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Copyright Law in New Zealand: Should We Adopt Fair Use?

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Abstract

Copyright exceptions limit the rights of copyright owners to control the reproduction, distribution, performance and display of their works. Fair use and fair dealing are models of statutory copyright exceptions that developed from the same body of common law in the United Kingdom. Fair use is found in the United States of America and several other jurisdictions. It involves an assessment of the fairness of the use of a copyrighted work and is characterised by its inherent flexibility. Fair dealing is found in a number of Commonwealth jurisdictions, including New Zealand, and also involves an assessment of the fairness of the use. However, in order for a use to constitute a fair dealing, the use must first fall within the scope of certain enumerated purposes. Accordingly, fair dealing is more restrictive than fair use, less able to adapt to new technologies and is more likely to limit uses of copyrighted works that do not harm copyright owner's markets. In response to rapid advances in digital technology a number of fair dealing jurisdictions have recently expanded their copyright exceptions with some, such as Australia and Ireland, recommending the adoption of fair use. The advantages of fair use are numerous and extensive. These advantages include that fair use promotes the objective of copyright, is flexible and technology neutral, is sufficiently certain, aligns with public expectations and uses of copyright and complies with international treaties and trade agreements. Accordingly, this paper argues that New Zealand should adopt a fair use exception into its copyright law.

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List of Abbreviations

ALRC	Australian Law Reform Commission
API	Application Programme Interface
AUSFTA	Australia United States Free Trade Agreement
CAOIA	Copyright Amendment (Online Infringement) Act 2015 (Australia)
CD	Compact Disc
CDPA	Copyright Design and Patents Act 1988 (UK)
CIFSA	Copyright (Infringing File Sharing) Amendment Act 2011(NZ)
CMA	Copyright Modernization Act (Canada)
CNTAA	Copyright (New Technologies) Amendment Act 2008 (NZ)
CRC	Copyright Review Committee (Australia)
CRRA	Copyright and Related Rights Act 2000 (Ireland)
CRRIAB	Copyright and Related Rights (Innovation) (Amendment) Bill 2015
ECHR	European Convention of Human Rights
EC	European Commission
EU	European Union
ISP	Internet Service Provider
LSUC	Law Society of Upper Canada
NZ	New Zealand
NZ BORA	New Zealand Bill of Rights Act 1990
PC	Productivity Commission
TDM	Text and Data Mining
TPM	Technological Protection Measure
TPP	Trans Pacific Partnership Agreement
TRIPS	World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property 1996
UGC	User-generated Content
UK	United Kingdom
US	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty 1996
WTO	World Trade Organisation

Section 107 Copyright Act 1976 (US)

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Chapter 1: Introduction

Fair use is a flexible legal doctrine that permits the use of copyright works without acquiring permission from copyright owners. Fair use has the potential to stimulate new productive uses of copyright works, termed “transformative uses”¹ and thereby promote innovation and economic growth.² Fair use is also said to promote the objective of copyright and fix imbalances in the copyright system that exist between users and owners of copyright works.³ This paper will argue that the advantages of fair use are numerous and extensive and accordingly, that a fair use exception should be adopted into New Zealand copyright law.

Copyright is a form of intellectual property and is the term used to describe the rights given to creators of various works including; literary, dramatic, musical and artistic works, sound recordings and films, communication works and typographical arrangements.⁴ Copyright protects original works against unauthorised use, including copying or adapting a work, for a limited duration.⁵ The objective of copyright is to encourage innovation and artistic creativity by stimulating the production and dissemination of copyright works for the public benefit.⁶ Copyright law attempts to realise this objective by balancing the proprietary rights and interests of copyright owners, sometimes termed “rights-holders”, against the rights and interests of potential users of copyright works.⁷ Copyright owners may be individuals, corporations, companies or collecting societies, the latter being entities that provide centralised licencing services of copyright works.⁸

¹ Australian Law Reform Commission *Copyright and the Digital Economy Final Report* (ALRC Report 122 2013) (hereafter termed the “ALRC Review”) at 102.

² Roya Ghafele and Benjamin Gilbert “A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore” (June 2014) Laws <www.mdpi.com>.

³ Ian Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) (hereafter termed the “Hargreaves Review”) at 42.

⁴ Copyright Act 1994, s14 (1).

⁵ Sections 22 to 25. In New Zealand the duration of copyright protection is 50 years from the end of the calendar year of the author’s death for all works (except typographical arrangements for which the duration of protection is 25 years from the author’s death).

⁶ Susanna Monseu “Copyright and the Digital Economy: Is it Necessary to Adopt Fair Use?” (March 2015) Social Science Research Network <www.papers.ssrn.com> at 5.

⁷ Copyright Review Committee Ireland *Modernising Copyright* (2013) at 58.

⁸ Copyright Council of New Zealand “Copyright Administration” (July 2016) <www.copyright.org.nz>.

The primary legal mechanism used to achieve the balance between owners and users of copyright works is the enactment of statutory exceptions to the protection afforded to copyright owners.⁹ Copyright exceptions are designed to allow uses of copyright works that offer benefits deemed either more important than those produced by the objective of copyright and/or benefits that do not substantially detract from that objective.¹⁰ These statutory exceptions limit the broad rights of copyright owners to control the reproduction, distribution, performance, and display of their works. They also accommodate a variety of economic, political, cultural, social and informational purposes.¹¹ Accordingly, the scope of these exceptions varies substantially between different jurisdictions. The statutory exceptions also differ between jurisdictions with respect to their nomenclature. For the purposes of this paper the term “exception” will encompass any statutory “limitation”, “defence,” “non-infringing use”, “free use”, “user’s right” or “permitted act” which allow a person to utilise copyright works without infringing copyright and without first requiring authorisation from the owners of those works.

The Statute of Anne enacted in England in 1709 forms the basis of modern copyright law in the United States of America (“United States”), the United Kingdom and Commonwealth countries including New Zealand, Australia, Canada and Ireland.¹² Copyright law developed in different jurisdictions by way of various modern copyright statutes, judicial decisions and obligations imposed by international instruments and trade agreements.¹³ In the last century copyright law has functioned to gradually expand the proprietary rights of copyright owners by, inter alia, widening the scope of works protected by copyright, increasing the duration of copyright protection and narrowing the scope of the statutory exceptions.¹⁴ This “long and strong copyright” has arguably heavily tipped the

⁹ Louise Longdin “Copyright and Fair Use in the Digital Age” (2004) 6 Business Review 2 at 1.

¹⁰ *Hargreaves Review*, above n 3, at 42.

¹¹ Bernt Hugenholtz and Martin Senftleben “Fair Use in Europe: In Search of Flexibilities” (2011) Instituut voor Informatierecht <www.ivir.nl> at 6.

¹² Matthew Sag “The Prehistory of Fair Use” (2010-2011) 76 Brooklyn Law Review 1371 at 1371.

¹³ Including the Berne Convention for the Protection of Literary and Artistic Works 1971; Agreement on Trade-Related Aspects of Intellectual Property Rights 1996; World Intellectual Property Organization Copyright Treaty 1996.

¹⁴ For example; the Sonny Bono Copyright Term Extension Act 1998 (US) which extended the term of all existing and future copyrights by a term of 20 years and the Derivative Works Right enacted in s 110 of the Copyright Act 1976 (US) which protects translations, dramatizations, movie versions, fictionalizations, abridgements “or any other form in which a work may be recast, transformed, or adapted.”

balance in favour of copyright owners.¹⁵ Where such an imbalance exists between owners and users, it is doubtful as to whether copyright law is realising its objective.

In addition to attempting to achieve an optimal balance between copyright owners and users, copyright law must also balance the maxim of legal security, which favours legal provisions that provide predictability of outcome; and; the principle of fairness, which favours flexible legal principles that permit a broad scope of judicial interpretation.¹⁶ Almost all domestic copyright laws include exceptions that are typically achieved through the adoption of either a fair use or a fair dealing model.¹⁷ Although fair use and the fair dealing share the same common law sources, they are intrinsically different in their statutory form and application.¹⁸ The key feature of fair use that distinguishes it from fair dealing is its inherent flexibility.

Fair dealing is commonly found in Commonwealth countries such as the United Kingdom, Australia, New Zealand, Ireland and Canada. Unlike fair use, fair dealing is confined to an exhaustive list of enumerated purposes. Use of a work may be termed fair dealing, and therefore may not infringe copyright, if the purpose for its use is one which falls within the prescribed statutory purposes. These purposes, including their number and scope, vary between jurisdictions.¹⁹ In New Zealand the enumerated purposes are criticism or review²⁰, the reporting of current events²¹ and research or private study.²² Because fair dealing limits the purposes for which a copyright work may be used, it is often argued by copyright owners to have greater legal certainty and to reduce the transfer of value away from copyright

¹⁵Patricia Aufderheide and Peter Jaszi *Reclaiming Fair Use. How to Put the Balance Back in Copyright* (University of Chicago Press, Chicago, 2011) at 16.

¹⁶ Hugenholtz and Senftleben, above n 11, at 6.

¹⁷ Michael Giest "Fairness Found: How Canada has quietly shifted from Fair Dealing to Fair Use" in Michael Giest (ed) *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, Ottawa, 2013) at 157.

¹⁸ Sag, above n 12, at 1373.

¹⁹ For example in New Zealand there are four purposes set out in ss 42 and 43 of the Copyright Act whereas the European Union Information Society Directive, Article 5 sets out 20 purposes for uses of copyright works which Member States may establish exceptions.

²⁰ Copyright Act, s 42(1).

²¹ Sections 42(2) and 42(3) provided such fair dealing is accompanied by sufficient acknowledgement in relation to specific types of works.

²² Section 43.

owners to copyright users.²³ However, by limiting these purposes, fair dealing may also create an unnecessary restriction on the use of copyright works.

Fair use is most closely associated with the United States although has also been adopted by other countries including Israel²⁴, Taiwan²⁵ Singapore²⁶ and the Philippines.²⁷ The United States' fair use provision is found in s 107 of the Copyright Act 1976 (US).²⁸ Section 107 provides that a use of a copyright work does not infringe copyright if it is "fair". In order to determine if a use is fair certain principles of fairness are considered, including the four "fairness factors" outlined in the provision.²⁹ Section 107 also contains a non-exhaustive list of illustrative purposes and leaves open the possibility of additional new purposes being considered fair. Accordingly, s 107 has been applied to a wide range of activities that fall outside of the boundaries of those listed in the provision.³⁰ The flexibility of fair use means it is better able to adapt to new technologies and new consumer practices than fair dealing.³¹

Historically, it has been the advent of new communication and information technologies that has upset the balance and exacerbated tensions between copyright owners and users.³² The development of the photocopier led to the amendment of international and domestic laws to cater for reprographic processes.³³ The advent of the home video recorder in the 1980's, which permitted consumers to engage in time shifting of copyright works, created conflict between owners and users that was ultimately resolved by the United States Supreme Court pursuant to s 107.³⁴ The recent rapid explosion of digital technology has once again exacerbated

²³ Australian Copyright Council "Submission Australian Law Commission Copyright and the Digital Economy" <www.alrc.gov.au>.

²⁴ Copyright Act 2007 (Israel), art 19.

²⁵ Copyright Act 2007 (Taiwan), art 65.

²⁶ Singapore Copyright Act, cl III.35

²⁷ Copyright Act 1994 (Philippines), s 185.1.

²⁸ Copyright Act 1976 (US), s 107.

²⁹ Section 107 "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include...*" (emphasis added).

³⁰ *ALRC Review*, above n 1, at 88.

³¹ Google Inc "Google submission, Australian Law Commission Copyright and the Digital Economy" <www.alrc.gov.au>

³² Dilan Thampapillai "Creating an Innovation Exception? Copyright Law as the Infrastructure for Innovation" (2010) Script-ed <www.scripted.org> at 109.

³³ Longdin, above n 9, at 3.

³⁴ *Sony Corp v Universal Studios* 464 US 417 (1984).

tensions between owners and users as to the parameters of copyright protection.³⁵ Digital technology permits works to be quickly, easily and often anonymously, copied, transmitted, uploaded, downloaded or linked to any site in any jurisdiction.³⁶ Digital delivery provides efficiency and savings for individuals, businesses and governments to drive further economic growth including creating new revenue sources for copyright owners.³⁷ However, it also provides extensive scope for unremunerated and unauthorised copying.³⁸

In response to the issues created by the growth in digital technology, governments in several countries have commissioned consultations on their copyright schemes resulting in the recent release of a number of reports and issues papers.³⁹ While differing jurisdictions vary considerably as to the nature of their proposed copyright reforms, a common issue is the role and framework of the statutory exceptions to copyright. It is recognised that if the exceptions to copyright protection are too broad this may disincentivise owners to create, but conversely if the exceptions are too narrow, innovation and freedom of expression may be hampered.⁴⁰ In the United Kingdom,⁴¹ Australia⁴² and Ireland,⁴³ law reformists have recommended the adoption of fair use. In Canada, the statutory fair dealing exceptions have been expanded and interpreted so liberally by the courts⁴⁴ that Canada now has a fair use provision in everything but name only.⁴⁵

³⁵ Monseau, above n 6, at 2.

³⁶ Longdin, above n 9, at 5.

³⁷ Australian Law Reform Commission *Copyright and the Digital Economy Summary Report* (ALRC Summary Report 122 2013) at 6.

³⁸ Melissa De Zwart “The future of fair dealing in Australia: Protecting freedom of communication” (March 2007) Script-ed <www.scripted.org> at 98.

³⁹ ALRC Review, above n 1; Copyright Review Committee Ireland *Copyright and Innovation: A Consultation Paper* (2012), Copyright Review Committee Ireland *Modernising Copyright* (2013) (hereafter termed “*Modernising Copyright*”); European Commission *Public Consultation on the Review of the EU Copyright Rules* (2013); European Commission *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules* (2014); “Hargreaves Review, above n 3; Ian Hargreaves and Bernt Hugenholtz *Copyright Reform for Growth and Jobs: Lisbon Council Policy Brief – Modernising the European Copyright Framework* (2013); UK Government: *Consultation on Copyright* (2011); UK Government Policy Statement: *Consultation on Modernising Copyright* (2012); UK HM Treasury *Gowers Review of Intellectual Property December 2006* (2006) (hereafter termed the “*Gowers Review*”).

⁴⁰ *Modernising Copyright* (2013), above n 39, at 58

⁴¹ *Hargreaves Review*, above n 3.

⁴² ALRC Review, above n 1, at 102.

⁴³ *Modernising Copyright* (2013), above n 39.

⁴⁴ Copyright Modernization Act 2012; *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

⁴⁵ Giest, above n 17, at 180.

Notwithstanding that fair use and fair dealing are different in form and application, both models of statutory exceptions must comply with the relevant provisions set out in international intellectual property treaties. Most developed industrial nations, including New Zealand, are Member States of the Berne Convention for the Protection of Literary and Artistic Works 1971 (“Berne Convention”) and the World Trade Organization’s (WTO) agreement on Trade Related Aspects of Intellectual Property 1996 (“TRIPS Agreement”). These instruments require certain minimum standards in copyright law, the most important in relation to copyright exceptions being the three-step test found in art 9(2) of the Berne Convention and in art 13 of the TRIPS Agreement. The three-step test is the international standard for assessing the permissibility of copyright exceptions.⁴⁶ There is some debate as to whether or not fair use, being an open-ended exception, meets the requirements of the three-step test.⁴⁷ The position taken by various jurisdictions as to whether or not to adopt fair use has been influenced by each jurisdiction’s view as to whether it will meet the requirements of the three-step test and accordingly, whether such reform will satisfy international obligations.⁴⁸

A number of international trade agreements, particularly those between the United States and other industrialised nations, contain provisions which have required those nations to amend their domestic laws to increase copyright protection.⁴⁹ On 4 February 2016, after considerable negotiation, New Zealand became a signatory to the Trans-Pacific Partnership Agreement (TPP), a multi-national free trade agreement involving 12 countries including the United States.⁵⁰ Whether the TPP will come into force will depend on whether international agreement can be reached between signatories as to its content and implementation. The intellectual property chapter of the TPP comprises an extensive set of provisions, many of which go

⁴⁶ Hugenholtz and Senftleben, above n 11, at 21.

⁴⁷ Christopher Geiger, Daniel Gervais and Martin Senftleben “The Three-Step Test Revisited: How to use the Test’s Flexibilities in National Copyright Law” (2014) 29 *American University International Law Review* 581.

⁴⁸ *ALRC Review*, above n 1, at 116. The Australian Law Reform Commission is of the view that fair use complies with the three-step test.

⁴⁹ For example the Australia-United States Free Trade Agreement (AUSFTA) required Australia to increase the penalties for copyright infringement and lengthen the copyright term in Australia.

⁵⁰ New Zealand Foreign Affairs & Trade “Trans-Pacific Partnership Signed” (4 February 2016) <www.mfat.govt.nz>.

beyond the obligations New Zealand currently has under international instruments.⁵¹ The TPP provisions specifically related to the exceptions to copyright, as currently drafted, are consistent with New Zealand's existing copyright law.⁵² However, New Zealand has agreed pursuant to the requirements of the TPP, to extend its existing laws on technological protection measures (TPMs) and the use of devices that may circumvent TPMs (often termed "anti-circumvention laws").⁵³ TPMs are technical locks copyright owners use to restrict the use of their material stored in digital format, for example, encryption software.⁵⁴ Anti-circumvention laws are argued by some authors to reduce the ability of copyright users to engage in the fair use of copyright works.⁵⁵

New Zealand copyright law is governed by the Copyright Act 1994 ("the Act"). The exceptions to copyright, termed "acts permitted in relation to copyright works" are found in Part III of the Act and include the fair dealing exceptions.⁵⁶ Although New Zealand's regime of statutory exceptions is reasonably comprehensive, the Act has a narrow scope of purposes for fair dealing compared to other jurisdictions where fair dealing for parody and satire,⁵⁷ the provision of legal advice,⁵⁸ education⁵⁹, caricature, parody and pastiche⁶⁰ and quotation⁶¹ is also permitted.

Copyright law in New Zealand is long overdue for reform. Unlike other fair dealing jurisdictions, the New Zealand government has not commissioned a review of its copyright regime in recent years. The Act was to be reviewed in 2014, however this review was postponed until after TPP negotiations were concluded.⁶² It is

⁵¹Ministry of Business, Innovation and Employment *Targeted Consultation Document. Implementation of the Trans-Pacific Partnership Intellectual Property Chapter* (2016); the legally verified text of the TPP was released on 26 January 2016 and can be accessed at <www.tpp.mfat.govt.nz>.

⁵² Ministry of Foreign Affairs & Trade "Trans-Pacific Partnership Intellectual Property Fact Sheet" (2016) <www.tpp.mfat.govt.nz>.

⁵³ New Zealand's anti-circumvention laws are found in ss 226A to 226E of the Copyright Act.

⁵⁴ Ministry of Business, Innovation and Employment "TPM Question and Answer Sheet" <www.mbie.govt.nz>.

⁵⁵ June M Beseck "Anti-circumvention Laws and Copyright: A Report from the Kernochan Centre for Law, Media and the Arts" (2004) 27 Columbia Journal of Law & the Arts 385 at 390.

⁵⁶ Copyright Act, ss 42 and 43.

⁵⁷ Copyright Act 1968 (Cth) (Australia), s 42.

⁵⁸ Section 43.

⁵⁹ Copyright Act of Canada RSC, s 29.

⁶⁰ Copyright Design and Patents Act 1988 (UK), s 30.

⁶¹ Section 30.

⁶² Cabinet Economic Growth and Infrastructure Committee Paper "Delayed Review of the Copyright Act 1994" (July 2013) at 1.

recognised by the New Zealand Government that “it is likely that many of the provisions setting out exceptions to copyright are now out of date with current technology.”⁶³ Accordingly, if a review of New Zealand copyright law is to be undertaken in the not-too-distant-future, the time is ripe for a comprehensive review of the statutory exceptions scheme. As part of that review, serious consideration should be given to the adoption of fair use into New Zealand copyright law.

In this paper it will be argued that any future reform to New Zealand copyright law should include the adoption of a fair use exception. The adoption of fair use will enable New Zealand to grow a more technologically innovative digital business environment as it better adapts to novel technologies than fair dealing. It also promotes transformative uses of copyright works and innovation by permitting trial and error by innovators, with the courts able to act as a backstop to adjudicate if copyright owners object that innovators have infringed their rights.⁶⁴ The New Zealand judiciary has demonstrated it is prepared to weigh up factors analogous to those fairness factors found in the United States fair use provision in order to determine whether the use of a copyright work is fair.⁶⁵ The adoption of fair use in New Zealand will ensure that users of copyright works have better access to these works and in doing so fair use will better promote the objective of copyright and ensure a more optimal balance between copyright owners and users. Finally, there is a strong argument that fair use complies with the three-step test and accordingly, would not conflict with the obligations New Zealand has under international treaties or trade agreements.

In the event that the New Zealand Government is not so minded to consider the adoption of fair use, it is proposed that expansion of the existing fair dealing exceptions would constitute the minimal necessary reform in order for New Zealand copyright law to keep pace with digital technology. A new fair dealing exception would consolidate the existing purposes and include new purposes similar to those found in other fair dealing jurisdictions. While this new fair dealing exception would permit a greater variety of uses to fall within its ambit, it is less flexible and less well suited to the digital environment than fair use.

⁶³ At 1.

⁶⁴ *Hargreaves Review*, above n 3, at 43.

⁶⁵ *Media Works NZ Ltd & Anor v Sky Television Network Ltd* (2007) 74 IPR 205 at [56] to [82].

1.1 Chapter Outline

This thesis has six chapters. The first introductory chapter sets out the background and policy considerations underlying the law of the exceptions to copyright and the rationale for the adoption of fair use in New Zealand.

The second chapter provides an overview of the law of the exceptions to copyright as it has developed historically and as it is currently set out in international instruments and trade agreements. Fair dealing and fair use originate from the same body of common law, being the flexible judicial doctrine of “fair user” that developed in the United States and the United Kingdom in the 19th century. It will be argued that the enactment and interpretation of the fair dealing provisions in Commonwealth jurisdictions in the 20th and 21st century has functioned to limit the scope and application of the fair user doctrine. In this chapter it will also be argued that a statutory framework containing a fair use exception does not conflict with the obligations New Zealand has under international trade agreements and treaties.

The third chapter examines fair dealing in other Commonwealth jurisdictions and copyright exceptions in the European Union, including analysis of the treatment of fair dealing by the judiciary, recommended copyright reforms and differing approaches taken to reform. It will be evident that the reforms proposed in these jurisdictions are underpinned by the need for increased flexibility. It will be argued that fair dealing, as it is currently enacted and as it is interpreted by the courts in some of these jurisdictions, fails to provide the flexibility needed for copyright law to keep pace with rapid developments in digital technology.

The fourth chapter reviews fair use, including analysis of its historical and current application in the courts of the United States and the methods through which it is being effectively utilised by copyright users in the United States through the development of codes of best practice. The case for fair use is presented and the argument developed that flexibility is a crucial requirement of any statutory copyright exception scheme in the digital age and that only fair use provides sufficient flexibility.

The fifth chapter examines the law of the statutory exceptions to copyright in New Zealand, particularly the fair dealing exceptions and how these have been interpreted by the New Zealand courts. It will be argued that fair dealing in New Zealand does not sufficiently promote the objective of copyright, does not facilitate growth and innovation in the digital environment in New Zealand or align with the reasonable expectations and uses of copyright works by the general public.

The sixth chapter makes recommendations as to how fair use may be most effectively adopted into New Zealand copyright law and implemented by copyright users in New Zealand. An alternative option for reform to accommodate new uses of technology in New Zealand, being the enactment of a new fair dealing exception, is also proposed. The conclusion is drawn that the fair use should be adopted into New Zealand copyright law.

Chapter 2: The Exceptions to Copyright Protection

2.1 The Historical Development of the Law of Exceptions

2.1.1 The Doctrine of Fair Abridgement

Copyright law in the United Kingdom emerged as a means of commercially rewarding literary entrepreneurs.⁶⁶ The Statute of Anne 1709 (“the Statute”) forms the basis of modern copyright law in the United States, the United Kingdom and other Commonwealth countries including New Zealand, Australia, Ireland and Canada.⁶⁷ The Statute was “An Act for the Encouragement of Learning by Vesting Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”⁶⁸ and was the first statute to provide for copyright to be regulated by Parliament and the courts.⁶⁹ The rights granted to authors under the Statute were the right to copy and to have exclusive control over the printing and reprinting of their works.⁷⁰ The Statute was concerned with exact and entire reprinting of works and did not address the copying of parts of works, translations or abridgements of works.⁷¹ Although the Statute contained no enumerated exceptions, early English copyright decisions following its enactment recognised that there may be acceptable non-licensed uses of copyright works that were not infringing.⁷² In the landmark 1740 case *Gyles v Wilcox*, Lord Hardwicke noted that the Statute should not be interpreted:⁷³

...so far as to restrain persons from making *a real and fair abridgement*, for abridgments may with great propriety be called a new book, because not only the paper and print but the invention, learning and judgment of the author is shewn in them.

⁶⁶ Anthony Christopher Seymour “Fair Dealing’: a quaint footnote to the British copyright regime?” (LLM, Durham University, 2008) at 1.

⁶⁷ Sag, above n 12, at 1371.

⁶⁸ Statute of Anne 1709, Long Title.

⁶⁹ R Deazley “Commentary on the Statute of Anne 1710” in L Bently and M Kretschmer “Primary Sources on Copyright 1450-1900” (2008) <www.copyrighthistory.org>.

⁷⁰ Statute of Anne 1709, art I.

⁷¹ Sag, above n 12, at 1381.

⁷² Peter Brudenal “The Future of Fair Dealing in Australian Copyright Law” (1997) 1 JILT at 3.

⁷³ *Gyles v Wilcox* (1740) 26 Eng Rep at 490 (emphasis added).

This purposive interpretation by Lord Hardwicke confirmed the legality of “fair abridgement” and made clear that copyright was not limited to mechanical acts of reproduction, despite the Statute’s seemingly narrow grant of rights to authors to only copy, print or reprint. The *Gyles v Wilcox* decision established what was termed the “doctrine of fair abridgement”. The doctrine of fair abridgement acknowledged that the abridgement of larger works into smaller extracts was vital to educational advancement and accordingly, the practice of abridgement was consistent with the stated purpose of the Statute, being the “Encouragement of Learning”.⁷⁴

The doctrine of fair abridgement is commonly perceived as the precursor to fair use.⁷⁵ Matthew Sag notes that many of the considerations present in modern fair use cases were evident in early English fair abridgement decisions.⁷⁶ These considerations include the effect of the non-authorised use of copyright works on the market, the use to which the alleged infringing work had been put (for example whether the work was transformative) and the proportion of the original work that had been copied.⁷⁷ The principled case-by-case approach utilised in modern fair use cases was also evident in fair abridgement decisions.⁷⁸ In *Dodsley v Kinnersley* the Court held that whether an abridgement of a work was fair was a complex factual question that required a case-by-case analysis and “resisted any formula or bright line rules”.⁷⁹

2.1.2 Development of the Doctrine of Fair Use

In the early nineteenth century the application of the fair abridgement doctrine expanded to cases where the allegedly infringing work was not an abridgement and in fact was some other derivative use. In *Cary v Kearsley*, Lord Ellenborough noted, where the defendant had added his own observations and corrected errors in a copyright book of road maps, that this was likely to be evidence that the defendant’s work was not an infringing copy.⁸⁰ Although the copying of road maps

⁷⁴ Sag, above n 12, at 1391.

⁷⁵ Benedict Atkinson and Bryan Fitzgerald *A Short History of Copyright: The Genie of Information* (Springer, Switzerland, 2014) at 38.

⁷⁶ Sag, above n 12, at 1393.

⁷⁷ At 1393.

⁷⁸ At 1393.

⁷⁹ *Dodsley v Kinnersley* (1761) Amb 403.

⁸⁰ *Cary v Kearsley* (1804) 4 ESP C 169.

was not strictly an abridgement, this was not the concern of the Court. The focus of the Court in *Cary v Kearsley* was whether the defendant engaged in fair use of the copyright material and whether that use delivered a public benefit. This has been said to represent the beginning of a judicial recognition of fairness in relation to the use of factual materials in the creation of new works.⁸¹ In *Wilkins v Aikin* the defendant acknowledged the source of the excerpts he had quoted from the original work within his allegedly infringing essay.⁸² Lord Chancellor Eldon recognised that copyright extended to partial reproduction of a work but that “fair quotation” must be allowed.⁸³ Whether a quotation was fair was to be determined in the context of each case and included consideration of whether the defendant had acknowledged the original work and whether the use of the quotation was for a purpose different to that of the original work.⁸⁴

The body of case law that had developed in English copyright law was highly influential on early copyright decisions in the courts of the United States. Although the United States legislature passed the Copyright Act in 1833, the application of the principles of fair abridgement, and later those of fair use, was left to the judiciary.⁸⁵ The analysis undertaken by Justice Story in *Folsom v Marsh*,⁸⁶ as to whether a claim for fair use should be approved, contained many of the considerations seen in earlier English fair abridgement cases.⁸⁷ Justice Story found that the defendant’s work was infringing, having analysed various factors including; the nature and purpose of the selections made by the defendant, the quantity and value of the materials used and the degree in which the use would have diminished the profits made by the plaintiffs, or superseded the original work. The analysis of Justice Story eventually formed the basis of section 107 of the Copyright Act 1976 (US).⁸⁸ For this reason, *Folsom v Marsh* is often cited as the origin of fair use.⁸⁹

⁸¹ Alexandra Sims “Appellations of Piracy: Fair Dealing’s Prehistory” (2011) 1 IPLJ 3 at 21.

⁸² *Wilkins v. Aikin* (1810) 17 Ves Jun at 421.

⁸³ At 422.

⁸⁴ At 425. This is now termed a “transformative use.”

⁸⁵ Atkinson and Fitzgerald above n 75, at 38.

⁸⁶ *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841) (No 4901).

⁸⁷ Sag, above n 12 at 1374. In his decision Justice Story cited 16 English fair abridgement authorities and no United States copyright authorities.

⁸⁸ Atkinson and Fitzgerald, above n 75, at 39.

⁸⁹ L Ray Patterson “Folsom v Marsh and Its Legacy” (1998) 5 JIPL 431 at 431.

