⁷⁴²

Wells echoes *Bleistein* and *Mitchell* here, in affirming commercial culture. He is optimistic about audiences and their powers of taste and comprehension. Wells sees audiences' purchases of rights to access works—in this case, tickets to the cinema—as *votes*. The moviemaker, whether she be a producer, director or some other person involved in creative decision making, is to be guided by the audience's vote.

Assuming (for now) audience demand really counts, this strategy is one which cultivates an inclusive distribution of cultural power. The consuming public is empowered to decide which works are 'useful' (*Mitchell Brothers*) or have 'aesthetic or educational value' (*Bleistein*). More to the point, the public decides where the money goes, which gives them a measure of power over the profile of the creative industries. Copyright businesses may make the final decisions about what to produce, and how to invest in works, but they are responding to audiences. In this way, consumers get to participate in the dynamics of cultural decision-making, albeit indirectly.

⁷⁴² Orson Wells, cited in Cowen (1998), 6-7. Emphasis added.

This market dynamic does not exactly effect a distribution of substantive power to intervene directly in culture, as an author might. It is not an empowerment of every person to create works on an equal footing. But (remembering our assumption that markets are approximately efficient) it is an indirect distribution to the public of power to shape culture through signals as to willingness to pay. There is a kind of inclusiveness to this kind of arrangement.

6.2.2 Updating the neoclassicist paradigm—markets and rigour

What about rigour? The implication of Wells' statement is that rigour (or whatever quality in works we value) is best cultivated by relying on the tastes of the consuming collective to direct decision making with regard to the creation of works. It is not only that the public is better than judges at evaluating the usefulness or rigour of works. It is also that the signals about preference implicit in audiences' willingness to pay—'votes'—are better tools for evaluating works than merely individual judgments. The collective—the audience—is on Wells' view, 'more intelligent' than individuals—in this case, film makers.

I said in chapter 3 that copyright minimalism carries rhetorical force because it does not appear on its face to be paternalistic. Negative liberty objectives, such as freedom to imagine, or freedom play are partly so appealing because they allow scholars to abdicate responsibility for qualitative outcomes: the idea is that if everyone is allowed to 'play' freely, then culture and cultural value will develop organically. Copyright facilitation of market allocations in relation to works is really not so different a strategy: allowing the market as a collective information system to evaluate works and allocate resources on the basis of that allocation.

The particular words that Justice Holmes chooses in *Bleistein* in justifying an ‘aesthetically neutral’ approach to determining copyright subsistence (the approach that gives pre-eminence to market evaluations) reveal something about markets and the ways in which they evaluate works. Justice Holmes uses a metaphor of the ‘language’ of unfamiliar genius. He observes that novel works of genius might be inaccessible ‘until the public learned the new language in which their author spoke.’⁷⁴³ The metaphor here bears striking similarities to the metaphor of the ‘vocabulary of art’ that I relied on in chapter 4 to frame the idea of ‘rigour’.

To recapitulate what I said there, briefly: the vocabulary of art is the domain in which rigour (or richness for Fisher) is realised.⁷⁴⁴ The vocabulary of any form of authorship is essentially the set of conventions in which the artist or author works. The complexity, subtlety and dynamism of a vocabulary of art (or discourse) is what makes that art enriching to its public. The author or artist has scope for being ‘rigorous’ by engaging, manipulating, testing, and extending that vocabulary.

Justice Holmes’ famous passage on aesthetic neutrality acknowledges that the enjoyment of works has to do with an appreciation of the artistic vocabularies deployed in those works. Moreover, it acknowledges that such vocabularies are plural, complex and contingent. It also ties in with the observation in chapter 4 that the user’s enjoyment of a work depends in part on the extent to which the work speaks in a ‘vocabulary’ the user can understand.⁷⁴⁵ Different groups may appreciate different works differently. If their tastes and cultural capital should differ from

⁷⁴³ *Bleistein* at 251-252

⁷⁴⁴ Fisher (1997), 1217. See also Dworkin (1985), 153-157.

⁷⁴⁵ See my discussion of rigour in part 3.4 above.

those of a single judge, they should not, as a result, lose out. Finally (and most importantly) Justice Holmes judges that the reflexive process of learning and evaluating, and in the process facilitating the funding of, new languages of art, are better mediated by the impersonal mechanics of markets than by the subjective judgments of judges.

Markets are attractive not only because they are open to plural visions of rigour and merit in works (and authors): the visions of various consuming taste publics. They are also attractive because they are liable to be more 'patient' judges than any single judge of merit (whether a judicial figure, or a patron or granter of government subsidy). What makes a work *rigorous* is often the author's critical and innovative engagement with existing conventions and vocabularies of art. Initially, innovations of this kind may challenge some sensibilities. Some people may struggle to learn the 'new language' in which the innovative work is conveyed—to borrow a phrase from *Bleistein*. A single, decisive judgment of some authority (whether it be a judge, patron or critic) is therefore not a reliable way to judge rigour.

The problem is not merely that such a judgment is paternalistic. It is also that the time for considering the judgment is limited. Rigour is best judged over a course of time. The significance of rigorous work takes time to sink in. A standard of copyright subsistence that defers to the evaluative processes of markets makes allowance for that fact. Markets not only distribute the power to judge a work across a collective of consumers (rather than a single judge), they also allow the judgment to run its course over a period of time. The total amount of spare time, or time for judgment, available to a group will tend to be greater than the aggregate of time for judgment available to an individual. The larger the group, the larger the total time

for judgment. The consuming public can decide gradually, collectively, rather than at a single stroke, whether any given work deploys its 'vocabulary of art' in such a way as to appeal to the taste niche to which it is marketed.

6.2.3 A different way to appreciate copyright's structural function

Here, then, is a different way to understand exclusive rights in copyright, the principles according to which they subsist, and their relationship to the public benefit. These rights need not be seen only as an incentive to create works. We can think of them as a means of facilitating markets for the sake of their qualitative and evaluative features. The market conditions supported can be understood as a set of parameters under which creativity takes place. These parameters operate at a couple of degrees of attenuation from the actual grant of exclusive rights, but there should be no doubt that they are consequences of that grant.

The fact that copyright profits generally depend on extracting payment from an audience made up of the general public, for access to a work, is of principle importance. There is a difference between the patterns of resource allocation (and therefore of expressive empowerment) that follow from this arrangement, and those patterns which follow from alternative arrangements in which the price mechanism is not in operation.

Let us consider some forms of 'indirect appropriation' and 'non-appropriation'.⁷⁴⁶ One example is an arrangement whereby authors might recoup some of the costs of creation by going on speaking tours. This might work for

⁷⁴⁶ See above part 1.3.3.

authors who are able and willing to travel, and are good public speakers. But it will not work for authors who are physically infirm, who have responsibilities to young children, who are eloquent writers but nervous speakers, and so on. It is not an inclusive funding arrangement, and if we rely on it, we cannot expect it to support expressive diversity.

Another example of indirect appropriation is an arrangement where owners of copyright in film would not be permitted to prevent free copying and sharing of their film, but could try to recoup their investment in the film by attracting audiences to cinematic showings and selling food and merchandise at the cinema.⁷⁴⁷ This might work for films where the viewing experience is radically improved by showing at a cinema—where cinematography and action were central to the film’s appeal. But where these features were subordinate to narrative, script and character development, audiences might feel less inclined to pay for cinema tickets. This form of indirect appropriation would therefore compromise on diversity and inclusiveness.

When the source of funding for works is patronage there tends to be a pressure on the author to please the patron. This is essentially the basis of Netanel’s structural argument in favour of copyright: that it created a class of authors and publishers who were independent of patronage. Not all authors will necessarily wish to please patrons. Nor is it true that authors without a patron will be incapable of independent expression—especially given the accessibility of tools for producing and disseminating works nowadays. But we are talking about patterns, pressures

⁷⁴⁷ See Nadel (2004), 828.

and trends here. Those who please patrons will be likely to have access to resources which will not be available to those authors who do not please patrons. And, as the previous chapter shows, this is likely, at a structural level, to bear on their capacity to execute their creative ambitions with rigour. The tastes of the patrons are likely to be served with rigorous effort; other tastes, less so.⁷⁴⁸

When the source of funding for works is advertising, the preferences of advertisers (rather than the preferences of a consuming audience) will tend to exercise sway over the creative sphere. The works which will be at an advantage, in terms of the allocation and availability of resources for realising and widely disseminating creative projects, will be those works which advertisers judge to be effective vehicles to which to append advertising. There will be a structural pressure that favours works which are compatible with the goals of advertisers and, again, this is not a pressure that is particularly compatible with inclusiveness or diversity.⁷⁴⁹

As the previous chapter showed, the 'free culture' in a cyberspace comes with its own arrays of qualitatively significant pressures and parameters. Moreover, the very proliferation of works made possible by networked and digital technologies necessitate filtration. But the dynamics of filtration tend to create hierarchies of attention. In application-mediated cyberspace, attention and resources tend to flow to those who provided (for free) content that either sells advertising, or extracts signals about consumer preferences that can be used in advertising in the future. To the extent a work's visibility (position in a news feed or search results) or

⁷⁴⁸ Garnham (1987), 61.

⁷⁴⁹ See Baker (1997), 334-335.

profitability is determined by the dynamics of networked distribution of attention and resources, then pressures associated with filtration, network effects, group polarisation, and the acquisition of views and eyeballs by way of 'clickbait' are likely come into play. As we have seen, these pressures are bad for diversity, rigour and inclusiveness.

What the examples above have in common is that the characteristics that determine how money is made are fairly arbitrary.⁷⁵⁰ The distribution of communicative power and resources under these arrangements is not determined by reference to whether a work is useful or desirable to the public for its own sake. It is other factors which are determinative, such as: whether the work is likely to sell advertisements, whether its author is personable and charismatic as a speaker, whether a film's viewing experience is better on the big screen, whether the work is suitable for maintaining 'time on app' on platforms which profit from extracting information about users' engagement with works, and so on.

Copyright produces less arbitrary parameters for making money. In order to make money, authors and publishers of works must respond to signals about consumer preferences about works themselves (even if the responses are attenuated to some degree, and signals interpreted with a considerable amount of imperfection). These are not signals about what shoes or electronic devices the consumer might buy, or what premium might be appropriate for that consumer's health insurance, or what kind of political rhetoric that consumer might be susceptible to (as might be the case for works produced for viral dissemination on

⁷⁵⁰ See Gordon (1989), 1353, 1467-8.

the internet). They are signals about the audience's evaluation of authors, works and publishers.

6.2.4 Meeting objections to neoclassicism

If we enrich the neoclassicist paradigm by articulating the qualitative significance of efficient markets for works in terms of rigour, diversity and inclusiveness, we are better equipped to meet some of the objections that it has raised. One of these objections was that there was a lack of clarity about what in market-funded works made them socially valuable or publicly beneficial in comparison with amateur produced works. For example, Lemley's suggestion that blockbuster films require copyright support begged the question of why blockbuster films are worth supporting in the first place?⁷⁵¹ We can answer that objection a little better now.

What is valuable, desirable, worth preserving about market-funded works is not merely that the parameters under which they are produced are different from other parameters that might apply. It is that those parameters produce particular qualitative trends and priorities. Facilitating market allocations is good not merely because well-functioning markets distribute resources 'efficiently'. Efficiency in markets for works translates into a system of allocation and evaluation calibrated to cultivate a certain kind of rigour and a certain kind of inclusiveness.

Rigour is cultivated insofar as markets fund works at all. Funding films with copyright is socially beneficial because it supports high budget film making, which in turn facilitates high production values—a kind of rigour in filmmaking which

⁷⁵¹ See above n (294) and accompanying text.

would otherwise be very difficult to sustain. The amount of funding has a bearing on the material constraints under which creative work proceeds, and we know that copyright funding is likely to provide more funding than other arrangements such as self-funding, or advertising.

As for inclusiveness, facilitating a market that approximates efficiency means that investment in works is directed to some extent (and I will consider to what extent shortly below) by audiences' tastes, rather than some more arbitrary measure. And if that approximation of efficiency is good, we can assume also that a certain amount of diversity results from meeting tastes of diverse audience niches.⁷⁵²

Another objection to the neoclassicist paradigm was that it was not normatively complete. Gordon's theory of fair use as market failure, for example, relies on limiting copyright in cases of market failures, but cannot offer a definitive principle according to which to judge market value.⁷⁵³ For her, a market failure occurs when the social value of a use ought to prompt an owner and purchaser to transact', but for whatever reason (transaction costs, hold up, the non-commerciality of the use), the transaction cannot go ahead. In order to determine when there is a market failure, we are required to make a judgment about when the social value of the use ought to prompt transaction. But how are we to do so? Gordon sidesteps the question, by offering an account of market failure that is essentially descriptive, rather than truly principled: we know it when we see it.⁷⁵⁴

⁷⁵² Frischmann (2007), 21.

⁷⁵³ But see above n (317): Gordon has elsewhere devoted much attention to non-market values and how to accommodate them through copyright law.

⁷⁵⁴ See Gordon (1982), 1615-1621.

But if we conceive the benefits and detriments of facilitating market allocations (though copyright) in the same qualitative terms as we conceive the benefits and detriments of access to works, we are normatively equipped to judge when the market has succeeded, and when it has failed. In relation to any given aspect of copyright protection, we can ask: are the rigour benefits associated with copyright's production function, combined with the inclusiveness benefits associated with copyright's structural function outweighed by the problems associated with the concentration and blandness critique? Taking into account the structural problems with alternatives to copyright (such as networked peer production and filtration), is it on the whole beneficial to maintain copyright, or do alternatives do better in terms of rigour, inclusiveness and diversity? Asking questions like these furnishes us with a richer vision of market 'success' and market 'failure'. They may be difficult questions to answer (and I will engage some ways in which they are difficult in the conclusion to this thesis) but at least we may answer them in a principled way.

First, however, my description of copyright's structural effects needs some refinement and qualification. I have said we need to consider whether copyright's structural benefits outweigh the structural detriments associated with the concentration and blandness critiques. In the rest of this chapter, I will outline the ways in which these critiques require us to adjust our vision of copyright's structural benefits; but I will also contend that this adjustment is not fatal. The broad thrust of the arguments I have made about the benefits of copyright's structural incentive holds true. Copyright still plays a role in connecting investment in works with

audience signals about willingness to pay—it is just that the influence is more attenuated than the simplified ‘audience vote’ narrative might lead us to believe.

6.3 Complicating the ‘audience vote’ narrative

6.3.1 The concentration critique

In what ways do we need to qualify our account of copyright’s structural influence? What does it mean to speak of copyright’s having a structural incentive? In particular, what does it mean to say that copyright generates a structural incentive that renders authors and publishers responsive to consumer demand? If we are speaking of author motivations, do we not have to take into account the fact that that evidence of authors profit-motive is thin?⁷⁵⁵ And if we are speaking of commercial intermediaries’ accountability to audiences, do we not have to factor in the concentration critique glossed in chapter 3?

Let us briefly recall the essence of the critique. In markets for works, there are market hierarchies. The supply side of the market is highly concentrated. The essence of this objection, framed in terms of my mid-level objectives, is that copyright does not effectuate an inclusive distribution of cultural power. Under the auspices of copyright, the means of producing works, and the power and resources derived from copyright revenues, are concentrated in the hands of a small and powerful group of copyright businesses.

Excessive market power in the hands of a select group of copyright aggregating businesses might distort the relationship between consumer demand and

⁷⁵⁵ See above, part 1.3.3.2.

investment in works.⁷⁵⁶ Asymmetries in the power of incumbent copyright owners and newcomers might prevent voices that would otherwise have powerful audience appeal from reaching their audiences. If there is insufficient competition, producers of works are not punished if works are not as well tailored to audience tastes as they might be. Both of these trends and pressures would tend to make markets less efficient—and therefore less inclusive—than they would ideally be.

It is hard to contest the main thrust of the concentration critique. Certainly, there is evidence of a high degree of concentration in the market for works. It is well known that markets for works display a ‘winner takes all’ dynamic.⁷⁵⁷ The top 4 movies account for 20% of revenues and the top eight for nearly 30%. Just 35% of movies earn 80% of revenues.⁷⁵⁸ Just 6.3% of movies earned 80% of profits earned in Hollywood between 1996 and 2006.⁷⁵⁹ The top 10% of creators of works receive a disproportionately large share of total income in the creative professions (for literary authors about 60-70% of total income; for composers/songwriters about 80% of total income).⁷⁶⁰ This compares to earnings data for the total population of employees, where the top 10% of earners earn about 20% of total income.⁷⁶¹

More generally there is good evidence that the ‘content industries’ are highly concentrated, so far as producer market share is concerned. According to Lessig, 3

⁷⁵⁶ See Netanel (2003), 53; see also Netanel (1996), 332.

⁷⁵⁷ Caves makes an impressive analysis of some of the dynamics contributing to this winner takes all dynamic. See e.g. Caves (2000), 57-58, 178-180. See also Rosen (1981); Towse (2006), 578; and Cook and Frank (1995) for a seminal piece on ‘winner-takes-all’ markets.

