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Master of Jurisprudence

‘Fair Dealing’: A Quaint Footnote to the British Copyright Regime?

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30 September 2003



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Degree: Master of Jurisprudence

Title: 'Fair Dealing': A Quaint Footnote to the British Copyright Regime?

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Abstract

The following thesis explores the vicissitudes of the British copyright law defence of fair dealing from its birth as the common law defence of fair use through its subsequent development under the 1911, 1956 and 1988 Copyright Acts to its present situation in light of the most recent case of *Ashdown v The Daily Telegraph* [2002] as well as the changes proposed by the British Patent Office in its endeavours to implement the European *Information Society Directive* (29/2001/EC). It is submitted that the general development of this provision has been one of gradual decline. On a statutory level the defence has been continually restricted to the point where if the proposals of the Patent Office are accepted, it will be barely be able to operate as a defence designed to balance the interests of copyright owners against copyright users. As far as judicial pronouncements are concerned, up until 1990 it is submitted that the courts, in general, failed to demonstrate any real dynamism when interpreting the fair dealing provisions. It has only been in the last 10 years that the true potential of the defence, in maintaining this copyright balance, has been explored, although this has only tended to manifest when the courts have considered the position of media litigants. This in conjunction with the latest proposals for reform from the Patent Office, in light of the emergence of the digital age, could arguably sound the death knell for fair dealing. As governments of the two main trading blocks of Europe and the US continue to adopt an increasingly rights-maximising approach in favour of copyright owners it is submitted that fair dealing may well become a footnote to the British copyright regime.

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Introduction

“We must take care to guard against two extremes equally prejudicial; the one, that men of ability who have employed their time for the service of the community, may not be deprived of their just merits and the reward of their ingenuity and labour; the other that the world may not be deprived of improvements, nor the progress of the arts be retarded.”

Sayre v Moore (1785) per Lord Mansfield¹

The copyright industry is one of the most lucrative markets in the world economy today. A recent government report calculated that copyright dominated areas such as TV, radio, music and film account for 5% of Britain’s GDP.² However, to regard copyright in this light alone would be to merely understand one aspect of its nature. Copyright is, after all, a multi faceted legal construct encompassing social, cultural as well as economic concerns. In its simplest form, it can be regarded as a negative right to prevent another individual from freely copying a work. Nevertheless, as recognised more than two hundred years ago by Lord Mansfield, its real purpose is somewhat more subtle, providing a balance between financial reward whilst still allowing creativity to flourish for the public good.

Copyright is not a monopoly right. It protects the form of ideas and not the ideas themselves. It is not an infringement to make use of an insubstantial amount of the right holder’s work. However, it is also clear that there is a necessity for a stronger check permitting substantial takings in certain instances to safeguard the free flow of information. In Britain, this exception, allowing the free use of substantial portions of a copyright work for the specific purposes of research and private study, criticism and review as well as reporting current events is the remit of ‘fair dealing’ and it is this defence to copyright infringement which forms the focus of the following thesis. The

¹ (1785) 1 East 361

² See the Department of Culture’s ‘Creative Industries mapping Document 2001’ available at www.culture.gov.uk

author aims to explore the trials and tribulations of this provision, examining the various influences affecting its statutory development and judicial interpretation in order to ascertain whether 'fair dealing' still plays a useful role in maintaining the delicate copyright balance between right holder and user or whether it is simply nothing more than a quaint footnote to the British copyright regime. The importance of this investigation should not be underestimated. On the contrary, the attitude towards the defence appears to act as a useful barometer for the copyright system. That is, through assessing the strength of a this set of exceptions and the sincerity with which they are maintained one is able to form an impression of the nature of the copyright regime that the British legislature is endeavouring to create. To this extent, it could be argued that the defence of 'fair dealing' goes right to the heart of the copyright question.

Chapter one witnesses the birth of common law 'fair use', followed by its statutory endorsement as 'fair dealing' in the first consolidated Copyright Act of 1911. The author endeavours to explain why Parliament chose to adumbrate the defence in that particular form and shed light on the early stutters of case law. The first real challenge that the changing copyright landscape threw at the defence comes in chapter two with the development of efficient reprographic technology. It is argued that 'fair dealing' was curtailed perhaps unnecessarily in trying to ensure that the copyright owner was not robbed of any revenue therefore giving a real indication of the sort of copyright regime envisaged by the British government. However, perhaps the best indication of the angst and tension involved in striking the best balance between user and right holder is discussed in chapter three over the provision of section 29 regarding research and private study. Indeed it is disputed whether the drafters of the 1988 Copyright Designs and Patents Act ever really had the user in mind as they debated over how best to balance the political ideology of a free market economy against the private economic rights of the individual copyright holder.

It is difficult to say just how much the courts were influenced by developments within Parliament relating to 'fair dealing'. It will be argued that the decisions handed down under the 1911 and 1956 Acts did not appear to display any aggressive stance on the part

of the judiciary in safeguarding user rights. However, in contrast to the tenor of the debates during the advent of the 1988 Copyright Designs and Patents Acts, the 1990s saw a number of rather interesting ‘fair dealing’ decisions delivered by the courts as they grappled with the growth of copyright in the media industry. Indeed, if this thesis were written in 1999, ending with an analysis of the Court of Appeal’s decision in *Pro Sieben* (1999),³ one would perhaps conclude that ‘fair dealing’ could look forward to a bright future. However, just as things were looking up for the defence, it is argued that it suffered a major blow in the form of the two most recent decisions of *Hyde Park v Yelland* (2000)⁴ and *Ashdown v Telegraph* (2002).⁵ The former demonstrated that copyright has practically developed into a right of private censorship, whilst the latter, though recognising the relevance of the European Convention of Human Rights in deciding a ‘fair dealing’ case, arguably could have gone a deal further. However, it is submitted that the real danger comes with the arrival of the Information Society Directive.⁶ A critique of the Directive and the proposed amendments from the Patent Office designed to implement it, which threaten to sound the death knell for ‘fair dealing’, forms the focus of the fourth chapter.