2.1.3 Development of the Fair Dealing Exceptions

The doctrine of fair abridgement continued to be gradually broadened in scope by the judiciary in the late nineteenth century in England, eventually developing into what was termed a “fair user” doctrine.⁹⁰ In 1878 the United Kingdom Copyright Commission stated that the answer to the question “what is a fair use of the works of other authors?” was best provided by the courts, as the legislature was unable to set out a principle for every example that may occur.⁹¹ The exceptions to copyright were eventually codified by the legislature in the Copyright Act (UK) 1911. In the 1911 Act certain statutory defences were made available in relation to the infringement of copyright, including the defence of fair dealing for the purposes of private study, research, criticism, review, or newspaper summary.⁹²

Alex Sims notes that the introduction of a fair dealing defence was odd given that it was the intention of Parliament that the provisions regarding the exceptions to copyright merely reflect the law as it was at the time, and that prior to 1911 there had been no mention of private study, research or newspaper summary in connection with copyright exceptions.⁹³ This was reflected in the words of Viscount Haldane, during the second reading of the Copyright Bill 1911 in the House of Lords where he stated that 'fair dealing' was to be equivalent to the doctrine of 'fair user' which existed in the common law.⁹⁴ No explanation was ever given by Parliament for the shift away from the broad principled fair use doctrine being applied by the judiciary towards specific enumerated statutory purposes for fair dealing.⁹⁵ Although it is postulated by authors that the introduction of the new concept of “fair dealing” was because of the acrimonious relationship between the United States and the United Kingdom over copyright law at the time with the United Kingdom reluctant to adopt the term “fair use”⁹⁶ or the desire to bring United Kingdom copyright law in line with the Berne Convention.⁹⁷

⁹⁰ Seymour, above n 66, at 2.

⁹¹ At 21.

⁹² Copyright Act 1911 (US), section 2(1)(i)-(vi) set out six specific circumstances where copyright would not be infringed.

⁹³ Sims, above n 81, at 22. Sims also notes that there was no reference to “quotation” or “refutation” which were uses of copyright works considered by the judiciary to be fair in some cases prior to 1911.

⁹⁴ Copyright Bill 1911 House of Lords 2R Vol X col 117

⁹⁵ Sims, above n 81, at 23

⁹⁶ At 23.

⁹⁷ Seymour, above n 66, at 9. Britain acceded to the Berne Convention in 1886.

2.2 *The Three Step Test*

Although historically fair use and fair dealing originated from the same body of common law, their modern statutory framework differs markedly. Fair use or fair dealing, or a combination of the two models, have been adopted by countries that have ratified certain international instruments and international trade agreements which govern their domestic copyright laws. These instruments and agreements contain provisions which provide guidance to legislatures as to the scope of permissible exceptions and limitations to copyright.⁹⁸ There is much debate among academics as to whether fair use complies with the obligations set out in these instruments and agreements, more specifically whether fair use complies with the three-step test.⁹⁹

2.2.1 *Article 9(2) of the Berne Convention*

The three-step test was first enacted in the 1967 version of the Berne Convention.¹⁰⁰ The Berne Convention is an international agreement governing copyright which was first accepted in Berne, Switzerland, in 1886. New Zealand became a party to the Berne Convention in 1928.¹⁰¹ The current version of the Berne Convention, the Paris Revision, dates from July 24, 1971, and entered into force on October 10, 1974. The Berne Convention requires Member States to provide strong minimum standards of copyright law and contains a number of articles outlining specific restrictions to the rights of copyright owners.¹⁰²

The three-step test controls Member State autonomy in drafting statutory domestic exceptions and may be incorporated directly or function as an aid to the interpretation of domestic legislation.¹⁰³ The three-step test was tabled at the 1967 Stockholm Conference for the Revision of the Berne Convention in order to cover

⁹⁸ For example the Berne Convention, art 9 and the TRIPS Agreement, art 13.

⁹⁹ Geiger Gervais and Senftleben, above n 47, at 581.

¹⁰⁰ Berne Convention, art 9.

¹⁰¹ Although the first version of the Berne Convention came into force in 1886, the United States did not become a party to the Berne Convention until 1989.

¹⁰² For example Berne Convention, art 10(1) which permits quotations to be made from a work provided that their making is compatible with fair practice and art 10(2) which permits an exception to the right of reproduction for the purpose of teaching.

¹⁰³ Geiger and others "Declaration A Balanced Interpretation of the "Three-Step Test" In Copyright Law" 2 (2010) JIPITEC 83 at 120.

both existing and possible future exceptions to copyright and to allow Member States to tailor national exceptions and limitations to their specific domestic needs.¹⁰⁴

The three-step test is found in Article 9(2) of the Berne Convention and reads as follows:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

2.2.2 The Three-Step Test in International Instruments and Agreements

The three-step test has been incorporated into art 10 of the WIPO Copyright Treaty 1996 (WCT) which expanded on aspects of the Berne Convention in order to adapt copyright to the digital age.¹⁰⁵ It has also been incorporated into art 16 of the WIPO Performances and Phonograms Treaty 1996 (WPPT) which deals with the rights of performers and producers of phonograms particularly in the context of the digital environment.¹⁰⁶ These instruments utilise the language of art 9(2) but extend its application beyond the right to reproduction to other rights, including the right of distribution, rental and communication to the public.¹⁰⁷

The TRIPS Agreement is a major international instrument governing copyright internationally and also incorporates art 9(2) of the Berne Convention.¹⁰⁸ However, whereas art 9(2) applies only to exceptions and limitations to the “right of reproduction”, art 13 of the TRIPS Agreement applies to exceptions and limitations to any of the “exclusive rights” conferred by copyright. Article 13 also refers to the protection of the legitimate interests of the “right holder” whereas the original text of art 9(2) refers to the legitimate interests of the “author”. Most notably, art 13

¹⁰⁴ WIPO Standing Committee on Copyright and Related Rights “WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment” 9th Session Geneva June 23-27 2003 <www.wipo.int> at 20.

¹⁰⁵ WCT, arts 10(1) and 10(2).

¹⁰⁶ WPPT, art 16(2).

¹⁰⁷ WCT, arts 6, 7 and 8 and WPPT, arts 9, 12 and 13.

¹⁰⁸ TRIPS Agreement, art 13. New Zealand became a party to the TRIPS Agreement on 1 January 1995.

does not state that Member States “may” permit exceptions to exclusive rights of the author, but instead uses the word “shall” which indicates a more positive obligation.¹⁰⁹ Furthermore, certain copyright works, such as computer programs and data compilations do not require protection under the Berne Convention but do require protection under the TRIPS Agreement.¹¹⁰ Accordingly, the language used in art 13 broadens the scope of the three-step test’s application and increases the restrictions under which Member States are able to develop exceptions to copyright.¹¹¹

The three-step test is inconsistently incorporated into the domestic laws of Member States. It is absent from domestic copyright law the United Kingdom and Canada as the statutory provisions themselves are intended to comply with it.¹¹² In contrast, art 5(5) of the European Union Directive on the Harmonisation of certain aspects of Copyright and Related Rights in the Information Society (the “InfoSoc Directive”) directly incorporates the three-step test using the language in art 13 of the TRIPS Agreement.¹¹³ In other countries such as Australia and Thailand, the three-step test as it is set out in art 13 has also been directly imported into national copyright law.¹¹⁴ Article 18.65(1) of the TPP incorporates the text of art 13 of the TRIPS Agreement. Accordingly, if New Zealand was to adopt the fair use exception into its domestic copyright law, fair use would need to comply with the three-step test in order for New Zealand to continue to meet its international legal and trade obligations.

¹⁰⁹ Tyler G Newby “What’s Fair Here is not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?” (1999) 51 Stanford Law Review at 1633 at 1648.

¹¹⁰ TRIPS Agreement, arts 10(1) and 10(2).

¹¹¹ Newby, above n 109, at 1648.

¹¹² Noppanun Supasiripongchai “Copyright exceptions for research, study and libraries in Thailand: What should be developed and reformed in order to improve the copyright protection regime?” (2014) 1 Thailand Journal of Law and Policy 17 at 21.

¹¹³ Directive on the harmonisation of certain aspects of copyright and related rights in the information society 22 May 2001 (Directive 2001/29/EC) (hereafter termed the “InfoSoc Directive”), art 5(5).

¹¹⁴ The Copyright Act 1968 (Cth), s 200AB (1) (d) (Australia). The provision provides that “conflict with a normal exploitation”, “special case” and “unreasonably prejudice the legitimate interests” have the same meaning as in Article 13 of the TRIPS Agreement; Thailand Copyright Act 1994, s 32 paragraph 1 incorporates the second and third conditions of the three step test.

2.2.3 *Interpretation of the Three-Step Test*

As its name suggests, the three-step test contains three conditions. These conditions permit limitations and exceptions to copyright only:

1. in certain special cases;
2. that do not conflict with the normal exploitation of the work; and
3. that do not unreasonably prejudice the legitimate interests of the author / right-holder

Despite its prevalence in domestic copyright laws, international instruments and trade agreements, there is little consensus as to the interpretation of the three-step test.¹¹⁵ Although art 9(2) of the Berne Convention has never been interpreted officially, art 13 of the TRIPS Agreement has received international analysis. In 2000 the World Trade Organisation Dispute Resolution Panel (the “WTO Panel”) dealt with the interpretation and application of the three-step test contained in art 13 of the TRIPS Agreement in the context of a dispute between the European Union and the United States (case WT/DS160).¹¹⁶ The WTO Panel determined that section 110(5)(B) of the Copyright Act 1976 (US), which permits certain commercial establishments such as bars or restaurants to use musical works without making copyright royalty payments, breached all three steps of the three-step test as incorporated into art 13 of the TRIPS Agreement.¹¹⁷

A crucial issue in regard to the compliance of fair use with the three-step test is whether a use for a purpose other than one of those specified in s 107, complies with the first step, by being a “certain special case”.¹¹⁸ The WTO Panel ruled that Article 13 of the TRIPS Agreement required that exceptions in national legislation should be clearly defined and “narrow in their scope and reach”¹¹⁹ and that the potential scope of users who can rely on an exception is relevant for determining whether an exception is sufficiently limited and therefore compliant.¹²⁰ Unlike fair dealing, fair use can potentially apply to all types of work, to any purposes of the

¹¹⁵ WIPO Standing Committee on Copyright and Related Rights, above n 104.

¹¹⁶ World Trade Organization United States – Section 110(5) of the US Copyright Act. Report of the Panel. WT/DS160 (15 June 2000) (hereafter termed the “WTO Panel Report”).

¹¹⁷ At 69.

¹¹⁸ WIPO Standing Committee on Copyright and Related Rights, above n 104, at 21.

¹¹⁹ WTO Panel Report, above n 116, at 33.

¹²⁰ At 33.

use of a work and can be relied on by any user of a copyright work to defend a claim of infringement. Accordingly, it is argued by some copyright scholars that fair use is too broad to qualify as a “certain special case.”¹²¹

Other copyright scholars disagree with the WTO Panel’s interpretation of the three-step test.¹²² A joint project by the Max Planck Institute for Intellectual Property, Competition and Tax Law and the Queen Mary University of London in 2008 brought together a group of experts who drafted the “Declaration for a Balanced Interpretation Of The 'Three-Step Test in Copyright Law" (the “Declaration”).¹²³ The Declaration proposed that an appropriately balanced interpretation of the Three-Step Test is “one in which existing exceptions and limitations within domestic law are not unduly restricted and the introduction of appropriately balanced exceptions and limitations is not precluded.”¹²⁴ The Declaration also noted that the first step of the three-step test does not preclude legislatures from introducing or retaining open-ended exceptions as long as the scope of such provisions is reasonably foreseeable.¹²⁵ Other authors agree and further state that it was never the intention of those who drafted the three-step test for it to act as type of straightjacket to the development of copyright exceptions.¹²⁶ This argument is supported by the following Agreed Statement approved by the Diplomatic Conference that adopted the WCT and WPPT in respect of art 10 of the WCT:¹²⁷

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, *these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.*¹²⁸

¹²¹ WIPO Standing Committee on Copyright and Related Rights, above n 104, at 69.

¹²² Geiger, Gervais and Senfleben, above n 47, at 592; Newby, above n 102, at 1633.

¹²³ Geiger, Gervais and Senfleben, above n 47.

¹²⁴ At 592.

¹²⁵ At 592.

¹²⁶ Matthew Sag “The imaginary conflict between fair use and international copyright law” (2013) <www.matthewsag.com>.

¹²⁷ *Agreed Statements Concerning the WIPO Performances and Phonograms Treaty*, adopted by the Diplomatic Conference on 20 December 1996, concerning art 16. Article 16 of the WPPT applies mutatis mutandis to art 10 of the WCT.

¹²⁸ *Agreed Statements Concerning the WIPO Copyright Treaty*, adopted by the Diplomatic Conference on 20 December 1996, concerning art 10 (emphasis added).

2.2.4 Summary

The three-step test was enacted in order to provide flexibility for Member States to adapt their domestic law as new technologies and uses of copyright works developed. Article 13 of the TRIPS Agreement must also be read in conjunction with art 7 which specifically refers to the necessary balancing of interests of copyright owners and users:¹²⁹

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, *to the mutual advantage of producers and users* of technological knowledge and in a manner conducive to social and economic welfare, *and to a balance of rights and obligations*.

A not unduly restricted interpretation of the three-step test strikes a better balance between the rights of copyright owners and users as envisaged in art 7. Such an interpretation of the three-step test shares the same objectives as, and does not conflict with, fair use. Accordingly, the adoption of fair use in New Zealand would arguably not compromise obligations New Zealand has under international trade agreements and treaties, including the TPP and the TRIPS Agreement.

¹²⁹ TRIPS Agreement, art 7 (emphasis added).

Chapter 3: Fair Dealing

Fair dealing, as introduced in the Copyright Act 1911 (UK), contains a list of prescribed purposes for which the use of a copyright work is permitted without requiring authorisation from the copyright owner. The prescribed purposes are exhaustive, meaning that it is irrelevant whether or not the use of a copyright work is fair; it will constitute copyright infringement if it has been copied for a purpose not prescribed. Unlike fair use, fair dealing involves a two-stage analysis. Once it is determined that a use falls within one of the prescribed purposes, it is then necessary to consider whether the use itself is fair. Statutory fairness factors for fair dealing are delineated in copyright statutes for some purposes, but frequently the determination of fairness is left to the common law.¹³⁰ Fair dealing is found in the United Kingdom and many of the common law jurisdictions of the Commonwealth including New Zealand, Australia, Canada and Ireland.¹³¹

3.1 Exceptions to Copyright in the European Union

The 29 Member States of the European Union are ultimately constrained by the regulatory framework of European Union copyright legislation.¹³² In June 2016, the public of the United Kingdom voted for the United Kingdom to withdraw its membership from the European Union.¹³³ It is expected that the United Kingdom will now invoke art 50 of the Lisbon Treaty which requires it to notify the European Council of its intention, negotiate a deal on its withdrawal and establish legal grounds for a future relationship with the European Union within the next two years.¹³⁴ If the United Kingdom now proceeds to exit from the European Union, it is not yet known as to what effect this could have on its copyright law, this being largely dependent on the trading relationship established.¹³⁵ A discussion of the

¹³⁰ In the Copyright Act (NZ) fairness factors are specified in relation to the purposes of research and private study but not for the purposes of criticism or review or the reporting of current events.

¹³¹ Copyright Act (NZ), ss42 and 43; Copyright Design and Patents Act 1988 (UK) ss 29 and 30; Copyright Act of Canada RSC, s 29; Copyright Act 1968 (Cth) (Australia) ss 40, 41, 41A and 42; Copyright and Related Rights Act 2000 (Ireland) ss 50,51 and 221.

¹³² The 11 European Union Directives.

¹³³ Brian Wheeler and Alex Hunt “The UK’s EU Referendum: All you need to know” (24 June 2016) BBC News <www.bbc.com/news/uk>.

¹³⁴ Treaty of Lisbon 2007, art 50.

¹³⁵ Theo Savvides “So what does BREXIT mean for copyright (and database rights) in the UK? (5 July 2016) Kluwer Copyright Blog <www.kluwercopyrightblog.com>.

European Union copyright exceptions framework is included in this paper as this framework currently has a direct influence on the reforms available to the United Kingdom and may continue to exert influence to some extent in the long term. Furthermore, the European Union copyright framework is not fair dealing per se, but is similar to the extent that the listed exceptions to copyright are prescribed and inflexible.

The Berne Convention was the first attempt to harmonise copyright law in Europe.¹³⁶ The modern regulatory framework of the European Union that also seeks to achieve harmonisation of copyright law of its Member States is made up of a set of eleven Directives which have been adopted by the Council of the European Union together with the European Parliament (the “Directives”). The Directives include copyright laws relating to rental and lending, resale, satellite and cable, computer software, protection of databases, use of orphan works, online music and on the harmonisation of copyright and related rights in the information society (the “InfoSoc Directive”).¹³⁷

3.1.1 The InfoSoc Directive

It is the InfoSoc Directive that has largely shaped copyright law in the European Union in the last 15 years.¹³⁸ Article 5 of the InfoSoc Directive sets out an exhaustive detailed list of exceptions to copyright and Member States are permitted to reflect in national legislation as many or as few of these exceptions as they wish.

¹³⁹ As a consequence, an exception in law of one Member State may not exist in a

¹³⁶ European Union “The EU Copyright Legislation” (2015) <ec.europa.eu>.

¹³⁷ Directive on certain permitted uses of orphan works 25 October 2012 (Directive 2012/28/EU); Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission 27 September 1993 (Directive 93/83/EEC); Directive on the collective management of copyright 4 February 2014 (Directive 2014/26/EU); Directive on the harmonisation of certain aspects of copyright and related rights in the information society 22 May 2001 (Directive 2001/29/EC); Directive on the legal protection of computer programs 23 April 2009 (Directive 2009/24/EC); Directive on the legal protection of databases 11 March 2004 (Directive 96/9/EC); Directive on the rental right and lending right and on certain rights related to copyright in the field of intellectual property 12 December 2006 (Directive 2006/115/EC); Directive on the resale right for the benefit of the author of an original work of art 27 September 2001 (Directive 2001/84/EC); Electronic Commerce Directive 8 June 2000 (Directive 2000/31/EC)

¹³⁸ Ian Hargreaves and Bernt Hugenholtz *Copyright Reform for Growth and Jobs: Lisbon Council Policy Brief – Modernising the European Copyright Framework* (2013) at 5.

¹³⁹ 15 uses are listed in the InfoSoc Directive, art 5(3).

neighbouring one or may vary in scope.¹⁴⁰ The InfoSoc Directive allows for copyright exceptions including teaching and research, quotations for criticism and review, parody, use for the purposes of public security, use during religious or official celebrations, certain temporary electronic copies, and private use format shifting on the condition that the rights-holder receives fair compensation.¹⁴¹ Article 5(5) of the InfoSoc Directive stipulates that all listed exceptions are subject to the three-step test. Member States are not permitted to develop any new exceptions and accordingly, any new kinds of copying which have been made possible due to developments in digital technology that do not fall within an exception are automatically unlawful in the countries of the European Union.¹⁴² The only reference to “fairness” of a use of a copyright work in the InfoSoc Directive is found in art 5(3)(d) which states that the use of a work “should be in accordance with fair practice, and to the extent required by the specific purpose”.¹⁴³

A European civil law system approach provides for broad, flexible exclusive rights for authors and a closed catalogue of defined exceptions. Such an approach is based on the natural law underpinnings of the European *droit d’auteur* (“authors rights”) where the author or creator of a work is the central actor.¹⁴⁴ This European approach differs markedly from the utilitarian underpinnings of Anglo-American copyright law, where the purpose of copyright is the enhancement of the overall welfare of society through an adequate supply of information and knowledge.¹⁴⁵ Accordingly, Dutch copyright academics Hugenholtz and Senftleben warn that transplanting a single fair use provision into a civil law based *droit d’auteur* regime may lead to unintended consequences and ultimately systemic rejection.¹⁴⁶

The expansive closed list of detailed exceptions in the InfoSoc Directive potentially offers greater legal certainty than a fair use provision by providing better foreseeability for users as to which specific acts may be carried out without

¹⁴⁰ European Commission *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (December 2015) at 8.

¹⁴¹ InfoSoc Directive, art 5(3) (a) – (o).

¹⁴² *Hargreaves Review*, above n 3, at 43.

¹⁴³ InfoSoc Directive, art 5(3)(d).

¹⁴⁴ Martin Senftleben “The International Three-Step Test: A Model Provision for EC Fair Use Legislation”¹ (2010) JIPITEC 67 at 68.

¹⁴⁵ At 68.

¹⁴⁶ Hugenholtz and Senftleben, above n 11, at 8.

infringing copyright.¹⁴⁷ However, it is argued that the InfoSoc Directive lacks the flexibility needed to adequately respond to the accelerating changes in technology¹⁴⁸ and encourages the application of the three-step test to further restrict statutory exceptions that are often already defined narrowly in domestic legislation.¹⁴⁹

3.1.2 Copyright Exceptions in the National Courts of the European Union

In the absence of sufficient flexibility in the InfoSoc Directive, the courts of Member States have attempted to fill the gap to address advances in digital technology, for example to permit the use of copyright protected thumbnail images by internet search engines.¹⁵⁰ The Federal German Supreme Court could not find that the exception under the German law for quotation could apply to the reproduction and display of thumbnail images but instead held that such an action did not infringe copyright under an implied licence theory.¹⁵¹ An implied licence was said to have been created by the copyright owner making her work available online and not employing any techniques to block the automatic indexing and display of the thumbnail images.¹⁵²

The Paris Court of Appeals found a different solution to the same situation by extending the safe harbor for hosting of third party content set out in the Electronic Commerce Directive (2000) to the reproduction and display of thumbnail images.¹⁵³ Article 14 of the Electronic Commerce Directive provides that to avoid liability for copyright infringement, hosts such as internet service providers (ISPs) must act expeditiously to remove or disable access to information if requested by the copyright owner or right holder (commonly termed “notice and takedown” procedures).¹⁵⁴ The Paris Court did not find the ISP liable in this case as the

¹⁴⁷ Senftleben above n 144, at 69.

¹⁴⁸ Hugenholtz and Senftleben, above n 11, at 7; Hargreaves and Hugenholtz, above n 138, at 1.

¹⁴⁹ Senftleben, above n 144, at 67.

¹⁵⁰ At 72.

¹⁵¹ German Federal Court I ZR 69/08 29 April 2010.

¹⁵² Trevor Cook “Exceptions and Limitations in European Union Copyright Law” (2012) 17 JIPR 243 at 244.

¹⁵³ Cour d’Appel de Paris Pole 5 – Chambre 1 Judgment of 26 January 2011; Senftleben, above n 144, at 723. The Electronic Commerce Directive (2000) establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers in the European Union.

¹⁵⁴ Electronic Commerce Directive (2000) art 14.

owner of the copyright works had not availed themselves of the notice and takedown procedures in the Electronic Commerce Directive.¹⁵⁵

The Hague Court of Appeal applied the right of freedom of expression pursuant to art 10 of the European Convention on Human Rights (ECHR) to create a defence to alleged infringement through circulating copyright images owned by the Church of Scientology on the internet.¹⁵⁶ While it is possible for the national courts of the European Union to creatively circumvent their restrictive copyright framework, it is suggested that these remedies are inconsistent and incompatible with the structure of copyright law.¹⁵⁷ This argument has merit when the inconsistent approach of the national courts of the European Union is compared to the approach taken by the courts of the United States when faced with a similar factual scenario. In *Perfect 10 v Amazon.com Inc*, the Ninth Circuit of Court of Appeals held that the indexing and display of thumbnail images qualified as a fair use pursuant to s 107 of the Copyright Act 1976 (US).¹⁵⁸ In reaching its conclusion the Court stated “we note the importance of analysing fair use flexibly in light of new circumstances...especially during a period of rapid technological change.”¹⁵⁹ In the United States, as opposed to the European Union, it was not necessary for the Court to invent around an overly restrictive framework of copyright exceptions.

3.1.3 Suggested Reforms to the European Union Copyright Framework

Hargreaves and Hugenholtz, in their 2013 report *Lisbon Council Policy Brief – Modernising the European Copyright Framework*, proposed that certain mandatory exceptions be introduced into the InfoSoc Directive, being those that reflect fundamental information rights and freedoms including for quotation, news reporting, parody, information location and research and data mining.¹⁶⁰ Some of these essential exceptions, such as quotation, the authors proposed could also be made resistant to standard user licences by declaring them non-overridable by contract.¹⁶¹ In order to preserve legal certainty and to prevent an exception being

¹⁵⁵ Cour d’Appel de Paris Pole 5, above n 153; Cook, above n 152, at 244.

¹⁵⁶ *Scientology v Karin Spank/XS4ALL* Ct Ap The Hague [2003] AMI 217 (4 Sept 2003).

¹⁵⁷ Senfileben, above n 144, at 73.

¹⁵⁸ *Perfect 10 Inc v Amazon.com Inc* 487 F 3d 701 (9th Cir 2007).

¹⁵⁹ At 723 citing *Sony Corp. v Universal City Studios Inc* 464 US at 431 (1984).

¹⁶⁰ Hargreaves and Hugenholtz, above n 138, at 8.

¹⁶¹ At 8.

too open-ended, Hargreaves and Hugenholtz also suggested that all exceptions remain subject to the three-step test.¹⁶²

Instead of introducing further mandatory exceptions into art 5 of the InfoSoc Directive, Senftleben argues for the introduction of a European Union Fair Use doctrine with the existing exceptions listed in art 5(5) of the InfoSoc Directive functioning as a reference point only for the identification of further permissible uses of copyright works.¹⁶³ However, law reform in the European Union is complex and slow.¹⁶⁴ Until such reform takes place, Hargreaves and Hugenholtz argue there is more scope for Member States to utilise the flexibility in the generally worded list of exceptions in art 5(5).¹⁶⁵

3.1.4 European Commission Proposed Reforms

In late 2013 the European Commission (EC) sought consultation from citizens and stakeholders as to suggested reform to the European Union copyright framework.¹⁶⁶ The primary issue in relation to copyright exceptions was whether a greater degree of flexibility could be introduced into the copyright framework while ensuring the required legal certainty with reference to international obligations.¹⁶⁷ Copyright users argued for the extension of the existing exceptions to include, for example, text and data mining, and for the introduction of an open-ended norm similar to a fair use provision to complement the list of exceptions in the InfoSoc Directive.¹⁶⁸ Authors and other copyright owners were generally against introducing new exceptions into European Union copyright law and considered that the current framework should be preserved to ensure in particular legal certainty and a stable and comprehensive framework for all stakeholders.¹⁶⁹ Copyright owners strongly argued against the introduction of a fair use type provision principally because it was felt that such an open norm would not be in line with European legal

¹⁶² At 8.

¹⁶³ Senftleben, above n 144, at 76.

¹⁶⁴ Cook, above n 152, at 244.

¹⁶⁵ Hargreaves and Hugenholtz, above n 138, at 14. This is also recognised in the *Hargreaves Review*, above n 3, at 46.

¹⁶⁶ European Commission *Public Consultation on the Review of the EU Copyright Rules* (2013).

¹⁶⁷ At 17.

¹⁶⁸ European Commission *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules* (2014) at 31.

¹⁶⁹ At 32.

traditions¹⁷⁰ and that replacing statutory law by judge-made law in the European Union would inevitably result in less legal certainty and expensive litigation.¹⁷¹ In early 2016 the EC proposed that it intends to focus its work on clearer exceptions to copyright that will be applied uniformly across the European Union.¹⁷² These exceptions will, according to the EC, boost research and innovation by making it easier for researchers to use text and data mining technologies, support teachers who give online courses and help people with disabilities to access more works.¹⁷³ There is no reference to the inclusion of an open-ended norm, such as a fair use provision, in the EC's proposed reform. It will remain to be seen whether the inclusion of yet more exceptions to the existing list in art 5 of the InfoSoc Directive will be sufficient to; address new uses that arise from developments in digital technology, adequately protect the interests and rights of copyright users in the digital environment in the European Union and/or assist the national courts to rule on copyright infringement cases without having to invent around a narrow regulatory copyright framework.

3.2 *Fair Dealing in the United Kingdom*

Fair dealing made its first statutory appearance in the Copyright Act 1911 (UK) after almost two centuries of development in the country's courts.¹⁷⁴ The fair dealing provisions are currently found in ss 29, 30, 30A and 32 of the Copyright, Designs and Patents Act 1988 (UK) (CDPA). The enumerated purposes for fair dealing are; research and private study,¹⁷⁵ criticism, review, quotation and news reporting,¹⁷⁶ caricature, parody or pastiche,¹⁷⁷ and illustration for instruction.¹⁷⁸ The CDPA contains no statutory definition of "fair dealing" with the assessment of the fairness being left to judicial determination.

¹⁷⁰ At 23.

¹⁷¹ At 24.

¹⁷² At 8.

¹⁷³ At 8.

¹⁷⁴ Sims, above n 81, at 22.

¹⁷⁵ Copyright Design and Patents Act 1988 (UK) (hereafter termed the "CPDA"), s 29 as amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

¹⁷⁶ Section 30 as amended by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

¹⁷⁷ Section 30A.

¹⁷⁸ Section 32.

The scope of the fair dealing provisions is a subject that has been addressed in various reviews commissioned by the United Kingdom Government.¹⁷⁹ These reviews have reached differing conclusions as to how the exceptions to copyright, including the fair dealing provisions, should be amended to keep pace with accelerated developments in digital technology. Fair dealing in the United Kingdom has also been the subject of much academic debate.¹⁸⁰ Some authors maintain that the enumerated purposes of fair dealing are too narrow and have been construed too restrictively by the courts of the United Kingdom to sufficiently address the rights of users of copyright works.¹⁸¹ Other authors are of the view that the courts have taken a liberal interpretation to the fair dealing exceptions and have struck an appropriate balance between copyright owners and users.¹⁸² The courts in New Zealand have most commonly drawn upon United Kingdom copyright jurisprudence in cases where fair dealing defences have been raised.¹⁸³ Accordingly, an analysis of the purposes of fair dealing and the assessment of what is considered “fair” by the judiciary of the United Kingdom is now outlined.

3.2.1 Fair Dealing in the Courts of the United Kingdom

The courts of the United Kingdom have provided some guidance as to the interpretation of the fair dealing provisions with respect to the purposes of research and private study,¹⁸⁴ criticism or review¹⁸⁵ and current events reporting.¹⁸⁶ The other purposes of fair dealing, being for quotation, caricature, parody or pastiche and illustration for instruction were introduced in the 2014 amendments to the CDPA and have not yet been the subject of judicial consideration.

¹⁷⁹ These include: Cmnd 6732 1977 *Copyright and Designs Law: Report of the Committee to consider the Law of Copyright and Design* (hereafter termed the “Whitford Report”); *Gowers Review*, above n 39; *Hargreaves Review*, above n 3.