⁷⁵⁸ De Vany (2006), 56

⁷⁵⁹ De Vany (2006), 56

⁷⁶⁰ Kretschmer (2010), 3.

⁷⁶¹ *Annual Survey of Hours and Earnings* (ASHE), UK Office for National Statistics, cited in Kretschmer (2010), 3

companies control 85% of media sources in the US in 2003.⁷⁶² In the same year, 5 major labels controlled 84.5% of the music market. Lessig seems to attribute much of this to media deregulation.⁷⁶³ But one might also argue also that the distribution of attention on the internet compounds this winner-take all dynamic.⁷⁶⁴ Whatever the cause, the essence of the concentration critique, that a small number of players mediates a large amount of cultural output, is clearly true.

6.3.2 Demand uncertainty

There is another problem with the ‘audience vote’ account of copyright markets—one that may distort the relationship between supply and demand even more than the concentration problem. To think of audience consumption of works in terms of ‘votes’ is a little misleading. Let us return to Orson Wells summation of the role of audience ‘votes’. He says, ‘The audience votes by buying tickets... The only problem is to interest them... That must be the feeling of the moviemaker.’⁷⁶⁵ In describing how audience votes operate in reality, the giveaway phrase is, ‘the feeling of the moviemaker’. The moviemaker must rely on a ‘feeling’ of interesting the audience.⁷⁶⁶ The moviemaker does not have a definitive knowledge that the movie will interest the audience and garner its votes. Although there are various indicators of an

⁷⁶² Lessig (2004), 71-2.

⁷⁶³ *Ibid.*

⁷⁶⁴ See above part 5.4.

⁷⁶⁵ Cowen (1998), 6-7.

⁷⁶⁶ Of course, with modern data mining capabilities that ‘feeling’ is increasingly well informed by data about trends in consumptive taste, but such data is still only indicative of future consumption behaviour, rather than a certain predictor of it. I will consider the predictive power of such past signals shortly below.

audience's interest in a work that may arise before the work is completed, the really decisive vote does not happen until the work is completed, published, and on the market.

Demand is not known until that point. This scenario is sometimes described as one of 'demand uncertainty'. It is extremely difficult to predict how a new work will fare on the market. The author and screenwriter, William Goldman, famously said:

Nobody knows anything..... Not one person in the entire motion picture field knows for a certainty what's going to work. Every time out it's a guess and, if you're lucky, an educated one.⁷⁶⁷

Professor Caves summed up this point in the catchphrase, 'nobody knows'⁷⁶⁸—and described the 'nobody knows' factor as one of the fundamental features of markets for works. This uncertainty regarding demand for works applies to some degree to almost every kind of work, and it is well recognised.⁷⁶⁹

If there is an audience vote, it happens *ex post*, not *ex ante*. The work is already made, and most of the costs of its creation and publication are already sunk. On the one hand, that is discouraging, if we really value inclusiveness. If audience desires are not known, then ultimately it would seem to be the commercial intermediaries and producers of works who are calling the shots. Their 'feeling' about what will attract an audience seems to be doing an awful lot of work. That

⁷⁶⁷ Goldman, cited in Caves (2000), 3.

⁷⁶⁸ Caves (2000), 3.

⁷⁶⁹ See e.g. De Vany (2006), 37 who observes that even highly successful film studios cannot predict the box office grosses of their future movies with any accuracy. See also Nadel (2003), 821; *United States v. Griffith Amusement Co.*, 68 F. Supp. 180, 196, W. D. Okla. (1946).

state of affairs would appear to concentrate cultural power very heavily in the hands of commercial intermediaries, and leave very little power in the hands of the public.

On the other hand, just because audience ‘votes’ come in after the publication of a work, and demand for any given work is not precisely known until after the work is published, it is not the case that publishers and intermediaries (and authors) can know nothing, in advance, about demand. Even Goldman admits that guesses about demand can be ‘educated’ guesses. Markets provide both information about works and, as I said in the previous chapter, an allocation of funding to copyright owners of successful works. These patterns of information and allocation create parameters and exert pressures on actors in the creative sphere in ways that, despite demand uncertainty, are not entirely unpredictable. Let me look at the pressures associated with each of these parameters contributing to copyright’s structural function—information and allocation.

6.3.3 The information parameter

Audience consumption still contributes important information inputs into the selection and funding of works. The audience purchases access rights to a work, in the form of a copy, or a licence to access a digital copy, or even a ticket to the cinema. This purchase is less like a vote than it is an answer to a survey about willingness to pay for that access right. Each vote, or response to the survey, indicates that the audience member’s demand for the work was roused to a sufficient extent to translate into a willingness to pay for access to it. Rather than directly influencing investment like a vote, these survey-answering purchases, taken in the aggregate, generate a matrix of information about patterns of taste and consumption. It is

information about what kinds of works, what kinds of authors, what audience niches may be commercially viable.

Even if the precise combination of elements that will appeal to audiences cannot be known exactly, that information guides future investment in works. Here then, is a limit to the rule of thumb that ‘nobody knows’. We can predict broadly, even if not certainly, what is *likely* to attract demand. It is the precise extent of demand that is hard to anticipate, not the matter of whether there will be demand at all. Film studios, for example, have ample information, gleaned from markets, that superhero films, based on popular comic book ‘universes’, consistently appeal to a large audience; and that appeal is sufficient to extract from that audience a payment for access. The characteristics of such films that make them appealing are also very readily identifiable: the specific heroes (Spiderman, Superman, X-Men, Wonderwoman, etc.), their ‘universes’, their superpowers, the responsibilities that come with them, and the villains who oppose them.

Because there is good evidence about past performance of superhero films, and it is relatively straightforward to identify and reproduce the elements associated with their commercial success, film studios reliably invest a very large proportion of their budget in superhero blockbusters.⁷⁷⁰ Universal Studios acquired copyright licences to use Marvel Comics’ whole catalogue of comics and characters about 15 years ago, and has had particular success with the X-men franchise.⁷⁷¹

Audience ‘votes’, then, operate at the level of type, trope, and genre rather than at the level of works themselves. A different way to come at this insight is through

⁷⁷⁰ See Elberse (2013), 19ff.

⁷⁷¹ Glenn (2016).

the lens of cultural economics literature on the characteristics of ‘oligopoly’ or ‘monopolistic competition’ in copyright-based markets.⁷⁷² The success of a work on the market creates a basis for money-minded investors to invest in indirect substitutes for the work. It is rational for such investors to try to cater to the market niche attracted by the first work. Since copyright will not permit them simply to reproduce the work itself, the way to engage the desired market niche is to try to develop works that resemble past successes at the level of type, trope, style, narrative, genre and so on. That produces ‘monopolistic competition’ between indirect substitutes.⁷⁷³

To use the superhero example again, superhero films are indirect substitutes for one another. Having seen Universal succeed so spectacularly with the Marvel franchise of superheroes, it would be rational for other studios to acquire comic book franchises of their own and to enter the superhero movie market niche (at least until that niche is saturated with substitutes.⁷⁷⁴ Unsurprisingly, this is what has actually come to pass. Universal Studios had enormous commercial success with its Marvel franchise, so Warner Bros has, predictably, tried to follow suit, spinning out increasing numbers of comic book-based films (including Superman, Batman, Watchmen, Wonderwoman, Justice League, Suicide Squad) from the catalogue of its subsidiary, DC comics. If it were true that demand were radically uncertain and

⁷⁷² On the process of the market entry of indirect substitutes, and the dynamics of competition and further entry in the market niches occupied by such substitutes, see Yoo (2004). See also Bracha and Syed (2013-2014).

⁷⁷³ Yoo (2004), 220, 237ff; Bracha and Syed (2013-2014), 1861, 1864.

⁷⁷⁴ Bracha and Syed, *ibid.*

unknowable, it is unlikely that Warner Bros would have followed Universal's lead like this.

I will discuss further implications of this dynamic for rigour and diversity in the next part: for now, let me stick to the matter of inclusiveness and the distribution of cultural power, concentrated or otherwise. It ought to be clear that the information parameter of copyright market dynamics is such that commercial intermediaries' 'feeling' for what audiences wants is not arbitrary. Insofar as that feeling is informed by market information, it is *inclusive to some extent*. It involves a measure of sharing of cultural power by authors and publishers with audiences. Even if the supply side of markets for works is concentrated, the concentration of cultural power is somewhat mitigated by this sharing.

6.3.4 Structural and production functions are mutually reinforcing

Markets not only inform future investments in works. Audience 'votes' empower suppliers of commercially successful works—both authors and commercial intermediaries—even as they provide information as to the success of the works. Each vote is, after all, an allocation of money. The money furnishes the recipient with the wherewithal to invest time or resources in new works. Audience votes furnish copyright owners with resources that, as Gordon puts it, 'cross-subsidise' their other enterprises.⁷⁷⁵ Not only do copyright owners get control over value extracted from their works once published (through use, purchase, licensing and

⁷⁷⁵ Gordon (1998), 1385, at footnote 192.

the chance to make efficient choices about these transactions); but they also control the fruits of that value, and are empowered to redeploy it in other creative projects.⁷⁷⁶ The allocative aspect of audience votes for works thus also operates as another kind of vote. It selects authors and investors, not just works.

The money earned from successful works has an impact on the creative and commercial possibilities open to copyright owners. Here the production function discussed in chapter 4 comes into play. For commercial intermediaries, like film studios or publishers, the revenue can go into investment in new works. For authors, the revenue can, if sufficient, cover the opportunity costs of time spent on new works. The revenue that Marvel acquires from its licence deal with Warner Brothers supports Marvel's creation of more comics, to an exacting standard. The revenue that Warner Bros makes from X-Men films (using Marvel copyrights) is a kind of endorsement of Marvel, and of Warner Brothers, and it cross-subsidises their investment in other works.

A supplier of works who has a track record of commercial success will not only have funds of their own (provided they own some copyright in those successes), but will also likely be able attract investment more easily than untried, or hitherto unsuccessful, authors. This is the information function of markets in operation again. In effect, this means authors with past 'winners' not only have the resources to realise their craft to a high level of rigour, but also tend to have far greater bargaining power, with respect to commercial intermediaries, than unknowns.⁷⁷⁷ A

⁷⁷⁶ Barron (2010), 14; Netanel (1996).

⁷⁷⁷ Kretschmer et al (2010), 41.

supplier who has made commercially successful investments in past works will have more money to invest in future works.

Let me give an example of how this might work—and how great a role is played by successful commercial intermediaries in the success of authors whom they support. The band, Radiohead, is often held out as an example of a group that liberated itself from record labels and commercial intermediaries. After a stint with a big label, EMI, they eventually began releasing works independently, with great success. What tends to be glossed over, in that narrative, is the fact that it was their previous capacity to generate copyright income that furnished them with the resources and confidence to release records independently. Their modest but consistent success in the 1990s (while signed to EMI, and benefiting from the whole machinery that EMI had for cultivating, developing and marketing its roster) furnished them with the wherewithal to invest in their own records.⁷⁷⁸ Their past success gave them a measure of security in that investment. Radiohead were in a position where they could be relatively sanguine about the risks of investing their own money into the production of new records.

⁷⁷⁸ The only song to make the top 40 in the charts was 'Creep', but it had staying power. It got up to number 34 in the Billboard charts in 1993, stayed in the top 100 for 20 weeks, and continues to sell well. Radiohead had another chart success in '96 with 'High and Dry', which reached number 78 in the Billboard charts, and stayed in the top 100 for 8 weeks. For details, see <http://www.billboard.com/artist/277326/radiohead/chart> accessed 10/6/16.

6.3.5 Communicative power shared between suppliers and consumers

The enhancement in the security that goes with past commercial success makes it rational for commercial intermediaries to invest in authors, and their new works, proportionally to the commercial success of their past works. On the one hand this is liable to compound concentration of cultural power (perhaps at the cost of inclusiveness). Success compounds success. Incumbents will be at an advantage in (likely) having more funds to invest in works, in being better placed to attract further investment in works and, moreover, in having more bargaining power *vis-à-vis* investors than would newcomers.

On the other hand, the compounding of concentrated cultural power is not just brought about by the power of commercial intermediaries. The ultimate source of power is still ‘audience votes’—even if their influence is somewhat attenuated. The star movie director, Stephen Spielberg, can generally expect more studio funding (as a producer or director) than a film-maker with only loss-making art films to her name. Consistent audience ‘votes’ for Spielberg, over the course of a long career, are the reason for this.

Of course, there is some fuzziness in causation here. Spielberg’s audience appeal might have something to do with his initial good fortune in receiving wide exposure with his early directing efforts. Demand uncertainty in the film market indicates that luck plays a very big part in film success.⁷⁷⁹ It is hard to separate talented from luck when it comes to the question of who gets a ‘break’. The talented

⁷⁷⁹ De Vany (2006), 55.

do not always succeed and go on to make many works, and success and productivity is sometimes enjoyed by those with more luck than talent.

However, once an author (in this case, a filmmaker) gets past the initial hurdle or, better still, produces a number of works, talent appears to correlate more reliably with success: talented directors who do succeed, tend to continue to succeed and receive investment.⁷⁸⁰ Perhaps the first investment Spielberg received was ‘lucky’. But it would be absurd to describe an investment into a Spielberg film today as lucky. Spielberg’s average box-office takings come in at around the \$147 million mark.⁷⁸¹ One site ranks Spielberg as having the highest ‘bankability index’ in Hollywood. A Spielberg directed or produced film is arguably the safest bet in Hollywood, based on Spielberg’s past performance.⁷⁸²

Audience willingness to support Spielberg films with their consistent votes underwrite the investments made by studios and producers into his films. Studios are not making decisions to invest arbitrarily: they are responding to audiences’ expression of their (limited) cultural power—buying tickets. All of this is to say, concentration of cultural power in commercial intermediaries and established incumbents is not absolute. However powerful, commercial intermediaries are still in some measure responsive to audience votes.

As for the problem of incumbency, we need to keep in perspective the advantages that the incumbent in copyright industries enjoys. These advantages are not absolute and unassailable. Once again, audiences have the power to dislodge an

⁷⁸⁰ See e.g. Rosen (1981), 846.

⁷⁸¹ www.boxofficemojo.com, accessed 10/6/16.

⁷⁸² See <http://www.the-numbers.com/person/135430401-Steven-Spielberg#tab=summary>, accessed 15/6/16. However, note that ‘safe’ is a relative term, especially in films—see De Vany (2006), 5.

incumbent. The Wachowski siblings, for example, enjoyed confident investment from film studios for quite some time after the cult success of *The Matrix*. That did not last for ever, however. They were not permanently inducted into a position of unquestioned cultural power. Indeed, they eventually found it hard to attract investment in their films because audiences ceased to ‘vote’ for them in sufficient numbers to maintain investors’ confidence. They had a series of ‘flops’: box office failures that were poorly reviewed, and that made a poor return. It is not as though the commercial film industry, concentrated as it is, could decide by fiat that audiences would have to put up with Wachowski films, *no matter what*. At a certain point, the information and funding functions performed by audience demand and consumption on the market hit home and audience desires had to be respected.

Audience ‘voting’ patterns can tell us more than merely whether an author (e.g. a film director) is a safe or risky bet. They tell us more than merely whether we can bet at all. They can also inform the *amount* that we bet.⁷⁸³ Compare Steven Spielberg to another commercially successful director, Woody Allen. Like Spielberg, Woody Allen also has consistent commercial success as a film maker. The difference is that the average box office gross of films in which he is involved is an order of magnitude less than Spielberg’s.⁷⁸⁴ Allen’s success indicates that his films have a market, but not as big a market as Spielberg. A rational movie studio will therefore invest in the two proportionately to their past success.

It ought to be clear that there are benefits to the arrangement I have just described, even as there are detriments. What is troubling is, as I have said, that

⁷⁸³ Garnham (1987), 55.

⁷⁸⁴ Boxofficemojo, *ibid*.

incumbents will tend to be at an advantage over newcomers in the business of selling works—especially when we take into account the ways in which their past successes facilitate more investment in new works. The advantage of incumbency is mitigated by audience voting power, but it is undeniably still an advantage that tends to crowd out the voices of newcomers. There is an inclusiveness downside here.

But the dynamics of incumbency have their upsides too. Incumbency means stability. Incumbency attracts the benefits associated with copyright's production function. Once an author achieves some measure of success, her access to resources will tend to be much improved. We would hope that success would also breed the cultivation of experience and skill, as it did in the case of George Eliot, which I described in chapter 4. The safety of a 'bet' on a work and author also frees up investment into the work: the safer the bet, the more money a rational investor will invest; the more scope for the production function to operate.

In short, suppliers and consumers of works are *both* included in decision-making about the contents and quality of culture, and the inclusion of consumers into this feedback loop mitigates to some degree the concentration of cultural power. Audience votes still count—even if their influence is more attenuated than Wells' account might suggest. The signal embodied in audience willingness to pay (with all the advantages over other signals described in the previous part) still plays a significant role in determining the operation of the production function. Audiences still have a measure of power over the material conditions under which any given author creates, or any given work is realised.