Overall, the author considers that the future of the British ‘fair dealing’ defence is rather bleak. Furthermore, even in the absence of the Information Society Directive, it is submitted that the prospects of this provision would be no brighter. Perhaps, especially considering the developments which had already taken place in 1988, the fate of ‘fair dealing’ is already sealed. However, refusing to end on a pessimistic note, this thesis concludes with a brief consideration of how the similar brand of Australian ‘fair dealing’ has fared and demonstrates that perhaps the demise of the British model was not, after all, inevitable. Indeed, it is submitted that although British ‘fair dealing’ may be approaching

³ *Pro Sieben AG v Carlton UK Television Ltd* [1999] F.S.R. 610

⁴ [2000] EMLR 363 See below.

⁵ [2002] Ch.149 See below.

⁶ Directive 2001/29/EC of the European Parliament and of the Council of May 2001 on the harmonisation of certain aspects of Copyright and Related Rights in the Information Society

the end of the line, its Australian relation may still enjoy a bright future especially if the reforms of the Copyright Law Review Committee are acted upon.⁷

⁷ Copyright Law Review Committee: Simplification of the Copyright Act 1968 (Commonwealth of Australia) September 1998. The Report can be obtained at: <http://clrc.gov.au/www/clrHome.nsf/AllDocs/>

Chapter One

From Confusion to Clarification? The 1911 Copyright Act and Resulting Case Law.

“Questions frequently arise with regard to literary works as to what is a fair use of other authors in the compilation of books. In the majority of cases, these are questions that can only be decided when they arise by the proper legal tribunals and no principle which we can lay down or which could be defined by the legislature could govern all cases that occur.”

1878 Royal Commission on Copyright¹

“The general proposition of the Bill recognises and endorses the principle that subject to the legitimate interests of the public, the author is to be secured in the control and use of his works.”

President of the Board of Trade, House of Commons, 1911²

“The moral basis upon which the protective provisions of the Copyright Act of 1911 rests is the Eighth Commandment: ‘Thou shalt not steal’.”

Lord Atkinson in *Macmillan v Cooper*³

English copyright law enjoys a unique history. It did not develop as a utilitarian tool for public good as in the US; nor was it based on the moral rights orientated European model such as *droit d’auteur*. Instead, common law English copyright emerged as a means of commercially rewarding the literary entrepreneur. It was a practical set of rules permitting wealth to fructify in the pockets of the individual author.⁴ This is not to say

¹ The 1878 Copyright Commission, 36th Annual Commission Paragraph 67

² Copyright Bill 1911, Hansard, House of Commons 2R [23] 1911 Col. 2595

³ 40 T.L.R. 186

⁴ Daniel Burkitt, ‘Copyrighting Culture – The History and Cultural Specificity of the Western Model of Copyright.’ [2001] IPQ 146-186. Burkitt comments on the “individual possessivism” that characterised English copyright law and that underlying the notions of genius and originality was the recognition of the monetary value of the literary market. The Statute of Anne 1710, for example, was passed in order to protect the commercial interests of the booksellers who felt threatened by piracy. See pp148-150. In the

however that the copyright owner could simply demand a royalty for every conceivable use of a work. The courts have long recognised that there should be certain exceptions to copyright in order that useful works be produced without hindrance. Works of abridgement were such an example. This particular doctrine can be traced back to the case of *Gyles v Wilcox* (1741).⁵ However, such works were not *exceptions* in the true sense of the word since the resulting piece was considered worthy of being classed an original work in its own right. The abridgement doctrine was valued as a way of disseminating information and encouraging the creation of new and valuable works. In considering whether an abridgement constituted an infringement, the court would investigate how much of the original work had been taken and whether enough skill and labour had been expended throughout the exercise of shortening the piece into more manageable form. After all, it required a great deal of skill to produce such a work. Nevertheless, as the 19th century progressed, copyright expanded and writing became a more and more respectable, and economically viable, occupation. It was therefore more important to protect the commercial interests of the author and the abridgement doctrine slowly petered out.⁶ This is not to say that the judiciary no longer permitted any exceptions to the copyright regime. Instead, the 19th century saw the development of the ‘fair user’ doctrine.⁷ *Cary v Kearsley* (1802) had established the principle that it was lawful to use former publications in composing a new work if they are fairly taken.⁸ Lord Ellenborough stated:

House of Commons, the commercial value of literature was also recognised by Sir George Agnew 1911 Copyright Bill, House of Commons col. 2621

⁵ (1741) 2 Atk 141 An act of abridgement was defined in *Hawkes v Newbury* (1774) Lofft 775 as “an act of understanding employed in carrying a large work into a smaller compass and rendering it less expensive and more convenient both to the time and use of the reader.” Taken from Vaver, ‘Abridgements and Abstracts: Copyright Implications’ [1995] EIPR

⁶ Vaver, ‘Abridgements and Abstracts: Copyright Implications’ [1995] EIPR 225-235, 227. Vaver states that by 1900 the abridgement doctrine was dead. See *Beauchemin v Cadiieux* (1900) 2 Can Comm Laws Repts 337, 361

⁷ See cases such as *Bradbury v Hotten* (1872) L.R. 8 Exch 1; *Smith v Chatto* (1874) 31 LT 775; *Leslie v Young* [1894] AC 335 HL

⁸ (1802) 4 Esp 168

“[A] man may fairly adopt part of the work of another: he may so make use of another’s labours for the promotion of science and the benefit of the public. But having done so then the question will be Was the matter so taken used fairly with that view and without what I call the *animus furandi*.”⁹

So at this early stage two tests are apparent. Firstly, there is the issue of for what use the work was taken. For example, whether it was for the promotion of science or some other worthwhile cause. Secondly, one must consider the issue of ‘fairness’, to which the idea of *animus furandi* was obviously closely related. It is not apparent what would be considered ‘fair’, but it is obvious that the defendant had to have some sort of honourable beneficial purpose in mind, rather than simply pursuing his own selfish and commercial ends. Certain purposes were seen as legitimate, despite the obvious need to copy the exact words of an original work. In *Mawman v Tegg* (1826)¹⁰ Lord Eldon observed that “quotation for instance is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it.”¹¹ The question was:

“[W]hether the party meant to give the public what might fairly be called a new work or whether on the other hand, in robbing the author of so much work he acted as Lord Ellenborough expresses it, *animo furandi*.”¹²

Interestingly, therefore, Lord Eldon seemed to think that in order for a defendant to rely on ‘fair dealing’, the resulting work had to be a new work. This seems to be similar to the attitude towards the abridgement doctrine. That is, an abridgement was considered to be an original work in its own right. His Lordship also felt, as Lord Ellenborough, that the key factor was the amount of work taken. If too much was appropriated, the defendant

⁹ In *ibid* 170 Put another way, Lord Ellenborough stated that one had to consider “whether what was so taken or supposed to be transmitted from the plaintiff’s book was fairly done with a view of compiling a useful book for the benefit of the public ... or taken colourable amounts merely with a view to steal the copyright of the plaintiff”. In *ibid* 171

¹⁰ (1826) 2 Russ 385

¹¹ In *ibid*. 393 In *Chatterton v Cave* (1878) 3 App Cas 483, Lord Hatherly stated: “Books are published with an expectation, if not a desire that they will be criticised and reviewed...” In *ibid* 492

¹² In *ibid*. 401 See also *Wilkins v Aitkin* (1810) 17 Ves 422 per Eldon LJ where his Lordship stated that in order for a defence of infringement to be valid, the new work had to represent “the fair exercise of a mental operation deserving the character of an original work.”

was acting in *animus furandi*. In *Bradbury v Hotten* (1872)¹³ the court also considered the *purpose* of the defendant's piece,¹⁴ whereas in *Leslie v Young* (1894) Lord Herschell concentrated on whether a substantial amount of the original work had been taken and what degree of skill and labour had gone into the new work.¹⁵ The overriding issue seemed to be an objective quantitative test of how much of the original had been taken. It is difficult to know, however, whether a defence could be provided for say criticism and review if the taking was substantial.¹⁶ There was some confusion also as to the relevance of intention. In *Bradbury v Hotten*, Kelly CB saw that in some cases it would be necessary to consider "the intent of the copyist"¹⁷ but it is fair to say this was not a key factor, except in rare circumstances.¹⁸ However, though the courts were keen to respect the author's claim to his copyright, there is also evidence, as in *Hanfstaengl v Empire Palace* (1894), that they were aware of some need to balance this lest copyright stifle creativity.¹⁹ Moreover, Lord Ellenborough opined in *Cary v Kearsley* (1802) "while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science."²⁰ Already, therefore, there were a number of factors to be

¹³ (1872) L.R. 8 Exch 1 The plaintiffs were proprietors of 'Punch' magazine and owned the copyright in a number of cartoons of Napoleon III. The defendants had published a book showing the life of Napoleon III as depicted by various satirists throughout his career. It was held that it was not a 'fair use' as the cartoons were reproduced with the same purpose to excite and amuse the reader.

¹⁴ In *ibid.* 7 per Bramwell B.

¹⁵ *Leslie v Young* [1894] AC 335 HL per Lord Herschell, 426. See also *Walter v Steinkopff* [1892] 3 Ch. 489, 495 per North J.

¹⁶ In *Chatterton v Cave* it was clear that a part of a work could only be taken for criticism or review if "the quantity taken be neither substantial or material, [and] if a fair use may be made of the publication..." In *ibid* 492

¹⁷ L.R. 8 Exch 1, 5

¹⁸ *Hanfstaengl v Empire Palace* [1894] 3 Ch. 109 "Although the intention of an infringer is immaterial, if he copies more than is fair, so that his copy may be used as a substitute for the original, as in *Roworth v. Wilkes* yet in doubtful cases the extent to which the copying has been carried and the object sought to be attained by the copies complained of are matters which must be considered, as is shewn by *Bradbury v. Hotten* and *Scott v. Stanford*. The extent of copying and the degree of resemblance between the original and the copy are always most material, as was pointed out long ago in *West v. Francis*."

¹⁹ *Ibid.* "The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion." Per Lindley LJ, 128

²⁰ *Cary v Kearsley* (1802) 4 Esp 168 See also the case of *Sayre v Moore* (1785) 1 East 361 where Lord Mansfield stated, "We must take care to guard against two extremes equally prejudicial; the one, that men of ability who have employed their time for the service of the community, may not be deprived of their just

considered, designed to ensure that the defendant did not take a free ride on the back of the efforts of the plaintiff. The courts were wary that the derivative work should not come into competition with or cause commercial harm to the original.²¹ Unfortunately, at no point was a general formulation developed which considered or incorporated all these factors. Indeed, this was a problem that pervaded the whole of the copyright law doctrine.²² As far back as 1872, it was accepted that it was “difficult to lay down any fixed principle” and that “no doubt the matter is to a great extent one of degree.”²³

By 1911, erratic though the judicial pronouncements were, there was still a recognisable ‘fair user’ doctrine. However, on codification in the Copyright Act 1911, in giving legislative voice to these situations of legitimate use, Parliament preferred the phrase ‘fair dealing’. Why the liberal government chose this new term has remained unclear. Perhaps they felt that ‘fair dealing’ encompassed more accurately the way the work was to be treated,²⁴ or maybe the significance of such a statute required that a distinction was drawn between the old common law and what was to follow after 1911. The latter view would

merits and the reward of their ingenuity and labour; the other that the world may not be deprived of improvements, nor the progress of the arts be retarded.”

²¹ *Weatherby & Sons v International Horse Agency and Exchange Limited* [1910] 2 Ch 297, 305 per Parker J, “The nature of the two publications and the likelihood or unlikelihood of their entering into competition with each other is not only relevant but may be the determining factor of the case.” See also *Bradbury v Hotten* per Kelly CB “Where one man for his own profit puts into his work an essential part of another man’s work, for which that other may still derive profit or from which ... he might have derived profit, there is evidence of a piracy upon which a jury should act.” At page 6 However, it must be noted that commercial harm was not necessarily a pre-requisite of infringement. In *Weatherby & Sons v International Horse Agency and Exchange Limited*, Parker J made it clear that: “[A]n unfair use may be made of one book in the preparation of another, even when there is no likelihood of competition between the former and the latter. After all copyright is a property right and an action to restrain the infringement of a right of property will lie even if no damage is shewn.” In *ibid* 305. However, if it was obvious that that the book was of use and met a genuine demand, it was hoped by Parker J “that arrangements (could) be made under which it will not be necessary to stop the sale of a book” *Ibid*. What these arrangements were is unclear but it is probable that Parker J had in mind some sort of license.