¹⁸⁰ Robert Burrell “Reining in Copyright Law: Is Fair Use the Answer?” [2001] IPQ 361 at 363; Giuseppina D’Agostino “Healing Fair Dealing?: A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use” Osgoode Digital Commons <www.digitalcommons.osgoode.yorku.ca>.

¹⁸¹ Sims, above n 81, at 193.

¹⁸² Lionel Bently and Brad Sherman *Intellectual Property Law* (2nd ed, Oxford University Press, Oxford, 2004) at 193.

¹⁸³ For example; *Copyright Licensing Ltd v University of Auckland & Ors* [2002] 3 NZLR 76; *Media Works New Zealand Ltd & Anor v Sky Television Network Ltd*, above n 65; *TVNZ Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91.

¹⁸⁴ For example; *Controller of HM Stationary Office and Anor v Green Amps* [2007] EWHC 2755 (Ch).

¹⁸⁵ For example; *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

¹⁸⁶ For example; *Pro Sieben Media v Carlton Television* [1999] 1 WLR 605.

3.2.1.1 Research and Private Study

Fair dealing for the purposes of research and private study is permitted for all types of works but research is confined to non-commercial research and must include sufficient acknowledgement.¹⁸⁷ This restriction was added to the CDPA in 2003 in order to comply with the InfoSoc Directive.¹⁸⁸ The case *Controller of HM Stationary Office & Anor v Green Amps* concerned Crown copyright in the Ordnance Survey maps and the fair dealing exception under s 29(1) of the CDPA, specifically what constitutes “non-commercial” research.¹⁸⁹ The issue before the High Court was whether the defendant had infringed copyright by covertly accessing Ordnance Survey maps to develop a geographic information system called “The Mapping Tool” which was not yet commercially available.¹⁹⁰ The defendant contended that there was no infringement of copyright because of the research status of The Mapping Tool.¹⁹¹ However, the Court held that the fair dealing defence must fail as the defendants had intended to develop a commercial product and the research was therefore for a commercial purpose.¹⁹² Accordingly, pursuant to s 29 of the CDPA, research must not only be non-commercial but it must also have no future potential commercial purpose in order to be considered fair dealing. Arguably this may create difficulty for researchers who, for example, wish to publish their research, which may include extracts from other copyright works, in a commercial publication.

3.2.1.2 Criticism or Review

Section 30 of the CDPA permits the use of a work for the purpose of criticism, review, quotation and news reporting if it is accompanied by sufficient acknowledgement and provided that the work has been made available to the public.¹⁹³ The scope of criticism or review has been the subject of some judicial consideration and in some cases the court has indicated that it will take a liberal

¹⁸⁷ CDPA, s 29.

¹⁸⁸ Section 29 of the CDPA was amended by The Copyright and Related Rights Regulations 2003. Historically, fair dealing was not confined to non-commercial research.

¹⁸⁹ *Controller of HM Stationary Office and Anor v Green Amps*, above n 184, at [24].

¹⁹⁰ At [21].

¹⁹¹ At [20].

¹⁹² At [23].

¹⁹³ CDPA, s 30.

view of fair dealing for this purpose.¹⁹⁴ In *Hubbard v Vosper* Lord Denning held that both the literary style and the thoughts underlying a literary work could be criticised, thereby expanding the scope of the defence.¹⁹⁵ The Court of Appeal in *Time Warner Entertainment v Channel Four Television Corporation* confirmed that criticism or review of a copyright work could be of the work itself or of another work.¹⁹⁶ In *Pro Sieben Media v Carlton Television*, the defendant Carlton Television (“Carlton”) had used a 30 second extract of a programme broadcast by Pro Sieben in its current affairs programme on the topic of chequebook journalism.¹⁹⁷ Carlton raised the defence of fair dealing for criticism or review or for the reporting of current events. The Court of Appeal overturned the lower court’s finding and found that Carlton’s current affairs programme was made for the purposes of criticism of chequebook journalism and gave the fair dealing exception a liberal interpretation:¹⁹⁸

‘Criticism or review’ and ‘reporting current events’ are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries are doomed to fail. They are expressions which should be interpreted liberally.

This liberal interpretation of criticism or review has also been seen in cases where the defendant has circulated news items and magazine articles to employees¹⁹⁹ and where the defendant has published copyright photos of celebrities in order to criticise tabloid journalism.²⁰⁰ Although the Court has stretched the interpretation of criticism or review to its limits in these cases, the court’s interpretation of the exception in other cases would mean that some significant situations to which the criticism or review exception should be available are not caught by the provision.²⁰¹

¹⁹⁴ *Pro Sieben Media v Carlton Television*, above n 186; *Time Warner Entertainment Co Ltd v Channel 4 Television* [1993] 28 IPR 459 [1994].

¹⁹⁵ *Hubbard v Vosper* [1972] 2 QB 84 at [94].

¹⁹⁶ *Time Warner Entertainment Co. Ltd. v Channel 4 Television*, above n 194.

¹⁹⁷ *Pro Sieben Media v Carlton Television*, above n 186.

¹⁹⁸ At 614.

¹⁹⁹ *Newspaper Licensing Agency v Marks & Spencer plc* [2003] 1 AC 551. The comments of the Court in this regard were obiter as no copyright infringement had occurred.

²⁰⁰ *Fraser-Woodward Ltd v BBC* [2005] EWHC 472 (Ch) [2005] 28(6) IPD 11.

²⁰¹ Robert Burrell and Alison Coleman *Copyright Exceptions The Digital Impact* (Cambridge University Press, Cambridge, 2005) at 53. For example *Ashdown v Telegraph Group Ltd*, above n 185; and *Beloff v Pressdram Ltd* [1973] RPC 765 [1973] 1 All ER 241.

For example, the Court of Appeal took a far more restrictive approach to the scope of fair dealing in *Ashdown v Telegraph Group Ltd.*²⁰² In this case one of the issues was whether the defendant's copying of portions of a confidential minute relating to a meeting between the British Prime Minister and the politician Paddy Ashdown was fair dealing for the purposes of criticism or review.²⁰³ Despite the scope of the exception to include criticism of a work *or* a performance of a work, Sir Andrew Morritt Vice Chancellor stated:²⁰⁴

What is required is that the copying shall take place as part of and for the purpose of criticising and reviewing the work. The work is the minute. But the articles are not criticising or reviewing the minute: they are criticising or reviewing the actions of the Prime Minister and the claimant.

Such an interpretation precludes users to cite copyright works in support of an argument or review and represents a major departure from *Pro Sieben*. This is argued by some authors to place an unjustifiable limit on the exception.²⁰⁵ Article 5(3)(d) of the InfoSoc Directive, upon which s 30 of the CDPA is subject to, does not limit the user of copyright in this way as it permits quotations for purposes such as criticism or review “provided that they relate to a work or *other subject-matter*.”²⁰⁶ Accordingly, s 30 and its interpretation by the Court of Appeal in *Ashdown* narrows the scope of the fair dealing defence of criticism or review unnecessarily.

In 2003 the fair dealing for criticism and review exception was amended to comply with the InfoSoc Directive by introducing the exclusion of unpublished works.²⁰⁷ The rationale behind this exclusion appeared to be to prevent unfinished works from being prematurely disclosed to the public in order to protect the author's rights to first publication.²⁰⁸ However the scope of the exception extends to all unpublished works, not only unfinished works. This may create an unjustifiable limitation on

²⁰² *Ashdown v Telegraph Group Ltd*, above n 185.

²⁰³ At [11].

²⁰⁴ At [69].

²⁰⁵ Burrell and Coleman, above n 201, at 54.

²⁰⁶ InfoSoc Directive, art 5(3)(d) (emphasis added).

²⁰⁷ Section 30 of the CDPA was amended by The Copyright and Related Rights Regulations 2003 to comply with Article 5(3)(d) of the InfoSoc Directive.

²⁰⁸ Burrell and Coleman, above n 201, at 46.

copyright users with respect to the right to freedom of expression.²⁰⁹ In 1972 in *Hubbard v Vosper* the defendant, a former member of the Church of Scientology, published a book which contained extracts from the unpublished works of Ron L Hubbard, the founder of the Church of Scientology.²¹⁰ Lord Denning declined to agree with the plaintiff's proposition that unpublished works could never be the subject of fair dealing for the purposes of criticism, review or newspaper summary.²¹¹ The Court found for the defendant and determined that the book was a fair dealing of the source material.²¹² Such a finding would probably not be possible today in the United Kingdom, given the absolute exclusion of unpublished works from the exception. In comparison, pursuant to the fair use provision of the Copyright Act (US), whether a work is published or unpublished or not determinative of whether the use of the work was fair.²¹³

3.2.1.3 Reporting of Current Events

The “reporting of current events” exception also falls within s 30 of the CDPA but does not require acknowledgement of source if the reporting is by means of a sound recording, film or broadcast or where acknowledgement would be impossible for reasons of practicality or otherwise.²¹⁴ There is no requirement that the work being reported is available to the public, although unauthorised taking of material subsequently quoted in newspapers has been a consideration in ruling that the use of a copyright work was not fair dealing.²¹⁵

The courts have determined in some cases that a liberal review of this exception should be taken and have indicated that they will take into account what is interesting to the public.²¹⁶ In *Pro Sieben* the Court of Appeal held that media coverage of a seemingly trivial matter would constitute an ‘event’ of public interest. However, it has been suggested that the additional requirements that the event be “current” may pose potential problems for users of copyright.²¹⁷ A one year period

²⁰⁹ At 46.

²¹⁰ *Hubbard v Vosper*, above n 195.

²¹¹ At [95].

²¹² At [96].

²¹³ Copyright Act (US), s 107.

²¹⁴ CPDA, s 30(3).

²¹⁵ *Hyde Park Residence Ltd v Yelland* [2000] EWCA Civ 37 [2001] Ch 143.

²¹⁶ *Ashdown v Telegraph Group Ltd*, above n 185; *Newspaper Licensing Agency v Marks & Spencer plc*, above n 199; *Pro Sieben Media v Carlton Television*, above n 186.

²¹⁷ Burrell and Coleman, above n 201, at 55.

between the taking and publishing of photos of Princess Diana and Dodi Al Fayed was held to be “current” due to the ongoing media publicity following their death.²¹⁸ Information regarding the conduct of politicians may also continue to be “current” for a prolonged period.²¹⁹ However, in *Ashdown*, Lord Phillips noted that the CDPA did not provide an exception where the information may be of great public interest but related in fact to a document produced in the past.²²⁰ Accordingly, the reproduction of material relating to newsworthy matters in history is not encompassed in the reporting of current events exception.

The requirement that the event be “reported” may further limit the application of the exception.²²¹ In *Hyde Park*, the use of stills from a security film to prove the falsity of public claims were not held to be the “reporting” of current events.²²² Although this issue was not decided in *Newspaper Licensing Agency v Marks & Spencer plc*, the copying and dissemination of material to employees in a private organisation was not thought to be the “reporting” of current events.²²³ Accordingly, it appears that this exception is available only to users in relation to reporting public events and in order to avoid infringement, the user must include some element of public dissemination of the information.

3.2.1.4 The Assessment of Fairness

Once it has been made out that the use of a copyright work falls within one of the enumerated purposes, the defendant must then persuade the court that the use was “fair”. The test for fairness was set out by Lord Denning in *Hubbard v Vosper*.²²⁴ Although stating it was a “matter of impression” Lord Denning set out the relevant considerations as; the number and extent of the quotations and extracts, the use made of them, if the extracts and quotation were used for a purpose to rival the author and the proportion taken.²²⁵ Other factors that have emerged in the assessment of fairness include; whether the work was obtained covertly,²²⁶ whether

²¹⁸ *Hyde Park Residence Ltd v Yelland*, above n 215, at [32].

²¹⁹ *Ashdown v Telegraph Group Ltd*, above n 185, at [64].

²²⁰ At [66] – [67].

²²¹ Burrell and Coleman, above n 201, at 56.

²²² *Hyde Park Residence Ltd v Yelland*, above n 215, at [41].

²²³ *Newspaper Licensing Agency v Marks & Spencer plc*, above n 199, at [290].

²²⁴ D’Agostino, above n 180, at 341.

²²⁵ *Hubbard v Vosper*, above n 195, at [95].

²²⁶ *Controller of HM Stationary Office and Anor v Green Amps*, above n 184.

it was used for a commercial benefit,²²⁷ whether the motive for using the work was malevolent or altruistic,²²⁸ whether the user's purpose could have been achieved by other means,²²⁹ and whether the work acted as a substitute for the original.²³⁰

In *Ashdown* the Court of Appeal relied on the three fairness factors set out in text *The Modern Law of Copyright and Designs*²³¹ and determined that, in addition to whether the work was published and the amount of the work reproduced by the defendant, the impact on the market of the defendant's work was the most important factor in the assessment of fairness.²³² Sims argues that the acceptance and usage by the Court of the three factor test in *The Modern Law of Copyright and Designs* created a simplistic analysis of fair dealing and decreases the likelihood of a defendant making out a successful fair dealing defence.²³³ This may be perhaps due to the exclusion of consideration of other fairness factors by the court such as whether the use was transformative.

The Court of Appeal in *Ashdown* also brought the concept of the "public interest defence" with reference to the right to freedom of expression as expressed in the ECHR into its assessment of fairness.²³⁴ While it contains no explicit public interest defence, the CPDA specifies that it does not affect any rule of law preventing or restricting the enforcement of copyright on grounds of public interest or otherwise.²³⁵ In *Ashdown* the Court noted that there were "occasions when it is in the public interest ... that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them."²³⁶ However, the application of a public interest defence was also noted by the Court to be "rare" as in most cases the fair dealing defences would be sufficient to protect the public interest in freedom of expression.²³⁷ Professor David Vaver notes that it is

²²⁷ *Newspaper Licensing Agency v Marks & Spencer Pl*, above n 199.

²²⁸ *Pro Sieben Media v Carlton Television*, above n 186.

²²⁹ *Associated Newspapers Group v News Group Newspapers* [1986] RPC 515 at 519.

²³⁰ *Hubbard v Vosper*, above n 195; *Ashdown v Telegraph Group Ltd*, above n 185.

²³¹ Hugh Laddie, Peter Prescott & Mary Vitoria *The Modern Law of Copyright and Designs* (3rd ed, Lexis Nexis, London, 2000).

²³² *Ashdown v Telegraph Group Ltd*, above n 185, at [72].

²³³ Sims, above n 81, at 216.

²³⁴ The right to freedom of expression is also enshrined in the Human Rights Act 1998 (UK), s 1 art 10.

²³⁵ CPDA, s 171(3).

²³⁶ *Ashdown v Telegraph Group Ltd*, above n 185, at [43].

²³⁷ At [66].

concerning that the Court has conceded that the defence of fair dealing had become so impoverished²³⁸ that it was forced to resort to application of the right to freedom of expression from the ECHR to prevent acts which no reasonable person would regard as infringing.²³⁹ Similar to the courts of the European Union, the United Kingdom courts have had to exercise some judicial creativity in order to circumvent the narrow statutory grant of exceptions.

3.2.2 Suggested Reforms to Copyright Exceptions in the United Kingdom

The exceptions to copyright in the copyright statutes of the United Kingdom have been amended substantively on several occasions in response to recommendations made in various government commissioned reviews. The Whitford Committee Report of 1977 (the “*Whitford Report*”) observed that the inclusion of yet more express exceptions for special cases in the fair dealing provisions would be unlikely to achieve any more clarity for users of copyright.²⁴⁰ The Whitford Committee instead recommended:²⁴¹

There should be a general exception covering all classes of copyright works and subject matters in favour of ‘fair dealing’ which does not conflict with the normal exploitation of the work or subject matter and does not unreasonably prejudice the copyright owner’s legitimate interests.

This recommendation for a general exception appears to be a proposal for the adoption of a modified fair use provision. However, this recommendation made in the *Whitford Report* was not taken up by the legislature when the CDPA was enacted in 1988. Since the enactment of the CPDA, there have been two further Government commissioned reviews of the intellectual property framework of the United Kingdom.²⁴² Both reviews suggest increasing the flexibility of the copyright exceptions in the United Kingdom and in the European Union in order to drive economic growth and innovation.

²³⁸ Referring to the decision in *Musical Fidelity Limited v Vickers* [2003] FSR 50 CA at [29].

²³⁹ David Vaver “Reforming Intellectual Property Law: An Obvious and Not-so-obvious Agenda” (2009) 1 IPQ 143 at 153.

²⁴⁰ *Whitford Report*, above n 179, at 668.

²⁴¹ At 695.

²⁴² *Gowers Review*, above n 39; *Hargreaves Review*, above, n 3.

3.2.2.1 *The Gowers Review*

The *Gowers Review of Intellectual Property* (the “*Gowers Review*”), commissioned by the Chancellor of the Exchequer and published in 2006, had the specific purpose of assessing whether the United Kingdom had an intellectual property system that met the needs of all of its users and was fit for the digital age.²⁴³ The *Gowers Review* made the general observation that the system as a whole was working in a broadly satisfactory manner.²⁴⁴ However, with respect to the flexibility of copyright it was noted:²⁴⁵

While the law is complex, this is not principally a problem of coherence, but a lack of flexibility to accommodate certain uses of protected material that a large proportion of the population regards as legitimate and which do not damage the interests of rights holders.

According to the *Gowers Review*, if these legitimate uses, such as the transference of music by consumers from their CDs to their MP3 player, are seen to be illegal, then it is more difficult to justify sanctions against copyright infringement that genuinely cost industry sales such as illegal internet downloads.²⁴⁶ This argument formed the basis for Andrew Gower’s recommendation that a private copying exception for format shifting be introduced into the CDPA.²⁴⁷ Although the flexibility and advantages of fair use was noted in the *Gowers Review*, no suggested changes to the fair dealing provisions were made. Instead, Gowers recommended several new exceptions be introduced to address the lack of flexibility in the United Kingdom copyright system.²⁴⁸ These included an amendment to the InfoSoc Directive to allow for an exception for transformative and derivative works within the parameters of the three step test, and the introduction of an exception for the purpose of caricature, parody or pastiche in the CDPA. Of the 54 recommendations made in the *Gowers Review*, only 25 had been implemented by 2010.²⁴⁹ Of the 25 recommendations implemented, none of these related to the exceptions to copyright.

²⁴³ *Gowers Review*, above n 39, at 1.

²⁴⁴ At 1

²⁴⁵ At 39.

²⁴⁶ At 40.

²⁴⁷ At 63.

²⁴⁸ At 63.

²⁴⁹ *Hargreaves Review*, above n 3, at 6.

3.2.2.2 *The Hargreaves Review*

In 2010 Professor Ian Hargreaves was commissioned by the United Kingdom Government to chair a review to assess how well the intellectual property framework of the United Kingdom supported economic growth and innovation.²⁵⁰ In its Terms of Reference, the *Hargreaves Review* was specifically asked to investigate the benefits of fair use and how these benefits might be achieved in the United Kingdom.²⁵¹ Hargreaves concluded that the copyright framework of the United Kingdom was falling behind what was needed.²⁵² A key problem with the European Union approach to copyright exceptions identified in the *Hargreaves Review* was that innovation is hampered when unduly rigid applications of copyright law enabled copyright owners to block emerging and important new technologies.²⁵³

The *Hargreaves Review* concluded that as significant difficulties would arise in any attempt to transpose a fair use provision into European law, the United Kingdom could achieve many of the benefits of fair use by fully implementing the copyright exceptions permitted under the InfoSoc Directive; including introducing exceptions for data and text mining, private format shifting and parody.²⁵⁴ In order to accommodate technological uses which do not threaten the interest of copyright owners, the *Hargreaves Review* proposed that the Government should argue for the introduction of an exception into the European Union copyright framework that allowed uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work.²⁵⁵ Hargreaves also noted that the fact that these new uses of technology happened to fall outside of the scope of the exceptions to copyright was essentially a side effect of how copyright has been defined, rather than it being relevant to what copyright is supposed to protect.²⁵⁶ Fair use is not subject to such definitional restrictions and accordingly, provides sufficient flexibility to address new uses of technology and thereby promote innovation and economic growth.

²⁵⁰ At 1.

²⁵¹ At 101.

²⁵² At 1.

²⁵³ At 43.

²⁵⁴ At 46 to 49.

²⁵⁵ At 47. For example, data mining or search engine indexing where copies need to be created for a computer to then be able to analyse the work.

²⁵⁶ At 47.

3.2.3 *Recent Reforms to Copyright Exceptions in the United Kingdom*

In response to the *Hargreaves Review* a number of reforms to the exceptions to copyright in the CDPA were implemented in 2014 via the enactment of five new statutory instruments.²⁵⁷ A number of specific exceptions were introduced and/or expanded including; an exception for the purpose of data and text mining,²⁵⁸ expansion of the existing exceptions for libraries and archives,²⁵⁹ and expansion of the existing exceptions permitting users to copy material on statutory registers or where material open for public inspection.²⁶⁰ A specific exception for copying for private use was also introduced which allows an individual to copy a work for a non-commercial purpose.²⁶¹

The fair dealing exceptions were also expanded and new fair dealing exceptions introduced as part of the 2014 reforms. Fair dealing for the purpose of “illustration for instruction” was introduced which allows teachers to use any type of copyright work ‘for the sole purpose of illustration for instruction’ provided it is accompanied by sufficient acknowledgement.²⁶² The amendments to the fair dealing for research or private study exception expanded the exception’s application to all copyright works, specifically including films, sound recordings and broadcasts.²⁶³ Fair dealing for the purposes of caricature, parody or pastiche was introduced²⁶⁴ and the use of quotation (for criticism or review or otherwise) may now be fair dealing provided that the work has been published, the length of the quotation is no more than required by the specific purpose for which it is used, and it is accompanied by

²⁵⁷ The Copyright and Rights in Performances (Disability) Regulations 2014; The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014; The Copyright (Public Administration) Regulations 2014; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014.

²⁵⁸ CDPA, s 29A amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

²⁵⁹ Sections 40A to 43 amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

²⁶⁰ Section 47 amended by The Copyright (Public Administration) Regulations 2014.

²⁶¹ Section 28B amended by The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014. Computer programs are excluded from this exception.

²⁶² Section 32 amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

²⁶³ Section 29 amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

²⁶⁴ Section 30 amended by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

sufficient acknowledgment.²⁶⁵ Arguably the qualification that a quotation falls within the scope of the exception only if the extent of the quotation is no more than required limits the application of the exception by importing a factor usually considered in the subsequent assessment of fairness. With respect to the fair dealing exceptions for criticism, review, quotation and news reporting caricature, parody or pastiche, research and private study and illustration for instruction, the 2014 amendments render unenforceable any contractual term which purports to prevent these activities.²⁶⁶

The effectiveness of the amendments to the fair dealing provisions, in terms of whether such amendments better serve the interests of the users of copyright, is yet to be tested in the courts. However, the High Court of the United Kingdom has recently ruled in relation to the specific private copying exception.²⁶⁷ In *BASCA and Others v Secretary of State for Business, Innovation & Skills* (2015), the British Academy of Songwriters, Composers and Authors (BASCA), the Musicians' Union and UK Music challenged The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 on the basis it made no provision for "fair remuneration of right holders", which BASCA and others argued that they were entitled to pursuant to Article 5(2) (b) of the InfoSoc Directive.²⁶⁸ While the Court did not expressly rule as to the compatibility of the 2014 private copying amendment with the InfoSoc Directive, the Court held that due to a lack of evidence, the government's refusal to introduce a fair remuneration scheme was unlawful.²⁶⁹ Accordingly, users of copyright in the United Kingdom are now in a position where it is illegal to make private copies of copyright material for format shifting. This puts United Kingdom copyright law vastly out of step with current consumer practices.

While the 2014 amendments to the CDPA update the law to better align with current uses of digital technology, it is arguable whether the amendments provide sufficient flexibility to future proof the United Kingdom copyright scheme to adapt to new

²⁶⁵ Section 30 amended by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

²⁶⁶ Section 29(4B), section 30(4), section 30A (2), section 32(3).

²⁶⁷ *BASCA and Others v Secretary of State for Business, Innovation & Skills* [2015] EWHC 1723.

²⁶⁸ At [130].

²⁶⁹ At [20].

uses of technology. While the restrictions imposed by the regulatory framework of the European Union may not permit the adoption of a fair use provision, both the *Hargreaves Review* and the *Gowers Review* argue for the need for further increased flexibility beyond that which can be achieved by simply increasing the list of enumerated exceptions in the CPDA and the InfoSoc Directive. The introduction of an exception that allowed uses of a work enabled by technology which did not directly trade on the underlying creative and expressive purpose of the work and the introduction of an exception for creative, transformative and derivative works would arguably permit the United Kingdom to enjoy the economic benefits associated with fair use without the need to adopt it.

Given that the United Kingdom may now withdraw its membership from the European Union, it is possible that, in the absence of the constraints imposed by European Union copyright legislation, the United Kingdom may choose to adopt fair use in the future. However, as the United Kingdom will remain a signatory to the Berne Convention, the position taken by the Government as to the compliance of fair use with the three-step test will likely be a critical factor weighing in on the extent and nature of any future copyright reforms.

3.3 *Fair Dealing in Australia*

Australia was the first Commonwealth country to adopt fair dealing, initially termed “fairly dealing,” in its Copyright Act 1905 (Cth).²⁷⁰ The fair dealing provisions were carried into subsequent copyright statutes, being the Copyright Act 1912 (Cth) which declared the Copyright Act 1911 (UK) to be in force in Australia, and the current Copyright Act 1968 (Cth) which replaced it.²⁷¹ Fair dealing in Australia is available for the purposes of research or study,²⁷² criticism or review,²⁷³ parody or satire,²⁷⁴ reporting news²⁷⁵ and for the provision of legal advice by certain individuals.²⁷⁶ Fair dealing is not available for all classes of copyright works. The

²⁷⁰ M De Zwart, ‘A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age’ (2007) 1 IPQ 60 at 89.

²⁷¹ Copyright Act 1968 (Cth) (Australia).

²⁷² Section 40.

²⁷³ Section 41. Sufficient acknowledgement of the original work is required.

²⁷⁴ Section 41A.

²⁷⁵ Section 42. Sufficient acknowledgement of the original work is required.

²⁷⁶ Section 43.

Copyright Act (Cth) provides that fair dealing is available for literary, dramatic, musical or artistic works,²⁷⁷ adaptations of works²⁷⁸ and audio-visual items²⁷⁹ the latter being defined as sound recordings, cinematograph films, sound broadcasts or television broadcasts.²⁸⁰

As is the case for the fair dealing framework of the United Kingdom, there is no statutory definition of “fair dealing” in the Copyright Act (Cth). However, with respect to fair dealing for the purposes of research and study, s 40(2) contains a list of non-exhaustive factors which must be taken into account in determining whether the dealing with a work or adaptation, whether in part or in whole, constitutes fair dealing. These are:²⁸¹

- a) the purpose and character of the dealing;
- b) the nature of the work or adaptation;
- c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- e) in a case where part only of the work or adaptation is reproduced--the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

This list of non-exhaustive factors was introduced into s 40 by the Copyright Law Committee in 1976, the factors being based to a large extent on principles derived from the case law on fair dealing at the time.²⁸² These factors are not expressly articulated in the Copyright Act (Cth) for any of the other enumerated purposes of fair dealing. The fair dealing framework in Australia is also unique in that it contains a quantitative test as to the amount of material that may be reproduced for the purposes of research or study.²⁸³ Notwithstanding the fairness factors outlined above, a “reasonable portion” of certain types of works may be reproduced for the

²⁷⁷ Section 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news), s 43(2) (the giving of professional advice by certain individuals).

²⁷⁸ Section 40(1) (research or study), s 41 (criticism or review), s 41A (parody or satire), s 42 (reporting news).

²⁷⁹ Section 103C (1) (research or study), s 103A (criticism or review), s 103AA (parody or satire), s 103B (reporting news).

²⁸⁰ Section 100A.

²⁸¹ Section 40(2).

²⁸² Copyright Law Committee *Report on Reprographic Reproduction* (1976) at [2.60]; *ALRC Review*, above n 1, at 134.

²⁸³ Copyright Act (Cth), ss 40(5) and 40(6).

without constituting infringement.²⁸⁴ A “reasonable portion” is defined with reference to the number of chapters, number of words or percentage of the original work (10%).²⁸⁵ If the amount reproduced exceeds the statutory definition of a reasonable portion however, it does not preclude the act of copying from qualifying as a fair dealing.²⁸⁶

A new ‘flexible dealing’ exception, s 200AB, was introduced by the Copyright Amendment Act 2006 which also introduced a number of changes into Australian copyright law on the basis of obligations arising under the Australia-United States Free Trade Agreement (AUSFTA). Section 200AB(1) directly imports the language of the three step test as it is set out in the TRIPS Agreement:²⁸⁷ The “flexible dealing” exception is very limited in its application to both the purpose for which the use is being made and to the group of copyright users whom may benefit from it; being libraries and archives, educational institutions and persons with disabilities. Despite the use of the open-ended language of the three-step test in section 200AB, a user of copyright could successful rely on the flexible dealing exception only in a very narrow set of circumstances.

3.3.1 Fair Dealing in the Australian Courts

Copyright cases in which fair dealing defences have been raised are rare in Australia.²⁸⁸ Where the defence of fair dealing has been invoked, the Australian courts have largely drawn from the fair dealing jurisprudence of the United Kingdom for the purposes of determining whether a use of a copyright work falls within the fair dealing exceptions and whether the use was fair.²⁸⁹

²⁸⁴ Sections 40(5) and 40(6).

²⁸⁵ Section 40(5).

²⁸⁶ Peter Knight *Copyright The Laws of Australia* (Thomson Reuters, Sydney, 2013) at 232.

²⁸⁷ Copyright Act (Cth), s 200AB.

²⁸⁸ Michael Handler and David Rolph "A Real Pea Souper": The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia" (2003) 15 Melbourne University Law Review 27(2) 381 at 381.

²⁸⁹ For example in *TCN Channel Nine v Network Ten Pty Ltd* [2001] FCA 108; (2001) 108 FCR 235 Justice Conti quoted from a number of United Kingdom authorities on fair dealing including the Court of Appeal decisions in *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation plc*, above n 194, at [34]; *Pro Sieben Media AG v Carlton UK Television Ltd*, above n 186, at [35]; and *Hyde Park Residence Ltd v Yelland*, above n 215, at [36].