6.4 Tempering the blandness critique

6.4.1 Pressures behind the Baywatch Effect

To demonstrate that copyright is more inclusive than its critics care to acknowledge is not to say that copyright reaches a level of inclusiveness that is satisfactory. Nor does it show that responsiveness to demand, attenuated as it is, produces diverse and rigorous creative products. We have just addressed two critiques of copyright's structural function: a critique about the normative limits of relying on market evaluations; and the concentration critique. We have not, however, disposed of the 'blandness' critique: whereby commercial pressures on creative industries produce a 'Baywatch effect'. That is a scenario where bland, homogeneous (and sometimes venal) works receive disproportionate investment, because they are commercially more profitable.⁷⁸⁵ Rigour, diversity and inclusiveness all lose out as a result.

I have argued that relying on willingness to pay as a signal that influences investment patterns involves a certain kind of inclusiveness. The blandness critique conveys the disadvantages associated with a system in which this signal is predominant. One such disadvantage has to do with distributive justice and inclusiveness. Works with wide appeal are likely to receive more investment than works with narrow appeal. Similarly, works targeted at a rich audience can expect a better return than works targeted at a poor audience. Tushnet puts it this way:

copyright-incentivized works will seek to appeal to more consumers; even when they target niche markets, they will target *markets* – people who can pay for something specialized. Not incidentally, people who can pay are less likely to be young, relatively poor, female, or otherwise part of culturally devalued groups, since cultural and economic power are often related.⁷⁸⁶

⁷⁸⁵ See above part 3.3.4.2.

⁷⁸⁶ Tushnet (2007), 115. My emphasis.

This is one way in which the voting metaphor breaks down. Those who are not in a position to express their preferences well or freely on the market have less voting power and will tend to be underserved by commercial suppliers of works.⁷⁸⁷ This is evidently a problem for inclusiveness. It means that the distribution of cultural power is unequal among consumers *vis-à-vis* other consumers (and not only in relation to commercial intermediaries).

A set of market pressures, and risk and cost management strategies with which profit-minded investors respond to them, can compound this inequality. One such pressure has to do with economies of scale. Conventional wisdom has it that economies of scale in markets tend to foster dominance by large players, and copyright markets seem to bear this out.⁷⁸⁸ Works require considerable fixed costs to be sunk in their creation—costs exacerbated by Baumol’s cost disease—and marketing works is also expensive.⁷⁸⁹ The marginal cost of copying and disseminating works is, relatively, much lower. This means the marginal return to the copyright owner increases with the size of the market. There are economies of scale to be realised, then, by investing in works targeted at large audiences. This produces an additional pressure to invest disproportionately in works that are likely to reach the largest possible audience.⁷⁹⁰

⁷⁸⁷ See Champagne (2005). See also Netanel (2000a), 1916.

⁷⁸⁸ Cohen (1998), 522. See also Agre (1999).

⁷⁸⁹ Regarding Baumol’s cost disease, see above n (487) and accompanying text. Regarding the disproportionate influence of marketing costs, see Nadel (2004)

⁷⁹⁰ Benkler (2006), 33; Garnham (1987), 57.

At the other end of the curve, if the potential audience of a work is sufficiently small, it will not be cost-efficient to invest resources in the work.⁷⁹¹ Minorities, and groups with less to spend, are likely to be underserved. Even if a minority audience would have been willing to pay for a work to serve its taste, and that payment would be sufficient to cover the costs of production and generate profit, that minority audience may not provide suppliers of works with the same economies of scale as a mass audience would have. In a standard mass market, there is a pressure to divert what money might have been invested in catering to that minority taste toward works appealing to a larger market. This is evidently bad for inclusiveness and diversity.

6.4.2 Disadvantages for rigour and diversity

The pressures I have just described would seem to bear out the blandness critique. In mass media markets, there appears to be a structural incentive to stick to safe, bland messages and aesthetics targeted at attracting the largest possible audience, rather than at satisfying the taste of any particular niche. It is therefore rational for the profit maximising copyright investor to avoid content that might offend or polarise audiences. Polarising, controversial works might find loyal fans, but might also halve the audience. Likewise, to convey a minority perspective, or minority tastes, too forcefully might discomfit the majority. There is commercial sense in maximising audience size by avoiding content that challenges the status quo. For multimedia conglomerates, it will also make sense to invest in content that serves

⁷⁹¹ Tushnet (2007), 115. Netanel (1996), 353-56.

the interests of all of its branches. We can expect the range of material that will serve this end to be fairly narrow.

The dynamics of demand uncertainty risk compounding this dynamic. Not everything about demand for works is, as I said in the previous part of this chapter, uncertain. Markets provide would-be investors in works and authors with information about past demand, but in broad strokes. They tell us about what ‘kind’ of work has succeeded in the past, and may therefore succeed in future. The safest investments will tend to be works of authors who have already found commercial success, or works in a style and genre that has already been successful.

The blockbuster patterns of investment in Hollywood films, sustained by the information parameter of copyright markets, therefore bear out the blandness critique to some extent. We see studios make massive investments in tried and true formulae, stars and directors, and backing these up with enormous expenditures on marketing and franchising.⁷⁹² The vast proportion of large Hollywood studios’ budgets goes into a few ‘tentpole’ films each year. Studios which follow this strategy enjoy higher returns than studios that spread their investment more evenly across diverse works.⁷⁹³ This blockbuster investment pattern is not unique to the film industry. Klinkenborg, for example, suggests that the music and book industries are also driven by the quest for blockbusters.⁷⁹⁴

⁷⁹² Elberse (2014), 19; Nadel (2004),

⁷⁹³ Elberse (2014). Note that De Vany and Walls argue that studios would be better off diversifying more and investing on a portfolio basis, rather than in specific films that are expected to be hits. (De Vany and Walls (1999), 29.) In some respects, the trend for investment in ‘franchises’ seems to follow this recommendation.

⁷⁹⁴ Klinkenbourg (2003). See also Feldman (2008), 27-31, 68; Netanel (2008), 137; Rothenbuhler and Streck (1998), 199, 217; Stossel (2001), 40; Epstein (2005), 234.

While no production enjoys a certainty of success, there is evidence that sequels, prequels, reboots and other such adaptations are much safer bets than untried works.⁷⁹⁵ One need only glance at film listings in a mainstream cinema on any given week to notice the preponderance of these kinds of films. Universal Studios continues to mine the Marvel comics' canon for profitable fare—it is hard to keep track of the number films in the *X-Men*, *Iron Man*, and *Avengers* franchises. Disney has bought the rights to *Star Wars* and shown its intent with two *Star Wars* releases in the past 18 months. Warner Brothers is ramping up its *Justice League* franchise. MGM and Paramount have recently remade *Ben Hur*. Columbia has recently remade *Ghostbusters*.

It is reasonable to worry that the money invested in these films is money diverted from other more novel and challenging works. That is problematic, from the point of view of rigour and diversity (and indeed inclusiveness of different voices and sources of works). A film by a controversial or unknown film maker, that is not a prequel or sequel from an existing franchise will tend to be at a disadvantage to a tried and true franchise film: first, because it won't attract blockbuster funding; and second, because even if it attracts funding, the pool of available funding will be much reduced because of the diversion of resources into blockbusters.⁷⁹⁶ It is hard for challenging, innovative works, and especially for untested authors who do not already have a good commercial track record, to break into markets like the film industry. The derivative is a more attractive investment than the innovative.

⁷⁹⁵ See De Vany (2006), 134.

⁷⁹⁶ See Nadel (2004).

6.4.3 The other side of the 'blandness' coin

Even assuming the mass market pressures associated with copyright described above are ubiquitous (I will argue below that they are not), their consequences are not entirely deplorable. Structures of commercial intermediation between authors and audiences, for all their flaws, generate some parameters that may be conducive to rigour and expressive diversity in some ways, even as they may raise obstacles for those qualities in other ways.

The necessity of extracting payment from reasonably large audiences in order to profit under a copyright-based market for works, exerts some salutary effects when it comes to rigour. However concentrated the supply of works may be, producers of works who rely on a copyright model need to produce works which, for one reason or other, are worth paying for. Commercial publishing infrastructure, and the profit motive of commercial intermediaries, tends to weed out works that are offensively bad: whether they be tone deaf, clumsy, incoherent, ugly, stupid, or whatever. It is not that such works cannot be made. It is that profit-minded intermediaries are unlikely to invest in them, and that they are therefore not likely to receive the endorsement or attribution of legitimacy that goes with publication in a reputable commercial source.

I pointed out in the previous part some of the limits of the generalisation that 'nobody knows anything'. Intermediaries can make fairly confident predictions about works that have a very high probability of succeeding commercially (blockbusters, superhero movies etc.), as well as predictions about the likelihood that certain producers of works will continue to produce content that appeals to audiences. Consistent poor performance by particular authors will deter investors. It

is also fair to say that commercial intermediaries can predict with reasonable confidence that works below a certain threshold of rigour are not worth investment. While there are always grey areas, commercial intermediaries can make fairly safe judgments that audiences will simply not part with their money for access to works that evidently have little appeal to any taste culture or niche.

What matters, here, is not *just* that copyright in some way makes producers of works accountable to audiences' 'votes'. After all, we might say that mediated filtration on social networks and search engines generates results produced by a kind of audience vote as well. But the nature of the vote is rather different in the case of paying for access to works. Willingness to pay is a 'signal' that is different in character to the signals implicit in an internet users' willingness to click. It represents a step that is more conscious and considered, and therefore more likely to be truly autonomous than an impulsive click on a free-to-access link. The costs of paying for a work are evident to the payer. By comparison, the time costs associated with following a link, that has been tailored to distract one's attention, are harder for most individuals to call to mind.

This is a beneficial aspect to the commercial motivations of commercial copyright intermediaries: the same pressure responsible for the blandness critique. The greater the extent to which a business relies on copyright for its revenue, the greater will be the pressure on that business to produce and disseminate works for which the public will part with its money. To extract copyright revenue, it is not enough simply to distract attention momentarily, or to obtain some data point which can then be sold on. Proprietary works generally have to be worth paying for if they are to be worth investing in (whereas freely accessible works on the internet,

relying on advertising or the extraction of user data, generally have only to be worth clicking on).

6.4.4 Exceptions to the blandness rule

Commercial pressures do not always push downward on rigour. Not only is it fair to say that mass media pressures weed out works below a certain threshold. We can also recognise that the blandness critique is a critique of generalities, rather than a hard and fast rule. Many controversial, challenging, unusual works do in fact succeed on mass media markets, despite the general trends and pressures in play. Downey gives the example of the long-running, hit television show, *The Simpsons*.⁷⁹⁷ *The Simpsons* plays, in the US, on Fox, which is owned by News Corporation, in turn controlled by the notorious media mogul, Rupert Murdoch. Fox is well known for propagating right-wing political perspectives. Yet the *Simpsons*, one of its most successful shows, is a counter-cultural satire. It targets, among other things, corporate greed, the inanity of network television news, and establishment political corruption, and it often makes fun of Fox and Murdoch specifically.

Not only does *The Simpsons* rise above 'Baywatch effect' aesthetics and messages, it lampoons the interests that the Baywatch effect is supposed to bolster.⁷⁹⁸ It attacks, in other words, the very institutions, forces and parameters that might have been expected to 'crowd out' or dull down its counter-cultural message; and, in doing so, it has been hugely successful on the mass market. The

⁷⁹⁷ See Downey (2006), 8-9.

⁷⁹⁸ On the Baywatch effect, see above, text to n (362).

point is that the complex relationship between ownership, control, mass market dynamics and creativity often defies generalisation.⁷⁹⁹

In spite of the imperative for television studios to produce ‘safe’ content, there is still a pressure for studios to invest in ‘quality tv’. There is still sense in giving autonomy to creative producers to make at least some shows that would gain prestige among the wealthier and more educated demographic groups—not least because these groups may be trend setters. Prestige and popularity are not necessarily opposed. To put it in Bourdieu-esque language: ‘restricted’ (highbrow) production has become part of mass production.⁸⁰⁰ The parameters generated by markets for works are not monolithic and absolute. While the dynamics underlying the ‘Baywatch effect’ may restrict some of the possibilities open to some authors, we must remember the market is not omnipotent. It influences; it does not prohibit.⁸⁰¹

Even the pressures associated with publishers’ risk aversion in response to demand uncertainty do not always push in the direction of homogeneity and blandness. While economies of scale may motivate publishers to make high investments in tentpole works, at the expense of other works, they cannot invest in blockbusters to the complete exclusion of everything else. Given how various the features of works are—authors, style, genre, subject, narrative, editor contributions—it is hard to work out what precisely about any given work was responsible for its commercial success. Publishers therefore cannot rely entirely on

⁷⁹⁹ Hesmondhalgh (2006), 221-222.

⁸⁰⁰ *Ibid.*

⁸⁰¹ Frey and Pommerehne (1989), 18.

strategies of safe investment based on past market information.⁸⁰² Demand uncertainty cuts both ways, so far as diversity is concerned. It both encourages blockbuster investment strategies, and tempers them with a need to diversify investment across a range of works targeted at a range of audience niches.

Some have even argued that blockbuster strategies facilitate more investment in non-blockbusters than would be possible without the revenues derived from ‘tentpoles’. Professor Tyler Cowen, for example, argues that authors who produce non-mainstream works do not suffer in absolute terms as a result of blockbuster strategies. This is a kind of ‘trickle down’ argument. The idea is that, given investors in works need to diversify to some extent to manage demand uncertainty, the enormous revenues from blockbusters might actually produce a larger amount of funds available for investment per work, or even a wider range of works, than a more evenly distributed investment across a wide portfolio.⁸⁰³

This recalls the arguments I made in chapter 4 about copyright’s production function, and also Netanel’s original argument about copyright’s production function. Copyright revenue produces benefits at an industry-wide level. Blockbusters employ many contributors, sharpen their talents, and furnish them with the resources to contribute to other works. Insofar as blockbusters work as ‘tentpoles, they also provide copyright industries with a buffer of funds that makes risk taking possible. This might ultimately support diversity and rigour.

Demand uncertainty may also exert some salutary effects on rigour—particularly on innovation in vocabularies of art—even as it may encourage risk

⁸⁰² See De Vany et al (1999), 4.

⁸⁰³ Cowen (1998), 54

averse investment strategies among certain commercial intermediaries. I described the superhero-type investment strategies of film studios above in terms of ‘monopolistic competition’: where indirect substitutes compete for the attention of a particular taste niche.⁸⁰⁴ A key feature of monopolistic competition is that suppliers of indirect substitutes realise diminishing returns for each new entrant into a taste niche.⁸⁰⁵ To put it more simply: audiences eventually get tired of the same old thing.

One of the reasons for demand uncertainty is the very fact that audiences have an appetite for novelty. A copyright industry business cannot succeed simply by selling identical films or books to audiences over and over, as McDonalds can sell identical burgers—even if copyright did permit this. Audiences want new films. While some degree of derivativeness and familiarity will tend to be appealing (and serves as a risk-mitigation strategy based on market information matrices), audiences will only tolerate repetition of familiar tropes without variation up to a point.⁸⁰⁶ In the language of monopolistic competition: once a niche is saturated with indirect substitutes it no longer makes financial sense to invest in yet another bland iteration of a trope that has been successful in the past. It is therefore necessary for commercial intermediaries—book publishers, record labels, film studios and distributors, and so on—to mitigate this risk by diversifying their investments in the hope that they will produce a new winner, and new tropes, whose welcome they can then gradually wear out.

⁸⁰⁴ See above n (772) and accompanying text.

⁸⁰⁵ Yoo (2004), 238.

⁸⁰⁶ See Bianchi (2008), [7]ff for a helpful review of behavioural studies into aesthetic satisfaction, familiarity and novelty.

6.4.5 Variable pressures and parameters

Another reason why the pressures associated with economies of scale are not universal is that they influence different actors in creative industries differently. While commercially motivated actors may respond to market pressures in profit maximising and risk averse ways, not all actors in creative industries are commercially motivated. Commercial intermediaries and their functionaries (what Caves would call, 'humdrum' inputs) can be expected to act in such a way as to maximise profit and minimise risk, when investing in works. But authors, as I have noted, often have 'art for art's sake' motivations.

Commercial intermediaries exert an influence on the financial conditions under which works are realised, and that may affect the quality and rigour with which those works (and other works which do not receive investment) are realised. But if a commercial intermediary chooses not to invest in an author's work, that does not prohibit that author from working. Assuming at least some authors have non-commercial motivations (and the evidence glossed in chapter 2 bears out this assumption) authors can be expected to pursue a wide variety of creative projects, and to be motivated to explore the creative variety available to them without receiving funding.