²² See Cd 4976, Report of the Committee on the Law of Copyright, 1910 which complained that “the common law principles which lie at the root of the law have never been settled.” At paragraph 8. Paragraph 13 recommended that “the law be reduced to an intelligible and systematic form.”

²³ *Bradbury v Hotten* (1872) L.R. 8 Exch 1, 4, per Kelly CB

²⁴ During the passing of the 1988 Copyright Designs and Patents Act, the Lords wasted a little time discussing the meaning of ‘dealing’ in light of a proposed amendment, which would alter ‘fair dealing’ to ‘fair practice’. It was argued that the latter term suggested a more general exploitation of the work, rather than the former, which implied the execution of some sort of transaction. But this point came to nothing. See House of Lords Vol. 491 1987-88 col. 85 regarding amendment to clause 29.

imply that the government intended a different, perhaps stricter, interpretation of this privilege than had been carved out by the courts. However, it is implicit from the words of Viscount Haldane, Secretary of State for War, speaking during the second reading of the Copyright Bill in the House of Lords that 'fair dealing' was to be equivalent to the doctrine of 'fair user' which existed pre 1911.²⁵ This certainly seems plausible, however, it is still unclear as to how Parliament came to construct the 'fair dealing' exception as it did. Certain early cases had identified specific uses of a copyright work as acceptable.²⁶ Even so, given the number of variables to be weighed in each case, one could have expected a defence that drew upon such factors as had been identified in the courts throughout the 19th century. For example the 'fair dealing' defence under the 1911 Act could have read:

In order to assess whether a work will be considered 'fair dealing', it will be necessary to consider the following factors:

- a) whether the new work competes commercially with the original.
- b) whether the quantity of the original work taken was too much.
- c) whether the new work has been constructed for the same purpose as the original.
- d) whether the defendant is guilty of any *animus furandi*.
- e) whether – bearing in mind that copyright law should never become an instrument of oppression – in protecting the copyright of the original, there is any danger that one might stifle or inhibit general creativity.

Instead, the legislature limited 'fair dealing' to five distinct categories, which we still have today. The answer as to why this should have been the case possibly lies in the establishment of the Berne Convention.²⁷ It was the first multilateral copyright agreement to emerge from all the other pre-existing bilateral agreements that made up the tangled web of international copyright law before 1883. The 1883 ALAI Conference at Berne

²⁵ Copyright Bill 1911, House of Lords 2R Vol X, col. 117

²⁶ *Cary v Kearsley* (1802) 4 Esp allowed the use of part of a copyrighted work if it was for the promotion of science or a benefit to the public whilst *Mawman v Tegg* (1826) 2 Russ 385 identified quotation for the purpose of reviewing as another acceptable use.

²⁷ The Berne Convention has been revised seven times: 1886, November 3rd 1908, March 20th 1914, June 2nd 1928, June 26th 1948, July 14th 1967 and July 24th 1971.

contained nothing on the subject of restrictions on copyright,²⁸ but one year later, Articles 8 and 9 were passed, which provided for a minimum level of exceptions to the reproduction right.²⁹ The former recognised the need to be able to use works for educational purposes or purposes which were of a scientific nature,³⁰ whilst the latter concerned the reproduction of newspaper and periodical articles to further the dissemination of information.³¹ Significantly, however, paragraph 2 of Article 9 stated that this exception did not apply to articles on science or art or any “other articles of some length extracted from newspapers or periodicals in relation to which the authors or publishers had expressly declared ... that reproduction was prohibited.” The limitation on the reproduction right also did not relate to political discussion.³² Although the recognition of such exceptions was indeed a positive step, it should be obvious that they were limited in scope.³³ Articles 8 and 9 were amended during the 1885 Diplomatic Conference and became Articles 7 and 8 respectively. The changes were significant. Although the restriction on political discussion remained, a new limitation relating to news of the day and current topics was introduced. Furthermore, the reproduction of an author’s work for educational and scientific purposes covered by Article 8 was to be left to domestic legislation.³⁴ After an uneventful revision conference in 1896, came the 1908 Berlin revision, which was the last revision before the Copyright Act 1911. Once again Articles 7 and 8 were amended, now becoming Articles 9 and 10. It was made clear that

²⁸ Samuel Ricketson, ‘Berne Convention for the protection of literary and artistic works 1886-1987’ Centre for Commercial Law Queen Mary College, Kluwer 1987, paragraph 2.17, p. 53

²⁹ The Diplomatic Conference of 1884 in *ibid* paragraph 2.30, p. 64

³⁰ Article 8 provided that each contracting state was to permit the publication of “extracts, fragments and whole parts” of literary or artistic works that had first appeared in another Union country “provided that this publication was specially made and adapted for educational purposes or had a scientific character.” This was subject to the requirement that the name of the author was given or the source from which the extract was taken was indicated. Article 8 paragraph 3

³¹ Article 9 concerned the reproduction of newspaper and periodical articles - the rationale being the general public interest in dissemination of information. In 1885, after much negotiation, Articles 8 and 9 became Articles 7 and 8. The need to provide some sort of acknowledgement of the author or the source was removed at the wish of the British who believed that the parameters of such exceptions should be left to domestic legislation

³² Article 9, paragraph 3

³³ Ricketson makes reference to the Haitian representative, who made a speech against the restriction of Article 9 from covering articles of a scientific nature as it clearly conflicted with Article 8. Ricketson, ‘Berne Convention,’ paragraph 2.31 p. 66