3.3.1.1 Research or Study

Fair dealing is available for the purposes of research or private study²⁹⁰ but is not available for educational institutions. In *Haines v Copyright Agency Ltd*, a full Federal Court drew a distinction between individuals undertaking study and research and the use of works by educational institutions for teaching purposes.²⁹¹ The term “research” in relation to the exception has been interpreted narrowly by the court as a “diligent and systematic enquiry or investigation into a subject in order to discover facts or principles” and is distinguished from a “mere information audit.”²⁹² The application of the exception was further limited in *De Garis v Neville Jeffress Pidler Pty Ltd* where the Court held that the defence of fair dealing was not available for a clipping service where copies of newspaper articles made by the clipping service may have been used by customers of the clipping service for research or study.²⁹³ Accordingly, the research or study exception only applies in Australia if the person who copies the work is the same person who undertakes the research and study. Unlike the research and study exception in the United Kingdom, the Australian provision does not confine use of a work to non-commercial purposes. However, the interpretation and application of the exception, with respect to the scope of the purpose, is narrower than the interpretation in other jurisdictions such as Canada.²⁹⁴ The Australian courts are yet to consider whether the use of copyright material for the purpose of commercial research and development could be regarded as a fair dealing for research or study.²⁹⁵

3.3.1.2 Criticism or Review

Fair dealing is available for criticism or review of a work or of another work²⁹⁶ and is not confined to literary criticism.²⁹⁷ In *De Garis*, “criticism” was interpreted by

²⁹⁰ Copyright Act Cth, ss 40 and 103C.

²⁹¹ *Haines v Copyright Agency Ltd* (1982) 64 FLR at 191.

²⁹² *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99; 95 ALR 625; 18 IPR 292; [1990] AIPC 90-678 at 105.

²⁹³ At 105.

²⁹⁴ For example the liberal interpretation of “research” by the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*, above n 44.

²⁹⁵ Attorney-Generals Department *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age Issues Paper* (May 2005) at [5.14].

²⁹⁶ Copyright Act (Cth), ss40 and 103A. The definition of “exempt recording” in s 248A(1)(fa) allows live recordings and recordings of live broadcasts of performances by way of fair dealings for the purpose of criticism or review of that or another performance.

²⁹⁷ *De Garis v Neville Jeffress Pidler Pty Ltd*, above n 292, at 107 citing *Sillitoe v McGraw-Hill Book Company (UK) Ltd* (1982), [1983] 9 FSR 545 (ChD).

the court with reference to its dictionary meaning being “the act of analysing and judging the quality of a literary or artistic work etc....the act of passing judgment as to the merits of something...a critical comment, article or essay; a critique”.²⁹⁸ Similarly “review” was interpreted as a “critical article or report.”²⁹⁹ A key problem with the use of dictionary definitions by the court in *De Garis* is the way in which it has since tended to restrict the application of the exception to obvious forms or styles of criticism and review at the expense of more subtle forms or styles.³⁰⁰

The approach to the “criticism or review” exception in *De Garis* was adopted, to an extent, in the case *TCN Channel Nine v Network Ten Pty Ltd*.³⁰¹ This case (“the *Panel Case*”) and related cases have been termed the “Panel Case” litigation.³⁰² “The Panel” was a weekly television show broadcast on Network Ten which regularly showed excerpts from other programmes to illustrate a point or to create discussion by a panel of commentators. Channel Nine brought proceedings against Network Ten alleging that Network Ten had infringed copyright by broadcasting 19 excerpts from Channel Nine programmes. In addition to *De Garis*, Justice Conti cited a number of United Kingdom authorities on fair dealing and concluded that eight fair dealing principles emerged from these authorities.³⁰³ With respect to the 19 excerpts, Justice Conti found that Network Ten could have established fair dealing in relation to 11 of them. Fair dealing for criticism or review was not found in an excerpt from the Midday Show which showed the Australian Prime Minister, John Howard, singing ‘Happy Birthday’ to retired Australian cricketer, Sir Donald Bradman.³⁰⁴ This was because the primary purpose of the excerpt was to “satirise the Prime Minister’s already well-known admiration for Sir Donald Bradman”.³⁰⁵

On appeal, the Full Federal Court found that fair dealing was established in only nine of the excerpts.³⁰⁶ One excerpt contained an interview with a manager of a Sydney hostel during which occupants of the hostel entered the interview room

²⁹⁸ At 105.

²⁹⁹ At 105.

³⁰⁰ Handler and Rolph, above n 288, at 392.

³⁰¹ *TCN Channel Nine v Network Ten Pty Ltd*, above n 289.

³⁰² Ben Mee “Laughing Matters: Parody and Satire in Australian Copyright Law” (2009/2010) 20 *Journal of Law, Information and Science* 61 at 61.

³⁰³ *TCN Channel Nine v Network Ten Pty Ltd*, above n 289 at 301.

³⁰⁴ At 292.

³⁰⁵ At 292.

³⁰⁶ *TCN Channel Nine v Network Ten Pty Ltd* [2002] FCAFC 146; (2002) 118 FCR at 417, 438–9.

causing the panellists to laugh and joke about the interview.³⁰⁷ The Full Court held that Network Ten's rebroadcast of the interview was "made for its own sake", or for the purpose of humour, rather than as an exercise in criticism or review.³⁰⁸ Accordingly, the construction of criticism or review in Australia has been drawn so closely that a user of copyright work must be expressly passing judgment on a work in order to fall within the ambit of fair dealing. At the time of the Panel Case litigation, poking fun at a work primarily to amuse or embarrass was not sufficient to protect against infringement.

The Full Court's reversal of several of Justice Conti's findings in relation to specific excerpts is argued by some authors to demonstrate the potential for ad hoc and unpredictable outcomes based on subjective considerations in fair dealing cases.³⁰⁹ The decision of the Full Court has also been said to exemplify the critical shortfall of fair dealing, being "the artificial pigeon holing of material into limited legislative heads which in turn are prone to conservative, rigid and formalistic interpretation by the courts."³¹⁰ The decision was criticised by the media at the time where it was suggested that the judges had failed to identify that the panellists had engaged in obvious examples of criticism and news reporting.³¹¹ Handler and Rolph contend that the Panel Case litigation created a climate of uncertainty in the Australian broadcasting industry and caused the cancellation of various entertainment shows.³¹²

3.3.1.3 Reporting News

A fair dealing with a work, or with an adaptation of such a work (other than an artistic work) does not constitute an infringement of the copyright in the work if done for the purpose of, or associated with, reporting news.³¹³ Fair dealing can involve reporting news by way of a newspaper, magazine or similar periodical provided that sufficient acknowledgement is made,³¹⁴ in a cinematograph film³¹⁵ or

³⁰⁷ At 440.

³⁰⁸ At 440.

³⁰⁹ Mee, above n 302, at 66.

³¹⁰ M De Zwart "Fair Use? Fair Dealing?" (2006) 24 (1&2) Copyright Reporter 20 at 32.

³¹¹ Andrew Bock, 'Satire Is Out? They Can't Be Serious' The Sydney Morning Herald (Sydney), 30 May 2002, 13.

³¹² Handler & Rolph, above n 288, at 21.

³¹³ Copyright Act (Cth), s 42(1) amended by the Copyright Amendment Act 2006 (Cth).

³¹⁴ Section 42(1)(a).

³¹⁵ Section 42(1)(b).

by means of a communication.³¹⁶ Unlike the equivalent fair dealing exception in the United Kingdom, the meaning of “news” in Australia is not confined to “current events” but will generally include “any intelligence, previously unpublished, about matters of public importance”.³¹⁷ Accordingly, the *Panel Case* excerpt which showed the Australian Prime Minister singing ‘Happy Birthday’, referred to above, was held not to be fair dealing for the purpose of reporting news as it was shown for its entertainment value alone.³¹⁸ Unlike the United Kingdom, fair dealing in Australia is not available for the purpose of reporting news in respect of unpublished material or material that has not been widely circulated.³¹⁹

3.3.1.4 Parody or Satire

Fair dealing for the purpose of parody or satire was introduced into Australian copyright law in 2006.³²⁰ Parody and satire are art forms that both require some degree of copying of original material.³²¹ A parody is “an imitation of all or parts of an original work, which is sufficiently close to the original to be identified, having a satirical or humorous purpose”.³²² Satire is “commentary of an original work “using references to (or extracts from) a work, again using irony, sarcasm or ridicule in exposing, denouncing, or deriding vices, abuses or follies”.³²³

The Australian courts are yet to apply the exception for parody or satire. It is hoped that the parody and satire exception will provide some certainty to producers of parody and satire material who previously could not be assured that their work would fall within the definition of criticism or review.³²⁴ However, certain uses may still fall outside the scope of the exception, for example the “Happy Birthday” clip of the Australian Prime Minister referred to above that was shown simply for entertainment value without any additional context that may be described as parody or satire.³²⁵ It is suggested by Suzor that the effectiveness of the introduction of the

³¹⁶ Section 42 (1)(b) A similar exception is provide for in s 103(B) which applies fair dealing for the purpose of reporting news to an audiovisual item.

³¹⁷ *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; ALJR 45; 32 ALR 485 at 56.

³¹⁸ *TCN Channel Nine v Network Ten Pty Ltd*, above n 306, at 294.

³¹⁹ *Commonwealth v John Fairfax & Sons Ltd*, above n 317, at 56.

³²⁰ Copyright Act (Cth), s 41A amended by the Copyright Amendment Act 2006 (Cth).

³²¹ Nicolas Suzor “Where the bloody hell does parody fit into Australian copyright law? (2008) 13 Media and Arts Law Review 218 at 219.

³²² Knight, above n 286, at 246.

³²³ At 246.

³²⁴ Suzor, above n 321, at 229.

³²⁵ Knight, above n 286, at 246.

parody and satire exception, in terms of providing greater protection and certainty to users of copyright, will ultimately depend on future judicial interpretation of the new legislative provision.³²⁶

3.3.2 Suggested Reforms to the Australian Copyright Exceptions

There have been several reviews undertaken in Australia which deal with the issue as to whether Australia should adopt a fair use exception. In 1998, the Australian Copyright Law Review Committee (ACLRC) in its report *Simplification of the Copyright Act: Part 1* recommended that the fair dealing exceptions be consolidated into open-ended one provision that refers to the current exclusive set of purposes but is not confined to those purposes, and that the fairness factors provided for in relation to research and study should apply to all fair dealings.³²⁷ These recommendations were not taken up by the Australian Government.

In the Australian Attorney General's *Fair Use Review* in 2005, stakeholders were asked whether the Copyright Act (Cth) should be amended to consolidate the fair dealing exceptions as recommended by the ACLRC or whether it be amended to replace the present fair dealing exceptions with a model that resembled the United States fair use provision.³²⁸ The submissions contained a number of arguments for and against fair use, however, a fair use provision was not adopted as it was noted in the explanatory memorandum to the Copyright Amendment Bill 2006 that "no significant interest supported fully adopting the United States approach" in addition to concerns of the Government as to whether fair use complied with the three-step test.³²⁹

3.3.2.1 The Australian Law Reform Commission Review

In 2012 the Australian Law Reform Commission (ALRC) was asked to consider how Australian copyright law was affecting Australia's participation in the digital economy.³³⁰ In relation to the exceptions to copyright, the ALRC was asked to

³²⁶ Suzor, above n 321, at 229.

³²⁷ Copyright Law Review Committee *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) rec 6.29, 6.35, 6.44.

³²⁸ Attorney-Generals Department, above n 295.

³²⁹ Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) at 10.

³³⁰ Australian Law Reform Commission *Copyright and the Digital Economy Issues Paper* (ALRC Issues Paper 2012) at 5.

consider whether the exceptions in the Copyright Act (Cth) were adequate and appropriate in the digital environment, and whether further exceptions should be recommended.³³¹ This included the question as to whether a broad, flexible exception should be adopted in Australia.³³² An issues paper released in August 2012 asked a number of questions of stakeholders in relation to the introduction of a flexible exception, including how the exception should be framed and whether such a new exception should replace all or some existing exceptions or should be in addition to the existing exceptions³³³ The ALRC noted that technology and social uses of technology had changed considerably since the *Fair Use Review* of 2005 and as a consequence there may now be more of an appetite for a broad, flexible exception in Australian copyright law.³³⁴

The key recommendation of the thirty made in the ALRC Review *Copyright and the Digital Economy Final Report* (the “ALRC Review”) was that Australian copyright law should be amended to include a fair use exception and all the existing fair dealing exceptions be repealed.³³⁵ The ALRC proposed that the fair use exception should include a non-exhaustive list of fairness factors to be considered in determining fair use and another non-exhaustive list of illustrative purposes, being the type of uses that might qualify as fair.³³⁶ The fairness factors proposed in the *ALRC Review* were almost identical to s 107 of the US Copyright Act 1976.³³⁷

- a) the purpose and character of the use;
- b) the nature of the copyright material;
- c) the amount and substantiality of the part used; and
- d) the effect of the use upon the potential market for, or value of, the copyright material.

The eleven proposed “illustrative purposes” were:

- a) research or study;
- b) criticism or review;
- c) parody or satire;

³³¹ *ALRC Review*, above n 1, at 19.

³³² At 19.

³³³ ALRC, above n 330, at 11.

³³⁴ At 78.

³³⁵ *ALRC Review*, above n 1, at 13.

³³⁶ At 13.

³³⁷ At 13.

- d) reporting news;
- e) professional advice;
- f) quotation;
- g) non-commercial private use;
- h) incidental or technical use;
- i) library or archive use;

In the event that the Australian Government opted not to enact a fair use provision, the ALRC recommended the enactment of a new fair dealing exception to consolidate Australia's existing fair dealing exceptions and the addition of new fair dealing purposes including; quotation, non-commercial private use, incidental or technical use, library or archive use, education and access by people with a disability.³³⁸ Importantly, unlike a fair use exception, the consolidated fair dealing exception would only apply to a use of a copyright work for one of the prescribed purposes as the purposes were not merely illustrative.³³⁹

The *ALRC Review* made out a comprehensive case for fair use by marshalling nine key arguments under three main heads; procedural arguments, economic and practical arguments and legal arguments.³⁴⁰ From a procedural perspective the ALRC argued that fair use was not a radical exception but shared the same common law history as, and built on, the existing fair dealing exceptions.³⁴¹ The ALRC also contended that fair use was considerably more flexible and thus better able to adapt to new technologies and new commercial and consumer practices than fair dealing.³⁴² ALRC did not believe that the flexibility of fair use detracted significantly from its certainty.³⁴³

The economic and practical arguments advanced by the ALRC included that fair use stimulated innovation,³⁴⁴ was technology neutral,³⁴⁵ better aligned with the expectations of users of copyright,³⁴⁶ promoted the public interest and found a more

³³⁸ At 14.

³³⁹ At 14.

³⁴⁰ Monseau, above n 6, at 23.

³⁴¹ *ALRC Review*, above n 1, at 93.

³⁴² At 95.

³⁴³ At 112.

³⁴⁴ At 104.

³⁴⁵ At 95.

³⁴⁶ At 108.

optimal balance between owners and users of copyright,³⁴⁷ promoted transformative uses of copyright works,³⁴⁸ and, with respect to the fourth fairness factor, protected rights-holders markets.³⁴⁹ From a legal perspective, the ALRC claimed that fair use is compatible with the three-step test.³⁵⁰ The primary rationale given for this claim was the absence of any international challenges to the United States fair use provision.³⁵¹

A collective of copyright owners and representatives recently commissioned Price Waterhouse Cooper to examine the potential effects of the introduction of a fair use type regime in Australia through a cost-benefit analysis.³⁵² The Price Waterhouse Cooper Report concluded that the costs of copyright litigation would rise from \$26.6 million to \$133 million dollars annually if fair use were introduced in Australia.³⁵³ The report also concluded that there was no firm evidence supporting a direct causal relationship between fair use and improved economic outcomes for the Australian economy as a whole.³⁵⁴ In response, a number of intellectual property academics from the United States, Canada and Australia have released a submission to the Australian Productivity Commission (PC) strongly criticising the Price Waterhouse Cooper Report.³⁵⁵ The PC has since similarly criticised the methodology and assumptions made in the Price Waterhouse Cooper Report, particularly the assumption that the current balance between the incentives to creators and the costs to users is currently ideal.³⁵⁶

3.3.2.2 *The Australian Productivity Commission Draft Report*

A recent review of Australian competition policy in 2015 (the “*Harper Report*”) concluded that a review of the intellectual property regime of Australia was a priority and noted that it was important to find an appropriate balance between

³⁴⁷ At 100.

³⁴⁸ At 100.

³⁴⁹ At 110.

³⁵⁰ At 115-116.

³⁵¹ At 116.

³⁵² Price Waterhouse Cooper *Understanding the costs and benefits of introducing a fair use exception* (February 2016).

³⁵³ At iv.

³⁵⁴ At v.

³⁵⁵ Peter Jaszi and Others *Evaluating the Benefits of Fair Use: A Response to the PWC Report on the Costs and Benefits of Fair Use* (15 April 2016).

³⁵⁶ Australian Government Productivity Commission *Intellectual Property Arrangements Draft Report* (April 2016) at 151.

encouraging widespread adoption of new productivity-enhancing techniques, processes and systems and fostering ideas and innovation.³⁵⁷ Google Inc, in its submission to the *Harper Report*, referred to the results of research undertaken by Deloitte Access Economics that indicated that a digitally-enabled economy was one of the most important sources of growth for Australia.³⁵⁸ Following release of the *Harper Report*, the Australian Government supported the recommendation for the PC to undertake an overarching review of Australia's intellectual property arrangements, with an inquiry being commissioned by the Treasurer in August 2015.³⁵⁹

In April 2016 the PC released its draft report, *Intellectual Property Arrangements*.³⁶⁰ This draft report seeks further submissions from stakeholders as to the proposals made with the final report due to be released in late 2016. The key proposal in relation to the exceptions to copyright was that the Copyright Act (Cth) should be amended to introduce the concept of 'user rights' to counterbalance the exclusive rights granted to rights holders and that this would be achieved by replacing the fair dealing exceptions with a fair use exception.³⁶¹ The PC recommended even more expansive reform than that suggested by the ALRC, noting that the ALRC's recommendation on fair use represented the minimum level of change that the Australian Government should pursue.³⁶²

Similar to the *ALRC Review*, the PC proposed that there should be a comprehensive list of illustrative purposes and that the assessment of whether a use of copyright material is fair should be based on a list of fairness factors, including:³⁶³

- a) the effect of the use on the market for the copyright protected work at the time of the use;
- b) the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work;

³⁵⁷ Ian Harper, Peter Anderson, Su McCluskey and Michael O'Brien *Competition Policy Review Final Report* (March 2015) at 40.

³⁵⁸ Google Inc *Submission Competition Policy Final Report* (26 May 2015) <www.treasury.gov.au> at 2.

³⁵⁹ Australian Government *Australian Government Response to the Competition Policy Review* (August 2015) at 8.

³⁶⁰ Australian Government Productivity Commission, above n 356.

³⁶¹ At 159.

³⁶² At 153.

³⁶³ At 162.

- c) the commercial availability of the work at the time of the infringement;
- d) the purpose and character of the use, including whether the use is commercial or private use.

These fairness factors differ to those proposed by the ALRC and to those found in s 107 of the Copyright Act (US). The factor that deals with the nature of the copyrighted work has been replaced by a factor that deals with the commercial availability of the work at the time of the infringement. This narrows the scope of this factor to a more specific question. An express reference to the degree of transformation of the new work has been included as has a specific reference to whether the use is private or commercial. These factors are said to be designed to assist the court in answering the question of whether the use of the copyright work has materially reduced a rights holder's commercial exploitation of their work.³⁶⁴ The fairness factors are proposed by the PC to be "rebuttable presumptions" being default positions which may be overturned depending on the facts of the case.³⁶⁵ In order to reduce the uncertainty that would arise from a new exception, the PC proposes that the Australian courts could draw on the principles laid out in fair use decisions as a starting point for the application of the fairness factors.³⁶⁶

Copyright owners and related organisations have, not surprisingly, objected to the proposals laid out in the *Intellectual Property Arrangements* report. APRA AMCOS, the Australasian Performing Rights Association Limited combined with the Australasian Mechanical Copyright Owners Society Limited, has stated that the PC has not provided any tangible evidence of genuine impediments to Australia's ability to innovate arising from existing copyright legislation.³⁶⁷

3.3.3 Recent Reforms to the Australian Copyright Exceptions

The recommendations in the *ALRC Review* as to the adoption of a fair use, or a consolidated fair dealing, exception were not taken up by the Australian Government. In 2014 when the *ALRC Review* was tabled in Parliament, the Attorney General of Australia George Brandis stated that "the Copyright Act is

³⁶⁴ At 160.

³⁶⁵ At 160.

³⁶⁶ At 160.

³⁶⁷ APRA AMCOS "Response to Productivity Commission's draft report on Intellectual Property Arrangements" (3 May 2016) < www.apraamcos.com.au >.

overly long, unnecessarily complex, often comically outdated and all too often, in its administration, pointlessly bureaucratic”.³⁶⁸ However, Brandis also stated, with reference to the ALRC recommendations, that he was not persuaded that Australia needed a fair use exception in its copyright law.³⁶⁹

Since the release of the *ALRC Review*, reform to the Copyright Act (Cth) has been primarily targeted at increasing protections for copyright owners. In June 2015 the Copyright Amendment (Online Infringement) Act 2015 (CAIOA) came into force.³⁷⁰ The CAIOA introduced new laws to give copyright owners who discover infringing material online a method of requiring carriage service providers, for example organisations that provide access to the internet and those that provide telephone services, to take reasonable steps to block access to the infringing content.³⁷¹ The Explanatory Memorandum for the CAIOA outlines that such measures are consistent with human rights, including the right to freedom of expression.³⁷² The Australian Human Rights Commissioner Tim Wilson has stated, with reference to the CAIOA measures, that Government attempts to block copyright infringement are consistent with advancing human rights only if a fair use exception is also introduced.³⁷³ This argument has merit. The extra protections granted to copyright owners by the CAIOA must be balanced by the ability of users of copyright works to access legally acquired and disseminated information. This can only be achieved via the enactment of a fair use exception.

The Australian Government has historically been reluctant to take up the various proposals made in Government commissioned reports in relation to the expansion or replacement of the fair dealing exceptions in Australian copyright law. Potentially it may now be more difficult for the Australian Government to avoid addressing such reform given the recent proposals made by both the ALRC and the PC that it is time for Australia to now adopt a fair use exception.

³⁶⁸ George Brandis “Address at the Opening of the Australian Digital Alliance Fair Use for the Future – A Practical Look at Copyright Reform Forum” (14 February 2014, Canberra, Australia) at 1.

³⁶⁹ At 1.

³⁷⁰ Copyright Amendment (Online Infringement) Act 2015 (CAIOA).

³⁷¹ Copyright Act (Cth), s 115A amended by the CAIOA.

³⁷² Copyright Amendment (Online Infringement) Bill 2015 Explanatory Memorandum at 3.

³⁷³ Tim Wilson “Copyright law with ‘fair use’ exception consistent with human rights” Australian Human Rights Commission (April 2015) <www.humanrights.gov.au>.

3.4 *Fair Dealing in Canada*

The fair dealing exceptions were introduced into Canadian legislation in 1921 as a duplication of section 2(1)(i) of the Copyright Act 1911 (UK).³⁷⁴ Since 1921, the fair dealing provisions have been amended on three occasions.³⁷⁵ The Copyright Act RSC 1985 (Canada) currently provides that fair dealing for the purposes of research, private study, education, parody or satire,³⁷⁶ criticism or review,³⁷⁷ and news reporting³⁷⁸ does not infringe copyright. Although the fair dealing model is typically characterised by its more limited scope, it has been argued by some authors that the breadth of fair dealing in Canada has been so expanded by statutory reform and to a greater extent by judicial interpretation, that it now more closely resembles a fair use model.³⁷⁹

3.4.1 *Fair Dealing in the Canadian Courts*

3.4.1.1 *The CCH Decision*

Until relatively recently fair dealing in Canada was viewed as restrictive in terms of both the limited number of statutory purposes that qualified for fair dealing and judicial interpretation of the fair dealing provisions.³⁸⁰ However, the Supreme Court of Canada in its landmark copyright decision *CCH Canadian Ltd v Law Society of Upper Canada*³⁸¹ took a “pro-user” approach grounded in copyright principle and in doing so significantly expanded the scope of the fair dealing exceptions.³⁸² The case involved allegations of copyright infringement against the Law Society of Upper Canada (the “LSUC”) by a number of publishers including CCH Canada. The LSUC operates and maintains a large research and reference library, the Great Library, which holds one of the largest collections of legal materials in Canada. The Great Library offers a custom request-based photocopy

³⁷⁴ Copyright Act 1921 (Canada), section 16(1)(i).

³⁷⁵ North American Free Trade Agreement Implementation, Act S.C 1993, s 64(1); An Act to Amend the Copyright Act S.C.1997, s18; Copyright Modernization Act 2012 (otherwise known as Bill C-11).

³⁷⁶ Copyright Act RSC 1985 (Canada), s 29.

³⁷⁷ Section 29.1, provided there is acknowledgement of source.

³⁷⁸ Section 29.2, provided there is acknowledgement of source.

³⁷⁹ Giest, above n 17, at 158.

³⁸⁰ At 166.

³⁸¹ *CCH Canadian Ltd v Law Society of Upper Canada*, above n 44.

³⁸² Anna Kingsbury “Finding the Copyright Balance: Originality, Authorisation and Fair Dealing in Canadian and New Zealand Law” (2005) 4 NZIPJ 68 at 68.

service carried out by staff and delivered to members, including lawyers and the judiciary, and additionally provides a number of self-serve photocopiers.³⁸³ One of the publisher's arguments was that provision of the custom photocopying service was an infringement of copyright in the legal materials that they published by the LSUC.³⁸⁴ With respect to the defence of fair dealing, the issue before the Court was whether the custom photocopy service fell within the ambit of s 29 of the Copyright Act, being fair dealing for the purpose of research or private study.³⁸⁵

The *CCH* decision is notable first because at the outset it characterises fair dealing as an integral part of the copyright scheme and as a "user's right" rather than a defence or an exception.³⁸⁶ Secondly, Chief Justice McLachlin notes that, in order to maintain a balance between the rights of copyright owners and users, fair dealing "should not be interpreted restrictively".³⁸⁷ Accordingly, the Court gave the term "research" a broad and liberal interpretation by declining to limit it to private or non-commercial situations and determining that lawyers carrying on the business of law for profit were conducting research within the scope of s 29.³⁸⁸ Thirdly, with respect to the assessment of fairness, the Chief Justice drew from the doctrine of fair use and the decision of Lord Denning in *Hubbard v Vosper* and approved six factors that would govern the determination of fairness in future cases in Canada.³⁸⁹ These six factors and a summary of the Court's analysis of each are as follows:³⁹⁰

1. *The Purpose of the Dealing* –allowable purposes should not be given a restrictive interpretation in order to avoid undue restrictions on user's rights.
2. *The Character of the Dealing*- it is relevant whether single or multiple copies are made, the latter tending to be unfair. It may be also be useful to consider the trade or custom in an industry or trade.

³⁸³ *CCH Canadian Ltd v Law Society of Upper Canada*, above n 44, at 346.

³⁸⁴ At 347.

³⁸⁵ At 347.

³⁸⁶ At 364.

³⁸⁷ At 364.

³⁸⁸ At 365.

³⁸⁹ At 366-369.

³⁹⁰ At 366-368.

3. *The Amount of the Dealing* – the amount of the dealing, the importance of the work allegedly infringed and the quantity taken of the work are relevant. It may be possible to deal fairly with a whole work.
4. *Alternatives to the Dealing*– it is relevant whether the dealing was reasonably necessary to achieve the ultimate purpose of the user.
5. *The Nature of the Work* – whether a work is unpublished is not determinative of fairness as it may be that the dealing has led to a wider public dissemination of the work. The dealing is likely to be unfair however, if the work was confidential.
6. *Effect of Dealing on the Work* – it is less likely to be fair dealing where the reproduced work is likely to compete in the same market as the original work. This factor is not the only, nor the most important factor in the assessment of fairness.

The combination of the Court’s emphasis on the utilitarian policy considerations of copyright, the elevation of fair dealing to a “user’s right” from a mere defence or exception,³⁹¹ the expansive interpretation of the fair dealing purposes and the liberal assessment of fairness in *CCH* has laid the foundation for a more flexible fair dealing framework in Canada³⁹² affecting virtually all copyright cases since.³⁹³

3.4.1.2 *The Copyright Pentalogy*

On 12 July 2012 the Supreme Court of Canada issued rulings on five copyright cases.³⁹⁴ These five decisions have been termed the “copyright pentalogy” and, according to some authors, these decisions “shook the foundations of copyright law

³⁹¹ At 364

³⁹² D’Agostino, above n 180, at 337.

³⁹³ Giest, above n 17, at 157.

³⁹⁴ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34, [2012] 2 SCR 231; *Province of Alberta v Canadian Copyright Licencing Agency* [2012] 2 SCR 345; *Re: Sound v Motion Picture Theatre Associations of Canada* [2012] SCC 38, [2012] 2 SCR 376; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada* [2012] SCC 35, [2012] 2 SCR 283; *Society of Composers Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326.

in Canada”.³⁹⁵ Fair dealing assumed a central role in two of these cases.³⁹⁶ In both, the Court articulated an expansive approach to the purposes of fair dealing and provided guidance as to the interpretation of the six *CCH* fairness factors. In *Province of Alberta v Canadian Copyright Licencing Agency*, the Supreme Court adopted an expansive interpretation of private study by ruling that it could include teacher instruction and that it “should not be understood as requiring users to view copyrighted works in splendid isolation”.³⁹⁷ In *Society of Composers Authors and Music Publishers of Canada v Bell Canada* the scope of the research purpose was also given a liberal interpretation to include the streaming of a 30-second song preview by consumers, noting that research, even if undertaken for no purpose except personal interest, would fall within the scope of fair dealing.³⁹⁸ According to Giest, this expansive approach to fair dealing means that a wide range of businesses and education groups could now be successful in making out that innovative uses of copyright works qualify as fair dealing and therefore do not require prior permission or compensation.³⁹⁹ Furthermore, it is also possible that other existing purposes, for example parody, are increasingly likely to encompass a broader range of activities.

In *Bell Canada*, the Court referred to the *CCH* decision and stated:⁴⁰⁰

In mandating a generous interpretation of the fair dealing purposes, including ‘research’, the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy hitting is done in determining whether the dealing was fair.

The Supreme Court’s analysis of the fairness factors in both the *Bell Canada* and *Alberta* cases entrenched the *CCH* analysis but also built on it, including adding the proposition that it is the purpose of the users of copyright that is relevant in relation to the first factor.⁴⁰¹ Accordingly, in relation to the purpose of research or private

³⁹⁵ Giest, above n 17, at 158.