The influence of commercial intermediation by copyright industry businesses on authors' autonomy, and on culture as a whole, is therefore limited in a crucial way. It only applies to the extent that authors need money, or accept money, or seek money from commercial intermediaries. The result of commercial intermediary decisions is not necessarily to 'crowd out' authors who do not toe the line in the sense of simply wiping them out of culture; it just means such authors are working

under more challenging constraints. There is less money available to them, and therefore greater difficulty in executing their creative aspirations rigorously. This is not ideal for diversity or inclusiveness, but we should bear in mind that commercial intermediaries' capacity to silence authors or works may actually be less pronounced than the capacity of internet intermediaries to do the same.

Another reason why risk averse motivations of commercial intermediaries do not influence culture in a uniform way has to do with the variety in relationships between authors and their intermediaries. The fact that some creation is corporate or hierarchical does not of itself reduce autonomy exercised by individuals within the hierarchy.⁸⁰⁷ For example, Gans cites one study suggesting musicians in Hollywood enjoyed more job satisfaction and autonomy than those working in non-corporate environments.⁸⁰⁸ Working with commercial intermediaries is not necessarily fatal to author autonomy. While commercial businesses may have some influence over product, demand uncertainty requires a certain deference to and trust in the judgment of creatives, especially where those creatives are perceived to understand the tastes of some particular target niche better than the business does.⁸⁰⁹

Of course, some production arrangements and structures do reduce author autonomy, subjugating artistry to commerce, but those arrangements are not ubiquitous. Production of works is not organised in a uniform way, even in highly concentrated markets characterised by high-cost works. Even in Hollywood, a

⁸⁰⁷ McGowan (2004), 63; see also Gans (1974), 25-27.

⁸⁰⁸ Gans (1974), 26.

⁸⁰⁹ Hirsch (1972), 644.

degree of dis-integration is quite common, and not all contributors within these disintegrated structures have mass-market profit motives. Different stages of film production may be undertaken by entirely separate organisations—such as small studios or production companies—with larger, more integrated structures like the big Hollywood studios and distributors only taking a role once the film is close to complete, or even ready to be distributed. The use of partially autonomous subdivisions within hierarchical structures of production has been a feature of large scale production of television, film and music for many years.⁸¹⁰

It is also important to keep in mind variations among blockbuster strategies. They are not identical in every creative industry. The lower the fixed cost of creating a work, the more sense it makes to diversify—and we see this in book publishing and the music industry. Book publishers and record labels follow a blockbuster strategy when it comes to marketing works and artists, because they cannot afford to market all works equally. But when it comes to actual publishing, they can afford to invest in a fairly wide range of works.⁸¹¹ This means that the success of blockbusters is particularly likely to cross-subsidise riskier works in the book and music markets.

Let me offer one more example of a scenario in which the dynamics of audience voting through willingness to pay does not produce a Baywatch effect. I offer the example to demonstrate that there are variations in the ways that audiences purchase access to works, and these variations change the ways in which

⁸¹⁰ Hesmondhalgh (2006), 222-ff.

⁸¹¹ See e.g. Vogel (2004), 208 regarding the recording industry.

their 'voting' signal influences investment. Let us consider subscription-based platforms for film and television.

Such subscription services seem to avoid, to some extent the 'Baywatch effect' dynamics that characterise free-to-air television, in spite of high supply-side concentration. Professor Yoo conducted a powerful analysis of the difference in parameters under which HBO (a cable channel) and NBC (a free to air channel) dealt with the airing of content about the controversial *Roe v Wade* decision on abortion rights. NBC suffered from a backlash from risk-averse advertisers when it tried to broadcast a movie version of the case. HBO, on the other hand, broadcast similar content without difficulty.⁸¹²

In this instance, what mattered more than merely the degree of concentration of communicative power in each broadcaster were the details of how each made its income. The free-to-air service relied heavily on advertiser funding, so it was under pressure not to alienate advertisers or potential purchasers of the advertisers' products. Subscription services are less subject to the homogenising and dulling effects of reliance on advertising revenue, so they are better placed to take risks with their programming. We see this kind of risk taking especially among providers of so-called 'prestige television' like HBO, AMC and more recently streaming services like Netflix and Amazon Prime. This suggests that the Baywatch effect may be less pronounced for commercial intermediaries who rely predominantly on copyright licensing for income, than it is for commercial intermediaries that also rely heavily on advertising.

⁸¹² Yoo (2005), 685.

Another important difference in constraint has to do with time and channel capacity. Until fairly recently, free to air broadcasters for the most part needed to pursue ratings—that is to say, they needed to attract the largest possible audience at key times in order to raise the price of advertising at that time. And, loosely speaking, they needed to put those audiences in the mood for consuming what is being advertised. This set of parameters is much more constraining than those applicable to subscription services, especially streaming services.⁸¹³ Streaming services have a much higher ‘channel’ capacity, and do not need to rely on maximising audience numbers for a single broadcasting window. Indeed, they can make a functionally infinite number of works available, for users to watch at their convenience.⁸¹⁴

This means that subscription based streaming services are under less pressure to maximise the audience for any given show. Instead, they have an incentive to tailor their *whole portfolio* to attract subscribers. The implications are interesting. They are not served merely by attracting passing interest, as might be the case for internet distributed, advertiser or data funded works. There must be enough works available that are of a quality to encourage audience members to continue paying for their subscription. Subscription platforms can make good money providing lowest common denominator fare, but they need not invest in that to the exclusion of more diverse works. Indeed, it makes sense for them to invest in diverse content, targeting diverse audience niches, in order to grow the subscription base with

⁸¹³ It may be, nowadays, that since most free television is now available on the internet, on demand, the lowest common denominator pressure will apply less strongly because broadcasters are not confined to trying to attract an audience to a single time slot.

⁸¹⁴ On the relationship between channel capacity and diversity, see Yoo (2000), 1942.

something appealing enough to attract that niche. grow subscription by catering to new and diverse audience niches.⁸¹⁵ The economies of scale problem still applies, but it is less constraining, especially online, because the market for online streaming services is global. A niche that might be too small to target for a free to air broadcaster broadcasting in one country might well be large enough to warrant a blockbuster size investment in the international market.

Of course, we might have some concerns about the concentration among streaming services, which gives them an inordinate amount of cultural influence.⁸¹⁶ But that problem of concentration seems ubiquitous across both copyright industries, and internet intermediaries. In any case, it is beside the point for the purposes of the narrower argument I am making here. That is, the Baywatch effect is not an inevitable and universal consequence of copyright's facilitation of market-based organisation of creative production.

6.4.6 A cautious defence of blockbusters

Let us change the focus of our inquiry a little, to the aesthetics of blockbusters themselves. Does the Baywatch effect leave room for rigour in those works to which it applies most powerfully—blockbuster films? I think it does. Where resources are very heavily concentrated into blockbusters, there are rigour upsides both for the works themselves. Participation in blockbuster production may also improve participants' capacity to produce rigorous works in future. This might not be immediately apparent, since it is a cliché that blockbusters appeal to lowest

⁸¹⁵ On Netflix's content strategy, see e.g. Pelts (2015); Schaefer (2015); Block (2012).

⁸¹⁶ For an interesting piece on this subject, see Guerrasio (2016).

common denominator tastes. Blockbuster films are not usually thematically or narratively especially interesting, and often suffer from a lack of attention to character development and dialogue. But there are other kinds of rigour.

The perceived safety of investment into tried and true franchises and film makers encourage studios to invest incredible amounts of money into these 'tentpoles'. This means that copyright's production function has the widest scope to afford its benefits, subject to the following constraint. The resources deployed in realising the work must be directed in such a way as to enhance the appeal of the work to the widest possible audience. This particular combination of liberty (being freed from constraints of cost) and constraint (the need to appeal to a wide audience) tends to direct the aesthetic focus of film makers toward a particular vocabulary of art.

What is the vocabulary of art particular to the blockbuster film? People watch blockbusters for the visual (and sometimes auditory) spectacle. Other than hiring stars, and marketing the film, that is where the money goes: into cinematography and effects. One need only look at the enormous list of contributors to big budget films to get a sense of the scale of creative effort involved. The safer the bet, the bigger the budget, the larger will tend to be the number of contributors to a film, the more time they will tend to have for their work, and the more room there will be for specialisation and lavish attention to spectacular detail.

Where a big budget makes that kind of room for creativity, we really do see rigorous engagement with the vocabulary of visual and audio cinematic spectacle.

Take, for example, Walt Disney Pictures' recent release, *Dr Strange*.⁸¹⁷ This is another superhero film, drawn from the Marvel franchise—so it is a safe bet. The plot is, of course, fanciful, and the character development is somewhat thin. The dialogue has its fair share of witty repartee, alongside some more contrived passages. The cast is stellar, full of celebrated and award-winning performers, including Tilda Swinton, Benedict Cumberbatch, Chiwetel Ejiofor and Rachel McAdams, so the acting is fine. Where the film shines, though, is in its visual and special effects. Following in the footsteps of blockbusters like *Inception*, the film plays with the perception of gravity in its action sequences, to quite remarkable effect.⁸¹⁸ Gravity shifts in sudden lurches and characters 'fall' from the ceiling to the floor; then the source of gravity moves into the horizontal plane, and they fly headlong along a corridor and out a window.

The film does not merely imitate *Inception*. It takes that visual vocabulary further, with a nod to the artist Escher's perspective-bending work, and a kaleidoscopic theme. Perhaps this is another step in developing the visual vocabulary of twirling staircases, a recurring visual motif in another franchise—the *Harry Potter* series. As with the motif of gravity shifts, *Dr Strange* takes this motif of rotation to a new level. Whole buildings and landscapes fold in on themselves, twisting and turning recursively in three dimensions. The effect is stunning, and its impact is magnified by the fact that the action moves through these dynamic backgrounds, and the actors interact with them.

⁸¹⁷ Scott Derrickson, *Dr Strange* (Walt Disney Pictures 2016).

⁸¹⁸ Christopher Nolan, *Inception* (Warner Bros, 2010).

There is nothing wrong with wishing that blockbusters evoked a deeper and more fulfilling engagement from audiences, through better character development and subtler scripts. But we should not turn up our noses at the enjoyment to be had from appreciation of a spectacle, especially one so detailed and lavish as may be found in a film with budget of hundreds of millions of dollars, made by a creative team numbering in the hundreds, if not thousands. If we care about cultural paternalism, we would also do well to exercise caution in condemning the appeal to the lowest common denominator. Lowest common denominator works might not reach the heights of expressive rigour (although, as I said, they might provide fertile ground for some kinds of rigour). But the notion that copyright industries should invest the most in works which appeal to, and unite, the widest possible audience ought not be inherently distasteful.

What we face, in this case, seems to be a trade-off between diversity and inclusiveness. In order to concentrate resources on something that appeals broadly, we may compromise on diversity. But we do not necessarily compromise on rigour—at least not along every dimension. As I said in chapter 4, we should not be fooled into thinking rigour does not factor in taste cultures in which formal features are less ‘refined’ than in high culture niches. Rigorous deployments of blockbuster audio-visual vocabulary can engage and develop the creative and interpretive capabilities of its audience without conforming to the standards of ‘high culture’.

6.5—It's complicated

The import of this chapter, summed up in two words is: 'it's complicated'. The point of this chapter is not to vindicate copyright's structural influence entirely, but rather to temper its dominant critiques. The market processes underwritten by copyright may not be perfect formulae for optimised democracy and autonomy, but nor are they uniformly bad for culture.

Copyright, in comparison with other arrangements (such as 'free' culture on the internet), has some important advantages. The neoclassicist view of copyright as facilitating fairly efficient markets in which social value, measured by audience demand, directs investment by authors and commercial intermediaries, needs revision. But it contains a kernel of truth. Copyright facilitates markets that give effect to a particular kind of signal from audiences: willingness to pay.

The relationship between supply and demand in markets for works is attenuated. It is attenuated by demand uncertainty, by supply side concentration and winner takes all dynamics, and by the profit and risk orientation of commercial investors in works. It is hard to predict precisely how any given work will fare on the market. Even so, it is possible to discern trends in relation to the kinds of works, tropes and devices that tend to succeed; and it is possible to identify authors of works who have a reasonable track record of success. It is audience demand for these *kinds* of works, or for the works of this class of authors, that is the signal from which these trends are discernible. Money cannot be made through copyright by producing works that audiences will not pay for, or by investing in the works of authors who cannot attract paying audiences.

This parameter of copyright-based markets exerts influence over the character of the creative sphere *regardless of author motivations*. Many authors and publishers may not strictly need copyright as an incentive, but this does not change the fact that copyright affects the allocation of resources, opportunity and influence among authors, commercial intermediaries, and users of works. Copyright money flows only to those who supply works for which audiences are ultimately willing to pay. This means copyright's production function is enjoyed only by those who supply works that induce payment from audiences. Those who find a paying audience are at a material advantage, in their capacity to realise further creative ambitions, over those who do not produce commercially successful works.

This parameter produces certain trade-offs with regard to our three mid-level principles. The defence of blockbusters that I have just traced out illustrates the character of these trade-offs well. Blockbuster pressures concentrate ownership of copyright, as well as actual wealth—both of which contribute to a concentration of communicative power and opportunity. Businesses able to accumulate a pool of owned or licensed copyrights in works which have, in the past, been commercially successful, find themselves at a significant advantage over new entrants to the market for works. This is bad for inclusiveness.

These pressures also encourage 'tried and true' and 'lowest common denominator' investment strategies. The former is bad for diversity insofar as it reduces the range of works which receive investment, and promotes the proliferation of franchises rather than novel works. It is bad for inclusiveness insofar as it favours incumbent authors and makers of works. The latter is bad for rigour, as it discourages risk taking in the engagement with vocabularies of art or in taking on

subject matter that challenges the status quo. It is bad for inclusiveness to the extent it underserves minority tastes.

At the same time, the blockbuster allocation pattern has some upsides. Lowest common denominator pressures are by their nature inclusive—at least in one particular way. The objective of the blockbuster is to unite a disparate group, and to appeal to the widest possible audience. Contrast this to the polarisation problems associated with networked filtration of works. We see audiences divided rather than united. A lowest common denominator is still *common*, and therefore imports an inclusiveness and cohesiveness payoff.

What about the fact that it is ‘lowest’? The nomenclature is misleading. Certainly, blockbusters tend not to manifest ‘high culture’ aesthetics. But the compromises in rigour associated with thematic, narrative and symbolic aspects of blockbusters seem to be offset by certain other advantages. The perception that a particular work—say an instalment of a cinema series franchise—is a ‘safe’ investment encourages commercial intermediaries to lavish resources on its production. That means that the works can become vehicles for interesting developments in at least some vocabularies of art: in particular the vocabulary of grand audio visual spectacle.

The broader point I want to make is that if we think in terms of mid-level principles, and the trade-offs that different structural arrangements produce among them, we get a fresh perspective on copyright, its alternatives, and the calibration of the law. We are not limited to binary frameworks like incentive/access, constraint/freedom, or commercial/cultural. Instead we play an optimisation game concerned with balancing qualitative outcomes and pressures. In this game, we may

not always be able to achieve an ideal outcome, be it semiotic democracy, access to knowledge, play, tolerant discourse or any other goal associated with our mid-level objectives and high level values. We may instead have to pursue the lesser of two evils. In the final chapter of this thesis I will sketch out a few salient trade-offs of this nature, and explain how we might tailor the law in order to optimise them as best we can.

Chapter 7

The least objectionable way

7.1 Segue

The choice between stronger and weaker copyright; or between a copyright regime and alternative ways of organising the production of works is a choice between different sets of cultural parameters and pressures. The application of these pressures involves trade-offs between our three mid-level principles. Adjusting and calibrating copyright is an exercise in optimising these trade-offs as best we can.

I have written, in this thesis, about why we should eschew the incentive narrative of copyright in favour of a richer qualitative theory (chapter 1); how we can mitigate the risk of paternalism in doing so (chapter 2); how qualitative theories have tended to prioritise access to works over exclusive rights in copyright (chapter 3); how we can appreciate copyright's role in funding works without relying on a simplistic notion of incentive (chapter 4); why we should avoid a romanticised vision of the virtues of access to works for its own sake just as we should eschew a simplistic incentive narrative (chapter 5); and how and why we should temper some of the predominant critiques of copyright's structural effects (chapter 6). Before I explore the practical implications of this approach, let me recapitulate, briefly, how I moved from a rejection of the incentive-access paradigm, toward a qualitative approach; and how my qualitative approach differs from the dominant strain of culturally oriented copyright theory.

7.1.1 Chapter 1

In Anglo-Saxon copyright jurisdictions, the dominant view is that copyright ought to serve the public benefit. It is traditional to describe copyright's benefits in terms

of the number of works produced as well as the number of works disseminated; and its detriments in terms of restrictions on access to and use of works. According to this conventional incentive-access paradigm, copyright law must balance the competing (but also somewhat complementary) needs to incentivise the production and dissemination of works, and to facilitate the widest possible access to and distribution of works.

I have contested this idea of benefit. We can be more ambitious. We ought to have a theory about copyright that looks beyond its supposed incentive effect, at the very least because this incentive effect is, as I showed in chapter 1, not well supported by evidence. More importantly, copyright influences the conditions under which cultural activity and creativity takes place (albeit one of many influences). This influence is inevitable, whether we intend it or not. That being so, we should factor in copyright's qualitative influences in theorising copyright's relationship to the public benefit, and decide what qualitative outcomes we favour.