³⁴ In *ibid*, paragraph 2.48 p. 77

articles in newspapers could be reproduced without consent, whilst a newspaper article could be freely reproduced by another newspaper unless expressly forbidden. It was also stated that ‘news of the day’ and ‘miscellaneous information’ would also be considered in the public domain.³⁵ So since 1884, there were now a number of specific exceptions to the reproduction right, the details of which were to be adumbrated by the Member States. Article 9 and 10 were still ambiguous in places, but this was to be expected. Exceptions were identified by the delegates which were common to all the member states. There was no chance of the representatives coming to the negotiating table with an elaborate set of criteria with the intention of codifying them in an international statute. It was far more likely that the delegates would agree on a limited set of specific purposes, leaving the detail to national legislation.³⁶ In theory parliament could have fleshed out the provision of ‘fair dealing’ as mentioned above. However, the government took the work of the copyright union very seriously. There was no chance that, they would risk creating a provision which clashed with this international document. In 1911, the British government seized the opportunity to reform their own law whilst adapting it to the

³⁵ Article 9 read:

1. Serial stories and all other works whether literary, scientific or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union, may not be reproduced in the other countries without the consent of the authors.
2. Articles on current economic, political or religious topics may be reproduced by the press unless the reproduction thereof is expressly reserved. Nevertheless, the source must always be indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.
3. The protection of the present Convention shall not apply to news of the day or miscellaneous information which is simply of the nature of items of news.

Article 10 read:

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational purposes, or having a scientific character, or for chrestomathies, the effect of the legislation of the countries of the Union and of special arrangements existing, or to be included, between them is not affected by the present Convention.

³⁶ The 1885 draft of the convention involved a great deal of compromise as a result of the British delegates who did not want to see an international treaty based on such absolute terms. This is not to say that Britain did not support the creation of Berne. As pragmatists, they merely saw that the best way of bringing about such unification was to establish only a piecemeal level of unification to enable the largest number of countries to adhere to the Convention. As it was the mutilated collection of statutes making up British copyright law would have to undergo a major revision in order to conform to Berne.

provisions of Berne at the same time in what was a period of general reform for the copyright regime. After all, movements towards Berne began shortly after it had been recognised that British copyright was in need of a major overhaul. What better time than to ensure that when the law was reformed, it adhered to the Union. The 1878 Royal Commission had concluded that the law of copyright in England was “wholly destitute of any sort of arrangement, incomplete often obscure and even when intelligible upon long study so ill-expressed that no-one who did not give such study to it could expect to understand it.”³⁷ Moreover, although Britain acceded to Berne in 1886,³⁸ they only fulfilled the minimum number of criteria to allow them to join, leaving much still to be done. The 1910 Report of the Committee on the law of Copyright was strongly concerned with the necessity to bring English Copyright in line with Berne.³⁹ The issue of exceptions was very much left to the member states own initiative.

However, although the British government was allowed to choose how it constructed the ‘fair dealing’ defence, it is tempting to believe that it was still influenced by the structure of Articles 9 and 10 which identified certain categories, such as news reporting, for which an exception could be granted along with the identification of certain purposes which had been identified by the courts as worthy of protection under ‘fair use’.⁴⁰ Accordingly, ‘fair dealing’ was crafted according to specific purposes rather than an open defence relating to the ‘effect’ of a dealing, which would be considered in light of the various factors already apparent in the common law authorities. Nevertheless, the codification of the ‘fair dealing’ defence in the 1911 Act was by no means the most important aspect of the 1911 Act relating to the 1908 revision. For instance, the extension of the copyright term to the author’s life plus fifty years was hotly debated in the Commons.⁴¹ Such important issues

³⁷ The 1878 Copyright Commission, 36th Annual Commission Paragraph 7

³⁸ The Diplomatic Conference of 1886. See Ricketson, ‘Berne Convention,’ paragraph 2.49, p. 77

³⁹ Cd. 4976 “...it is highly desirable that the opportunity, which the amendment of the law to give effect to the Convention could afford should be taken to place the British law on an intelligible and systematic footing.” p. 3

⁴⁰ For example, both *Mawman v Tegg* and *Chatterton v Cave* recognised the importance of criticism and review.

⁴¹ Copyright Bill 1911, House of Commons 2R [23], col. 2616-2657

demanded greater attention than subtle areas such as the balance of copyright as between owner and user through ‘fair dealing’.

The Copyright Act 1911 was an immense piece of drafting, repealing no less than eighteen other Acts. In the words of Viscount Haldane, it was “a Bill of very great magnitude and importance.”⁴² Nevertheless, it should be made clear that though the statutory recognition of ‘fair dealing’ clearly recognised the need for some sort of exception to the copyright rule,⁴³ it gave no guidance as to the manner in which this defence would operate. The Bill concerned the bigger more substantive issues of the day. The common law, which had been in a muddle “ever since Lord Camden differed from Lord Mansfield in 1774 in the case of *Donaldson v Becket*” was now put on a solid footing.⁴⁴ The Act also established a robust copyright system throughout the British Empire.⁴⁵ Whereas pages and pages of discussion were devoted to the ‘fair dealing’ defence during the passage of the 1956 and 1988 Acts, the same privilege attracted sparse comment in 1911.⁴⁶ Parliament wished merely to codify the defence and was quite content to let the judiciary develop a coherent policy of interpretation. It was hardly surprising that when faced with a restrictive amendment from Lord Malmesbury to confine ‘fair dealing’ to literary or dramatic works, Viscount Haldane clearly stated “[t]he law of fair criticism and reproduction for the purposes of fair criticism is the work of the *courts*...”.⁴⁷ The ‘fair dealing’ provision of the 1911 Act read:

2(1) Copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is by this Act conferred on the

⁴² Copyright Bill 1911, House of Lords 2R Vol X, col. 39

⁴³ Copyright Bill 1911, House of Commons 2R [23], col. 2587 per President of the Board of Trade, Mr Buxton MP

⁴⁴ Copyright Bill 1911, House of Lords 2R Vol X, col. 40 Lord Haldane also criticised the fact that the old law made no provision for the modern development of innovations such as the cinematograph, the phonograph and the piano player, col. 43.