³⁹⁶ *Province of Alberta v Canadian Copyright Licencing Agency*, above n 394; *Society of Composers Authors and Music Publishers of Canada v Bell Canada*, above n 394.

³⁹⁷ *Province of Alberta v Canadian Copyright Licencing Agency*, above n 394, at 350.

³⁹⁸ *Society of Composers Authors and Music Publishers of Canada v Bell Canada*, above n 394, at 336.

³⁹⁹ Giest, above n 17, at 157.

⁴⁰⁰ *Society of Composers Authors and Music Publishers of Canada v Bell Canada*, above n 394, at 337.

⁴⁰¹ *Province of Alberta v Canadian Copyright Licencing Agency*, above n 394, at 360; *Society of Composers Authors and Music Publishers of Canada v Bell Canada*, above n 394, at 338.

study, the relevant purpose is that of the student even when the copying is completed by or under the instruction of the teacher.⁴⁰² Furthermore, in *Alberta*, the Court held that the amount of dealing with a work refers to the individual copy, not to the aggregate amount being copied by an institution.⁴⁰³ These findings in *Alberta* provide more flexibility for educational and other institutions to disseminate works to students or members for the purposes of research or private study without infringing copyright.

In relation to the fairness factor “the effect of the dealing on the work”, in *Alberta* the Court canvassed the issue of market harm and determined that the plaintiff would need to demonstrate sufficient evidence of economic harm as a result of the copying in order to demonstrate a negative effect.⁴⁰⁴ Although in fair dealing cases the defendant has the evidentiary burden to show that the dealing was fair, the decision in *Alberta* effectively shifts that burden to the plaintiff, at least with respect to the market effect factor, to demonstrate that the defendant’s dealing with the work caused the plaintiff actual economic harm.⁴⁰⁵ This makes practical sense as it is unlikely that a defendant would have sufficient access to information held by the plaintiff in order to adduce sufficient evidence related to economic harm.

Although fair dealing was not the issue tackled by the Canadian Supreme Court in *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, this case had potentially significant implications for the copyright exceptions scheme in Canada, including the fair dealing provisions.⁴⁰⁶ In *Entertainment*, the Court struck down the demand for payment for music included in downloaded video games as compared to their counterparts on the basis that such payment violated the principle of technological neutrality.⁴⁰⁷ In *Entertainment* Geist argues, the Court embedded a technology-neutral principle into copyright law that will extend far beyond this particular case; as future litigants will be able to

⁴⁰² *Province of Alberta v Canadian Copyright Licencing Agency*, above n 394, at 360.

⁴⁰³ At 363.

⁴⁰⁴ At 365.

⁴⁰⁵ This finding is based on that in *CCH* where the Court held that the plaintiff publishers should make the case that they were negatively affected by the copying practices of the Law Society. The Court permitted the LSUC to rely on the Great Library’s general practice to establish fair dealing.

⁴⁰⁶ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, above n 394.

⁴⁰⁷ At [5].

argue that in order to ensure technology neutrality, new uses of copyright works should fall under the scope of existing exceptions, including the fair dealing exceptions.⁴⁰⁸

However, the recent decision in *Canadian Broadcasting Corporation/Société Radio-Canada (CBC) v SODRAC 2003 Inc*⁴⁰⁹ is potentially a backwards step for copyright users with respect to technological neutrality. The Court held that incidental copies of broadcasts made by the CBC in the course of preparing a master recording for a television broadcast were still copies pursuant to the Copyright Act and that accordingly, the CBC must obtain permission to use them.⁴¹⁰ The Court's ruling that theories of technological neutrality could not supplant the plain words of Canada's Copyright Act potentially detracts to some extent from the flexibility that the Court had established in the 2012 copyright pentology decisions.⁴¹¹

3.4.2 Recent Reforms to the Canadian Copyright Exceptions

Since 1997, when Canada signed the WCT and the WPPT, at least 12 Government reports have made recommendations for reform to address digital issues in Canadian copyright law.⁴¹² Between 1997 and 2012, several attempts were made to reform the Copyright Act (Canada) to ensure Canada met its international obligations and kept up with developments in digital technology.⁴¹³ However the Copyright Act (Canada) was not amended until 2012 when the Copyright Modernization Act (CMA), also known as Bill C-11, was enacted. The CMA introduced fair dealing for the purposes of education⁴¹⁴, satire and parody⁴¹⁵ and also introduced specific exceptions including exceptions for personal use (time and format shifting)⁴¹⁶ and non-commercial user generated content (UGC).⁴¹⁷ The latter

⁴⁰⁸ Giest, above n 17, at 158.

⁴⁰⁹ *Canadian Broadcasting Corporation/Société Radio-Canada v SODRAC 2003 Inc et al* (2015) SCC 57.

⁴¹⁰ At 618.

⁴¹¹ At 618.

⁴¹² Barry Sookman "Copyright Reform for Canada: What Should We Do? Copyright Consultations Submission." (2014) Osgoode Hall Review of Law and Policy 72 at 73.

⁴¹³ For example Bill C-60, An Act to Amend the Copyright Act, 1st Sess 38th Parl, 2005 [Bill C-60]; Bill C-61 An Act to Amend the Copyright Act 2nd Sess 39th Parl, 2007-2008 [Bill C-61]. Neither of these Bills succeeded to a second reading.

⁴¹⁴ Copyright Act RSC (Canada), s 29. Fair dealing for education does not currently require acknowledgment of source.

⁴¹⁵ Section 29.

⁴¹⁶ Section 29.23.

⁴¹⁷ Section 29.21.

exception, known as the “mash-up provision”, provides that an individual is permitted to use, in a non-commercial context, a publicly available work in order to create a new work.

Although Canada appears to have a rigid fair dealing framework, it is argued, following *CCH* and the copyright pentalogy, that it now has a framework that is at least as flexible as that of the United States.⁴¹⁸ D’Agostino postulates that the real difference between Canada, the United Kingdom and the United States lies in the policy preoccupations held by their respective courts.⁴¹⁹ In Canada, the Court has shifted its focus towards the rights of users in order to balance copyright whereas in the United Kingdom, rights-holder’s interests and commercial exploitation are of primary concern.⁴²⁰ In the United States, D’Agostino notes that the pendulum swings back and forth between different stakeholders.⁴²¹ The user rights framework in Canada has attracted growing attention worldwide, as Canadian copyright law is increasingly cited as the paradigm example for balancing creators and user rights.⁴²² The Canadian model may be a viable approach for those jurisdictions wishing to increase copyright flexibilities but simultaneously facing concerns over compliance with international and trade obligations and the value of domestic certainty.⁴²³

3.5 *Fair Dealing in Ireland*

Ireland is a Member State of the European Union. Accordingly, the copyright reforms available to Ireland are ultimately constrained by the regulatory framework of European Union copyright legislation. Most of the provisions of the InfoSoc Directive have been transposed into the Copyright and Related Rights Act 2000 (Ireland) (CRRRA).⁴²⁴ Irish copyright law was brought into further compliance with the InfoSoc Directive by the European Communities (Copyright and Related Rights) Regulations 2004.⁴²⁵

⁴¹⁸ D’Agostino, above n 180, at 356.

⁴¹⁹ At 357.

⁴²⁰ At 357.

⁴²¹ At 357.

⁴²² Giest, above n 17, at 180.

⁴²³ At 180.

⁴²⁴ Copyright and Related Rights Act 2000 (Ireland) (CRRRA).

⁴²⁵ European Communities (Copyright and Related Rights) Regulations 2004 (Ireland).

Fair dealing in Ireland is currently available for the purposes of research or private study,⁴²⁶ criticism or review⁴²⁷ and the reporting of current events.⁴²⁸ Fair dealing in relation to these purposes means fair dealing with a work which has already been lawfully made available to the public for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright.⁴²⁹ Fair dealing is also available in respect of reutilising a substantial part of the contents of a database where that part is extracted for the purposes of research or private study⁴³⁰ or by an educational institution for the purposes of illustration or instruction.⁴³¹

3.5.1 Suggested Reforms to the Irish Copyright Exceptions

The Irish Copyright Review Committee (CRC) was established in 2011 in order to examine Irish copyright legislation and identify any areas that were perceived to create barriers to innovation.⁴³² One of the terms of reference for the CRC review was to examine whether the fair use doctrine would be appropriate in an Irish context.⁴³³ In its report *Copyright and Innovation: A Consultation Paper*, the CRC noted that fair use was the issue which aroused the greatest passions from stakeholders and the general public.⁴³⁴ The CRC proposed that a fair use provision would need to take into account the legitimate concerns of its critics, be tied to the existing exceptions in the CRRA and based not only on the four United States fairness factors but also on art 9(2) of the Berne Convention and on the experience of other countries that had adopted fair use.⁴³⁵ Accordingly, the CRC's proposed draft fair use provision included eight fairness factors, a reference to the age and value of the copyright work, integrated clauses from the United States, Israel and Singapore fair use provisions and contained a specific reference to the language of the three-step test. The CRC then sought submissions as to the appropriateness of the draft fair use provision for Ireland.⁴³⁶

⁴²⁶ CRRA, s 50(1).

⁴²⁷ Sections 51(1) and 221(1).

⁴²⁸ Section 221(1).

⁴²⁹ Sections 50(4) and 221(2).

⁴³⁰ Section 329(1).

⁴³¹ Section 330(1) and (2).

⁴³² Copyright Review Committee Ireland *Copyright and Innovation: A Consultation Paper* (2012), above n 39, at 1.

⁴³³ At 1.

⁴³⁴ At 123.

⁴³⁵ At 120.

⁴³⁶ At 123.

Over two years later in October 2013 the CRC released its final report *Modernising Copyright*.⁴³⁷ The report contained an extensive draft Copyright and Related Rights (Innovation) (Amendment) Bill 2013 to implement the CRC recommendations. The CRC took the view that the draft fair use provision was not incompatible with European Union law or the three-step test and, unlike the *Hargreaves Review*, concluded that there was scope for Member States of the European Union to adopt a fair use provision.⁴³⁸ The CRC considered that a fair use provision was necessary in Ireland primarily due to unpredictable advances in digital technology for which it would not be possible to create an *ex-ante* legal response.⁴³⁹ The CRC recommended some substantive changes to the draft fair use provision based on United States fair use jurisprudence, to better align it with the the existing CRRA exceptions and to provide more clarity around some of the fairness factors.⁴⁴⁰ These changes included specific reference to whether the use is transformative and/or non-consumptive and whether there is a public benefit or interest in dissemination of the work through the use in question. The CRC was of the view that the following amended fair use provision creates an appropriate balance both within and between the various rights owners, collecting societies, intermediaries, users, entrepreneurs, and heritage institutions in Ireland.⁴⁴¹

49A. Fair Use.

- (1) The fair use of a work is not an infringement of the rights conferred by this Part.
- (2) The other acts permitted by this Part shall be regarded as examples of fair use, and, in any particular case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.
- (3) For the purposes of this section, the court shall, in determining whether the use made of a work in any particular case is a fair use, Whether increasing the list of factors would result in increased certainty is arguable take into account such matters as the court considers relevant, including any or some or all of the following—
 - (a) the extent to which the use in question is analogically similar or related to the other acts permitted by this Part,

⁴³⁷ *Modernising Copyright*, above n 39.

⁴³⁸ At 91.

⁴³⁹ At 92.

⁴⁴⁰ At 95.

⁴⁴¹ At 97.

- (b) the purpose and character of the use in question, including in particular whether:
 - (i) it is incidental, non-commercial, non-consumptive, personal or transformative in nature, or
 - (ii) if the use were not a fair use within the meaning of the section, it would otherwise have constituted a secondary infringement of the right conferred by this Part.
- (c) the nature of the work, including in particular whether there is a public benefit or interest in its dissemination through the use in question,
- (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the work as a whole,
- (e) the impact of the use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market,
- (f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case,
- (g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and
- (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.
- (4) The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section.
- (5) The Minister may, by order, make regulations for the purposes of this section—
 - (a) prescribing what constitutes a fair use in particular cases, and
 - (b) fixing the day on which this section shall come into operation.

The recommendations in *Modernising Copyright* are yet to be adopted in Ireland. The Copyright and Related Rights (Innovation) (Amendment) Bill 2015 (CRRIAB) was introduced into Parliament in December 2015. The text of the 2015 Bill is the same as the draft 2013 Bill set out in *Modernising Copyright* with a few variations.⁴⁴² The “fair use” provision outlined in the CRC report is described in the 2015 Bill as a “reasonable dealing” exception.⁴⁴³ The rationale for the change in the name of the exception is that the fair use provision described in *Modernising Copyright* differs so substantially from the United States fair use provision that describing it in those terms was “misleading”.⁴⁴⁴ Furthermore, it was proposed that

⁴⁴² Copyright and Related Rights (Innovation) (Amendment) Bill 2015 (CRRIAB).

⁴⁴³ Section 29.

⁴⁴⁴ CRRIAB Explanatory Memorandum at 3.

“reasonableness” is a familiar standard in many aspects of Irish law and “dealing” a familiar standard in Irish copyright law.⁴⁴⁵

In the CRRIAB, the existing exceptions are regarded as examples of reasonable dealing and must be exhausted before analysis reaches the question of reasonable dealing.⁴⁴⁶ This includes exhausting the existing fair dealing provisions which are not repealed. In effect, the reasonable dealing is a “catch-all” provision designed to catch all those uses which do not fall within any other exception. The Irish reasonable dealing provision thus differs from s 107 where there is no statutory requirement as such to first exhaust the other exceptions in the Copyright Act (US).⁴⁴⁷ It is arguable whether the inclusion of this requirement is necessary. It would be difficult to imagine that an alleged infringer would argue that his use was a fair use, or a “reasonable dealing”, without first attempting to obtain protection from one of the specific statutory exceptions. It is possible that retaining the fair dealing exceptions may also create some confusion as to their interpretation, for example: Will the court consider more or less, or different, fairness factors to those outlined in the reasonable dealing provision? Will it be easier or more difficult for an alleged infringer to make out fair dealing as opposed to reasonable dealing?

The CRRIAB also contains an “innovation exception”.⁴⁴⁸ The explanatory memorandum for the CRRIAB sets out that in order to encourage innovation in Ireland it will not be an infringement of copyright to derive an original work which either substantially differs from, or substantially transforms, the initial work, this being termed an “innovative work”.⁴⁴⁹ The innovation exception requires that, within a reasonable time of the date on which the innovative work is first made available to the public, the author of the innovative work must inform the owner of the rights in the initial work about the availability of the innovative work.⁴⁵⁰ Notwithstanding that the work is an innovative work, it will be an infringement if the owner of the rights in the initial work can establish by clear evidence that, within

⁴⁴⁵ At 3.

⁴⁴⁶ At 3.

⁴⁴⁷ Instead, the illustrative purposes in section 107 provide examples of uses that may be considered fair.

⁴⁴⁸ CRRRA, section 106E to be amended by the CRRIAB.

⁴⁴⁹ CRRIAB Explanatory Memorandum, above n 444, at 3.

⁴⁵⁰ CRRRA, section 106E (4) to be amended by the CRRIAB.

a reasonable time after first publication of the work, he or she had embarked upon a process to derive from it a work to which the innovative work is substantially similar or related.⁴⁵¹ However, in practice it is unlikely that producers of innovative works would have access to any derivative works that the copyright owner had started to develop but had not yet made available to the public. These extra requirements and conditions that the producer of an innovative work must fulfil in order to fall within the ambit of the innovation exception may result in the innovation exception being somewhat redundant. It may be more likely that an innovative work would fall within the reasonable dealing provision which does not impose any of the other conditions or requirements set out in the specific innovation exception.

The fair dealing exceptions will also be expanded pursuant to the CRRIAB. Fair dealing will be permitted for the purposes of use during religious celebrations or official celebrations organised by a public authority,⁴⁵² for the purposes of caricature, parody, pastiche, or satire or for other similar or related purposes⁴⁵³ and for the purposes of use in connection with the demonstration or repair of equipment.⁴⁵⁴ New exceptions for format shifting for personal use⁴⁵⁵ reproduction on paper for private use⁴⁵⁶ and for non-commercial UGC⁴⁵⁷ are proposed as is a new provision that renders void some contractual terms which purport to prevent the permitted acts under the CRRA.⁴⁵⁸

Notwithstanding the potential interpretation issues that may arise from the new structure and complexity of the proposed Irish statutory exceptions scheme, the introduction of a fair use style provision, an innovation exception and other specific exceptions to address advances in digital technology together with expansion of the fair dealing defences, will if enacted, undoubtedly create a more optimal balancing of the interests of users and owners of copyright in Ireland.

⁴⁵¹ Section 106E (6).

⁴⁵² Section 52(5) to be amended by the CRRIAB.

⁴⁵³ Section 52(6) to be amended by the CRRIAB.

⁴⁵⁴ Section 52(7) to be amended by the CRRIAB.

⁴⁵⁵ Sections 106B and 254A to be amended by the CRRIAB.

⁴⁵⁶ Section 106A to be amended by the CRRIAB.

⁴⁵⁷ Sections 106D and 254C to be amended by the CRRIAB.

⁴⁵⁸ Section 19 to be amended by the CRRIAB.

3.6 *Summary*

It is evident that the scope of the purposes for which fair dealing is permitted varies between the jurisdictions reviewed in this paper. Law reformists in each of these jurisdictions have contended that an increase in the flexibility of their copyright laws is necessary in order to sufficiently address advances in digital technology. The scope of other specific statutory exceptions enacted in these jurisdictions has been broadened in recent years primarily to bring copyright law in line with developments in digital technology but also for other reasons, including addressing copyright issues for the blind and visually impaired.⁴⁵⁹ The specific exceptions related to private format shifting, non-commercial UGC and innovation that have been, and/or will be, enacted in some of these jurisdictions will undoubtedly remove some of the constraints on users of copyright that are present principally due to the law failing to keep pace with technology developments.

However, the scope of the general fair dealing exceptions in these jurisdictions has received varied attention from the respective legislatures. In Canada the fair dealing framework now functions in a similar fashion to a flexible fair use model due primarily to the user-rights approach taken by the courts. If Ireland's reasonable dealing provision is enacted it will likely create a statutory exceptions scheme that is just as flexible as the United States and Canada, provided judicial interpretation of the provision does not function to limit its application. In some jurisdictions such as Australia, fair dealing remains reasonably limited in scope. This has been in part due to statutory drafting and in part due to restrictive judicial interpretation. The recent expansion of the United Kingdom's fair dealing defences are an improvement on the former provisions but potentially may fail to incorporate new unpredicted uses of digital technology that will almost certainly emerge in the future.

⁴⁵⁹ For example The Copyright and Rights in Performances (Disability) Regulations 2014 (UK).

Chapter 4: Fair Use

Judge Pierre Leval of District Court for the Southern District of New York wrote (extra judicially):⁴⁶⁰

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.

4.1 Fair Use in the United States

4.1.1 Section 107 Copyright Act 1976 (US)

4.1.1.1 The History of Section 107

The history and development of copyright in England in the 18th century has been said to form the basis of what copyright meant to those who drafted the United States Constitution.⁴⁶¹ Accordingly, copyright was introduced into the United States as a grant of statutory monopoly, as was its form in England, and not as a natural law right of authors.⁴⁶² The Statute of Anne was the source of the language used in the first United States copyright statute, the Copyright Act 1790 and also that used in the “copyright clause” of the Constitution in 1787.⁴⁶³ Article I Clause 8 of the Constitution states that the United States Congress shall have the power to:⁴⁶⁴

Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The copyright clause gives the power to Congress to grant exclusive rights to copyright owners through the enactment of copyright legislation. However, it simultaneously permits Congress to constrain these rights by way of limiting the duration of protection and the type of works able to obtain protection.⁴⁶⁵

⁴⁶⁰ Pierre Leval, ‘Toward a Fair Use Standard’ (1990) 103 Harvard Law Review 1105 at 1110.

⁴⁶¹ L Ray Patterson “Understanding Fair Use” (1992) 55 Law and Contemporary Problems 249 at 249.

⁴⁶² At 250. Compared to the European Union concept “droit d’auteur” based on the natural law rights of authors.

⁴⁶³ At 250.

⁴⁶⁴ United States Constitution, art I cl 8.

⁴⁶⁵ Patterson, above n 461, at 249.

Accordingly, copyright in the United States is a privilege conferred by statute and not a right guaranteed by the Constitution.⁴⁶⁶ Pursuant to the authority of the Constitution, Congress has passed several Copyright Acts, the most recent being the Copyright Act 1976.

Fair use has its roots in the fair abridgement cases decided in the United Kingdom courts extending back to 1710⁴⁶⁷ but its origin is commonly attributed to the judgment of Justice Story in *Folsom v Marsh*⁴⁶⁸ where his honour stated:⁴⁶⁹

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Fair use remained a common law doctrine until 1976 when it was codified into s 107 of the Copyright Act 1976.⁴⁷⁰ The House Committee Report on the 1976 Copyright Bill that became s 107 records that the statement of the fair use doctrine in s 107 was to offer guidance to copyright users and noted that “the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute.”⁴⁷¹ Accordingly, the intent of Congress was that the courts be free to adapt the fair use doctrine to particular situations on a case-by case basis⁴⁷² in order to adapt the doctrine to new technology without repeated legislative amendment.⁴⁷³

4.1.1.2 The Structure of Section 107

Section 107 comprises three parts. The first part, a preamble, consists of a list of illustrative purposes for which the fair use of a copyright work would not constitute infringement. The illustrative purposes in s 107 are: criticism, comment, news

⁴⁶⁶ Harry N Rosenfield “Constitutional Dimension of Fair Use in Copyright Law” (1975) 50 Notre Dame Law Review 790 at 791.

⁴⁶⁷ Sag, above n 12, at 1373.

⁴⁶⁸ Neil Weinstock Netanel “Making Sense of Fair Use” (2011) 15 Lewis & Clark Law Review 715 at 718.

⁴⁶⁹ *Folsom v Marsh*, above n 86.

⁴⁷⁰ Copyright Act 1976 (US), s 107.

⁴⁷¹ Copyright Law Revision (House Report No 94-1476), at 66. The Report added that “section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”

⁴⁷² At 66.

⁴⁷³ Newby, above n 109, at 1638.

reporting, teaching (including multiple copies for classroom use), scholarship, or research.⁴⁷⁴ The types of uses listed are proposed to indicate two rationales behind the fair use doctrine; that use should be permitted when transaction costs of obtaining a licence outweigh the actual value of the use, and when the public benefit to the use outweighs the harm to the copyright owner's interests.⁴⁷⁵

The second part of s 107 outlines the four factors that the court considers in determining whether a particular use is fair, these shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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.

The use of the word “shall” indicates that the court must consider these four factors at a minimum in its consideration of what constitutes “fair”. However, the word “include” creates an open-ended list meaning the court may consider other factors it deems relevant to the specific case. It has been suggested by the United States Supreme Court that s 107 does not assign more weight to any individual factor.⁴⁷⁶

The third part of s 107 is the statement that “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” Unlike the fair dealing for criticism or review exception in the United Kingdom⁴⁷⁷ and the fair dealing for news reporting exception in Australia,⁴⁷⁸ the fact that a work is unpublished in the United States does not automatically preclude the use of that work being fair.

⁴⁷⁴ Copyright Act (US), section 107.

⁴⁷⁵ Newby, above n 109, at 1638 citing Paul Goldstein *Goldstein on Copyright* (2nd ed, Oxford University Press, Oxford, 1996).

⁴⁷⁶ *Sony Corp v Universal Studios*, above n 34, at 476.

⁴⁷⁷ CPDA, section 30.

⁴⁷⁸ Copyright Act (Cth), section 42(1).

4.1.2 Fair Use in the Courts of the United States

The United States Supreme Court has stated that s 107:⁴⁷⁹

Continues the common law tradition of fair use adjudication and requires case by case analysis rather than bright line rules. The statutory examples of permissible uses provide only general guidance. The four statutory factors are to be explored and weighed together in light of copyright's purpose of promoting science and the arts.

The following section of this paper examines the United States courts' analysis and application of each of the fairness factors of s 107. It will be evident that fair use has been invoked as a defence to claims of infringement in a vast variety of situations including where the defendant has; reverse engineered a computer programme to gain access to interface information,⁴⁸⁰ drawn from original works in the creation of a musical parody,⁴⁸¹ cached websites to enable consumers easier access to them,⁴⁸² photocopied a document to adduce as evidence in a court proceeding,⁴⁸³ cached thumbnail images with links to websites,⁴⁸⁴ made copies of television programmes for the purpose of time shifting,⁴⁸⁵ and reproduced music concert posters in a book about a rock band.⁴⁸⁶ It will also be evident from the following discussion that in the United States fair use has been instrumental in maintaining the balance between copyright owners and users in the face of rapidly developing technology.

However, there has also been considerable academic debate as to the Court's interpretation of s 107, in particular whether the courts have oversimplified the analysis of the fairness factors to create "rules of thumb" which are not consistent with the nature of fair use.⁴⁸⁷ It is the first and fourth factors that have received the most attention in the literature and in the courts.⁴⁸⁸

⁴⁷⁹ *Luther R Campbell aka Luke Skywalker et al Petitioners v Acuff Rose Music Inc* 510 US 569 (1994) at 4 (hereafter termed "*Campbell v Acuff Rose Music Inc*").

⁴⁸⁰ *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1510 (9th Cir 1992).

⁴⁸¹ *Campbell v Acuff Rose Music Inc*, above n 479.

⁴⁸² *Field v Google Inc* 412 F Supp 2d 1106 (D Nev. 2006).

⁴⁸³ *Sturgis v Hurst* 86 US PQ 2d (BNA) 1444 (ED Mich 2007).

⁴⁸⁴ *Perfect 10 Inc v Amazon.com Inc*, above n 158.

⁴⁸⁵ *Sony Corp v Universal Studios*, above n 34.

⁴⁸⁶ *Bill Graham Archives v Dorling Kindersley Ltd* 448 F 3d 605 (2nd Cir 2006).

⁴⁸⁷ William F Patry and Shira Perlmutter "Fair Use Misconstrued: Profits, Presumptions and Parody" (1993) 11 Cardozo Arts and Entertainment Journal 667 at 670.

⁴⁸⁸ At 670.

4.1.2.1 Factor 1 - The Purpose and Character of the Use including whether such Use is of a Commercial Nature or is for Non-Profit Educational Purposes

The focus of the courts in relation to the first factor is whether the use is characterised as commercial and whether it should be deemed transformative.⁴⁸⁹ It is apparent from examination of the jurisprudence of fair use that the first factor has assumed increasing importance in the last 20 years.⁴⁹⁰

Commercial use of an original work by a defendant was once noted as “presumptively unfair” by the United States Supreme Court.⁴⁹¹ This statement was applied by various lower courts until it was ultimately rejected in *Campbell v Acuff Rose Music Inc.*⁴⁹² In *Campbell*, the rap group “2 Live Crew” created a parody using the lyrics of Roy Orbison’s song “Pretty Woman” and sold over a quarter of a million copies. Acuff Music sued Campbell and the other members of 2 Live Crew for copyright infringement and were successful in the Court of Appeals.⁴⁹³ On appeal, the Supreme Court held that the Court of Appeals had erred by confining its analysis of the first factor to the commercial nature of the use and inflating the significance of this fact by ruling that every commercial use is presumptively unfair.⁴⁹⁴ The Supreme Court noted that if commerciality carried presumptive force against a finding of fair use, the presumption would embrace nearly all of the illustrative uses listed in s 107 as these uses are almost always carried out for profit.⁴⁹⁵ The *Campbell* decision established the principle that while commercial use will generally weigh in favour of the plaintiff, the commercial use of an original work is only one element of the first factor enquiry.⁴⁹⁶

⁴⁸⁹ For example: *Bill Graham Archives v Dorling Kindersley Ltd*, above n 486; *Campbell v Acuff Rose Music Inc*, above n 479.

⁴⁹⁰ Matthew D Bunker and Clay Calvert “The jurisprudence of transformation: intellectual incoherence and doctrinal murkiness twenty years after *Campbell v Acuff Rose Music*” (2014) *Duke Law and Technology Review* 92 at 93.

⁴⁹¹ *Sony Corp v Universal Studios*, above n 314 at [46]. This statement was obiter dictum.

⁴⁹² Michael W Carroll “Fixing Fair Use” 85 *North Carolina Law Review* 1087 at 1102; *Campbell v Acuff Rose Music Inc*, above n 479, where the Supreme Court found fair use of the original work through parody.

⁴⁹³ *Acuff-Rose Music Inc v Campbell* (Campbell II) 972 F2d 1429 1439 (6th Cir 1992).

⁴⁹⁴ *Campbell v Acuff Rose Music Inc*, above n 479, at 583 citing *Acuff-Rose Music Inc v Campbell*, above n 493.

⁴⁹⁵ *Campbell v Acuff Rose Music Inc*, above n 479, at 584 citing the dissenting judgment of Brennan J in *Harper & Row v Nation Enterprises* 471 US 539 (1985) at [110].

⁴⁹⁶ *Dr Seuss Enterprises LP v Penguin Books USA Inc* 109 F 3d 1394 (9th Cir 1997) at 1401.

The second focus of the courts in relation to the nature and purpose of the use is whether the use is transformative.⁴⁹⁷ The “transformative test” was adopted by the Supreme Court in *Campbell* and evaluates the fairness of the use of a copyright work with reference to whether the use supersedes the original work or instead adds “something new, with a further purpose or different character, altering the first with new expression, meaning or message”.⁴⁹⁸ The Court rationalised its emphasis on the extent to which the new work was transformative by noting that transformative use furthers the goal of copyright, being the promotion of science and the arts.⁴⁹⁹ The Court relied principally on the thesis of Pierre Leval in which Leval described transformative use as the guiding principle for fair use using the basic goal of copyright law.⁵⁰⁰ Further credence to the importance of transformative use was given by the Court as it was noted that the more transformative the work, the less other factors, such as commercialism, will weigh against fair use,⁵⁰¹ that a transformative use such as parody will generally permit a greater borrowing of the original work,⁵⁰² and that it will be more difficult to infer market harm where the use is transformative.⁵⁰³

The transformative test has been applied in a variety of situations since *Campbell* and has been a crucial consideration in cases involving internet search engines, specifically the creation of thumbnail images of original works.⁵⁰⁴ In *Kelly v Arriba-Soft Corporation*, the Court ruled that thumbnail images do not stifle artistic creativity, are not used for illustrative or artistic purposes and accordingly do not supplant the original works.⁵⁰⁵ A recent example of the application of the transformative test was by the United States Court of Appeals (Second Circuit) in *Cariou v Prince*.⁵⁰⁶ Photographer Michael Cariou sued appropriation artist Richard Prince on the basis that Prince had infringed Cariou’s copyright in his photographs by cutting them out of Cariou’s book and juxtaposing the photographs with a

⁴⁹⁷ Carroll, above n 492, at 1102.