7.1.2 Chapter 2

A qualitative approach to copyright risks being paternalistic, but paternalism is not an insurmountable problem. We can minimise the scope for paternalism through our choice of high level values and mid-level objectives. *Autonomy* (in the sense of individual self-realisation) and *democracy* (in the sense of a robust democratic civil society) are uncontroversial first order values in western liberal democracies. There is enough consensus in copyright theory and political theory about these first order values, that we can adopt them as a foundation for our normative framework without the appearance of radical paternalistic intervention.

We can build on this foundation to come at intermediate goals for copyright and culture; what I call mid-level objectives. We can formulate these objectives by way of critical analysis of existing literature concerned with copyright's influence on culture and politics, by way of analysis of other bodies of law that regulate culture, or by arguing from first principles. I advocate three such objectives: (i) expressive diversity among the works to which the public is exposed (*diversity*); (ii) a distribution of communicative and culture power that includes the public as widely as possible (*inclusiveness*); and (iii) the cultivation of conditions in which authors substantive capacities to engage rigorously with the conventions of the medium in which they work are optimised (*rigour*).

Diversity and inclusiveness are relatively clear priorities of the 'cultural turn' in copyright scholarship (though scholars engage them using varying terms with varying emphasis). They are also implicit priorities underlying 'transformativeness' exceptions to copyright. Rigour is harder to induce from critical analysis of copyright jurisprudence, but (as I explained in chapter 4, and will recap below) it follows as a matter of principle from a commitment to autonomy and democracy.

7.1.3 Chapter 3

Other than advocacy of a qualitative approach to copyright, the main objective of this thesis has been to give reasons to resist the temptation to conflate a qualitative approach to copyright with a minimalist one. Certainly, a review of the literature concerned with copyright's qualitative influence creates an impression that most of the qualitative benefits available to the copyright policy-maker lie on the side of increasing access to works, rather than on the side of exclusive copyrights.

Since copyright's benefits are mostly conceived in terms of its supposed (dubious) incentive effects, there has been relatively little said about how exclusive rights in copyright might support diversity, inclusiveness and rigour, or similar qualitative objectives such as freedom of expression. Much more is said about how copyright obstructs these goals. Once copyright's incentive effect is cast into doubt, justifications for copyright carry less force.

By contrast, the benefits of access have always been conceived (at least in part) in terms of qualitative cultural outcomes. Scholars concerned with cultural outcomes are therefore optimistic about the potential of non-copyright, or weaker-copyright alternatives to produce a freer, more inclusive and more expressively diverse cultural landscape than strong proprietary copyright. Optimism is particularly focussed on the internet, as a sphere in which individuals may freely and actively participate in culture and discourse; in which a diverse array of expression flourishes; where the copying and distribution of works proceeds fairly freely; and where it might proceed more freely still.

A few scholars recognise copyright's capacity to deliver benefits other than its supposed incentive effects. Netanel argues that copyright exerts 'structural' influences, along with its function of supporting the production of sustained works of authorship. He contends that these production and structural influences contribute positively to democratic civil discourse.

Still, the balance of benefits and detriments, even as Netanel describes them, seem to favour a much weaker copyright than we currently have in most Anglo-Saxon jurisdictions. The same production and structural functions supposed to support author and publisher independence also seem to underwrite market

hierarchies: concentrations of wealth and cultural power. Market hierarchies seem to favour the production of mass-market works, but not the scholarly, diverse, challenging or *avant garde*. If we are to cultivate these latter qualities, we must rely on the dynamics of play in a robust public domain, characterised by freedom of expression, freedom of imagination; and we must allow the freest possible circulation of works on the internet—so the argument goes, at least.

7.1.4 Chapter 4

I am sceptical of the framing I have just described. Freedom (of expression, of information, of imagination) is always relative, and always conditioned by constraints of some kind or another. Copyright's imposition of formal restrictions on expressive freedom may produce an array of conditions and constraints that, in substance, enhance expressive possibilities, inclusiveness, diversity and rigour. The inverse is also true. Increases in formal freedom to copy and distribute works may fail to produce substantive freedom, inclusiveness or diversity; or even produce substantive barriers to those mid-level objectives.

If we are to comprehend this point, we must get beyond the incentive narrative, and we must further develop Netanel's arguments about copyright's production and structural functions. I elaborated on copyright's structural function in chapter 4 with the following argument. Copyright may not be strictly necessary in order for many kinds of works to be produced. But that does not mean that it is not of cultural benefit to fund works by way of copyright. Whether these funds are necessary or not, and whether they motivate authors or not, they have a bearing on

who creates, with what resources and support, and under what constraints of time and cost.

All of these things have a bearing on rigour. The correlation between the amount of funding and the rigour with which a work is executed is far from perfect. Still it is a matter of commonsense that investment of money into a work's creation facilitates rigour in its execution. Money buys time, collaboration, tools and so on, and it sustains a creative infrastructure that supports and cultivates talent.

7.1.5 Chapter 5

There are of course ways to fund, or otherwise sustain, the production of works without copyright. But every arrangement for funding and distributing works comes with its own set of cultural parameters. These parameters influence the conditions under which works are created and disseminated, and therefore the profile of the cultural sphere. This is true of copyright, and it is true of arrangements under which works are produced and circulated without reliance on copyright.

We should therefore temper the rather utopian vision that many have of networked peer production, along with networked means of directing the public's attention and disseminating works. Internet technology, and the day to day practices that have grown up around it, have led to more liberal copying and distribution of works. On the one hand, this has made it much easier for ordinary people, without the backing of commercial publishing businesses, to create and publish their own works; and to re-use and 're-mix' existing works. It has also furnished ordinary people with tools to select the works they are interested in consuming, rather than having their choices mediated by commercial

intermediaries. This represents an increase in individuals' communicative power relative to commercial intermediaries. We can reasonably expect certain gains in inclusiveness and diversity to follow from these increases in individuals' opportunities for participation in culture.

On the other hand, internet culture evinces some serious, countervailing detriments. The sheer volume of material circulating 'freely' on the internet makes filtration tools, like search engines, indispensable. These tools seem to concentrate the attention of the public rather narrowly. While some independent voices flourish on the internet, networked information economies have not undone the dominance of traditional copyright intermediaries. Perhaps more alarming than the dominance of these traditional intermediaries is the concentration of cultural power in the hands of new internet intermediaries such as search engine providers and social networks. Companies like Google and Facebook command the lion's share of the public's online attention, and accrue massive amounts of valuable data and advertising revenue by exploiting that attention. By contrast, the middle class of professional authors and publishers has fewer resources than ever, and appears to have a smaller reach, in comparison with the short-head winners, than in the past. In other words, winner-takes-all dynamics persist, and have arguably worsened as a result of the conditions on the internet.

Moreover, the 'free culture' of cyberspace comes with its own arrays of qualitatively significant pressures and parameters. Dynamics of search and filtration create power law distributions of attention. Individually tailored filtration seems to create 'filter bubbles', cutting off individuals from the cornucopia of works, and segregating them from other sections of the public. Attention maximising

filtration encourages the proliferation of shallow, attention diverting content, or extreme and radical perspectives. Together these forces tend to work against inclusiveness, diversity and rigour.

7.1.6 Chapter 6

What we see from our analysis of internet dynamics is that the principles governing the allocation of funding create qualitatively relevant pressures. When the source of funding for works is patronage, or where a work's dissemination depends on patronage, there tends to be a pressure on the author to please the patron. To the extent the source of funding for works is advertising, any person involved in the creation or distribution of works who is motivated to extract profits (even if only to maximise the resources available for their creative projects) will be under pressure to make the content compatible with the goals of advertisers. Each of these pressures has an impact on our three mid-level principles.

The array of pressures and trade-offs that I am interested in is of course the one which applies under copyright, and in the commercial marketplace that it underwrites. The most significant structural feature of copyright is that it facilitates markets for works, by establishing a price mechanism for access to works. This market facilitation function represents not so much an incentive to produce works, as an incentive *structure* under which the production and dissemination of works takes place.

Copyright-based markets for works furnish audiences with a kind of 'vote', albeit one with attenuated influence, over the conditions under which authors and commercial intermediaries may realise their creative ambitions. There are

advantages for inclusiveness, diversity and rigour that go along with this arrangement, even as there are disadvantages of the kind identified in the concentration and blandness critiques.

Take the following set of trade-offs, for example. Commercial pressures in copyright-based markets for works favour investments that take advantage of economies of scale, and cast their net widely and shallowly. On the one hand, minority taste groups, and more challenging fare, tend to lose out—and this is bad for diversity, rigour and inclusiveness. On the other hand, there is something inclusive in a structural arrangement that rewards those who aim to reach the widest possible audience. And the concentration of resources in blockbusters, though at the cost of more diverse investments, affords the makers of those works with resources to execute their creative ambitions with a high degree of rigour.

We should recall, however, that no existing arrangement for organising the production and dissemination of works, produces unmitigated benefits for inclusiveness, diversity and rigour. There are always trade-offs. In light of that fact, copyright's flaws seem more forgivable.

7.2 Implications for the 'minimum necessary' proviso

7.2.1 General implications

The simplest and broadest implication of my thesis is that copyright minimalism need not be the reflexive position of the jurist or policymaker interested in

copyright's qualitative outcomes. On the contrary, if we are less reliant on the incentive narrative to justify and evaluate copyright, we can find reasons to sustain copyright which are commensurable with, and as urgent as, the reasons commonly given for promoting access to works. Then we will not be cornered into claims like Hunter and Lastowka's: that the destruction of copyright industries 'would be a terrible thing if, and only if, they represented the sole means that creative content could be generated.'⁸¹⁹

Given my framing of social benefit, we can see many ways in which even the substantial weakening, of copyright industries (and the simultaneous consolidation of dominant internet intermediaries' cultural power) *could* be a terrible thing. Just because there are alternatives arrangements under which works may be produced, it does not follow that those arrangements will actually be more conducive to the public benefit or progress—to democracy and autonomy by way of diversity, rigour and inclusiveness—than copyright.

The question we should ask in evaluating and developing the law is not whether particular works would or would not be created without copyright, or with a different calibration of copyright. Nor should we be preoccupied with calibrating copyright at the minimum necessary level to produce an incentive. Rather we should ask whether the array of parameters for creative activity that result from any given calibration of the law are on the whole, socially beneficial; or at least, more beneficial than the array of parameters that would apply under alternative arrangements.

⁸¹⁹ Hunter and Lastowka (2004), 1019.

We should judge that question by reference to our three mid-level principles; and in making such judgments, we should keep in mind that there will always be trade-offs. These trade-offs are not only characteristic of copyright. Neither proprietary copyright, nor the least constrained possible circulation of information and ideas in a ‘robust public domain’ (supposed to be attainable on the internet) produces outcomes that are unqualifiedly good for inclusiveness, diversity and rigour.⁸²⁰

In making this point, I am not falling back on a purely *diversity* based defence of copyright. Recall, for example, Benkler’s commendable objective of maintaining the widest possible set of choices among the different arrays of constraints under which cultural activity may take place.⁸²¹ Certainly, there is value in preserving the array of constraints that apply under copyright (or something resembling them) for the sake of their difference from the kinds of constraints that apply under alternative arrangements. The cultivation of autonomy and democracy rely on the existence of a plurality of ways of organising the creation and dissemination of works, including patronage, advertising, networked peer production, state subsidy and copyright.⁸²² I would go further than this, though.

At least some of the outcomes that copyright produces appear to be superior to those that non-proprietary internet culture produces, and therefore worth preserving *for their own sake*. Even where copyright involves trade-offs among mid-level objectives, they are often worthwhile trade-offs. Let me offer an example—

⁸²⁰ Regarding the ‘freest possible circulation of information’ argument, see above, text to n (279)

⁸²¹ See above, text to n (323).

⁸²² See Netanel (1996), 359. See also Netanel (2000a), 1925-1926.

also, by the way, a point to which I would like to give particular emphasis. It has to do with a set of inclusiveness trade-offs. By no means is the paying audience member, under the auspices of a copyright-based market, on an equal footing with the commercial copyright intermediary, but at least the relationship is at arm's length, and curation and manipulation (by way of advertising, for example), are relatively overt. For all its problems, that relationship has a transparency, even dignity, that is absent from the asymmetrical relationships that characterise the 'surveillance capitalism' of dominant applications on the internet.⁸²³

The fact that, under current copyright laws, most authors do not profit, or that most individuals lack the cultural power of integrated commercial intermediaries, is not by itself a sufficient ground for gutting copyright industries through copyright law reform. If communicative power is excessively concentrated in the hands of copyright businesses, the solution is not to simply transfer that cultural dominance into the hands of internet intermediaries. If independent voices get an unfairly small proportion of copyright revenues, and have too little cultural power in comparison with commercially minded copyright businesses, the solution is to try to increase that share, not reduce it to zero.⁸²⁴

We should not fall into the trap of favouring, by reflex, any arrangement which makes the dissemination of works 'freer' and which therefore furnishes those internet businesses with the raw materials on which they build their asymmetric power and wealth. To the extent copyright based markets foster conservative investment strategies and bland works, the solution is not to fall back on

⁸²³ On the subject of 'surveillance capitalism', see Zuboff (2015).

⁸²⁴ Fisher (2004), 34

arrangements that themselves often produce echo-chamber filtration, clickbait content, and surveillance-based rent seeking. That would not advance the causes of democracy and autonomy.

I am advocating, then, an inversion of the priorities of the cultural turn. I described, in chapter 3, a wide held belief that weak copyright is less risky as a form of information policy than strong copyright. I would argue, however, that too weak a copyright regime is also risky. Our most urgent task is not to prevent copyright from 'locking down' free expression. It is to preserve, as best we can, copyright's beneficial influences on the organisation of cultural production and dissemination in the face of the expansion of sharing and dissemination of works via powerful internet intermediaries.

Of course, we are not making a zero-sum choice between copyright-based organisation of cultural production and 'free' amateur and algorithm based organisation of cultural production on the internet. There is overlap between the two systems—as is evident, for example, from my observation that hierarchies of attention on the internet entrench the dominance of traditional news media providers.⁸²⁵ And though I have been forceful in my criticism of some of the negative aspects of filtration-based, 'free' selection and dissemination of works, it is not as though our choice is binary: between 'good' copyright and 'bad' networked, peer produced structures.

What we should do instead, is try to manage qualitative trade-offs as best we can. This should be our organising principle in considering doctrinal questions. We

⁸²⁵ See above n (639) and accompanying text.

are not helpless to resolve clashes between competing mid-level objectives. We have our high-level values to assist us. I will offer, here, a brief illustration of how this approach might play out in tailoring copyright duration. Then, in the remaining parts of the conclusion, I will address the trade-offs associated with fair use doctrine, and liability rules in more detail, before I offer some concluding comments.

I do not, of course, pretend to offer comprehensive recommendations for the development of the law; nor decisive solutions to the many problems with both copyright and networked information economies. There is more than enough to say about copyright duration, fairness exceptions and liability rules to write a doctoral thesis about any of these three themes. And there are limits to what can be achieved by tailoring the law. My objective here is only to illustrate how my qualitative theory might direct our approach to difficult doctrinal questions, and produce some useful insights along the way.

7.2.2 Copyright term

The incentive-access paradigm leads to a particular orientation toward tailoring copyright term. The general idea is that the term (along with most other aspects of copyright's strength and scope) should be no longer than the minimum necessary to incentivise the production of works. So, for example, one of the main bases for economists' objection to copyright's retrospective term extension in the US was that the increase in term would not materially increase authors' incentives to produce

works.⁸²⁶ Landes and Posner have argued that a term of around 25 years enables rights holders to generate a revenue comparable to what they would receive in perpetuity (in present value terms), and would therefore be sufficient to incentivise creative effort.⁸²⁷ The radical minimalist Pirat Partei has argued that copyright term should be no longer than 5 years.⁸²⁸ Even Australia's Productivity Commission has made much of the fact that the average duration during which works produce commercial returns to copyright owners is 2 to 5 years, as a ground for reducing copyright term.⁸²⁹

My framing produces a different chain of reasoning. If we know that markets for works are characterised by demand uncertainty, winner-takes-all dynamics, and cross-subsidisation of new works with funds from winners, we can bring this knowledge to bear in tailoring copyright. The length of the copyright term should not be tailored in such a way as to cater for the majority of works, or for the average duration of profitability of works. Rather, the term should be long enough to capture a good portion of the revenue that might be derived from winners, rather than only long enough to capture the returns from average works. At least one study suggests that this small group of winners remains commercially valuable for a period of time that is consistent with the expanded copyright term under the US *Copyright Term Extension Act*.⁸³⁰

⁸²⁶ See above n (425) and accompanying text.

⁸²⁷ Landes and Posner (2002).

⁸²⁸ Molinari [2006], 16.

⁸²⁹ See above n (426) and accompanying text.