⁴⁵ It must be remembered that British copyright law forms the foundation for other countries such as Canada, Australia and Singapore.

⁴⁶ The 1911 Act in the House of Lords was more concerned with the extension of term of copyright and how to define ‘genius’ than more subtle questions of balancing the interests of copyright owner and user.

⁴⁷ Copyright Bill 1911, House of Lords 2R Vol X, col. 117

owner of the copyright: provided that the following acts shall not constitute an infringement of copyright:⁴⁸

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary.

What immediately becomes apparent is the extraordinary openness of the language used in both s2(1) and s2(1)(i). Just as *any* person who does *anything* without the consent of the owner which is reserved under copyright, is deemed to have infringed the owner's copyright, there is an exception for *any* 'fair dealing' (whatever that meant in 1911) with *any* work for the purposes of five specific categories. Therefore, whether the judge deciding the case took a strict or more expansive line when deciding the case, could produce very different results. 'Fair dealing' was also not confined to published works.

As to the effect of the new provision, Skone James, in the first edition of *Copinger* to be published after the Act was passed, submitted that the new 'fair dealing' defence limited the principal reasoning behind the old 'fair user' doctrine that had been implicit in the case law up till 1911,⁴⁹ to five purposes, which would result in works which were likely to differ from the original pieces from which the extracts were taken.⁵⁰ In doing this, although 'fair dealing' had not altered the actual *law* relating to 'fair user' it had "prevented any attempt to extend the defence to new purposes".⁵¹ As to the way in which it was to be interpreted, this was left for the courts to wrestle over. E J MacGillivray, writing in 1912, following the line taken by earlier courts, pointed out that the limits of 'fair dealing' were probably exceeded "wherever the use is such that it must naturally compete with and injure the sale of the original work".⁵² Skone James similarly identified the economic element as an important factor. He also observed that as the fact that there had been a substantial taking of a work had not prevented a defendant from taking advantage of the 'fair user' exception, there was no reason not to carry this on into

⁴⁸ Copyright Act 1911, Section 2(1)

⁴⁹ *Bradbury v Hotten* (1872), *Leslie v Young* [1894], *Smith v Chatto* (1874)

⁵⁰ F.E. Skone James, 'Copinger on the law of Copyright' 6th ed. Sweet & Maxwell 1927, 122

⁵¹ *Ibid.*

⁵² E.J. MacGillivray, 'The Copyright Act 1911 (Annotated)' London: Stevens and Sons Ltd. 119 &120 Chancery Lane Law Publishers 1912.

‘fair dealing’.⁵³ Another major consideration was the *character* of the new work and whether it had been written for a totally different purpose than the original piece. The commercial competition element was relevant in discerning whether the particular dealing was ‘fair’. If a work was of the same character, the likelihood would be that it was in competition with the original and would be viewed with suspicion.⁵⁴

Though these pointers were no doubt useful in approaching the five categories of private study, research, criticism, review or newspaper summary, the government offered no guidance as to how the words would be interpreted. The meaning of the new exception of ‘private study’ was given no explanation.⁵⁵ Indeed, the difference between ‘private study’ and ‘research’ has been a source of confusion in other jurisdictions.⁵⁶ It was obviously different from the proviso of ‘research’, which was assumed to carry on from the old case law of ‘fair user’, which had in turn been defined by Stephen J as:

- i) using the information or the ideas contained in a work, without copying its words or imitating them so as to produce what is substantially a copy.
- ii) Making extracts (even if they are not acknowledged as such) as long as they appeared under all the circumstances of the case to be reasonable in quantity, in number and length, regard being had to the objects for which the extracts are made and to the subject to which they relate.⁵⁷

The true meaning and scope of ‘private study’, on the other hand, was mystifying. Though unclear, MacGillivray assumed it would involve not just ‘private study’ by the student himself but also tuition to a class of persons, as long as the copying was not so

⁵³ F.E. Skone James, ‘Copinger on the law of Copyright’, p. 122

⁵⁴ *Ibid.*

⁵⁵ E.J. MacGillivray, ‘The Copyright Act 1911 (Annotated)’ London: Stevens and Sons Ltd. 119 & 120 Chancery Lane Law Publishers 1912.

⁵⁶ Following the Franki Committee 1976, the word ‘private’ was dropped from ‘private study’ in Australian ‘fair dealing’ The difference between ‘private study’ and ‘research’ has provided an interesting debate in Singapore regarding the case of *Creative Technology Ltd. v Aztech Systems Pte* [1997] F.S.R. 491 See Daniel Seng, ‘Reviewing the Defence of fair dealing for research and private study.’ Singapore Journal of Legal Studies 136. See also Stanley Lai, ‘Recent Developments in Copyright Protection and Software Reverse Engineering in Singapore: a triumph for the Ultra Protectionists.’ [1997] EIPR 524

⁵⁷ E.J. MacGillivray, ‘The Copyright Act 1911 (Annotated)’ p.14

extensive as to provide a substitute for the original thus harming the sales of the original work.⁵⁸ If this was so, it was still unclear whether ‘private study’ covered the use of an original work in order to produce say a study aid for the toiling student.

The reasonable extract, which was permitted to be taken for the purpose of ‘criticism and review’ was allowed only for that purpose and not for enhancing the value of the tertiary work by “producing the plums of the original”.⁵⁹ The exception of ‘newspaper summary’ permitted the reproduction of the ‘kernel or pith’ of the work summarised, as long as it was considered ‘fair dealing’ which was, again, as MacGillivray mused, to be decided along the lines of “whether, having regard to the circulation and character of work, there is a probability of substantial commercial injury being done” to the original. It may well be queried, however, why such well-established points of the defence were not included as guidelines in a more flexible ‘fair dealing’ defence.

In terms of copyright, the 1911 Act was a huge departure, worthy of admiration, but the fact of the matter is it was overshadowed by the more important issues of the day such as the Parliament Act and the Old Age Pensions Act. Demands on parliamentary time meant that the Copyright Act could not possibly be considered in the same amount of detail necessitated by the other pieces of legislation. Small wonder that ‘fair dealing’ lacked any detail relating to interpretation.