⁴⁹⁸ *Campbell v Acuff-Rose Music Inc*, above n 479, at 579. The Court drew from the writings of Pierre Leval in Leval, above n 460, at 1111.

⁴⁹⁹ *Campbell v Acuff-Rose Music Inc*, above n 479, at 579 referring to US Constitution, art I cl 8.

⁵⁰⁰ Leval, above n 460.

⁵⁰¹ *Campbell v Acuff-Rose Music Inc*, above n 479, at 579.

⁵⁰² At 588.

⁵⁰³ At 591.

⁵⁰⁴ *Field v Google Inc*, above n 482; *Kelly v Arriba-Soft Corporation* 336 F 3d 811 (9th Cir 2003); *Perfect 10 Inc v Amazon.com Inc*, above n 158.

⁵⁰⁵ *Kelly v Arriba-Soft Corporation*, above n 504, at 9073.

⁵⁰⁶ *Cariou v Prince* 714 F3d 694 (2d Cir 2013).

number of other photographs to create a series of collages.⁵⁰⁷ Prince's collages were sold for over 10 million dollars.⁵⁰⁸ The primary element in the Court's determination of whether Prince's use of the photographs was fair was whether Prince had engaged in a transformative use.⁵⁰⁹ The majority held that 25 of Prince's works were transformative and remanded the case to the District Court to determine whether the other five works were similarly transformative.⁵¹⁰ The Court specifically rejected the District Court's finding that to qualify for a fair use defense, a secondary use must comment on, relate to the historical context of, or critically refer back to the original works.⁵¹¹ Instead the Court held that what was critical was how the work in question appeared to the reasonable observer.⁵¹² The *Cariou* decision has been criticised for expanding the transformative test and thereby undermining the exclusive right of authors to make derivative works.⁵¹³ However, it is notable that the Supreme Court was not so opposed to the *Cariou* decision as to grant the plaintiff's petition for appeal.⁵¹⁴

The transformative test has assumed increasing importance since the Supreme Court's decision in *Campbell*.⁵¹⁵ Statistical studies have observed that a finding of transformation in a claim for fair use doubles the likelihood,⁵¹⁶ or virtually assures a finding,⁵¹⁷ that the use was fair. Despite its prevalent use, the decision in *Cariou* is proposed by some authors to highlight the "tremendous uncertainty" that has been created by the transformative use doctrine since *Campbell*.⁵¹⁸ Bunker and Calvert refer to the dissenting judgment of Judge Wallace in *Cariou* who expressed scepticism that the Court could apply its own artistic judgment to identify transformative use in any principled way.⁵¹⁹ These authors argue that the

⁵⁰⁷ At 698.

⁵⁰⁸ Brian Boucher "Richard Prince wins major victory in landmark copyright suit" (25 April 2013) < www.artinamericamagazine.com>.

⁵⁰⁹ *Cariou v Prince*, above n 506, at 711.

⁵¹⁰ At 711.

⁵¹¹ *Cariou v Prince* 784 F. Supp. 2d 348.

⁵¹² *Cariou v Prince*, above n 506 at 14 citing *Campbell v Acuff Music*, above n 486, and *Leibovitz v. Paramount Pictures Corp* 137 F 3d 109 113-14 (2d 11 Cir 1998).

⁵¹³ *Kienitz v Sconnie Nation LLC* 766 F 3d 756 (7th Cir 2014) at 4.

⁵¹⁴ Pamela Samuelson "Possible Futures of Fair Use" (2015) 90 Washington Law Review 815 at 844.

⁵¹⁵ Netanel, above n 475, at 736.

⁵¹⁶ Matthew Sag "Predicting Fair Use" (2012) 73 Ohio State Law Journal 47 at 76.

⁵¹⁷ Netanel, above n 468, at 741.

⁵¹⁸ Bunker and Calvert, above n 490, at 94.

⁵¹⁹ *Cariou v Prince*, above n 506, at 13.

transformative use test is ambiguous, particularly outside of the parody context, and that it should assume a more modest role in the determination of fair use, or alternatively its application be limited to particular forms of copyright expression.⁵²⁰ However, research has identified that there are identifiable consistencies across fair use cases where the transformative test has been applied to various uses of copyright works.⁵²¹ A change in the predominant purpose of the work was a consistent finding in approved fair use cases in the United States courts.⁵²² More specifically, the study by Michael Murray found that a new work will likely be justified as fair even if there is no alteration in its content or expression, provided that the purpose of the original work is changed in the new work in a manner that fulfils the objective of fair use, being the creation of original expression that benefits the public.⁵²³

4.1.2.2 Factor 2 - *The Nature of the Copyrighted Work*

This factor focuses on whether the original work is factual or fictional and whether it is published or unpublished.⁵²⁴ The use of fictional and creative works is less likely to be found to be fair than if the original work was purely factual.⁵²⁵ The United States courts have to date indicated that fair use is less likely to be found if the original work is unpublished.⁵²⁶ In *Harper & Row Publishers v Nation Enterprises* an anonymous source provided Nation magazine with extracts of the soon to be published memoirs of Gerald Ford of which Nation printed excerpts of.⁵²⁷ Harper & Row had previously sold pre-publication rights to Time Magazine, however following the publication of Nation's article, Time Magazine cancelled its contract with Harper & Row.⁵²⁸ The Supreme Court found against Nation and held that the unpublished nature of the work was a key factor, although not determinative, that negated a defence of fair use.⁵²⁹ The Court went further and stated that "under ordinary circumstances the author's right to control the first public

⁵²⁰ Bunker & Calvert, above n 490, at 126.

⁵²¹ Michael D Murray "What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law" (2012) 11 Chicago-Kent Journal of Intellectual Property 260 at 291.

⁵²² At 291.

⁵²³ At 291.

⁵²⁴ D'Agostino, above n 180, at 347.

⁵²⁵ *Stewart v Abend* 495 U.S. 207 (1990) at 236.

⁵²⁶ *Harper & Row v Nation Enterprises*, above n 495, at [18].

⁵²⁷ At [1].

⁵²⁸ At [1].

⁵²⁹ At [18].

appearance of his undisseminated expression will outweigh a claim of fair use”.⁵³⁰ The special consideration given to unpublished works in relation to a fair use claim was confirmed in *Salinger v Random House* with respect to the publication of the unpublished letters of American author JD Salinger.⁵³¹ While the third part of s 107 does not preclude the use of unpublished works from being considered fair, it appears that the courts in the United States have made clear that the other factors would need to be strongly in favour of the defendant to permit such use.

4.1.2.3 Factor 3 – The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This factor appears to be the least significant of the four fairness factors.⁵³² The focus of the courts in relation to this factor is on the quality or substance of the work taken rather than the quantity.⁵³³ In *Harper & Row*, the Court held that although only 300 words were taken from the unpublished memoirs, the excerpts published by Nation were the “heart of the book”.⁵³⁴ In *Campbell*, the Court noted that the extent of permissible copying is related to the purpose and character of the use.⁵³⁵ For example, where the use is a parody, there must be sufficient copying of the original work for the original work to be identified, this being an essential element of a parody.⁵³⁶ Furthermore, the “heart” of the original work is in many cases what permits identification of that work and it is the heart at which parody is focussed.⁵³⁷ In certain circumstances, notwithstanding that a user has copied an entire work, the courts have found the use to be fair.⁵³⁸ These uses include the reproduction of rock concert posters,⁵³⁹ time shifting of television programmes,⁵⁴⁰ and the production of thumbnail images by internet search engines.⁵⁴¹

⁵³⁰ At [17].

⁵³¹ *Salinger v Random House* 811 F 2d 90 (2d Cir 1987).

⁵³² D’Agostino, above n 180, at 348.

⁵³³ *Harper & Row v Nation Enterprises*, above n 495, at [37].

⁵³⁴ At [37].

⁵³⁵ *Campbell v Acuff Music*, above n 486, at 587.

⁵³⁶ At 581 citing *Fisher v Dees* 794 F2d at 438.

⁵³⁷ At 589.

⁵³⁸ *Bill Graham Archives v Dorling Kindersley Ltd*, above n 486; *Kelly v Arriba-Soft Corporation*, above n 504; *Sony Corp v Universal Studios*, above n 34.

⁵³⁹ *Bill Graham Archives v Dorling Kindersley Ltd*, above n 486.

⁵⁴⁰ *Sony Corp v Universal Studios*, above n 34.

⁵⁴¹ *Field v Google Inc*, above n 482; *Kelly v Arriba-Soft Corporation*, above n 504; *Perfect 10 Inc v Amazon.com Inc*, above n 185.

In the recent and much publicised decision issued by the Second Circuit, *Authors Guild v Google Inc*, the Court held that even where entire literary works had been copied and digitised by the defendant without authorisation of the rights holders, the use was still fair pursuant to s 107.⁵⁴² In 2005 the Authors Guild and other authors of published books under copyright sued Google Inc for copyright infringement. Google had made digital copies of millions of books, including the plaintiffs', for its Google Books Project and its Library Project.⁵⁴³ The purpose of these projects was to provide a large publicly available search function whereby an internet user could search without charge to determine whether a particular book contained a specified word or term and also see "snippets" of text containing the searched-for terms.⁵⁴⁴ The plaintiffs argued that Google's copying of entire books was not transformative within the meaning of *Campbell*, that Google's ultimate commercial profit motivation precluded fair use and infringed the plaintiff's derivative rights in the works and that the plaintiff's works were at risk of being copied and distributed freely by internet hackers.⁵⁴⁵ In late 2015, the Second Circuit rejected these arguments and concluded that the District Court had correctly sustained Google's fair use defense.⁵⁴⁶ The Court held that, despite the entire works being copied by Google, the making of a digital copy to provide a search function was a transformative use which enhanced public knowledge by making available information about the plaintiff's books.⁵⁴⁷

In May 2016 Google claimed another fair use victory in the case *Oracle v Google* in relation to its copying of Java application program interfaces (APIs), owned by Oracle America Inc, on Android smartphones.⁵⁴⁸ In *Oracle* Google had once again copied entire copyright works in order to develop new technology. Oracle has indicated that it intends to appeal the decision to the United States Supreme Court. If granted leave to appeal, it would provide the Supreme Court the opportunity to clarify the extent to which users of copyright may rely on the fair use defence in relation to API's and other similar emerging digital technology.

⁵⁴² *Authors Guild v Google Inc* No 13-4829 (2d Cir 2015).

⁵⁴³ At 1.

⁵⁴⁴ At 2.

⁵⁴⁵ At 3.

⁵⁴⁶ At 3.

⁵⁴⁷ At 3.

⁵⁴⁸ *Oracle America Inc v Google Inc* 872 F Supp 2d 974 (ND Cal 2012); *Oracle America Inc v Google Inc* 750 F.3d 1339 (Fed Cir 2014). The decision issued in May 2016 is not yet reported.

4.1.2.4 Factor 4 – *The Effect of the Use on the Potential Market for or Value of the Copyrighted Work*

The emphasis on market harm in the fair use analysis serves copyright's constitutional objective of promoting innovation by limiting uses that would stifle a copyright owner's decision to create or distribute their work.⁵⁴⁹ In 1984 in *Sony v Universal Studios* the United States Supreme Court endorsed the notion that commercial uses were presumptively unfair.⁵⁵⁰ This was followed soon after by the *Harper & Row* decision where the Supreme Court characterised the fourth factor as "undoubtedly the most single important element of fair use".⁵⁵¹ The market centred, economic approach taken by the Supreme Court entrenched the inquiry into market harm as the dominant paradigm in any fair use analysis for the following decade.⁵⁵²

Central to the inquiry into market harm has been what has been termed the "market failure" approach.⁵⁵³ This approach is grounded in economic theory and is based in part on the seminal work of Wendy Gordon.⁵⁵⁴ Gordon argued that a market-based analysis of copyright would better clarify and provide greater certainty in fair use cases.⁵⁵⁵ An example of market failure is where the use of a copyright work would otherwise require a legal licence but the transaction costs of obtaining that licence would outweigh any gains from trading, thereby leaving no market for licencing the original work.⁵⁵⁶ According to Gordon's approach fair use excuses copying of work only when such market failure is present.⁵⁵⁷

In *Sony* the Supreme Court overturned the finding of the Ninth Circuit and ruled that private videotaping of a copyrighted television broadcast for purposes of time-

⁵⁴⁹ Christina Bohannon "Copyright, Harm, Foreseeability and Fair Use" (2007) 85 Washington Law Review 969 at 969.

⁵⁵⁰ *Sony Corp v Universal Studios*, above n 34, at [46].

⁵⁵¹ *Harper & Row v Nation Enterprises*, above n 495, at [40].

⁵⁵² Aaron B Wicker "Much Ado about Transformativeness: the Seventh Circuit and Market Centered Fair Use" (2016) 11 Washington Journal of Law Technology & Arts 355 at 358.

⁵⁵³ Bohannon, above n 549, at 969.

⁵⁵⁴ Wendy J Gordon "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 Columbia Law Review 1600.

⁵⁵⁵ At 1601.

⁵⁵⁶ Glyn S Lunney Jr "Fair Use and Market Failure: Sony Revisited" (2002) 82 Boston University Law Review 975 at 975.

⁵⁵⁷ Bohannon, above n 549, at 981.

shifting constituted a fair use.⁵⁵⁸ In applying the market failure approach to the Ninth Circuit ruling in the *Sony* litigation, Gordon concluded that a fair use finding might be justified on the basis that there would be no market for consumer time shifting licences due to prohibitively high transaction costs.⁵⁵⁹ It is argued by some authors that, following Gordon's analysis, the decision in *Sony* has been incorrectly and narrowly construed in subsequent decisions as an exceptional instance of market failure.⁵⁶⁰

In *Basic Books Incorporated v Kinko's Graphics Corporation*, the Court found that the photocopying and compilation of parts of copyright works for sale to students as "course packs" was not a fair use.⁵⁶¹ In *Basic Books* and later in *American Geophysical Union v Texaco Inc* the courts emphasised that "market cures," such as document delivery services that paid royalties to publishers, the presence of licensing institutions such as the Copyright Clearance Center, and the ability of the defendants to negotiate licenses directly with individual publishers, weighed against a finding of fair use.⁵⁶² Similarly in *A & M Records v Napster*, the court rejected the claim of fair use for personal space-shifting of digital music files on the basis that the music industry was willing to provide licenses to consumers and therefore no market failure was present.⁵⁶³ This market based approach is argued to establish a presumption that copyright owners are entitled to payment for all uses of their copyright works that violate their copyright works, whether or not these uses actually cause harm.⁵⁶⁴

In addition to its influence on the interpretation of the first factor, *Campbell* was also a watershed with respect to the analysis of the fourth factor.⁵⁶⁵ The Court in *Campbell* stressed that rather than prioritising the effect on the market of the copyright work, all factors were to be explored and weighed together bearing in mind the objectives of copyright.⁵⁶⁶ *Campbell* recognised that some market harms,

⁵⁵⁸ *Sony Corp v Universal Studios*, above n 34.

⁵⁵⁹ Gordon, above n 554, at 1655-56.

⁵⁶⁰ Lunney Jr, above n 556, at 977 citing *A & M Records v Napster* 239 F 3d 1004 (9th Cir. 2001).

⁵⁶¹ *Basic Books Inc v Kinko's Graphics Corp* 239 F 3d 1004 (9th Cir 2001).

⁵⁶² *Basic Books Inc v Kinko's Graphics Corp*, above n 561; *American Geophysical Union v Texaco Inc* 60 F 3d 913 (2nd Cir 1994).

⁵⁶³ *A&M Records Inc v Napster Inc*, above n 560, at [45].

⁵⁶⁴ Bohannon, above n 549, at 991.

⁵⁶⁵ Pamela Samuelson, n 514, at 818.

⁵⁶⁶ *Campbell v Acuff Rose Music Inc*, above n 479, at 578.

for example where an effective parody harms the market for a targeted work, do not weigh against fair use.⁵⁶⁷ *Campbell* also established a broader conception of market harm which may involve the courts taking into account the potential *benefits* of the defendant's use on the copyright owner's market.⁵⁶⁸

The influence of *Campbell* was evident in the Second Circuit's analysis of the fourth factor in *Bill Graham Archives v Dorling Kindersley Ltd.*⁵⁶⁹ In *Bill Graham* the defendants had paid licencing fees for other images in its book about the music group The Grateful Dead but had not paid licencing fees in respect of the concert posters for which it claimed it had made fair use of.⁵⁷⁰ The Second Circuit referred to *Campbell* to support its view that the fact that a publisher is willing to pay licence fees for the reproduction of images does not preclude that publisher also making fair use of those images.⁵⁷¹ Furthermore, the Second Circuit affirmed the view in *Campbell* that copyright owners cannot obstruct exploitation of transformative markets of their copyright works.⁵⁷²

In a recent case, *Authors Guild v HathiTrust*, the Court pointed out that the market harm in the fourth factor was precisely defined, stating:⁵⁷³

It is important to recall that the factor four analysis is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work.

Accordingly, following *Campbell*, *Bill Graham* and *Authors Guild*, it would appear that the courts in the United States are now unlikely to rule that the presence of a means of licensing negates a finding of fair use, or that market harm exists where a use is transformative.⁵⁷⁴

⁵⁶⁷ At 592.

⁵⁶⁸ Jeanne C Fromer "Market Effects Bearing on Fair Use" (2015) 90 Washington Law Review 615 at 629 (emphasis added).

⁵⁶⁹ Samuelson, above n 514, at 827; *Bill Graham Archives v Dorling Kindersley Ltd*, above n 486.

⁵⁷⁰ *Bill Graham Archives v Dorling Kindersley Ltd*, above n 486, at 615.

⁵⁷¹ At 615.

⁵⁷² At 615.

⁵⁷³ *Authors Guild Inc v HathiTrust* 755 F 3d 87 (2d Cir 2014) at 22.

⁵⁷⁴ However, recently in *Kienitz v Sconnie Nation LLC*, above n 513, the Court found fair use but departed from the *Campbell* jurisprudence, dismissed transformative use and focussed on the market harm factor. The plaintiff has been granted leave to appeal to the Supreme Court and the case is yet to be heard.

4.1.3 Fair Use in Practice

4.1.3.1 The Development of Codes of Best Practice

In 2005 United States documentary film makers sought to take advantage of the trend toward a transformativeness approach in the United States courts through the creation of the “Documentary Film Maker’s Statement of Best Practices in Fair Use” (“the Statement”).⁵⁷⁵ The Statement was created because documentary film makers in the United States had found themselves increasingly constrained by demands of copyright owners to “clear rights” for the copyright material that they were using in their films.⁵⁷⁶ “Clearing rights” is a process whereby the copyright user verifies that there is no material in their work that has been used illegally and is sometimes termed “obtaining permission.”⁵⁷⁷ The Statement clarified when users of copyright works, specifically documentary film makers, could safely assert fair use and focused on the following four common situations where this might be necessary: Employing copyrighted material as the object of social, political, or cultural critique; quoting copyrighted works to illustrate a point or argument; capturing copyrighted media content in the process of filming something else; and using copyrighted material in a historical sequence.⁵⁷⁸

The Statement had an immediate and profound effect on the ability of film makers in the United States to produce documentary films that would not have been produced previously due to the prohibitive costs of clearing copyright and obtaining licences.⁵⁷⁹ Following the release of the Statement, all major insurance companies that provided coverage for errors and omissions in United States film production added a fair use coverage policy to their portfolios.⁵⁸⁰ The Stanford University Free Use Project entered into an agreement with MediaPro, a large errors and omissions insurer, to provide free legal defence if there was a fair use lawsuit on the basis that MediaPro issued a policy covering fair-used material.⁵⁸¹ Prior to the release of the Statement, insurers had usually accepted fair use claims only with considerable

⁵⁷⁵ American University’s Washington College of Law Center for Social Media “Documentary Film Makers Statement of Best Practices in Fair Use” <www.cmsimpact.org>.

⁵⁷⁶ At 1.

⁵⁷⁷ Joy Butler “Guide through the Legal Jungle” (2 January 2010) <www.guidethroughthellegaljungleblog.com>.

⁵⁷⁸ American University’s Washington College of Law Center for Social Media, above n 575, at 4.

⁵⁷⁹ Aufderheide and Jaszi, above n 15, at 100.

⁵⁸⁰ At 103.

⁵⁸¹ At 103.

negotiation and had routinely insisted that rights be licensed.⁵⁸² This had frequently led to the abandonment of projects due to the high costs of obtaining licences from the many copyright owners whose works were being used to a greater or lesser extent in these projects.⁵⁸³

In the years following the release of the Statement, other industries and institutions in the United States developed their own codes of best practice for fair use, particularly the areas of education and journalism.⁵⁸⁴ In 2008 the Center for Social Media at American University released the “Code of Best Practices in Fair Use for OnLine Video” (“the Code”).⁵⁸⁵ The Code describes six practices that fall under fair use:⁵⁸⁶

1. Commenting on or critiquing of copyrighted material.
2. Using copyrighted material for illustration or example.
3. Capturing copyrighted material incidentally or accidentally.
4. Reproducing, reposting, or quoting in order to memorialize, preserve, or rescue an experience, an event, or a cultural phenomenon.
5. Copying, reposting, and recirculating a work or part of a work for purposes of launching a discussion.
6. Quoting in order to recombine elements to make a new work that depends for its meaning on (often unlikely) relationships between the elements.

The Code strongly emphasised the primary indicator of fair use that had developed in the courts, being that of the transformativeness of the work.⁵⁸⁷ Google Inc funded the Stanford Fair Use Project to make a short film about the Code, “Remix Culture: Fair Use Is Your Friend”,⁵⁸⁸ which is widely available on the Internet, including on the YouTube website. Accordingly, codes of best practice for fair use are not only

⁵⁸² Patricia Aufderheide and Peter Jaszi “Fair Use and Best Practices: Surprising Success” (October 2007) *Intellectual Property Today* < www.cmsimpact.org>.

⁵⁸³ Aufderheide and Jaszi, above n 15, at 100.

⁵⁸⁴ For example: American University’s Washington College of Law Center for Social Media “Set of Principles in Fair Use for Journalism” (2013) < www.cmsimpact.org>; American University’s Washington College of Law Center for Social Media “Code of Best Practices in Fair Use for Academic and Research Libraries” (2012) < www.archive.cmsimpact.org>.

⁵⁸⁵ Peter Jaszi and Patricia Aufderheide “Code of Best Practices in Fair Use for OnLine Video” American University’s Washington College of Law Center for Social Media <www.digitalcommons.wcl.american.edu>.

⁵⁸⁶ At 5-9.

⁵⁸⁷ At 5.

⁵⁸⁸ Stanford University Fair Use Project “Remix Culture: Fair Use is Your Friend” (2 May 2013) <www.youtube.com>.

available for industry groups but may also be utilised by individuals who wish to use copyright works in a non-commercial context, for example when creating mash-ups and remixes to post online.

4.1.3.2 The Benefits of Codes of Best Practice

Codes of best practice provide education and guidance on fair use for particular communities of copyright users and in doing so, empower these users to assert fair use.⁵⁸⁹ According to author Michael Madison, codes of best practice “offer the outline of a map between life and copyright law”.⁵⁹⁰ Codes of best practice are often preceded by a study of the types of uses of copyright works in a specific community of users.⁵⁹¹ These studies document the requirements of a specific community of users, the challenges that the copyright system presents to these users and the community’s practices in relation to the use of copyright works, such information being important for law reform.⁵⁹² Codes of best practice may also assist the court by providing a context for individual fair use cases in relation to a specific industry.⁵⁹³ It is also suggested by some authors that codes of best practice can assist lawyers to understand community creative practices which can help them to discuss practical risks with clients and give advice as to the risk of litigation.⁵⁹⁴

Some examples of the success of the implementation of codes of best practice in the United States include:⁵⁹⁵

1. Code of Best Practice in Fair Use for Open Courseware – the makers of OpenCourseWare, an online course provider at Massachusetts Institute of Technology in the United States, launched 31 new online courses within a year of creating a code of best practice.

⁵⁸⁹ Renee Hobbs “Best Practices Help End Copyright Confusion” (March 2009) The Council Chronicle <www.ncte.org> at 12.

⁵⁹⁰ Michael J Madison “Some Optimism about Fair Use and Copyright Law” (June 2010) Social Science Research Network <www.papers.ssrn.com> at 352.

⁵⁹¹ Jennifer E Rothman “Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law” (18 October 2010) Journal Copyright Society of USA 373 at 375.

⁵⁹² At 375.

⁵⁹³ At 376.

⁵⁹⁴ Anthony Falzone and Jennifer Urban “Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices” (2010) Journal Copyright Society of USA 337 at 347.

⁵⁹⁵ Aufderheide and Jaszi, above n 15, at 108-126.

2. Code of Best Practices in Fair Use for Poetry – the clearance practices of publishers have long represented the greatest impediment to the publication of new books and articles providing critical perspectives on modern poetry in the United States. The code released in 2010 is changing the practices of publishers including Princeton University Press and Oxford University Press by increasing their confidence when making licencing decisions and in asserting fair use.
3. Codes of Best Practices for Academic and Research Libraries - Librarians at major universities in the United States are confidently employing their code of best practices to better serve students, professors and researchers.

Codes of best practice complement and expand the utility of a fair use provision. They have been described as providing an “elegant compromise to the uncertainty versus flexibility conundrum” of fair use.⁵⁹⁶ Accordingly, jurisdictions considering the adoption of fair use may wish to also consider developing and implementing codes of best practice in order to provide industry specific guidance to copyright users.

4.2 The Case for Fair Use in New Zealand

This section of the paper marshals the key arguments in favour of fair use and responds to its criticisms in order to build a comprehensive case for the adoption of a fair use exception in New Zealand.

4.2.1 Fair Use Promotes the Objective of Copyright

The objective of copyright is to encourage innovation and artistic creativity by stimulating the production and dissemination of copyright works for the public benefit.⁵⁹⁷ This objective is reflected in the Statute of Anne, being an “Act for the Encouragement of Learning...”⁵⁹⁸ and the United States Constitution which grants the right to Congress to “promote the progress of science and the useful arts...”⁵⁹⁹

⁵⁹⁶ Falzone and Urban, above n 594, at 337.

⁵⁹⁷ Monseau, above n 6, at 5.

⁵⁹⁸ Statute of Anne 1709, Long Title.

⁵⁹⁹ US Constitution Article I Clause 8.

The objective of copyright is achieved by obtaining an optimal balance between the owners and users of copyright works. The preamble of the WCT sets out the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.⁶⁰⁰

It is doubtful that fair dealing, by limiting the purposes for which copyright works may be used, strikes an appropriate balance between owners and users of copyright works. This is particularly apparent in situations where the use of a copyright work does not impact upon the copyright owner’s market or revenue yet such use does not fall within the ambit of a fair dealing provision or specific exception and therefore constitutes infringement. The exclusion of these types of uses at the first stage of the fair dealing analysis prohibits any consideration as to whether the use is fair, including whether the use in fact serves the objective of copyright. Often such infringing uses are non-commercial, for example copying legally acquired copyright material between computers and other devices for personal use,⁶⁰¹ or data mining for personal use.⁶⁰² The need for an exception to cover such situations was recognised in the *Hargreaves Review* where it was proposed that the United Kingdom Government lobby at European Union level for the introduction of a general exception that allowed uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work.⁶⁰³ Where such use of a copyright work does not fall within a fair dealing provision or within a specific statutory exception, there is real potential for copyright law to be at odds with the objective of copyright.

The importance of public access to copyright works has been confirmed by the courts.⁶⁰⁴ The United States courts have opined on a number of occasions that

⁶⁰⁰ WIPO Copyright Treaty 1996, preamble.

⁶⁰¹ The UK has recently legislated for such use by enacting a private copying exception –CPDA, s28B amended by The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014. Such use would constitute copyright infringement in Australia and in New Zealand, the latter only in relation to works that were not sound recordings.

⁶⁰² The UK has recently legislated for such use by enacting a data and text mining exception being the CPDA s29A amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

⁶⁰³ *Hargreaves Review*, above n 3, at 47.

⁶⁰⁴ *Sony v Universal Studios*, above n 34, at [80] citing *Twentieth Century Music Corporation v Aiken* (1975) 422 US at 156.

internet search engines provide a public benefit by incorporating an original work into a new work, specifically an electronic reference tool⁶⁰⁵ which enhances information gathering techniques⁶⁰⁶ and the dissemination of knowledge.⁶⁰⁷ In New Zealand and in the United Kingdom an ISP is permitted to cache infringing material subject to certain conditions.⁶⁰⁸ However, in Australia the caching and indexing by ISPs would infringe copyright under the current range of exceptions.⁶⁰⁹ In the United States, uses such as caching by ISP's, private format shifting and data mining would be subject to a fair use analysis and not automatically infringe. Such a fair use analysis would encompass consideration of whether the particular use promoted the objective of copyright and would not hinge on whether it fell within a specific enumerated purpose or specific exception.

Critics of fair use propose that it negatively affects rights holders' markets and therefore tips the balance in favour of copyright users.⁶¹⁰ While it is essential that copyright allows rights holders to exploit the value of their works, it is not axiomatic that use of those works impedes such exploitation.⁶¹¹ It is evident that some uses of copyright works may actually enhance the value of the original works.⁶¹² In *Authors Guild Inc v Google Inc*, Google argued that the Google Book Project functioned to renew interest in older books on the market and increase book sales.⁶¹³ Other copyright owners, such as Disney, which had once been extremely protective of their copyrighted works, are now declining to take action against those users who have built on its songs, characters and materials, suggesting that these copyright owners now understand that certain unauthorised uses of their works can bring them financial benefit.⁶¹⁴

⁶⁰⁵ *Perfect 10 Inc v Amazon.com Inc*, above n 185, at 15470.

⁶⁰⁶ *Kelly v. Arriba-Soft Corporation*, above n 504, at 9073.

⁶⁰⁷ *Field v Google Inc*, above n 482, at 11.

⁶⁰⁸ Copyright Act 1994 (NZ), s 92E inserted by section 53 of the Copyright (New Technologies) Amendment Act 2008; Electronic Commerce Regulations 2002 (UK), Reg 18.

⁶⁰⁹ *ALRC Review*, above n 1, at 102.