⁸³⁰ See Liebowitz and Margolis (2003), 18ff.

Of course, the duration of a work's commercial value is not the whole story. We would need to assess the trade-off between the rigour benefits derived from the production function—the long-lasting revenue from the 'winner'—and the detriments to inclusiveness that might result from keeping other works (non-winners) out of the public domain for so long. To make such an assessment in detail is beyond the scope of this chapter. Suffice it to say that there are arguments to be made for a term that is longer than a 'minimum necessary' term for recouping investment in works.

Having said that, one of the biggest risks of adopting a long copyright term is that it would tend to favour conservative investment strategies. The enduring stream of revenue from winners with a long copyright term is liable to be invested in a bland, homogeneous corpus of works. The benefits of rigour that might follow from such an enduring stream of revenue might be offset by a lack of diversity among the recipients of that funding. As I noted in chapter 6, in some media, especially high cost films, the pressure to invest in safe bets tends to produce a steady stream of highly derivative prequel and sequel 'franchises', which may crowd out more innovative works.

The result does not undermine rigour entirely, since the safety of the bets would help facilitate the rigour-enhancing aspects of copyright's production function: more money, more time, more resources etc. But there is a trade-off here that might be better calibrated. There is a trade-off between rigour (based on high investment) and diversity (based on wider investment). A qualitative approach would play the following optimisation game: leave scope for the rigour gains that come with safely betting on sequels, prequels and adaptations, but do not allow

these kinds of works to crowd out everything else. To put it another way, three Star Wars films are great; nine is too many.

There could, therefore, be merit in tailoring the duration of derivative rights in works, or perhaps the duration for which such rights could be exclusively licensed, separately from the duration of other copyrights. Of particular significance is the right to make adaptations of works, especially film adaptations of books and comics.⁸³¹ However long the term of copyright in the original work, the term of copyright in the commercial film adaptation could be set at a significantly shorter duration.

A right to make film adaptations within, say, a ten year window ought to permit film makers sufficient time to produce a trilogy, and therefore to realise a fairly safe profit. But such a time period would not permit of a 10th or a 20th instalment of a franchise. After that ten year period, counted from the date of publication of the film adaptation, the right to make derivative films based on the original copyright work would cease to be exclusive. Anybody would then be permitted to produce film adaptations of the original work, although perhaps not to reproduce the derivative work itself. Indirect, but fairly close substitutes, could then enter into monopolistic competition in the same niche as the derivative works. Structural incentives (pressures and parameters, recall, not subjective incentives) would no longer align so clearly with over-production of prequels and sequels.

The example above is purely illustrative. I do not pretend, here, to offer a comprehensive plan for tailoring derivative or adaptation rights. My object is rather

⁸³¹ See e.g. *US Act* §103(b), §106; *Canadian Act*, 3(1)(a)-(e).

to show that, in principle, copyright term can be tailored within a qualitative framework, rather than only by reference to the ‘no more than necessary’ proviso. We can make adjustments that respond to our descriptive understanding of copyright’s structural effects. And we can pursue particular structural ends, based on qualitatively normative goals. The goal I have used to illustrate the point—the prevention of over-investment in bland blockbuster franchises that crowd out more diverse investments—is one among many we might pursue.

7.3 Implications for fair use

7.3.1 Reasons to consider fair use trade-offs in qualitative terms

One of the recommendations common to many proponents of the cultural turn is to expand fairness exceptions: in the case of fair dealing jurisdictions, by introducing fair use; and in fair use jurisdictions, by expanding the classes of use deemed fair. As I demonstrated in chapter 5, fair use exceptions have in fact recently expanded in the US to incorporate orthogonal uses under the umbrella of transformative uses. There is also a possibility that fair use will be introduced in Australia, and even remotely possible that it might be considered in the UK. The Australian Law Reform Commission recommended introducing a US-style fair use exception in Australia, including the four fair use factors that apply in the US. The Australian Productivity Commission also favoured a fair use exception for transformative uses.⁸³² When Britain leaves the EU, it may no longer have to comply with Article 5 of the *Information Society Directive*, and this would permit the introduction of fair use.

⁸³² ALRC Report, (2013), 87ff; Productivity Commission (2016), 123.

For all these reasons, it is worth considering how my descriptive and normative conclusions would inform our approach to fair use.

The approach to copyright that I have propounded in this thesis is compatible with fair use, but it would require us properly to take account of qualitative trade-offs in calibrating the scope of the exception. Expansion of fair use is generally justified on the basis that it would enhance freedom of expression, freedom of imagination, and a fair distribution of cultural power.⁸³³ Expanding fairness exceptions could serve to mitigate the causes of the concentration critique, by furnishing individuals and non-incumbents with greater cultural and communicative power relative to incumbent copyright industry players. These are all, broadly speaking, inclusiveness goals, with follow on effects for diversity and rigour.

The effectiveness of fair use exceptions in furthering these mid-level goals depends, however, on the scope of the exceptions, and the distributive consequences of that scope. Let me first explore a specific example of how introducing fair use might mitigate certain inclusiveness and rigour problems associated with copyright: in the context of pop music. Then I will turn to some of the problems that arise as the scope of the exception expands past a certain point. Finally, I will note a few qualitatively significant trade-offs that arise, more or less regardless of fair use's scope. None of these problems require us to reject fair use, but they do indicate that we should not rely excessively on fair use as a means of correcting distributive problems associated with copyright's structural function.

⁸³³ See above, part 3.5.3.2.

7.3.2 Fair use might serve rigour and inclusiveness in relation to musical works

One reason to adopt an open ended fair use exception, in place of more limited fair dealing exceptions, is that fair use is better adapted to accommodating artistic practice.⁸³⁴ I noted early in this thesis that various forms of borrowing and appropriation are fundamental to creative activity. Insofar as copyright law suppresses these kinds of practices, and to the extent they are central to any given form of expression, the law limits the vocabulary of art available to authors. This is bad for rigour. The introduction of fair use, and in particular, the role of transformativeness in fair use jurisprudence, could mitigate this problem.

The example of musical ‘quotation’ and homage illustrates this. I expressed disappointment in chapter 5 at the outcome of the Australian music copyright case, of *Larrikin*.⁸³⁵ Had fair use been available in Australia, there is a good chance that case would have been decided differently. In their song, ‘Land Down Under’, Men at Work reproduced roughly half of the melody of the children’s song, ‘Kookaburra sits in the old gum tree’, but with some important changes. They:

- varied the rhythm of the Kookaburra melody;
- played the melody at a much faster tempo than it would be sung in the original version;

⁸³⁴ For a more general comparative analysis of fair use and fair dealing, see ALRC Report. See also, D’Agostino (2008).

⁸³⁵ See above, part 5.2.1.

- arranged the melody in a different key over different chords without the original lyrics, and next to entirely different lyrics; and
- phrased the melody in a creative way, with each musical phrase separated by a few bars, and played in the style of ‘licks’, in between phrases of the main ‘Land Down Under’ melodic theme.

Engaging with the original work in this way is an expression of fundamental tropes and conventions in music: theme and variation, and play with the various musical elements such as harmony, rhythm, meter and so on. Without fair use, this creative engagement with an existing piece of music is penalised, rather than rewarded. Fair dealing exceptions are probably not broad or flexible enough to encompass musical homage or play, or other rigorous deployments of artistic convention and vocabulary which do not fit into the narrow fair dealing categories.⁸³⁶

With fair use, by contrast, the doctrine of transformative use could come into play. Producing ‘new aesthetics’ as well as ‘new insights and understandings’ are all key indicia of transformative use.⁸³⁷ We can see in the recent US Second Circuit case of *Cariou v Prince*, how the transformative use inquiry permitted the court to give some weight to the aesthetic conventions and the vocabulary of art of a particular medium. In that case, the court engaged closely with the vocabulary of contemporary visual art, observing the ways in which artworks containing copies of the plaintiff’s photographs manifested an ‘entirely different aesthetic’ to the original

⁸³⁶ On this subject, and the difficulty of accommodating ‘high art’ aesthetics and practises with fair dealing exceptions, see Griffiths (2010). Note also that the court expressed discomfort at having to find such an homage to be infringing: *Larrikin* at [98].

⁸³⁷ *Campbell*, 579.

works.⁸³⁸ In a case like *Larrikin*, a court similarly attentive to matters of how *Men at Work*'s creative engagement with 'Kookaburra', and the 'vocabulary' of music in general, produced new aesthetics, meanings and new insights, might have allowed that the use—both by virtue of being an homage, and by virtue of the changes in phrasing, tonality and so on—was fair.⁸³⁹

One of the key qualitative benefits of introducing fair use, then, is not merely that it could distribute some communicative power to new authors, and away from incumbents. It is also that it gives courts capacity to inquire into the matter of transformation. Thinking about transformation encourages attention to the actual conventions of works' vocabularies of art in a way that merely being asked to answer questions about whether a work parodies, satirises etc. does not. Transformative use doctrine allows us to prioritise the cultivation of rigour—just as existing parody and satire exceptions prioritise inclusiveness and diversity.

7.3.3 We should not over-extend the concept of transformative use

While introducing fair use could help us to cultivate rigour along some dimensions, we should avoid expanding our concept of what amounts to transformativeness too far. We should also not allow transformativeness to override the other fair use factors entirely. Let me explain, by reference to the *orthogonal use* cases that I dealt with in chapter 5: the *Googlebooks*, *Hathitrust* and *Arribasoft* cases (I will refer to them collectively as the 'orthogonal use cases'). Those cases developed fair use in a

⁸³⁸ *Cariou* [18].

⁸³⁹ For a more critical view on the failures of fair use to account for various forms of creative appropriation in visual arts, see Adler (2016).

way that tends to cement the cultural dominance of internet intermediaries, especially search engines.⁸⁴⁰

They do so in two ways. Firstly, they expand the concept of transformativeness to encompass orthogonal uses. They establish precedents for treating mass unauthorised copying to facilitate the searching and browsing of works as transformative uses, even when the copying does not result in the creation of a new work of authorship, or new meanings, insights or aesthetics.⁸⁴¹ Secondly, they established that courts' findings on the first fair use factor (the nature of the use) bear heavily on the analysis of the fourth fair use factor. The fourth fair use factor is 'the effect of the use upon the potential market for or value of the copyrighted work.'⁸⁴² The orthogonal use cases establish a loose rule of thumb that if a use is transformative, it probably does not supersede the objects of the original work, and therefore is very unlikely to operate as a market substitute for that work. The more specific implication of the cases is that where works are reproduced, even in full, for the purposes of data analysis and search technologies, courts will be unlikely to consider that there is an effect on the potential market for or value of the copyright works.

The result is to cement an approach to the fourth fair use factor—the effect of a use on a copyright work's potential market or value—in which the key issue is substitution on *existing* markets. Copyright owners are, in effect, deemed not to be entitled to profit from a search engine's rendering their works more searchable,

⁸⁴⁰ See above, part 5.2.3.3.

⁸⁴¹ *Ibid.*

⁸⁴² US Act, §107.

even when internet intermediaries profit directly or indirectly from making the works available in this way.

On the one hand, these developments are good for inclusiveness, diversity and rigour, at least along some dimensions. The public's power and entitlements in relation to the use of works is increased, and this is autonomy enhancing.

Individuals' and deliberating bodies' capacity to find the precise parts of cultural artefacts relevant to their day to day concerns has grown. The range and diversity of books and images available for the public to search and browse has also grown.

On the other hand, we should be careful not to lose sight of the broad, structural picture. If we confine our picture of copyright's potential benefits to its supposed incentive effects, then there is little sense in extending copyright owners' rights into markets which cannot reasonably be considered to have affected authors' and publishers' motivations in the first place, especially if the use in question provides a benefit to the public. Markets which did not exist at the time of creation or publishing seem to fit this description. But my approach does not confine copyright's benefits to its incentive effects.

I have recommended that we take into consideration the broader distribution of communicative power, and the broader structural effects of any given calibration of copyright law. The substantive, structural effect of the expansion of fair use in the orthogonal use cases is to allocate communicative power to dominant internet intermediaries. Those best placed to take advantage of the developments in fair use brought about by cases like *Googlebooks* are, unsurprisingly, dominant internet intermediaries like Google. Concentrating user attention on free content is extremely profitable for businesses like Google; not least because it permits the

gathering of valuable data about those individuals that can then be used to sell advertising, or even for the purposes of propaganda.⁸⁴³ It is businesses like Google, on that scale, which have the resources to conduct mass copying and data analysis exercises, extracting valuable data about the public in the process. It is businesses of that size that can be confident of having the resources to defend copyright suits and make a case for fair use. Smaller businesses are not on the same footing.

My concerns about the networked information economy suggest we take care not to make cultural dominance too easy a feat for internet intermediaries. We should not forget that the practical outcomes of *Googlebooks* was to furnish Google with a kind of monopoly; a first mover advantage against any potential competitors in the niche of online book search whose scruples or lack of resources prevented them from digitising books without permission. Indeed, in earlier proceedings, the risk of Google's obtaining a de facto monopoly over the digital market for millions of books was one of the grounds for rejecting a proposed settlement between Google and the plaintiffs.⁸⁴⁴ Under the settlement, Google would have paid licence fees to copyright owners. If market power was a problem under a settlement where Google would have been paying licence fees for its use, it is surely an even greater concern in the fair use, zero price scenario. In short, expanding transformative use to encompass orthogonal uses is likely to contribute to the conditions in the networked information economy that produce the poor outcomes for inclusiveness, diversity and rigour identified in chapter 4.

⁸⁴³ See above, parts 5.4.3 and 5.4.5.

⁸⁴⁴ *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 682–83 (S.D.N.Y. 2011)

We should therefore resist treating orthogonal uses as transformative. In the US, this would mean returning to the position on transformative use set out in *Infinity v Kirkwood*. That is: copying works in such a way as to allow them to be used for a different purpose (such as research, or search), is not the same as transformation.⁸⁴⁵ In Australia, if fair use is adopted, courts would do well to follow *Infinity*, and avoid following the orthogonal use cases.

We should also not allow transformative use to become the sole, or even predominant, determinant of fair use. Courts should give due weight to the fourth fair use factor. They should not allow a finding of transformation to predetermine findings regarding the fourth fair use factor: the effect on the potential market for or value of the original work.

A use can be transformative, but at the same time, the structural effect of treating it as fair might allocate power, wealth and resources away from copyright owners, or disproportionately toward internet intermediaries in comparison with copyright owners or the public. The European Commission has recently described that flow of wealth and power as a ‘value gap’, whereby copyright owners do not obtain a ‘fair share’ of the value that other businesses, like internet intermediaries, derive from the use of their works.⁸⁴⁶

For my purposes, the question is not whether the distribution of value is fair in a deontological sense, but rather whether it is inclusive. Still, the metaphor of a ‘value gap’ captures the inclusiveness problems associated with orthogonal uses

⁸⁴⁵ *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (1998), 108

⁸⁴⁶ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market—COM(2016)593.

rather well. Moreover, it ties in well with the language of the fourth fair use factor: ‘the effect on the... value of the work’. Uses of the kind deemed to be fair in the orthogonal use cases may increase the amount of time users spend on internet intermediaries’ platforms or applications, or provide valuable data about user preferences, or facilitate the sale of advertisements. Surely this is an effect on the value of the work. Value is affected insofar as it is allocated toward internet intermediaries (and arguably away from copyright owners). This very significant structural outcome ought to be taken into consideration when evaluating the effect of a use on a ‘potential market for or value of’ the copyright work.

The concept of the potential market for or value of a work need not be confined to markets or commercial value which the copyright owner had in mind when creating or publishing a work. If we get beyond the incentive narrative, and think in broader, structural terms, it is beside the point whether a copyright owner contemplated exploiting her work in a particular market; or whether the prospect of extracting commercial value from a particular kind of use of the work served as an incentive to the copyright owner. Our objective is not to keep copyright incentives to the minimum necessary level, but rather to try to optimise inclusiveness, diversity and rigour.

This calls for a broader, more purposive, interpretation of the fourth fair use factor. That factor should not be addressed by reference to a narrow question, ‘is the copyright owner’s market harmed’? Instead, courts should ask the broader question, ‘is the effect on the potential market for, or value of, the work *fair*.’ After all, the fair use factors are not supposed to be treated in isolation. They should be weighed

together in light of copyright's overarching objectives.⁸⁴⁷ Courts can and should find a balance between the pre-*Campbell* position on commerciality and fair use—where commerciality rendered a use presumptively unfair—and the approach established cemented in the orthogonal use cases, where it was consigned to near irrelevance.⁸⁴⁸

Courts should be cognisant of the possibility that a finding of fair use will not always produce, in substance, a more inclusive distribution of communicative power than a finding of copyright infringement. A result which compounds the cultural dominance of powerful internet intermediaries, and the 'value gap', is bad for inclusiveness. It is also bad for rigour, if copyright's production function suffers as a result of the allocation of entitlements away from copyright owners and toward internet intermediaries. Where a use clearly creates a value gap, courts should be more cautious about treating it as fair. The commerciality of the use should not lead to a presumption of unfairness, but it should lead courts to inquire into the distributive consequences of that commercial exploitation.