Judicial Interpretation of the Copyright Act 1911

Having discussed the birth of the statutory ‘fair dealing’ defence, one would have hoped that it was nurtured and developed by the courts. However, between 1911 and 1956 there were only four significant decisions concerning ‘fair dealing’. The feeble trickle of case law has hardly helped to demarcate the doctrine and the paucity of precedents is more

⁵⁸ E.J. MacGillivray, ‘The Copyright Act 1911 (Annotated)’ However, this was very soon to be restricted in the case of *London University Press v University Tutorial Press* [1916] 2 Ch 601

⁵⁹ *Ibid.*

apparent in light of the wealth of case law decided under the American defence of 'fair use'.⁶⁰

University of London Press v University Tutorial Press (1916) represented a frustrating opening approach.⁶¹ The discussion of 'fair dealing' constituted a painfully small part of the decision. The plaintiffs argued that they held copyright in a set of matriculation papers set by three examiners who were in a contract of sale with University of London Press.⁶² The defendants had gained possession of these papers and published them in a book for the benefit of students in preparing for such exams. The majority of the case centred on whether the examiners were indeed in a contract of service with the plaintiffs and whether the examination papers could be considered original works for the purpose of copyright. But even if these issues were decided in favour of the plaintiffs, the defendants argued that the use of the plaintiff's work constituted a 'fair dealing' under s2(1)(i) of the Copyright Act 1911 for the purpose of 'private study'. University Tutorial Press was merely enabling prospective candidates to prepare.⁶³ The fact that the defendants were making profit was of no relevance. The test was whether there was any commercial competition between the original and the defendant's work and this, it was argued, was not the case.⁶⁴ They did not see themselves as guilty of any *animus furandi*. Moreover, relying on Copinger, counsel for the defendants stated "a man may take part or even a whole of a copyright without being liable if he adds to it a considerable amount of matter".⁶⁵ How much matter had to be added was unclear but it seems that University Tutorial Press were of the opinion that the additions that had been made to the papers were enough to make the work sufficiently different to enable the new work to be a 'fair dealing'.

⁶⁰ Nimmer, 'A Riff on Fair Use in the Digital Millenium Copyright Act,' *University of Pennsylvania Law Review* Vol. 148 Jan. 2000 No. 3 pp. 673-742

⁶¹ [1916] 2 Ch 601

⁶² The plaintiffs could not claim themselves as they had failed to successfully assign the copyright. However, by enjoining the co-plaintiffs to their action they were able to mount an action.

⁶³ *University of London Press* [1916], p. 606

⁶⁴ *Ibid.*

⁶⁵ In *ibid.* 606-607 Emphasis added

Peterson J did not concur. Although he did not analyse the case in terms first of ‘purpose’ and then of ‘fairness’, it is possible to decipher his approach. He agreed that the plaintiff and defendant had considered that the publication of the matriculation papers was for educational purposes.⁶⁶ So perhaps the defendants had satisfied the test of ‘purpose’. However, the judge was not prepared to accept that this was all that was needed to satisfy the requirement of ‘private study’. There also had to be an element of critical analysis on the part of the defendant. Peterson J noted the short criticisms on the construction of the various papers, but concluded that they were of no moment.⁶⁷ The problem was not that ‘private study’ did not cover the production of such works to aid students, as was thought in the later decision of *Sillitoe v McGraw-Hill Book Co. (UK) Ltd* (1983) by Mervyn Davies J,⁶⁸ but that the defendants had not significantly added to the original papers, nor had they provided enough criticism of the work. However, this implies that if they had, a defence of ‘private study’ would have been successful. Macgillivray had already expressed the view that private study should cover teaching to a class of pupils so surely it covered the making available of a work to aid students in their private preparation. Peterson J offered little guidance on this point. He stated that:

“Both publications are intended for educational purposes and for the use of students and in my judgement the defendant have failed to bring themselves within the protection of s2(1)(i).”⁶⁹

This ambiguous statement can be read in two ways. One could argue that Peterson J limited the ‘private study’ defence to *personal* study by the student and that this did not cover the making available of a resource to the individual student for that purpose. Arguably however, this was not what Peterson J intended to suggest. The case did not appear to turn on the issue of *animus furandi* or whether the works were in competition with each other. Rather, ‘fair dealing’ was refused because the defendants had not

⁶⁶ *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at page 613

⁶⁷ *Ibid*

⁶⁸ [1983] F.S.R. 545 See Chapter 2 page 18

⁶⁹ *University of London Press* [1916] p. 614

engaged in enough criticism of the original work. If the defendants had spent a greater amount of time providing answers and guidance for the more difficult questions accompanied by an in depth critique of how the paper was laid out and how best it should have been approached, it is submitted that the defence of ‘fair dealing’ for ‘private study’ may well have been allowed. As it was, the defence was refused on the grounds that the defendant had not done enough to the original work – a reasoning that appeared similar to the line taken in *Mawman v Tegg*⁷⁰ – not that ‘private study’ was unable to cover such circumstances.

The decision may well have represented the correct outcome, but the scope of ‘private study’ remained unclear.⁷¹ Robert Burrell further criticises *University of London Press*, as Peterson J failed to identify the relationship between the pre-1911 case law and this decision passed under the new Act.⁷² However, this may not be such an accurate criticism. Indeed Peterson J did not explicitly make reference to the pre 1911 case law, but his dicta did implicitly draw on jurisprudence which preceded the passing of the Act. His statement criticising the fact that the defendants’ work had been created for the exact same purpose as the original work, was similar to the dicta in *Bradbury v Hotten*.⁷³ Although he did not explicitly mention it, he was no doubt aware that the defendants should not be permitted to use the plaintiffs’ copyright for financial gain, at the expense of the plaintiffs, a factor which ran through much of the earlier copyright case law.