⁶¹⁰ For example: Australian Guild of Screen Composers Submission to the Australian Law Reform Commission on Copyright and the Digital Economy Discussion Paper (July 2013) <www.alrc.gov.au>.

⁶¹¹ *ALRC Review*, above n 1, at 102.

⁶¹² Samuelson, above n 514, at 823.

⁶¹³ *Authors Guild Inc v Google Inc*, above n 542. Brief in Opposition.

⁶¹⁴ Fromer, above n 568, at 618.

The argument that fair use negatively affects rights holders markets is also countered by the fact that, by way of the fourth fairness factor, the courts will take into account not only on the effect on the existing market but on any *potential* markets that could be exploited by the rights holder.⁶¹⁵ While the fourth factor is no longer the most significant factor in the fair use analysis, the courts in the United States are likely to deem a use unfair where it causes economic injury to a rights holder because such use serves as a substitute for the original work.⁶¹⁶ If a licence can be obtained for a particular use of a copyright work, unlicensed use will often be found to be unfair.⁶¹⁷ Accordingly, there is a strong argument that fair use sufficiently protects the markets of copyright owners while also enhancing the dissemination of information to the public, and thereby promotes the objective of copyright.

4.2.2 Fair Use is Flexible and Technology Neutral

Fair use has successfully been claimed by users of copyright in situations where technology has advanced to allow for new uses of copyright works such as time-shifting⁶¹⁸ and text mining.⁶¹⁹ Copyright law that is conducive to new technologies should at least allow for the question of fairness to be raised.⁶²⁰ Fair dealing precludes the assessment of fairness where the use does not fall within one of the prescribed statutory purposes. While jurisdictions such as the United Kingdom and Canada have broadened the scope of their fair dealing provisions, these reforms may not be sufficient to encompass the development of digital technologies that allow copyright material to be sold, licensed and distributed in ways not previously thought to be possible. The need for copyright law to be flexible and technology neutral has been emphasised in many reports tackling the issue of copyright reform.⁶²¹ The courts have also recognised the importance of flexibility in copyright law with the Supreme Court of Canada recently implanting the principle of technological neutrality into copyright jurisprudence in Canada.⁶²²

⁶¹⁵ Copyright Act (US), s 107.

⁶¹⁶ *Authors Guild Inc v HathiTrust*, above n 573, at 22.

⁶¹⁷ *ALRC Review*, above n 1, at 110.

⁶¹⁸ *Sony v Universal Studios*, above n 34.

⁶¹⁹ *Field v Google Inc*, above n 482.

⁶²⁰ Australian Law Reform Commission, above n 330, at 107.

⁶²¹ Including: *ALRC Review*, above n 1; *Hargreaves Review*, above n 3; *Gowers Review*, above n 39; and *Modernising Copyright*, above n 39.

⁶²² *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, above n 394.

An example of a technological development that potentially sits outside of the scope of both specific statutory exceptions and the fair dealing exceptions in most jurisdictions is three-dimensional (“3D”) printing. 3D printing, also known as “additive manufacturing”, is a process whereby a physical copy of a digital shape is generated by computer controlled machines depositing layers of materials. In New Zealand, 3D printing is increasingly being used by small to medium enterprises.⁶²³ In fact, New Zealand is at the forefront of international developments in the use of titanium in 3D printing to create a range of industrial and consumer products.⁶²⁴ 3D printers are now also available to the general public in New Zealand at a reasonable price.⁶²⁵ In 2015 the United Kingdom Intellectual Property Office commissioned a legal and empirical study into the intellectual property implications of 3D printing.⁶²⁶ The study concluded that although the impact of 3D printing technology will not be felt among the general public for a few years to come, it will be necessary to address the impending intellectual property issues that will arise from such technology.⁶²⁷ However, research demonstrates that 3D printing is becoming much more available to the general public in the United Kingdom as it is in New Zealand.⁶²⁸ In both New Zealand and the United Kingdom, the construction of a 3D object by a consumer from a copyright digital shape for non-commercial, private purposes would not fall within the fair dealing exceptions and, in the absence of a specific exception, would constitute an infringement of copyright. This would be the case whether or not such use had any impact on the copyright owner’s market or revenue. In contrast, the construction of a 3D object from a copyright work would only constitute infringement in the United States if such a use was deemed unfair pursuant to s 107.

In the fair dealing jurisdictions and in the European Union, legislative change in the area of copyright law has typically been slow and piecemeal. In the United Kingdom, Australia and New Zealand the legislature has attempted to respond to

⁶²³ Caitlin Sykes “Small Business: 3D Printing” *The New Zealand Herald* (Auckland) 29 June 2015.

⁶²⁴ John Anthony “Air New Zealand uses 3D printers to make seat parts” (24 February 2016) <www.stuff.co.nz>.

⁶²⁵ Pat Pilcher “Affordable 3D Printing is finally here” (30 June 2015) <www.stuff.co.nz>.

⁶²⁶ Intellectual Property Office (UK) *A legal and empirical study into the intellectual property implications of 3D printing* (March 2015) <www.gov.uk>.

⁶²⁷ At 8.

⁶²⁸ The Economist “3D printing scales up” (7 September 2013) <www.economist.com>. For example service providers that print objects from digitised plans are becoming more common.

developments in technology by adding more and more specific exceptions to address these changes, usually long after the technologies have been on the market.⁶²⁹ In contrast, s 107 has not required legislative amendment since its enactment in 1976, some 40 years ago. It is argued that potential future developments in digital technology cannot be foreseen and that fair use is the only model that provides a sufficient ex-ante legal response to this unforeseeability by being inherently flexible and technology neutral.

4.2.3 Fair Use Promotes Innovation and Economic Growth

Copyright owners have a long history of demanding increased copyright protections and resisting the emergence of new technologies which threaten their economic interests.⁶³⁰ However, the rhetoric of copyright owners that increasing copyright protection will facilitate innovation and creativity is generally no longer accepted by policy makers.⁶³¹ The United Kingdom Prime Minister David Cameron, when announcing the Government's review of intellectual property and growth in 2010, stated that "the founders of Google have said they could never have started their company in Britain".⁶³² Submissions to the *ALRC Review* provided various other examples of technologies that could not have been developed in Australia as they relied on fair use, including: a mobile phone application that reproduces less than two seconds of an audio stream of a programme that a user is watching and matches that thumbprint to a thumbprint in a data base to inform the user as to the name of the programme⁶³³ and a database that uses legal briefs and motions to enable lawyers to research how other lawyers have framed similar arguments.⁶³⁴ As noted in the *Hargreaves Review*, the failure of the law to adapt to new digital communications technology which routinely involves the copying of text, images and data, has resulted in copyright law acting a regulatory barrier to the creation of

⁶²⁹ For example the Copyright (New Technologies) Amendment Act 2008 (New Zealand), s 44 introduced an exception for private format shifting of sound recordings years after such a use was available to consumers in New Zealand.

⁶³⁰ *Hargreaves Review*, above n 3, at 46. For example, VHS recorders.

⁶³¹ Susy Frankel "Emerging Regulatory Issues Intellectual Property and Global Value Chains" (2014) 10 Policy Quarterly 28 at 28.

⁶³² British Broadcasting Commission "UK copyright laws to be reviewed, announces Cameron" (4 November 2010) BBC News <www.bbc.com>.

⁶³³ Yahoo! 7 "A Submission in response to the Australian Law Reform Commission's Issues Paper on Copyright and the Digital Economy (IP 42)" (December 2012) <www.alrc.gov.au>.

⁶³⁴ Universities Australia "Submission in response to the Australian Law Reform Commission discussion paper on Copyright and the Digital Economy" (July 2013) <www.universitiesaustralia.edu.au>.

new, internet based businesses.⁶³⁵ It is these smaller, innovative businesses that are crucial to economic growth in the United Kingdom⁶³⁶ and in New Zealand.⁶³⁷

It is noted in the *ALRC Review* that there is no evidence that fair use hinders creativity and the production of copyright works.⁶³⁸ In the United States creative industries continue to flourish in the context of a copyright scheme that includes a fair use provision.⁶³⁹ A United States study that investigated the contribution of fair use industries in the context of the national economy found that the growth rate of fair use industries had outpaced overall economic growth in recent years, fuelled productivity gains, and assisted the United States economy to sustain strong growth rates.⁶⁴⁰ As digital technology, and in particular private copying technology, has advanced, fair use has played an increasingly significant role in United States innovation policy.⁶⁴¹ The creators of new private copying technologies, such as iPods, rely on fair use to permit users of copyright works to be able to utilise their new technology, for example to copy their personal CD collection onto their iPod without infringing copyright.⁶⁴² Accordingly, in the United States private copying technologies are unlocking new opportunities for both users and owners of copyright works in the context of a fair use framework.

Fair use has been adopted in other “technology ambitious” countries including Israel, South Korea and Singapore.⁶⁴³ In 2006 amendments were made to the Singapore Copyright Act (Ch 63) to include clause III.35, which is almost identical to s 107. A counterfactual impact analysis of fair use on private copying technology and copyright markets in Singapore, published in 2012, concluded that following the fair use amendments in Singapore private copying technology industries enjoyed a 10.18% average annual growth rate, a significant increase from -1.97%

⁶³⁵ *Hargreaves Review*, above n 3, at 3.

⁶³⁶ At 3.

⁶³⁷ Simon Wakeman and Trinh Le (2015) *Measuring the Innovative Activity of New Zealand Firms* Working Paper 2015/2 <www.productivity.govt.nz> at 3.

⁶³⁸ *ALRC Review*, above n 1, at 13.

⁶³⁹ *Hargreaves Review*, above n 3, at 45.

⁶⁴⁰ Thomas Rogers and Andrew Szamoszegi “Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use” (2011) CCIA <www.ccia.net.org>.

⁶⁴¹ Fred von Lohmann “Fair Use as Innovation Policy” (2008) 3 *Berkeley Technology Law Journal* at 7.

⁶⁴² At 8.

⁶⁴³ *Hargreaves and Hugenholtz*, above n 39, at 4.

prior to the amendments.⁶⁴⁴ Furthermore, the growth of private copying technologies had a negligible impact on copyright industry revenue.⁶⁴⁵

New Zealand has been said to have evolved as a type of frontier society and one that has led to an inventive culture, which has been encapsulated in the “number 8 fencing wire” national myth.⁶⁴⁶ However, Sir Peter Gluckman, chief science advisor to the New Zealand Prime Minister, has emphasised that inventiveness and innovation are not one and the same thing with innovation being the achievement of an economic return on inventiveness.⁶⁴⁷ A study undertaken by the Productivity Commission of New Zealand and Motu in 2015 found that, despite ongoing investment in research and development, New Zealand’s innovation output has been steadily decreasing in recent years.⁶⁴⁸ In 2016 the New Zealand Government announced that pursuant to its 2016 Budget, \$761.4 million will be invested in growing innovation over the next four years.⁶⁴⁹ This investment needs to be supported by an intellectual property framework that facilitates the growth of innovation in New Zealand, specifically, one which includes a fair use provision.

The fact that New Zealand is a net importer of intellectual property⁶⁵⁰ does not preclude New Zealand from being a part of what Susy Frankel terms a “global value chain”.⁶⁵¹ A global value chain includes research and development and manufacture and distribution, all of which involve intellectual property.⁶⁵² Frankel notes that New Zealand lacks data as to the effect of intellectual property law on innovation and argues that this data is necessary to avoid the negative effects that bad intellectual property law can have on economic growth.⁶⁵³ It is crucial that New Zealand’s intellectual property law, including its copyright law, does not function to impede innovation and economic growth in New Zealand. Accordingly, the

⁶⁴⁴ Ghafele and Gilbert, above n 2, at 5.

⁶⁴⁵ At 6.

⁶⁴⁶ Peter Gluckman “Innovation and Society: Licence and Precautions” (25 September 2015) <www.pmsa.org.nz>.

⁶⁴⁷ Gluckman, above n 646.

⁶⁴⁸ Wakeman and Le, above n 637, at 3.

⁶⁴⁹ Ministry of Business, Innovation and Employment “Innovative New Zealand” <www.mbie.govt.nz>.

⁶⁵⁰ Susie Frankel and Geoff McLay *Intellectual Property in New Zealand* (Lexis Nexis, Wellington, 2002) at 162.

⁶⁵¹ Frankel, above n 631, at 31.

⁶⁵² At 31.

⁶⁵³ At 31.

adoption of a fair use exception, which has been associated with the growth of creative industries in other jurisdictions such as the United States and Singapore, is warranted.

4.2.4 Fair Use is Sufficiently Certain

The doctrine of fair use has been called “the most troublesome in the whole law of copyright”.⁶⁵⁴ The most frequent criticism of fair use is that it is uncertain.⁶⁵⁵ This uncertainty is said to result from the necessary case by case analysis of s 107 and/or the lack of judicial consensus on the fundamental principles that underlie fair use.⁶⁵⁶ It has led authors to characterise fair use as “the right to hire a lawyer”.⁶⁵⁷ The perceived ad-hoc nature of the fair use doctrine is frequently raised in opposition to legislative proposals to adopt a fair use exception.⁶⁵⁸ The most significant concern of stakeholders in the *ALRC Review* was that the lack of clear and precise rules would result in uncertainty about what uses are fair.⁶⁵⁹ Stakeholders argued that the lack of certainty would require users and owners of copyright to obtain legal advice to determine what uses were fair which would lead to increased transaction costs and create chilling effect on the creation of new works or the investment in innovation.⁶⁶⁰ Stakeholder’s objections to the adoption of fair use in Ireland included that it was unclear and accordingly would undermine existing business models and result in lengthy and costly court proceedings.⁶⁶¹ In response, the CRC of Ireland noted that the objection that fair use is available only to the litigious ignores the benefit that a legal precedent can bring to the general public, not just the parties to the litigation.⁶⁶²

⁶⁵⁴ *Universal City Studios v Sony Corp. of America* 659 F.2d at 969 (9th Cir. 1981) quoting *Dellar v Samuel Goldwyn Inc* 104 F.2d 661 (2d Cir 1939).

⁶⁵⁵ Netanel, above n 468, at 716.

⁶⁵⁶ David Nimmer “Fairest of them All and Other Fairy Tales of Fair Use” (2003) 66 *Law and Contemporary Problems* 263 at 263.

⁶⁵⁷ Lawrence Lessig “Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity” (2004) <www.suffolk.edu>. Aufderheide and Jaszi, above n 15, argue that this statement was made by Lessig prior to the development of codes of best practice in the United States. Lessig was a founder of the Stanford Fair Use Project.

⁶⁵⁸ Netanel, above n 468 at 717.

⁶⁵⁹ *ALRC Review*, above n 1, at 112.

⁶⁶⁰ *ALRC Review*, above n 21, at 113.

⁶⁶¹ Copyright Review Committee Ireland *Copyright and Innovation: A Consultation Paper* (2012), above n 39, at 117.

⁶⁶² *Modernising Copyright*, above n 39, at 90.

Despite uncertainty being the most frequently opined problem with the fair use model, there are a number of empirical studies that suggest that fair use is not as uncertain as commentators suggest.⁶⁶³ Barton Beebe's seminal work involved the collection and analysis of all reported federal fair use decisions from 1978 to 2005.⁶⁶⁴ Beebe made a number of findings including that the first and fourth factor were overwhelmingly the most important when associated with the outcome of the litigation and, that even after the Supreme Court's decision in *Campbell*, the influence of the transformative doctrine remained quite limited.⁶⁶⁵ Those cases in which courts did analyse whether the use was transformative almost always found in the affirmative.⁶⁶⁶ The explanation for the limited application of the transformative doctrine by the courts in Beebe's research is that the transformative use paradigm ascended to its predominant position only after the period that Beebe studied, even if the trend towards its use began well before.⁶⁶⁷

In 2008 Samuelson took a different approach to the analysis of the fair use decisions examined in Beebe's study by grouping those decisions, and more recent decisions into "policy-relevant clusters" and within each policy-relevant cluster grouping together similar uses.⁶⁶⁸ Samuelson's policy-relevant clusters were as follows:⁶⁶⁹

1. Free speech and expression fair uses
2. Authorship-promoting fair uses
3. Uses that promote learning
4. "Foreseeable Uses of Copyrighted Works beyond the Six Statutorily Favoured Purposes," including personal uses, uses in litigation and for other government purposes, and uses in advertising
5. "Unforeseen Uses," including technologies that provide information location tools, facilitate personal uses, and spur competition in the software industry.

While the purpose of Samuelson's study was not to produce any across-the-board generalisations about fair use outcomes, one observation made by Samuelson was

⁶⁶³ Netanel, above n 468; Sag "Predicting Fair Use" (2012) 73 Ohio State Law Journal 47; Pamela Samuelson "Unbundling Fair Use" (2008-2009) 77 Fordham Law Review 2537.

⁶⁶⁴ Barton Beebe "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005," (2008) 156 University of Pennsylvania Law Review 549.

⁶⁶⁵ At 582-586, 604-605.

⁶⁶⁶ At 605.

⁶⁶⁷ Netanel, above n 468, at 734.

⁶⁶⁸ Samuelson, above n 663.

⁶⁶⁹ At 2544-46.

that fair use defences are generally successful in transformative and productive use cases as long as the defendant is careful about the proportion of work taken in relation to their purpose for doing so.⁶⁷⁰ More generally, Samuelson found that fair use law is more coherent and certain that it is typically perceived once it is recognised that fair use cases tend to fall into common patterns.⁶⁷¹

In 2012 Matthew Sag published his statistical study of 220 fair use cases decided in the United States federal district courts between 1978 and 2006.⁶⁷² Sag's approach differs from Beebe's and Samuelson's in that he assessed the predictability of fair use in terms of case facts which existed prior to any judicial determination.⁶⁷³ Through applying a regression model Sag found that a defendant has a greater chance of making out fair use where that defendant is a natural person as opposed to a corporation, had copied only what was necessary for the purpose (referring to the amount and substantiality of the work taken), and had engaged in what Sag termed a "creativity shift" (analogous to transformative use).⁶⁷⁴ A defendant is much less likely to make out fair use where that defendant had used the plaintiff's work as part of a commercial product or service without applying its own labour or creativity to change the original work, termed "direct commercial use".⁶⁷⁵ In contrast, commercial use overall had an insignificant effect on the outcome.⁶⁷⁶ Sag concluded that fair use is not nearly as incoherent or unpredictable as is often asserted.⁶⁷⁷

A more recent quantitative study by Netanel confirmed the importance of the influence of transformativeness on the outcome of fair use cases.⁶⁷⁸ Netanel studied 68 decisions between 2006 and 2010 and concluded that if the use was transformative and the defendant had not copied excessively in light of the transformative purpose, the use would most likely be held to be fair. This is even

⁶⁷⁰ At 2620.

⁶⁷¹ At 2543.

⁶⁷² Sag, above n 663.

⁶⁷³ Sag, above n 663, at 51.

⁶⁷⁴ At 79.

⁶⁷⁵ At 83.

⁶⁷⁶ At 84.

⁶⁷⁷ At 86.

⁶⁷⁸ Netanel, above n 468.

when the copyright holder might have entered into a licencing market for a similar purpose or been willing to licence the use to the defendant.⁶⁷⁹

Over the last 40 years, a comprehensive body of fair use jurisprudence based on the application of s 107 to a multitude of different uses of copyright works has developed in the United States. These empirical studies suggest that fair use jurisprudence is far more predictable and certain than its critics propose, certainly in the last ten years. While United States fair use jurisprudence would not be binding in New Zealand, it is persuasive and could be utilised effectively by both users and owners of copyright to assess whether a particular use would likely be deemed fair. As fair use jurisprudence develops in those countries that have recently adopted fair use, it is open for New Zealand to also look to these countries for guidance. Fairness in the context of New Zealand copyright law is not new. The existing fair dealing exception for research and study requires consideration of fairness factors very similar to those in s 107.⁶⁸⁰ Moreover, as Sims points out, some of the most well understood and effective laws in New Zealand take a similarly broad principled approach, such as s 9 of the Fair Trading Act 1986.⁶⁸¹

While it is frequently proposed to offer greater certainty and predictability, fair dealing in practice may be no more certain than fair use. The two-stage analysis involved in the fair dealing provisions in New Zealand arguably creates another level of uncertainty in relation to whether the alleged infringing use falls within one of the enumerated purposes. This may be difficult to determine in some cases where the use falls at the boundaries of the scope of the particular fair dealing exception. In these cases, the focus of the court should not be, as has been the case in New Zealand,⁶⁸² on whether the use falls within a particular category but on whether the use is fair. While this can be achieved in a fair dealing context, for example the Canadian fair dealing regime, the expansion of the statutory purposes to the extent that almost any use would fall within their ambit arguably results in the first stage being entirely superfluous and the outcome therefore no more certain than fair use.

⁶⁷⁹ At 678.

⁶⁸⁰ Copyright Act (NZ), s43 (3).

⁶⁸¹ Alexandra Sims “The case for fair use in New Zealand” (2016) 24 IJILT 176 at 197.

⁶⁸² For example in *Copyright Licensing Ltd v University of Auckland & Ors*, above n 183.

4.2.5 *Fair Use Aligns with Public Expectations and Uses of Copyright*

In fair dealing jurisdictions such as the United Kingdom, copyright law has become increasingly mismatched with public expectations and behaviours in regards to the use of copyrighted works.⁶⁸³ The *Hargreaves Review* considered that a copyright scheme cannot be contemplated as fit for the digital age when millions of people are daily breaching copyright by merely format shifting information from one device to another.⁶⁸⁴ Where a law fails to align with public expectations, it will lack legitimacy and be more likely to be ignored.⁶⁸⁵ Sims gives an example of the artificiality of the current copyright law in New Zealand which permits a copyright user to format shift music tracks from a CD onto her mobile phone but does not permit her to format shift a movie on a DVD.⁶⁸⁶ Other examples of common consumer behaviours that may constitute copyright infringement are; forwarding an email, posting photos of goods on online auction sites, distributing printed copies of internet articles to others, obtaining tattoos of a copyrighted animated character and singing “Happy Birthday” in a restaurant.⁶⁸⁷ While the adoption of a specific exception to cover non-commercial UGC⁶⁸⁸ will reduce the likelihood of consumer infringement in certain situations, it is not sufficiently broad to encompass other reasonable, everyday uses of copyright works that do not harm copyright holders markets. The adoption of a fair use provision in Australia, the ALRC argues, will align better with consumer expectations of what uses are fair and reasonable.⁶⁸⁹ As will be evident in the following chapter, New Zealand’s fair dealing exceptions are even more restrictive than that of Australia, and accordingly, ALRC’s argument undoubtedly applies to New Zealand.⁶⁹⁰

⁶⁸³ *Hargreaves Review*, above n 3, at 43.

⁶⁸⁴ At 4.

⁶⁸⁵ Federica Giovanella “Effects of Culture on Judicial Decisions: Personal Data Protection Vs Copyright Enforcement” in Roberto Caso and Federica Giovanella *Balancing Copyright Law in the Digital Age: Comparative Perspectives* (Springer-Verlag, Berlin, 2015) at 85.

⁶⁸⁶ Sims, above n 681, at 194; Copyright Act (NZ), s 81(A) which covers format shifting of sound recordings only (provided that the user has not contracted out of this exception pursuant to s81(A)(h)).

⁶⁸⁷ John Tehranian “Infringement Nation: Copyright Reform and the Law/Norm Gap” (2007) Utah Law Review 537 at 546.

⁶⁸⁸ For example; Canadian Copyright Act RSC, s 29.21.

⁶⁸⁹ *ALRC Review*, above n 1, at 108.

⁶⁹⁰ Sims, above n 681, at 194.

4.2.6 Fair Use Complies with the Three Step Test

It has been argued in Chapter 2 of this paper that the purpose and interpretation of the three-step test does not conflict with a fair use exception. The ALRC expressed that it does not find the arguments that fair use is inconsistent with international law persuasive.⁶⁹¹ In contrast, the *Hargreaves Review* found that importing fair use wholesale into the United Kingdom was unlikely to be feasible in Europe.⁶⁹² One reason for this is the incompatibility of fair use with Article 5(5) of the InfoSec Directive to which the United Kingdom must currently comply.⁶⁹³ A further argument in favour of compliance with the three-step test is that there is a notable absence of challenges in international forums to the United States and to other countries that have introduced fair use or extended fair dealing exceptions. It is difficult to imagine that the United States would have agreed to the Berne Convention in 1989 if it believed that such a central aspect of its copyright law was not compatible with the Berne Convention and would be subject to international challenge.⁶⁹⁴ It is also difficult to imagine that the United States would require other signatories to the TPP to implement less flexibility than the United States has in its own copyright law. Accordingly, fair use would not conflict with the obligations New Zealand has under the Berne Convention, the TRIPS Agreement, the TPP or any other international instruments or agreements New Zealand ratifies in the future that include the three-step test.

4.3 Summary

Fair use is entrenched in the United States as potentially the most important doctrine for users of copyright material to create new and innovative works. Since 1976 the courts in the United States have developed a comprehensive jurisprudence relating to the interpretation of s 107 of the Copyright Act 1976 (US). *Campbell* is the most significant copyright decision of the twentieth century in terms of doctrinal developments of copyright law in the United States. It has fundamentally altered the interpretation of s 107 and in doing so, opened doors for users of copyright to engage in uses that are transformative and has ensured that s 107 serves the

⁶⁹¹ *ALRC Review*, above n 1, at 116.

⁶⁹² *Hargreaves Review*, above n 3, at 5.

⁶⁹³ Cook, n 152, at 243.

⁶⁹⁴ *Sag*, above n 126.

objective of copyright by promoting access to, and dissemination of, copyright works to the public.

Fair use allows uses of copyright works that do not impact on the markets of copyright owners to be regarded as fair. It also promotes innovation and the economic growth of private copying industries. New digital technologies are not automatically excluded by fair use. A number of emerging digital technologies, such as 3D printing, will potentially be excluded by fair dealing, even where the uses of these technologies are non-commercial. The key criticism of fair use is that it is uncertain. However, research spanning a period of over a decade of fair use decisions demonstrates that fair use is not as uncertain as its critics allege. Furthermore, the development of codes of best practice in the United States has functioned to increase the utility and certainty of fair use, particularly within specific industries. Fair use also aligns with the reasonable expectations and behaviours of the users of copyright material. This assists copyright law in maintaining its legitimacy and acceptance by the general public. Finally, there is a strong argument that fair use complies with the three-step test and therefore does not comprise New Zealand's obligations pursuant to international trade agreements and treaties.

Chapter 5: Copyright Exceptions in New Zealand

New Zealand copyright law, like that of Australia, Canada and Ireland, has evolved and developed from copyright law in the United Kingdom.⁶⁹⁵ The first appearance of copyright law in New Zealand was the Copyright Ordinance 1842, being the 18th ordinance enacted after the signing of the Treaty of Waitangi.⁶⁹⁶ This remained in force until the Copyright Act 1913 was enacted which adopted the Copyright Act 1911 (UK). The subsequent Copyright Acts of 1962 and 1994 were substantively based on the Copyright Acts of 1956 and 1988 (UK) respectively.⁶⁹⁷ The Copyright Act 1994 (New Zealand) (“the Act”) contains an extensive raft of specific exceptions under Part III of the Act headed “Acts permitted in relation to copyright works”. These exceptions are divided into those particular to the type of copyright work (24 sections)⁶⁹⁸ and those exceptions that apply to educational establishments, libraries and archives and for public administrative uses (22 sections).⁶⁹⁹ In New Zealand it is also possible to obtain copyright protection of copyright in a design for a maximum period of 15 years under the Designs Act 1953.⁷⁰⁰

5.1 Fair Dealing in New Zealand

Fair dealing in New Zealand is currently available for the purposes of criticism or review,⁷⁰¹ news reporting,⁷⁰² and research or private study.⁷⁰³ Fair dealing for the purposes enumerated in the Act, similar to other jurisdictions such as the United Kingdom, Australia and Canada, are subject to certain conditions. Fair dealing for the purposes of criticism or review does not infringe copyright if it is

⁶⁹⁵ Frankel and McLay, above n 650, at 159.

⁶⁹⁶ Susy Frankel “A brief perspective: The history of copyright in New Zealand” in B Fitzgerald, & B Atkinson *Copyright future, copyright freedom: Marking the 40th anniversary of the commencement of Australia's Copyright Act 1968 Australia* (Sydney University Press, Sydney, 2011) at 74.

⁶⁹⁷ At 75.

⁶⁹⁸ Copyright Act 1994, ss 67 to 91.

⁶⁹⁹ Sections 44 to 66.

⁷⁰⁰ Designs Act 1953, ss 11 and 12. The design must be registered.

⁷⁰¹ Section 42(1)

⁷⁰² Section 42(2) and (3) – the purpose is termed “reporting current events” in these sub-sections.

⁷⁰³ Section 43.

accompanied by sufficient acknowledgement.⁷⁰⁴ Sufficient acknowledgement in relation to a work, means an acknowledgement identifying the work by its title or other description and the author of the work, unless it is published anonymously or it is not possible by reasonable inquiry to ascertain the identity of the author.⁷⁰⁵ Fair dealing for the purposes of reporting current events must also be accompanied by sufficient acknowledgement if the dealing is carried out by means other than a sound recording, film, communication work.⁷⁰⁶

There is no statutory definition of “fair dealing” in the Act. However, with respect to fair dealing for the purposes of research or private study, section 43(3) contains a list of factors which the court shall have regard to in determining whether the dealing with a work constitutes fair dealing.⁷⁰⁷ These are:

- a) the purpose and character of the dealing;
- b) the nature of the work or adaptation;
- c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- e) in a case where part only of the work or adaptation is reproduced--the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

The research or private study exception applies only to dealing with published works⁷⁰⁸ and does not permit the making of more than one copy of a work.⁷⁰⁹

Unlike Australia, the United Kingdom and Canada, New Zealand does not permit fair dealing for the purposes of parody or satire, quotation, illustration for instruction and/or education. Accordingly, the fair dealing provisions in New Zealand are currently some of the most restrictive of the Commonwealth jurisdictions.⁷¹⁰

⁷⁰⁴ Section 42(1).

⁷⁰⁵ Section 2.

⁷⁰⁶ Sections 42(2) and (3). Or if the work is a photograph.

⁷⁰⁷ Section 43(3). These factors are identical to section 40(2) of the Copyright Act Cth (Australia) and section 29(2) of the CPDA (UK).

⁷⁰⁸ Section 43(2).

⁷⁰⁹ Section 43(4).

⁷¹⁰ In Ireland the fair dealing purposes are similar to those in New Zealand however the CRRIAB 2015, if passed, will introduce a fair use provision and expand the scope of fair dealing in Ireland.