7.3.4 Creative imagination and fairness

The final recommendation with respect to fair use that I will deal with here is the recommendation to treat all use involving creative imagination as fair. In a slightly different iteration, the recommendation is to change the burden of proof so that copyright owners would have to prove a use to be unfair in order to make out copyright infringement.

⁸⁴⁷ *Campbell*, 578.

⁸⁴⁸ See above part 5.2.3. For the dictum asserting the presumptive unfairness of commerciality before *Campbell*, see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), 451.

The benefit of extending fair use further, to encompass all imaginative uses of works is obviously that it would distribute the right to engage with works creatively in a far more inclusive way. But, as with the expansion of transformative use doctrine to encompass orthogonal uses, this expansion of fair use would involve trade-offs. As with orthogonal uses, internet intermediaries who profit from attracting ‘eyeballs’ and collecting data, are well served by treating all imaginative uses as fair and non-infringing of copyright. Proliferation of non-commercial, imaginative uses of works drives traffic on internet intermediaries’ platforms, and traffic is their currency. They profit, and develop the information asymmetries described in chapter 5, not only on the back of copyright works themselves, but also from the public’s creative engagements with copyright works. In other words, there is another value gap associated with non-commercial uses of works: internet intermediaries profit from them; copyright owners, less so.

So much for the structural implications of a broad exception for imaginative use. What about the direct allocation of entitlements? It would not always be the ‘little man’ who would benefit from relying on the exceptions. Commercial businesses might, by applying a minimum of creative imagination to works created by amateurs or independent authors, find themselves in a position where they could profit without ever paying authors. There are already examples of successful commercial publications like BuzzFeed disregarding copyright, and reproducing and publishing photographs and other works created by amateurs, in ‘listicles’ without attribution or authorisation.⁸⁴⁹ An imaginative use exception therefore

⁸⁴⁹ Veix (2013); Catt (2013).

seems to me just as likely to produce a less inclusive distribution of communicative power as to produce a more inclusive one, even if on its face, it would seem to recognise rights of free imagination more widely.

As for the recommendation of an inverted burden of proof, this would at first glance appear to empower the public *vis-à-vis* copyright owners. The right to use works, especially for non-commercial purposes, would appear to be very inclusively distributed under such an arrangement. At a structural level, however, such a development would be liable to compound inequalities in communicative power and opportunity. If copyright owners had to prove unfairness, the cost of copyright enforcement would go up.

The higher the costs of enforcing copyright, the more incumbents and large businesses are at an advantage relative to independent authors and publishers. Entrenched players in copyright industries can afford to enforce their copyrights through legal action. Independent authors and publishers, newcomers to the industry, and non-commercial authors usually cannot afford to do so. Entrenched players could also afford the costs of defending a suit for infringement—and therefore infringe more freely—in the knowledge that poorer copyright owners would struggle to meet the costs of discharging the new evidentiary burden.

The same may be said of deriving profits from sources other than copyright. Insofar as copyright revenues would be reduced as a result of creating a wide exception for imaginative uses, it is the larger, more established business (including internet intermediaries) who are best placed to derive revenues from elsewhere. It is they who tend to have the data, the resources, and the platforms to bundle works with other services and make a financial return. Again, we would see a ‘value gap’.

I am not asserting, here, that there should be no exception made for imaginative uses of works. Rather, I am insisting that our approach to imaginative uses of works be informed by our mid-level principles, and by the descriptive understanding of copyright's production and structural function. It is worth curtailing some imaginative uses of works to preserve those functions, and also to keep a check on the 'value gap'. The fair use defence is better suited to managing the trade-offs associated with treating certain creative or transformative uses of existing works as non-infringing than a broad imaginative use exception, especially if due consideration is given to the fourth fair use factor.

7.4 Implications for liability rules

7.4.1 Liability Rules

Let me turn now to the final category of recommendations: the recommendation to introduce liability rules into copyright law. Netanel, Fisher and Lessig all make similar recommendations about introducing a levy-style liability rule, although there are a few differences in detail. Netanel and Fisher seem open to permitting non-commercial peer to peer sharing of works by users, without charge to users; but imposing a levy on providers of the means of sharing of works.⁸⁵⁰ Fisher also contemplates a more general increase in income tax as a source of funds to compensate copyright owners for unpaid peer to peer sharing.⁸⁵¹ Another interesting detail that Fisher contemplates is the application of the levy to

⁸⁵⁰ Netanel (2003), 4; Fisher (2004), 217.

⁸⁵¹ Fisher (2004), 214ff.

derivative, creative uses of works—what Lange might describe as exercises of creative imagination. The publication of derivative works produced in this way would be counted in determining the apportionment of levy or tax funds to copyright owners. It is not clear whether Fisher envisions users being required to pay for such uses, or only those businesses which profit more generally from peer to peer sharing.

Lessig broadly agrees, but offers a few differences in detail. He recommends that non-commercial sharing of works, where it operates as a substitute for purchase of works, should be taxed, to the extent harm is demonstrated—but he is not clear on who should pay the tax, or whether it would be a levy or income tax. Lessig also adds the interesting caveat that the law should revert back to a property rule (like the current exclusive rights arrangement) if the liability rule and levy arrangement ‘harmed’ creative industries.⁸⁵²

I agree with the proposal to charge a levy to businesses that profit from the free distribution of works. I also think that non-commercial use should also be subject to a liability rule style compulsory payment—which could also be administered in the form of a levy. Let me first outline some key operational concerns that my theory requires we adopt in formulating a liability rule regime for online sharing of works. Then I will explain in general terms why I favour the introduction of a levy or liability rule (given the details of the levy it is, in substance, similar to a compulsory licence). With those concerns in mind, I will then explore some of the pros and cons of my preferred liability rule arrangement, namely:

⁸⁵² Lessig (2004), 125.

- levying businesses that profit from free sharing of works; and
- charging users a compulsory fee for sharing works online, even where the sharing is non-commercial.

7.4.2 Connecting liability rules with my mid-level principles

Of course, working out details as to the practical operation of liability rules, especially the implementation of levies of the kind proposed by Fisher, Netanel and Lessig, is a complex matter.⁸⁵³ To provide a detailed plan for the implementation of such a regime would be the work of another book or thesis. In any case, Netanel, Fisher and Ginsburg and others have considered in some detail the practicalities of implementing various levy and liability rule arrangements similar to the kind I favour.⁸⁵⁴ Fisher in particular pre-empts many potential concerns about practical implementation of a regime of the kind I am describing, and where the reader is uncertain about the practical implementation of my suggestions, I would refer them to the final chapter of his book, *Promises to Keep*.⁸⁵⁵

My object here is to illustrate how my theoretical outlook would interact with what Fisher describes as a ‘governmentally administered reward system’.⁸⁵⁶ I will therefore confine myself to outlining key qualitative matters at stake, and to suggest

⁸⁵³ Fisher suggested income tax as an alternative to his levy proposal, but conceded that levies were politically more palatable. For the sake of clarity, here, I therefore treat Fisher’s recommendation as one which favours levies.

⁸⁵⁴ Fisher (2014); Netanel (2003); Ginsburg (2014). See also Lunney (2001). On the economic consequences of levies on recording equipment in Europe, see e.g. Kretschmer (2011). On the use of digital rights management technologies to avoid untailed, blanket levies, and a sceptical view of the appropriateness of levies for private copying, see Hugenholtz et al (2003).

⁸⁵⁵ Fisher (2014), 199ff

⁸⁵⁶ Fisher (2014), 202.

lines of inquiry and research. Keeping in mind my analysis of copyright's production and structural functions, and their relationship to our mid-level objectives, we can fruitfully delineate two broad operational concerns.

Firstly, given the follow on effects of concentration of communicative power among both traditional intermediaries and internet intermediaries, we should try to distribute communicative power more evenly among internet intermediaries, copyright owners, and users. As well as fostering non-commercial uses of works without the requirement of copyright owner authorisation (as Lessig suggests), new liability rules or levy arrangements should be aimed at getting internet intermediaries to share with copyright owners some of the wealth and communicative power they derive from both the direct and indirect exploitation of works for commercial advantage.

This primary, redistributive, goal would also serve the secondary objective of sustaining copyright's production function. In doing so, we should recall that the goal is not to provide some optimal incentive to copyright owners. We are, instead, conducting an impressionistic exercise. Fisher describes the object of this exercise as setting 'a level of aggregate reward sufficient to provide consumers a rich array of entertainment products.'⁸⁵⁷ Put in terms of our mid-level principles, that means, sufficient to sustain rigour. It also means, sufficient to ensure that returns from commercial 'winners' are large enough that copyright owners and their intermediaries can afford to take risks in how they invest money; which would support diversity.

⁸⁵⁷ Fisher (2004), 2017.

Secondly, we should try, in implementing a liability rule or levy regime, to maintain some of copyright's more beneficial structural features. We should, as far as possible, preserve the connection fostered by copyright (attenuated though it may be) between audience demand for works and investment in work.⁸⁵⁸ I have also been arguing that one of the advantages of the price mechanism is that it gives priority to a particular signal—willingness to pay. The nature of that signal matters, because payment for a work is a signal that tends to be more considered and autonomous than the signals associated with 'clickbait' and other structural arrangements organised by advertising and data collection business models. We should try to preserve the integrity of that payment signal, to the extent possible.

7.4.3 Mechanics of a levy on internet intermediaries

I am broadly in favour of a levy, which would require businesses which profit directly or indirectly from distribution and non-commercial sharing of copyright works by their customers and users, to share some of that profit with copyright owners. Netanel recommends, and Lessig and Fisher adopt this recommendation, that the targets of the levy would be businesses that provide:

- equipment used to make copies of digital recordings;
- media used to store such copies;
- services used to gain access to the Internet; and
- peer to peer systems or other services used to share files.⁸⁵⁹

⁸⁵⁸ See Netanel (2003), 36.

⁸⁵⁹ Ibid.

My priority would be to place internet intermediaries firmly in this fourth category, including search engines, social networks and free video on demand services. Such businesses may not, strictly speaking, be providing peer to peer file sharing services, but they certainly facilitate and profit from the free sharing and use of copyright works.

The levy could operate as follows. Copyright works would be tagged with identifying metadata, for example using a technology like blockchain, or YouTube's 'contentID'.⁸⁶⁰ The technology would track and record uses and reproductions of works or parts of works. The records of these uses would then provide information about:

- the works used;
- the platforms on which uses or copies were shared; and
- the extent and frequency of use.

This would help in setting the amount internet intermediaries should pay in relation to use on their platform, and the proportions in which levy money would be distributed among copyright owners.

In effect (though not in legal detail) such a levy would be similar to taking the following two steps: (1) expanding secondary or authorisation liability in relation to internet intermediaries; then (2) making such liability subject to a compulsory licence. Rather than taking the roundabout route of expanding copyright, and then reducing its scope with a compulsory licence, a levy would simply establish an

⁸⁶⁰ Re contentID, see 'How ContentID Works', *YouTube Help > Copyright and rights management > How to Manage Your Copyrights on YouTube*, accessed 10/5/17 from <<https://support.google.com/youtube/answer/2797370>>

analogous liability rule, without the need for showing actual infringement.

Whatever its name—levy or compulsory licence—its object would be to effect a redistribution of wealth and power as between two competing classes of business: copyright owners and internet intermediaries.

Compare this to fair use. Fair use is an ‘all or nothing’ solution. Either a use is fair and proceeds without any authorisation by, or remuneration to, copyright owners; or it is infringing and potentially subject to injunction or (in the US at least) exorbitant statutory damages payments.⁸⁶¹ The distribution of communicative power that results is liable to be somewhat arbitrary. The *Napster* case found Napster’s facilitation of peer to peer sharing to be infringing. As a consequence, Napster failed as a business, the potential social benefits of peer to peer sharing were obstructed.⁸⁶² In the *Googlebooks* case, by contrast, the finding of fair use entrenched the ‘value gap’ and cemented Google’s monopolistic dominance over book search. Neither produced a particularly satisfactory distribution of communicative power.

A liability rule shares communicative power, rather than producing all or nothing outcomes. There is precedent for regulation if this kind, aimed at apportioning (communicative) power between different interest groups.⁸⁶³ We might, in fact, follow Professor Tim Wu, in thinking of the bulk of copyright provisions as instruments of information policy. The greatest volume of actual text

⁸⁶¹ Kozinski (1998), 525.

⁸⁶² On the negative effects of *Napster* and *Grokster* cases on music business innovation, see Lemley and Reese (2014).

⁸⁶³ See Fisher (2004), 174-180 and US Act, §§203, 304(c) and 114(g), for examples of copyright provisions that apportion wealth and communicative power between competing interest groups.

in copyright acts are devoted not to the regulation of authorship, but to the distribution of wealth and power as between organisations that disseminate works. Historically, compulsory licences have been used for apportioning cultural and informational power, particularly in cases where the distribution of such power has shifted because of changes in the technological landscape.⁸⁶⁴ For example, the development of the piano roll put songwriters and pianola roll makers at odds. The mechanical royalty scheme, whereby there is a statutory licence in place for making recordings of a musical work, was a legislative settlement of this dispute.⁸⁶⁵ This conflict and legislative settlement, according to Wu, was the model for the development of copyright law over the 20th century.⁸⁶⁶ A levy would follow the same model of legislative intervention in distributing communicative power between incumbents and innovators.

7.4.4 Benefits of a levy—distributive

The most obvious benefit of a levy, with regard to the first operational principle, is that it would place individuals on a footing where they did not require permission in order to make use of copyright works. Liability rules take away from copyright owners the power to enjoin whatever uses are subject to those liability rules. They remove the prospect of arbitrary enforcement, because they remove the necessity of enforcing against individual infringers. This immediately effectuates a more inclusive distribution of substantive opportunities to engage with works, because

⁸⁶⁴ Wu (2004), 24-31.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ Wu (2004), 8-9.

users no longer have to ask permission of copyright owners to make the relevant uses.

At the same time, the levy would go some way to reducing the ‘value gap’. Those businesses which profited the most from sharing of copyright works, internet intermediaries, would share some of their revenue with copyright owners. Users would gain in communicative power relative to copyright owners and internet intermediaries. This would reduce one asymmetry. And internet intermediaries would share some of their wealth with copyright owners, reducing another asymmetry.

Less obviously, a levy would improve inclusiveness as between incumbent copyright businesses, authors and users at a structural level. It would reduce structural obstacles to inclusiveness, including enforcement and transaction costs, as well as other costs associated with uncertainty. As I noted in chapter 3, the costs of licensing copyright and of enforcing copyright place favour wealthy businesses at the expense of independent authors and non-commercial (or even small, commercial) users of works.⁸⁶⁷ Wealthy businesses can afford the costs of enforcement, they can afford the cost of paying for licences, and they can afford the cost of defending copyright suits. Individuals and smaller players cannot—and the unlikelihood of their enforcing copyright also means that wealthier players can infringe copyright in their works without much risk. The relative benefit of liability rules in this respect is best understood in comparison with fair use exceptions and safe harbours.

⁸⁶⁷ See above, text to n (349).

Fair use exceptions are open ended, and therefore uncertain. They afford users with formal communicative entitlements *vis-à-vis* copyright owners. In substantive terms, however, they may compound the disadvantages of small scale commercial and non-commercial users of works. In the face of uncertainty about whether any given use is fair, wealthy, established businesses can afford to pay for copyright advice, and even to risk copyright infringement. They can defend a suit, or respond to a threat of litigation effectively. Moreover, risk-averse, established commercial are better placed than independent authors or ordinary individuals to pay licence fees. If they do not wish to take the risk that a use may be held not to be a fair use, they can simply price in copyright licence fees. Independent authors or ordinary members of the public do not have the same security.⁸⁶⁸

Similar problems apply with respect to safe harbours. The notice and take down procedure may be abused; or even used in good faith, but in such a way as to target uses that ought to be considered fair. Those without the wherewithal to understand their rights under fair use or fair dealing exceptions are liable simply to concede to a takedown notice, even where it pertains to a use that is not in fact infringing. The people likely to be in this situation are individual, independent authors and non-commercial users. This means the least profitable uses—by individual users—are more readily subjected to enforcement. Meanwhile, the most profitable exploitation of copyright material often goes ahead without remuneration to copyright owners.⁸⁶⁹ The ‘value gap’ described in the previous part

⁸⁶⁸ On the impact of this uncertainty with respect to visual arts, see Adler (2016).

⁸⁶⁹ But see Lemley and Reese (2004), 1349ff for a review of cases in which copyright owners have successfully pursued internet intermediaries such as peer to peer networks.

arises in great part because enforcement against businesses that merely provide the means of sharing works, without having direct knowledge of each instance of sharing is fairly difficult.

A levy would redress these imbalances somewhat.⁸⁷⁰ Transaction costs for using copyright would be taken out of the picture—payment would effectively be automated. The cost of administering a levy might even be offset by the savings in transaction costs—especially those associated with notice and take down arrangements.