5.1.1 Fair Dealing in the New Zealand Courts

As is the case in Australia, judicial decisions involving fair dealing in New Zealand are very few. Where the judiciary has had to determine whether a particular use of a copyright work constitutes fair dealing, it has relied heavily on United Kingdom fair dealing decisions.⁷¹¹ The courts in New Zealand have defined fair dealing as “simply a reasonable use”.⁷¹² The reasonableness of the use of a copyright work is said to be judged by looking at the nature of the works and the purpose for which the defendant dealt with them.⁷¹³

5.1.1.1 Criticism or Review

There is only one case example where the scope of fair dealing for the purposes of criticism or review has been considered by the New Zealand judiciary.⁷¹⁴ In *Copyright Licencing Ltd v University of Auckland and Ors*, the High Court was asked to rule on the scope of five provisions in Part III of the Copyright Act 1994, including the fair dealing provisions. The plaintiff operated a licencing scheme on behalf of publishers and authors and had for a number of years licenced the defendant universities to photocopy copyright material for distribution to students.⁷¹⁵ A dispute arose between the plaintiff and the defendants (all universities in New Zealand) over the terms of the licence for the 2000 and 2001 academic years, in particular the scope and extent of provisions in Part III of the Act.⁷¹⁶

Justice Salmon noted in the first instance that the words “criticism” and “review” should be given their ordinary meanings.⁷¹⁷ “Criticism” was to be interpreted in relation to its dictionary meaning being “the investigation of the text, character, composition, and origin of literary documents” and “the art or practice of estimating the qualities and character of literary or artistic works.”⁷¹⁸ “Review” was also to be interpreted in relation to its dictionary meaning, being “an account

⁷¹¹ Frankel, above n 696, at 73.

⁷¹² *TVNZ v Newsmonitor Services Ltd*, above n 183, at 107.

⁷¹³ At 107.

⁷¹⁴ *Copyright Licensing Ltd v University of Auckland & Ors*, above n 183.

⁷¹⁵ At 76.

⁷¹⁶ At 79.

⁷¹⁷ At [32].

⁷¹⁸ At [32] and [33].

or criticism of a . . . book, play, film, product, etc.”⁷¹⁹ This is a similar approach to that taken in the Australian Court in *De Garis* and is an approach which restricts the application of the criticism and review exception to exclude subtle forms of criticism.

While Justice Salmon held that the exception was not limited to those undertaking a criticism or review for publication in a newspaper or periodical⁷²⁰ much of his reasoning was focused on the objective of the user of the copyright work.⁷²¹ In his view the copying must be done by, or for, the person undertaking the criticism or review, meaning that the relevant purpose was that of the copier.⁷²²

Accordingly, the copying of copyrighted materials for distribution to students in course packs without a specific request by a student for a copy of the work for the purposes of criticism or review, or the copying of a work and making it available for students enrolled in a course to copy it themselves or providing individual copies of that work to students was not fair dealing pursuant to section 42(1).⁷²³ Having failed to overcome the first stage of the fair dealing analysis, the fairness of the use was not canvassed by the Court.

The narrow interpretation of “criticism or review” by the New Zealand judiciary in *Copyright Licencing Ltd* contrasts with the liberal interpretation of this exception taken by the Court in *Pro-Sieben*.⁷²⁴ The scope of the criticism or review exception in New Zealand, confined to its dictionary meanings, is as restrictive as it is in Australia. However, in Australia many other more subtle forms of criticism or review that would fall outside the ambit of the exception may constitute fair dealing for the purposes of parody or satire.⁷²⁵ Similarly, in the United Kingdom, such forms of criticism or review may fall under the recently enacted fair dealing exception for the purposes of caricature, parody or pastiche provision.⁷²⁶ New Zealand does not currently have an exception for more subtle,

⁷¹⁹ At [33].

⁷²⁰ At [35].

⁷²¹ At [34] – [38].

⁷²² At [34].

⁷²³ At [43].

⁷²⁴ *Pro Sieben Media v Carlton Television*, above n 186.

⁷²⁵ Copyright Act (Cth), s 41A. Fair dealing for the purposes of parody and satire was introduced into the Copyright Act 1968 by the Copyright Amendment Act 2006

⁷²⁶ CPDA, s 30 amended by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

less traditional forms of criticism or review and accordingly these uses may be excluded, even where such uses are fair.

Despite the exclusion of the use by the universities at the first stage of the fair dealing analysis, if the facts in *Copyright Licencing Ltd* were subject to a fair use enquiry, it is probable that the court would find infringement. Although “education” is an illustrated purpose pursuant to s 107, the courts in the United States have consistently held that reprinting copyrighted materials in academic course packs is not a fair use and that permission is required from the owners of the copyright material.⁷²⁷

5.1.1.2 Reporting of Current Events

Fair dealing for the purposes of reporting current events is said to reflect the public interest that exists in the ability of our media organisations to report current news.⁷²⁸ In *Copyright Licencing Ltd*, Justice Salmon stated that “it is difficult to think of any circumstances where the reporting of current events would occur other than in some section of the news media”.⁷²⁹ Fortunately more recent judicial consideration has given a more expansive interpretation to this fair dealing exception.

The scope of reporting current events was considered by the judiciary in 2007 in *Media Works NZ Ltd & Anor v Sky Television Network Limited*.⁷³⁰ Media Works had entered into a licencing agreement with Rugby World Cup Limited granting it exclusive rights to broadcast the rugby matches of the World Cup in New Zealand. Sky used short excerpts of the matches without permission in various programmes on its network. These programmes included news sports headline programmes and sports magazine programmes.⁷³¹ Sky claimed that its use of the copyrighted material was fair dealing for the purpose of reporting current events.⁷³²

⁷²⁷ *Basic Books Inc v Kinko's Graphics Corp*, above n 561; *Princeton University Press v Michigan Document Services Inc* 99 F 3d 1381 (6th Cir 1996).

⁷²⁸ *Media Works NZ Ltd & Anor v Sky Television Network Ltd*, above n 65, at [67].

⁷²⁹ *Copyright Licensing Ltd v University of Auckland & Ors*, above n 183, at [41].

⁷³⁰ *Media Works NZ Ltd & Anor v Sky Television Network Ltd*, above n 65.

⁷³¹ At [17].

⁷³² At [8].

Justice Winkelmann cited both *Pro Sieben* and *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* in giving the phrase “reporting of current events” a broad interpretation and one that did not necessarily exclude entertainment.⁷³³

However, ultimately Sky’s use of copyrighted material in its sports magazine programmes was not held to be fair dealing for the purpose of reporting current events.⁷³⁴ With respect to whether the use of the material by Sky was fair, Justice Winkelmann stated that the degree to which the challenged use competed with the exploitation of the copyright material by the owner was a key consideration.⁷³⁵

The Judge referred specifically to articles by New Zealand authors Louise Longdin⁷³⁶ and Jo Oliver,⁷³⁷ both of which emphasised the importance of the impact of the use on the copyright owner’s market in a fair dealing analysis. The extensive, repetitive use of the material by Sky, the impact of its use functioning to unfairly undermine the plaintiff’s ability to exploit its copyright, and the absence of sufficient public interest to outweigh such use meant that the Court did not find the use to be fair.⁷³⁸

The *Media Works* decision arguably demonstrates an appropriate interpretation of a fair dealing exception, and one that would be consistent with a fair use analysis through its consideration of relevant policy factors including the balancing of competing interests and the consideration of factors akin to the s 107 fairness factors. If such a case were subject to a fair use analysis it is probable that the same outcome would be reached. The lack of a transformative use of the work, the commercial nature of the use by Sky, the potential impact on Media Works’ market, the substance of the work taken (being the highlights of the rugby games) are factors that would tend to weigh against fair use in this case.

⁷³³ At [45] and [46] citing *Pro Sieben Media v Carlton Television*, above n 186; *TCN Channel Nine v Network Ten Pty Ltd*, above n 306.

⁷³⁴ At [51], [52] and [54].

⁷³⁵ At [61].

⁷³⁶ Louise Longdin “Fair Dealing and Market for News: Copyright Law Tiptoes Towards Market Definition” (2001) NZBLQ 10.

⁷³⁷ Jo Oliver “Copyright, Fair Dealing and Freedom of Expression” (2000) 19 NZULR 89.

⁷³⁸ *Media Works NZ Ltd & Anor v Sky Television Network Ltd*, above n 65, at [61].

5.1.1.3 Research or Private Study

The research and study fair dealing exception is said to be potentially the broadest in the Act.⁷³⁹ In *TVNZ Ltd v Newsmonitor Services Ltd*, the Court held that the term “research” for the purposes of s 19(1) of the Copyright Act 1962 (now s 43 of the Copyright Act 1994) could encompass something done with a commercial end in view.⁷⁴⁰ Newsmonitor was a commercial information service that recorded broadcasts and transcribed them for sale to commercial organisations who used the transcripts for purposes that Newsmonitor argued constituted research or private study.⁷⁴¹ The Court accepted that the review of a transcript created by the defendant for a customer could constitute research or private study.⁷⁴² However, Justice Blanchard was not prepared to uphold Newsmonitor’s ‘vicarious protection’ argument and held that the fair dealing protection belonged to the researcher and not those who supplied the researcher.⁷⁴³ In contrast, in the *Alberta* case, the Canadian Supreme Court found that in relation to the purpose of research or private study, the relevant purpose is that of the student even when the copying is completed by, or under the instruction of, the teacher.⁷⁴⁴

Notwithstanding that the use of the copyright works by Newsmonitor did not constitute “research or private study” Justice Blanchard proceeded to analyse whether the use would be considered a fair dealing.⁷⁴⁵ While he acknowledged that it was possible for a dealing to be fair even where the entirety of a work was copied⁷⁴⁶ and that it was unlikely that the value of the television programmes owned by the plaintiff would be affected by the use,⁷⁴⁷ Justice Blanchard could not find that the use was fair. The primary reason appeared to be that the use by Newsmonitor was “parasitic” and that it was open for Newsmonitor to enter into a licencing agreement with Television New Zealand which it had not.⁷⁴⁸ The analysis by Blanchard is, with respect, simplistic in its approach and offers no real guidance as to the interpretation of s 43(3) of the Act. In contrast, a fair use

⁷³⁹ Frankel and McLay, above n 695, at 287.

⁷⁴⁰ *TVNZ Ltd v Newsmonitor Services Ltd*, above n 183.

⁷⁴¹ At 105.

⁷⁴² At 106.

⁷⁴³ Frankel and McLay, above n 695, at 288.

⁷⁴⁴ *Province of Alberta v Canadian Copyright Licencing Agency*, above n 394, at 360.

⁷⁴⁵ *TVNZ Ltd v Newsmonitor Services Ltd*, above n 183, at 107.

⁷⁴⁶ At 108 citing *Hubbard v Vosper*, above n 195.

⁷⁴⁷ At 107.

⁷⁴⁸ At 108.

analysis, where the Court considers each fairness factor in turn, is a far more structured and principled approach. It is probable that the lack of transformative use of the scripts by Newsmonitor, for a commercial purpose, would weigh against fair use in this case.

5.1.2 Recent Reforms to New Zealand Copyright Law

The most recent reforms made to the Act are the Copyright (New Technologies) Amendment Act 2008 (CNTAA) and the Copyright (Infringing File Sharing) Amendment Act 2011(CIFSA).

5.1.2.1 The Copyright (New Technologies) Amendment Act 2008

The purpose of the CNTAA was to “ensure that the Act keeps pace with developments in digital technology and...in many respects make New Zealand’s copyright law consistent with new international standards.”⁷⁴⁹ In addition to modifying the definition of “copying” in the Act to include storing the work in any material form (including any digital format)⁷⁵⁰ the CNTAA also removed the dated terms “broadcasting” and “cable programme service” and introduced the technology-neutral terms “communicate” and “communication work”.⁷⁵¹ These terms were transplanted into many of the existing statutory exceptions including the fair dealing exceptions. The fair dealing exceptions were not amended in substance however the CNTAA did introduce some specific exceptions into the Act designed to address advances in digital technology, including:

- Format shifting of sound recordings (no other types of works) for personal use provided certain conditions are met.⁷⁵²
- Copying or decompiling a computer programme provided certain conditions are met.⁷⁵³

⁷⁴⁹ Office of the Associate Minister of Commerce Economic Development Committee Cabinet Paper 1 “Digital Technology and the Copyright Act 1994: Policy Recommendations” (October 2005) (2005 Cabinet Paper) at 1.

⁷⁵⁰ Copyright (New Technologies) Amendment Act 2008, s 4(3) (CNTAA).

⁷⁵¹ Section 4(2).

⁷⁵² Copyright Act, s 81A inserted by s 44 of the CNTAA. These conditions include that the copy is made for personal/household use, only one copy is made, that the owner retains ownership of the sound recording and that the owner has not contracted out of this right.

⁷⁵³ Sections 80A to 80D inserted by s 43 of the CNTAA.

- Time shifting of communication works provided certain conditions are met.⁷⁵⁴
- Caching and storing infringing material by ISPs provided certain conditions are met.⁷⁵⁵

The CNTAA was met with opposition from many groups, including ISPs⁷⁵⁶ and librarians,⁷⁵⁷ in relation to section 92A which required ISPs to adopt a policy providing for the termination of a repeat infringer's Internet account.⁷⁵⁸

5.1.2.2 The Copyright (Infringing File Sharing) Amendment Act 2011

The CIFSA was principally enacted to provide rights owners with a special regime for taking enforcement action against people who infringe copyright through file sharing.⁷⁵⁹ The CIFSA did not make any substantial changes to the exceptions regime however, it did repeal section 92A of the CNTAA and replaced it with a “three-strikes” regime whereby Internet account holders may be sent notices for illegal downloading and uploading of copyright material on their account by an ISP. After three notices, the copyright owner can then apply to the Copyright Tribunal for an order against the account holder.⁷⁶⁰

5.1.3 Problems with the New Zealand Copyright Exceptions Scheme

The *ALRC Review* lists a number of uses that are beneficial to the public but that the Australian copyright exceptions regime would unnecessarily prohibit or stifle.⁷⁶¹ Of these uses, those which would currently also be unnecessarily prohibited or stifled in New Zealand, include:

⁷⁵⁴ Section 84 inserted by section 45 of the CNTAA.

⁷⁵⁵ Sections 92C and 92E inserted by sections 92C and 92E of the CNTAA. These conditions include that the ISP does not modify the material, complies with any conditions imposed by the copyright owner of the material for access to that material, does not interfere with the lawful use of technology to obtain data on the use of the material and updates the material in accordance with reasonable industry practice.

⁷⁵⁶ Chris Keall “ISPs: New copyright law puts business in the gun; scrap it” *National Business Review* (21 January 2009) <www.nbr.co.nz>.

⁷⁵⁷ *Computerworld New Zealand* “Now librarians come out against copyright law” (21 January 2009) <www.computerworld.co.nz>.

⁷⁵⁸ CNTAA, s 92A, now repealed.

⁷⁵⁹ Copyright (Infringing File Sharing) Amendment Act 2011, s 122B (1) (CIFSA).

⁷⁶⁰ CISFA, s 4. The three-strikes regime is contained in ss 122A to 122U of the CISFA.

⁷⁶¹ *ALRC Review*, above n 1, at 103.

- Communication to the public of the datasets underlying research results that could assist in independent verification of those results,;
- use of orphan works;
- copying legally acquired material (excluding sound recordings) between computers and other devices for personal use;
- using material to satisfy personal curiosity, rather than to undertake formal research;
- the communication to the public of works created by students and researchers using museum collections;
- use of third party images or text in a presentation to illustrate the point being made;
- use of short quotations in academic publications;
- copying portions of a confidential document, such as a Cabinet minute, for the purpose of commenting on a matter of public importance;
- use of material to support commentary or the expression of opinion rather than reporting of events—for example, humorous topical news programmes or some types of newspaper opinion piece;
- parody and satire and some practices that go beyond parody or satire, such as pastiche or caricature;
- copying for the purpose of back-up and data recovery
- 3D printing.

Other uses that have developed in recent years due to advances in digital technology, but the use of which may be prohibited or stifled under the current statutory exceptions scheme in New Zealand, include; text and data mining (TDM), APIs, the creation and distribution of UGC and geoblocking.⁷⁶² As discussed earlier in this paper, other fair dealing jurisdictions have recently enacted specific exceptions for TDM⁷⁶³ and UGC.⁷⁶⁴ The enactment of a fair use provision in New Zealand would negate the need for the introduction of these specific exceptions in the Act. The use and development of APIs has recently

⁷⁶² Chalmers and Associates “Discussion Paper on Internet/Copyright Issues. A Paper to Start the Discussion on Internet-related Copyright Issues in Advance of the Copyright Act 1994 Review” (February 2015) Chalmers and Associates <www.issuu.com> at 5.

⁷⁶³ CDPA, s 29A.

⁷⁶⁴ Copyright Act (Canada), s 29.21.

been held to be a fair use by the United States Court of Appeals.⁷⁶⁵ However, it is unlikely that such use would fall within one of the fair dealing exceptions. Accordingly, Google's development of its widely used Android software platform for mobile phone devices would simply not have been possible in New Zealand.

5.2 *Summary*

The scope of fair dealing in New Zealand is very limited compared to most other fair dealing jurisdictions. The New Zealand judiciary has demonstrated that, where a use passes the first hurdle of the fair dealing analysis, it will engage in a consideration of whether the use was fair by weighing up fairness factors analogous to those in s 107 of the Copyright Act (US). In some cases the New Zealand courts have taken a restrictive approach to the interpretation of the fair dealing provisions,⁷⁶⁶ and in others a broader approach has been adopted.⁷⁶⁷ This may be in part due to the reliance on United Kingdom fair dealing jurisprudence which is similarly variable, but also due to a lack of statutory guidance, particularly for fair dealing for the purposes of criticism or review and the reporting of current events.⁷⁶⁸

There are a number of uses of copyright works that have become available to the general public but which are likely to be stifled or prohibited by the copyright exceptions framework in New Zealand. To date the New Zealand legislature has attempted to keep pace with developments in digital technology by enacting specific provisions including those for ISP caching and storage,⁷⁶⁹ transient reproduction,⁷⁷⁰ format shifting and time shifting,⁷⁷¹ and copying and/or decompiling computer programmes.⁷⁷² However, it is evident that the use of a number of new technologies, such as APIs and 3D printing would be stifled by the current exceptions scheme in New Zealand, even where the use is fair.

⁷⁶⁵ *Oracle America Inc v Google Inc*, above n 548.

⁷⁶⁶ *Copyright Licensing Ltd v University of Auckland & Ors*, above n 183; *TVNZ Ltd v Newsmonitor Services Ltd*, above n 183.

⁷⁶⁷ *Media Works NZ Ltd & Anor v Sky Television Network Ltd*, above n 65.

⁷⁶⁸ Fairness factors are only outlined in the Act for the purposes of research and study.

⁷⁶⁹ Copyright Act, ss 92C and 92E inserted by ss 92C and 92E of the CNTAA.

⁷⁷⁰ Section 43A.

⁷⁷¹ Section 84 inserted by s 45 of the CNTAA; Section 81A inserted by s 44 of the CNTAA.

⁷⁷² Sections 80A to 80D inserted by s 43 of the CNTAA.

Chapter 6: Recommendations and Conclusions

6.1 The New Zealand Fair Use Exception

A fair use exception (the “New Zealand Fair Use Exception”) should be introduced into the Copyright Act 1994. If enacted, it is proposed that the fair dealing provisions in ss 42 and 43 of the Act be repealed to avoid potential statutory interpretation problems.⁷⁷³ In order to retain as much certainty as possible, it is proposed that the other existing specific exceptions in Part III of the Act remain in force. The New Zealand Fair Use Exception will thereby function as a type of catch-all provision that may be utilised by users of copyright if their particular use of a copyright work does not fall under a specific section in the Act, but could be considered fair. The following discussion outlines a proposed structure of the New Zealand Fair Use Exception and methods that may be implemented in New Zealand to address any concerns about its uncertainty.

6.1.1 The Structure of the New Zealand Fair Use Exception

The New Zealand Fair Use Exception would contain the three following elements:

1. A statement that the fair use of copyright material does not infringe copyright and that the objective of the exception is to ensure New Zealand’s copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement;
2. A non-exhaustive list of four fairness factors to be considered by the court in determining whether the use is fair; and
3. A non-exhaustive list of illustrative purposes.

This structure is almost identical to s 107 of the Copyright Act (US). The additional statement that includes reference to the objective of the exception would be included as it would provide further guidance to those seeking to interpret the terms of the exception.⁷⁷⁴ The New Zealand Fair Use Exception

⁷⁷³ As opposed to the suggested approach by the Irish CRC in Modernising Copyright whereby the existing fair dealing provisions in the CRRA will remain in force.

⁷⁷⁴ A similar statement is suggested by the Australian Productivity Commission in its recent review of copyright law in Australia, above n 356, at 162.

would not include the express statement contained in s 107 being “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” It is proposed that such an express statement is not necessary. This is primarily because the nature of the copyright work, including whether the work is published, is encompassed within the analysis of the second fairness factor.

6.1.2 The Fairness Factors

The New Zealand Fair Use Exception would include four fairness factors based upon the four factors common to s 107 and factors (a), (b), (d) and (e) contained within s 43(3) of the Act.⁷⁷⁵ This part of the New Zealand Fair Use Provision would read as follows:

In determining whether the use of a work in any particular case is a fair use the factors to be considered should include, but not be limited to:

1. The purpose and character of the use.
2. The nature of the copyright work.
3. The amount and substantiality of the part copied taken in relation to the copyrighted work as a whole.
4. The effect of the copying on the potential market for, or value of, the work.

The fairness factor contained in s 43(3)(c) of the Act that pertains to “whether the work could have been obtained within a reasonable time at an ordinary commercial price” would not be included in the New Zealand Fair Use Exception. The primary reason for this is that the “commercial price factor” is subsumed within the determination of fairness pursuant to fairness factor four, the effect of copying on the potential market for, or value of, the work. Furthermore an advantage to enacting fairness factors substantially the same as those in s 107 is that there is an extensive fair use jurisprudence for the New Zealand judiciary to draw upon in relation to those factors compared to a paucity of fair dealing case law. The interpretation of a “new” fairness factor and its relationship to the s 107 fairness factors would potentially create unnecessary uncertainty as to its

⁷⁷⁵ Copyright Act, s 43(3) being “fair dealing for research or private study”.

relevance. Unlike the four fairness factors listed above, the commercial price factor may also not be relevant to all uses of copyright works, for example parody and satire and criticism and review. The *ALRC Review* also took this view and noted that, with the exception of Singapore, all other jurisdictions that have adopted fair use have not included a commercial price factor in their legislation.⁷⁷⁶

6.1.3 *The Illustrative Purposes*

The New Zealand Fair Use Exception would contain a non-exhaustive list of illustrative uses or purposes that are specific to New Zealand but that also mirror those of other fair use jurisdictions. The function of the illustrative purposes would be the same as those illustrative purposes outlined in the preamble of s 107, being to provide the court with guidance as to the type of activities that might be regarded as fair under the particular circumstances of the case.⁷⁷⁷

The 11 illustrative purposes in the New Zealand Fair Use Exception would be comprised of those purposes found in the fair dealing provisions of the Act,⁷⁷⁸ purposes which are commonly found in fair dealing provisions in other jurisdictions and purposes which are not covered by specific enumerated exceptions in the Act. This approach is substantially the same as that proposed by the *ALRC Review* in relation to its proposal for an Australian fair use exception.⁷⁷⁹

The non-exhaustive list of illustrative purposes would include the following:

1. Criticism or review;
2. Research or private study;
3. News reporting;
4. Parody or satire;
5. Quotation;
6. Non-commercial private use;
7. Incidental or technical use;
8. Education;

⁷⁷⁶ *ALRC Review*, above n 1, at 142.

⁷⁷⁷ *Harper & Row Publishers Inc v Nation Enterprises*, above n 495, at 561.

⁷⁷⁸ Copyright Act, ss 42 and 43.

⁷⁷⁹ *ALRC Review*, above n 1, at 151.

9. Library or archive use;
10. Access for people with disabilities; and
11. Professional advice.

This list is more extensive than those listed in the preamble of s 107 however is not so lengthy as to suggest that the flexibility of the exception is compromised. It is important that the non-exhaustive nature of the illustrated purposes is obvious to those seeking to rely on the New Zealand Fair Use Exception and to the New Zealand judiciary when interpreting its terms. Accordingly, the list of illustrative purposes would be set out with the following statement preceding the list:

The following purposes are illustrative only and provide general guidance as to the types of uses that may be considered to be fair:

Uses that are currently likely to be stifled or prohibited under the current statutory exceptions scheme in New Zealand, such as 3D printing for private use, non-commercial use of UGC and non-commercial development of API's would fall within the ambit of the purpose of "non-commercial private use". Accordingly, whether these uses constituted infringement of copyright would turn on whether such uses were fair pursuant to the four fairness factors.

6.1.4 Methods to Limit Uncertainty

It is evident that the alleged uncertainty of fair use is the most common concern voiced by stakeholders, academics and the United States judiciary. There are several methods which would provide guidance as to the application of the New Zealand Fair Use Exception in practice. First, as discussed in paragraph 4.3.1.4, in order to reduce any uncertainty that may arise from the New Zealand Fair Use Exception the New Zealand courts could draw on the extensive body of United States fair use jurisprudence as a starting point for the application of the fairness factors.⁷⁸⁰ Secondly, the enactment of a fair use provision could be accompanied by an explanatory memorandum to provide guidance as to the application of the fairness factors and illustrative purposes.⁷⁸¹ This may assist in avoiding an overly

⁷⁸⁰ This suggestion was also made in the *ALRC Review*, above n 1, at 151.

⁷⁸¹ This suggestion was also made by the Australian Productivity Commission, above n 356, at 162.

restrictive interpretation of the New Zealand Fair Use Exception by the judiciary. Thirdly, the enactment of a fair use provision would mean that certain industry groups, such as film-makers, libraries and educational institutions, could make use of successfully implemented codes of best practice in the United States. These codes could be modified to the extent necessary to reflect the practices of each industry in New Zealand, provide guidance as to how the New Zealand Fair Use exception would impact these existing practices and suggest new practices that may now be possible due to the broadening of the statutory exceptions scheme.

6.2 The New Zealand Fair Dealing Exception

The New Zealand Government may choose not to introduce a fair use exception into the copyright law of New Zealand. Potential reasons for this may include concerns that fair use does not comply with the three-step test and that other similar jurisdictions, in particular Australia, have not implemented fair use despite recommendations to do so.

In the event that the New Zealand Government elects not to adopt fair use, it is proposed that the existing fair dealing exceptions be repealed and replaced with a consolidated fair dealing provision (the “New Zealand Fair Dealing Exception”). The New Zealand Fair Dealing Exception would contain a prescribed list of enumerated purposes that are sufficiently expansive to permit a wide range of uses to fall within its ambit. Unlike the New Zealand Fair Use Exception, the purposes would not be illustrative but instead the New Zealand Fair Dealing Exception would only apply when a given use is carried out for one of the prescribed purposes. The purposes would be the same as the 11 illustrative purposes proposed for the New Zealand Fair Use Provision in paragraph 6.1.3. Confining the scope of the exception to a list of prescribed purposes will allay concerns about compliance with the three-step test, particularly the requirement that exceptions be limited to “certain special cases”.⁷⁸²

⁷⁸² Berne Convention, art 9.

If a use of a copyrighted work falls within one of the 11 purposes, it would be necessary to determine if that use is fair by reference to the same fairness factors as those outlined for the New Zealand Fair Use Exception in paragraph 6.1.1. Accordingly, the only difference between the New Zealand Fair Use Exception and the New Zealand Fair Dealing Exception is that in the latter, the use must first fall within one of the prescribed purposes in order to then be subjected to a fairness analysis. This approach is similar to that of the Canadian fair dealing model where the enumerated purposes are reasonably broad, so that it is likely that most uses, including new unforeseeable technological uses, would fall within their scope. Accordingly, comparable to the Canadian approach, whether a use of a copyrighted work will infringe copyright would then more likely turn on whether the use is fair, rather than whether it falls within one of the enumerated purposes.

The *ALRC Review* proposes a similar alternative to a fair use exception in Australia.⁷⁸³ As noted in the *ALRC Review*, a confined fair dealing exception will be less flexible and less able to adapt to new technologies than a fair use exception.⁷⁸⁴ Accordingly, it is more likely that a fair dealing exception, even if broadly framed, would exclude socially useful purposes that promote the objective of copyright. To limit the exclusion of such purposes, the scope of the purposes in the New Zealand Fair Dealing Exception should not be given a narrow construction. To ensure that this is the case, it is proposed that the enactment of the New Zealand Fair Dealing Exception be accompanied by an explanatory memorandum to provide guidance and examples of the prescribed purposes and the application of the fairness factors. However, the New Zealand Fair Dealing Exception is proposed only as an alternative in the event that fair use is not adopted. The New Zealand Fair Use Exception is preferable for the reasons discussed in Chapter 4 of this paper.

⁷⁸³ *ALRC Review*, above n 1, at 163.

⁷⁸⁴ At 164.

6.3 Conclusion

Copyright law in New Zealand has failed to keep pace with developments in technology. The current statutory copyright exceptions scheme potentially excludes uses of copyright works, in particular novel uses of digital technology, that do not harm the markets of copyright owners. Accordingly, New Zealand's copyright law is not achieving an appropriate balance between the rights of users and the rights of owners of copyright and therefore is also failing to promote the objective of copyright itself. It is not axiomatic that increasing the strength of users' rights causes loss for copyright owners. It is essential to accommodate reasonable user expectations alongside the legitimate interests of the owners of copyright. The reasonable expectations of the public in New Zealand are not being met by the current copyright law framework as many common everyday uses presently constitute infringement.

The exclusion of certain uses of emerging technologies may result in copyright law acting as a regulatory barrier to the creation of new industries in New Zealand, thereby hampering innovation and economic growth. In order for copyright law to be responsive to developments in technology it is necessary for it to be flexible and technology neutral. The existing scheme of statutory exceptions, including the fair dealing provisions, do not provide sufficient flexibility. It is evident that it not possible for the legislature to predict and create bespoke exceptions to future uses of copyright works.

The solution to this problem is for New Zealand to adopt a fair use exception. The adoption of fair use would enable New Zealand to grow a more technologically innovative digital business environment as has occurred in the United States and in other jurisdictions that have adopted fair use. It would also better align New Zealand's copyright law with the reasonable expectations of the general public as to the use of new technologies. Given that a number of other jurisdictions are presently considering its adoption, it is now time for serious consideration to be given as to the adoption of fair use in New Zealand.

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