The levy, if it worked based on tracking use of works, would also obviate the need for enforcement to some extent, because collection and distribution of levy fees would be administered by the state. Smaller businesses would no longer need to be able to afford to enforce their copyright in order to profit from it.⁸⁷¹ The Facebook video scenario, with billions of valuable views lost on videos posted without authorisation, and taken down too late, would be a thing of the past. The revenue derived from such videos—at least those derived by Facebook—would simply be shared with the copyright owner.⁸⁷²

This would have positive follow on effects for rigour and diversity. The barrier to profiting from copyright would be lowered, and profits derived by smaller players could fund more rigour in their work. The gain in resources and rigour for smaller players would presumably support diversity, because those smaller players' voices would be more powerful and compelling than previously.

⁸⁷⁰ But see *ibid*, 1408 regarding the problematic aspects of targeting technologies rather than the people doing the infringing.

⁸⁷¹ See Litman (2004), 36.

⁸⁷² See above, text to n (669).

7.4.5 Trade-offs

Turning to the second operational concern—the matter of maintaining copyright’s structural function—a liability rule or levy of the kind proposed would disrupt one particular structural relationship that neoclassicists are interested in. That is the relationship between price and demand. Liability rules would permit prices for rights in relation to works being set without the copyright owner’s final say or veto. The value on such a right placed by an *individual* would-be purchaser might be obscured if the price were simply fixed.

My levy would preserve the influence of demand signals to some extent, however. It would be calibrated to ensure, as much as possible, the persistence of signals which are operative in efficient markets. Ideally, levy payments due to copyright owners would be determined based on the use of works. Each copyright owner’s share of levy proceeds would be proportional to the total profits derived from use of that owner’s works.⁸⁷³ The content identification would allow use to be monitored for this purpose. In this respect the levy arrangement I would favour would resemble a compulsory licence as much as a tax, because internet intermediaries would accrue liability to pay on the basis of use.

As for price, there would be various ways to determine the rate per use but, again, compulsory licences are instructive here. Copyright owners and those liable to pay the levy could use compulsory mediation or negotiation to set levy rates, with the possibility of an administrative body or tribunal fixing a rate in case of failure by the parties to agree. This would preserve a semblance of the structures that

⁸⁷³ Fisher (2014), 223.

characterise voluntary transactions. Indeed, some economists have argued that even under the apprehension of intervention by a government body (a governmentally administered liability rule) negotiating parties can still reach efficient bargains regarding copyright licence fees.⁸⁷⁴

The main benefits of imposing a levy on internet intermediaries (but not on individuals) are these. Internet intermediaries would share power and resources with copyright owners, which bolsters the production function and supports rigour. At the same time, barriers to use and sharing for individuals would be lowered. Individuals would make gains in autonomy, being more empowered to contribute to culture on their own terms (inclusiveness). They could access, more easily, through sharing, a wide range of perspectives and works (diversity). And, since levy distribution would be connected to use of works, signals about users' demand for works would retain a role in directing allocation of resources in the world of works (structural inclusiveness).

There are, however, some trade-offs that come with these benefits. It is important to keep these in mind, not least because of Lessig's emphasis on testing levies for 'harm'. He said the law should revert to a proprietary copyright if the new arrangement 'harmed' creative industries.⁸⁷⁵ I said that in order to make such a decision, we would need to have a clear sense of what was meant by 'harm'. The concept of harm would need to encompass broad qualitative concerns, and not

⁸⁷⁴ See e.g. Ayres and Talley (1995), 1099-1100. Kaplow and Shavell are less optimistic but concede that liability rules may facilitate more efficient bargaining than property rules in certain circumstances, for example when transaction costs are high. See Kaplow and Shavell (1995), 232.

⁸⁷⁵ Lessig (2004), 125.

merely the question of whether a sufficient *number* of works was being created and made accessible to a sufficient *number* of people.

It is hard to predict the nature of such harm in advance, but it seems to me that one particular kind of harm is likely. It has to do with the nature of the 'signal' to which a levy system would give primacy. I have argued that we should preserve, as far as possible, copyright's structural function, by facilitating as close as possible a relationship between audience demand for works and investment in works. This relationship can never be perfect, but to the extent we can approximate it, we should.

By connecting the distribution to the actual use of works, the levy arrangement would approximate this relationship to some extent. But one key ingredient would be missing. One of the benefits of proprietary copyright, structurally speaking, is that copyright industries, in order to be profitable, need to attract paying audiences for their works. Works need to be of a quality that induces such payment. The corresponding problem in the networked information economy is that users' impulsive clicks and consumption are treated as such an important signal. The structural incentives align with increasing user 'time on app'. The objective is to do so by presenting information that distracts users momentarily, or induces impulsive consumption or clicks, rather than aiming to satisfy users.⁸⁷⁶

If users know they have to pay to use works, we could expect them to make more considered decisions about whether to deploy their attention—because the cost of their attention is more evident to them. But if, under the levy system, users

⁸⁷⁶ See above n (691) and accompanying text.

use and share works without paying, then the signal that directs the allocation of resources among internet intermediaries, and now also copyright owners, would be the same. It would be a signal about *willingness to use*, but not necessarily *willingness to pay* for a work.

A levy on internet intermediaries might, in other words, make copyright owners income more dependent on ‘views’ and ‘shares’ of their work, and less dependent on inducing audiences to pay. This might produce a structural incentive for authors and publishers to become even more complicit in online dynamics of filter bubbles, ‘clickbait’, polarisation, and so on, than they are at present. This would not be desirable from the point of view of rigour or diversity.

If a levy regime of the kind I have been discussing resulted in a dramatic redirection of investment, away from works of sustained authorship, and toward ‘clickbait’, perhaps this would be the kind of harm that would mandate a change in tack. One way to respond to this problem would be to take up Lessig’s proposal, and enact levies with a sunset, keeping the door open to returning to markets based on exclusive copyrights and private ordering (rather than governmentally administered rewards like levies). If infrastructure for readily transacting rights to use, share and distribute works were developed, and copyright owners were willing to market rights to re-use and re-mix works directly to the public, that might achieve some of the redistributive effects expected of a levy, with a lower administrative cost.⁸⁷⁷

Another way to respond to the clickbait problem I have just described might be to require commercial and non-commercial users, as well as internet

⁸⁷⁷ For interesting proposals on such a register, see Fraser (2010). On proposals for lowering copyright enforcement costs, and

intermediaries, to pay for their use and sharing of works. A levy on internet intermediaries (at least as conceived by Fisher and Lessig) would seem to make many such uses free: at the very least no-commercial uses. Sticking with exclusive rights, on the other hand, would maintain the direct obstacles to creative uses of works, as well as the structural obstacles (transaction and enforcement costs) that stand in the way of inclusiveness.

A liability rule in relation to non-commercial creative and derivative uses of works could free us from a binary, all or nothing approach to imaginative uses—whether commercial or non-commercial. Uses which were creative, and which permitted individuals to exercise freedom of imagination, but which did not rise to the level of true transformative use, could be subject to a small compulsory payment. Likewise, non-commercial sharing of works—for example, by way of embedding on social networks.

I will not go into detail about the administration of such a liability rule, but a few observations are salient. Perhaps the liability rule could be set up on a similar footing as the levy on internet intermediaries. End-user creative uses and sharing of works could be tracked using metadata attached to works. Liability rule payments could then be tied to individual usage, and distributed to copyright owners *pro rata* to use. Fees could be charged for sharing and use of copyright works much in the same way as internet and phone providers now charge their customers for data usage.

In other words, use and sharing of works could, under this arrangement, be billed like a utility. If power and water bills operate to discourage consumers from using water and power that they do not want or need, a monthly copyright licensing

fees bill might encourage users to consider more carefully how they would like to use their attention. This in turn might have a salutary effect on the filtration and clickbait dynamics we are concerned about.

7.4.6 Injunctions

Despite the potential benefits of levy style liability rules, it is important to keep in mind how dramatic a change to the copyright system would be required to bring them into effect. Whether or not we ever arrive at a levy system, there would still be worth in compromising to some extent on copyright's 'property rule' character. Courts would do well to grant injunctions against copyright infringers only sparingly. There would be merit in adding guidance to copyright legislation regarding remedies to that effect.

We can find a blueprint for this kind of approach in US patent law, in the case of *EBay v Merckexchange*.⁸⁷⁸ In that case, the US Supreme Court held that the generally applicable, four factor test for granting injunctions should apply in respect of patent infringements. Under that test, courts may only award an injunction if: damages would be an inadequate remedy; the harm suffered to the rights holder would be irreparable, were the injunction not granted; the balance of hardship would favour the party seeking the injunction; and the injunction would be in the public interest.⁸⁷⁹

There is certainly scope for such an approach in US copyright law. Indeed, while *eBay* was a patents case, the Supreme Court observed there, in obiter, that in

⁸⁷⁸ 126 S.Ct. 1837 (2006).

⁸⁷⁹ *Ibid*, 1880.

copyright cases, it had 'consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.'⁸⁸⁰ Subsequently, some lower courts have applied the principles from *eBay* in copyright cases.⁸⁸¹ The *eBay* approach may, in other words, proliferate fairly organically in the US.

In other jurisdictions, more positive steps to change the law might be necessary. In England and Wales, for example, if the plaintiff establishes copyright infringement, she will normally be entitled to a permanent injunction to restrain future infringements, unless it is clear that the infringement will no longer occur.⁸⁸² However, the grant of an injunction is also subject to Article 3 of the EU *Enforcement Directive*, which requires the remedies be, among other things, fair and equitable, proportionate, and applied in such a manner as to avoid the creation of barriers to legitimate trade.⁸⁸³ UK courts could use Article 3 to develop an approach to injunctions similar to that in *eBay v Mercexchange* on the basis that granting injunctions in cases where damages would be an adequate remedy (etc.) would not be proportionate, and would create barriers to trade in (and use of) works.⁸⁸⁴

If courts generally awarded damages rather than injunctions, copyright would operate more like a liability rule. The inclusiveness and diversity problems that

⁸⁸⁰ *Ibid*, 1840. See also *Campbell*, 578 and *New York Times Co. v. Tasini*, 533 U.S. 483, 505 for the proposition that the goals of copyright law are not always best served by granting injunctive relief.

⁸⁸¹ See e.g. *Bethesda Softworks, L.L.C. v. Interplay Entm't Corp.*, 452 F. App'x 351 (4th Cir. 2011)

⁸⁸² *Copinger and Skone James on Copyright* (17th ed), 21-229, 21-233. See also *Performing Right Society Ltd v Ciry l Theatrical Syndicate Ltd* [1923] 2 K.B. 146; *Samuelson v Producers Distributing Co Ltd* (1931) 48 R.P.C. 580 at 593.

⁸⁸³ EU: Directive 2004/48/EC

⁸⁸⁴ 547 U.S. 388 (2006).

would arise as a result of enjoining socially valuable and interesting uses of works would be mitigated somewhat. In cases where uses enhanced inclusiveness, diversity or rigour, but did not quite rise to the level of a fair use or fair dealing, we would not be trapped into an all or nothing choice. These uses could be permitted, subject to proportionate damages or the payment of licence fees.⁸⁸⁵ These awards would help to redress the ‘value gap’.

Rules that empower judges to determine the licence fees to be paid to copyright holders do not necessarily mean that, in practice, judges, rather than the parties, will actually set the price for rights in relation to works. Recall, we are interested in copyright’s broad, attenuated influence, and not merely its formal allocation of rights. There are grounds for thinking parties can transact efficiently and reach efficient bargains under liability rules: the uncertainty of a potential damages award encourages parties to transact voluntarily.⁸⁸⁶ In other words, a de-facto liability rule of the kind under consideration, need not disrupt copyright’s structural function of facilitating market transactions.

⁸⁸⁵ For a common sense approach to the award of proportional damages for lost licence fees, see the recent Australian Federal Court case of *Briner v The Happy Herb Company & Ors* [2017] FCCA 1854

⁸⁸⁶ See e.g. Ayres and Talley (1995), 1099-1100. Kaplow and Shavell are less optimistic but concede that liability rules may facilitate more efficient bargaining than property rules in certain circumstances, for example when transaction costs are high. See Kaplow and Shavell (1995), 232.

Conclusion

Copyright as part of a coherent cultural policy

I have offered a brief sketch of how copyright term, fairness exceptions, and liability rules might answer to our qualitative objectives. My objective has been to demonstrate two things. Firstly, we can address doctrinal and policy issues in copyright with qualitative objectives in view, rather than merely through the lens of the incentive-access paradigm. Secondly, adopting such objectives does not necessarily always mean trying to make access to works 'freer'. Sometimes reductions in the strength and scope of formal copyright entitlements produce structural outcomes that are worse for inclusiveness, diversity and rigour than stronger copyright. We should, therefore, try to preserve copyright's beneficial production and structural functions to the extent we can. We should also be aware of the trade-offs in question.

On that note, let me acknowledge a few limitations of liability rules and the other interventions that I have recommended. No single adjustment to the law can be expected to fully dismantle market hierarchies and do away with undesirable concentrations of power, either among copyright businesses or internet intermediaries. The interventions I have proposed somewhat improve the position of independent authors and smaller copyright businesses relative to dominant incumbent copyright businesses, because they reduce enforcement and transaction costs.

However, there would still be a cost to using and sharing works, even under a liability rule regime. This would mean that neither the winner-takes-all dynamics of markets for works, nor the troublesome dynamics of the market for online

attention, would be likely to go away entirely. Those with more money could afford to use and share works more, and authors and intermediaries with successful works would tend to have much more money than those without. In markets for works, demand is uncertain, and winners outdo other works by very large degrees. Under those conditions, businesses with large portfolios of works and large budgets will tend to outdo smaller independent producers of works, because they can spread their bets between blockbusters and other works, and invest more in marketing.

Authors would also remain at a disadvantage in bargaining power with respect to large copyright publishing, marketing and distribution businesses. They would still generally rely on such businesses to reach a large audience, even if they could, in principle, publish cheaply without such intermediaries.⁸⁸⁷ Establishing a minimum royalty percentage for authors to be paid out of the levy pool might go a little way toward mitigating this disadvantage. It might ensure that more successful authors could be furnished with sufficient funds to invest in their works independently of commercial intermediaries.

But even that step would not place authors on an equal footing with experienced and wealthy copyright businesses; nor new market entrants in copyright industries on an equal footing with incumbents. Nor would a liability rule generally do a great deal to disrupt the dominance of internet intermediaries. It might share cultural power as between internet intermediaries and copyright owners, but as between internet intermediaries themselves, it is not clear that it would solve concentration problems. Neither the concentration of power among

⁸⁸⁷ See above text to n (639) for my observations on the ways in which copyright incumbents still dominate attention on the internet relative to less established voices.

incumbent copyright businesses (in relation to individual authors or new entrants to copyright markets) nor the concentration of power among internet intermediaries is entirely attributable to the calibration of copyright. No single input can comprehensively change culture.⁸⁸⁸

Copyright alone cannot solve the problems with creative industries or networked information economies. We will always need to remain conscious of the limits of our interventions, understanding that they involve messy trade-offs. When making recommendations, we are talking of calibrating influences and parameters as best we can, not making surgical and instantaneous changes to culture. This is no cause for fatalism, however.

Benkler wrote that cultural discourse is 'systematically not amenable to formal regulation, management or direction from the political system.'⁸⁸⁹ I would argue, however, that our response to the difficulty of regulating culture ought not to be simply to prefer as little intervention, and as much formal freedom, as possible. By Benkler's own admission, freedom is always relative.⁸⁹⁰ It seems to me that a non-interventionist stance simply amounts to a tacit endorsement of whatever substantive constraints prevail without the intervention; whatever distribution of power or wealth happens to follow from those constraints; and whatever pressures on creative activity that result. That is surely worse than making incremental adjustments to improve the law, limited though those improvements may be.

⁸⁸⁸ Cohen (2007), 1193.

⁸⁸⁹ Benkler (2006), 298.

⁸⁹⁰ See above, text to n(606).

If we have a clear sense of what we desire in our cultural landscape, we ought not shy away from pursuing it. I am optimistic about our capacity to regulate cultural conditions for the better, through copyright law, in spite of its limitations. Where there are limitations, they should encourage us to treat copyright as part of our broader information and cultural policy, and take a coherent approach to convergent bodies of law. We should try to bring copyright law, media ownership law and content regulation, competition law, internet law, and (of course) day to day practice in line, working together to try to address asymmetries of cultural power, and their distorting effects on autonomy and democracy.⁸⁹¹

We may not be able to attain a 'perfect' cultural landscape (as if such a thing could exist). We should however, do our best to work out where the public benefit lies, to understand it in rich qualitative terms, and to keep pursuing what improvements we can. We will need to remain open to continuous evaluation and adjustment. I hope that I have, in this thesis, set out a useful framework for doing so.

⁸⁹¹ For an interesting piece on changes to day to day commercial practice that could influence copyright and cultural policy for the better, see Beer (2017).

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