In the next case, *British Oxygen Co Ltd. v Liquid Air Ltd* (1925),⁷⁴ the plaintiff and the defendant were clear commercial rivals. It concerned a letter, written by the plaintiffs to another company – Tanks and Drums Ltd – with which they had a significant amount of business. The plaintiffs had offered Tanks and Drums considerable price concessions on

⁷⁰ Where the issue was, “[W]hether the party meant to give the public what might fairly be called a *new* work...” p. 401 Emphasis added

⁷¹ See interpretation of ‘private study’ in later case of *Sillitoe v McGraw-Hill Book Co.* [1985] FSR 545

⁷² Robert Burrell, ‘Reining in Copyright Law: Is fair use the answer?’ [2001] IPQ 361-388, 371

⁷³ Where the defendant’s copies of the pictures contained in the plaintiff’s publication of ‘Punch’ were judged to have exactly the same object as the original pictures “namely to excite the amusement of his readers.” p. 7

⁷⁴ [1925] 1Ch 383

the oxygen they purchased. However, when it became clear that Tanks were still planning to trade with the defendants, the plaintiffs wrote a letter to the effect that they were willing to cease trading with Tanks and Drums. The said letter then fell into the hands of the defendants, was copied and distributed to a firm of stockbrokers as an example of the sort of bullying tactics the plaintiffs were prepared to employ in order to secure custom. The plaintiff claimed that the publication was a breach of copyright as well as a breach of confidence, although the plaintiffs based their argument solely on breach of copyright before Romer J. It is immediately obvious that *British Oxygen* was not a typical copyright case as Liquid Air was not mounting a defence of ‘fair dealing’ under the provision of ‘criticism or review’ in order to make use of a work to produce another which was to be published. Instead, the defence was to be used to reveal the allegedly suspicious dealings of the plaintiff. That is, the use of the defence was not for any ‘creative’ purpose as such. No doubt Romer J came to the correct decision. The facts were weighed heavily in the plaintiff’s favour as there had been a well established doctrine that an injunction would be granted to restrain the recipient of a letter from publishing it.⁷⁵ Objecting to the contention that the plaintiff’s letter was in restraint of trade or against public policy,⁷⁶ he stated that the defendants would not be allowed to rely on ‘fair dealing’ in order to attack the commercial character of *British Oxygen*.⁷⁷ It is also submitted that, although ostensibly concerning copyright, another influential consideration was the courts’ reluctance to involve themselves in the commercial affairs of competing businesses.⁷⁸ Though Romer J failed to express his decision in these terms, it is this underlying view that drove him, quite correctly, to judge that it was an infringement to allow a company to publish a private business correspondence between two other companies when there was no evidence of restraint of trade. It would have sufficed to say that there was a clear *animus furandi* in the defendant’s use of the

⁷⁵ In *ibid* 389

⁷⁶ In *ibid* 392

⁷⁷ In *ibid* 394

⁷⁸ See Gower, ‘Principles of Modern Company Law’ 1997 Sweet & Maxwell Chapter 8 at page 149 “Normally however third parties are nether bound nor entitled to look behind such information as the law provides that be made public... there is something in the nature of a curtain formed by the company’s public life and what goes on behind it is concealed from the public gaze.”

plaintiff's letter, to prevent a 'fair dealing' defence.⁷⁹ 'Fair dealing' permits certain acts, such as criticism and review, to be done in the general public interest. This has always been the case since *Cary v Kearsley*.⁸⁰ This was not the situation here. The defendants had used 'fair dealing' to gain a personal advantage by trying to sully the name of the plaintiff. Instead of recognising this simple fact, Romer J went a step too far. Though observing that 'fair dealing' extended to published and unpublished works, he opined nevertheless:

“[I]t would be manifestly unfair if an unpublished literary work should, without the consent of the author be subject to public criticism, review or newspaper summary.”⁸¹

It is submitted with respect that this is plainly wrong. Section 2(1)(i) of the 1911 Act drew no distinction between published and unpublished works, nor made any reference to the requirement of authorial consent. On both points, the approach adopted by Romer J was unnecessarily strict. The judge clearly saw copyright from the plaintiff's point of view. This is perfectly understandable. Copyright is a very powerful right, not only enabling the owner to demand a fee for the work, but also giving him/her the power to control whether the work should be published or remain unpublished. However 'fair dealing' is an exception to this right. To demand consent would be to undermine the exception of 'fair dealing'. Romer J admittedly came to the right conclusion, but it can already be seen how the court was chipping away at the defence of 'fair dealing' and the case of *Hawkes and Son v Paramount Film Service* (1934)⁸² continued in this vein.

Hawkes v Paramount proved all the more significant as it was the first case since 1911 to go from the High Court to the Court of Appeal, involving a major disagreement between the two. The plaintiffs were the owners of copyright in the well-known 'Colonel Bogey' tune and brought an action against the defendants who had produced a newsreel covering

⁷⁹ *British Oxygen* [1925], p. 386

⁸⁰ See Lord Ellenborough who stated, “[A] man may fairly adopt part of the work of another... for the promotion of science and the *benefit of the public*.” p. 170 Emphasis added.

⁸¹ *British Oxygen* [1925], p. 393

⁸² [1934] 1Ch 593

the opening of a hospital school by the Prince of Wales. During the ceremony, a number of boys were incidentally filmed marching to music of 'Colonel Bogey'. The plaintiffs demanded a royalty despite the fact that only twenty bars of the music had been recorded on the newsreel. Paramount argued simply that the newsreel could be regarded as a type of newspaper and so the use came well within s2(1)(i) of the 1911 Act under the exception of 'newspaper summary'.⁸³

If there was any case to highlight just how restrictive the five category approach of the defence of 'fair dealing' was, this is surely it. *Hawkes v Paramount* demonstrated how the structure chosen by Parliament had limited the ability of 'fair dealing' to adjust to new advances in technology. Even if the taking had been insubstantial, the use harmless and the court not so willing to see copyright in the same absolute terms as they did, the defence of 'fair dealing' would have failed on the simple grounds that the newsreel could not be considered a newspaper and therefore was automatically excluded from s2(1)(i). Although, Eve J obviously did not see this as a problem at first instance, all the judges in the Court of Appeal disagreed.⁸⁴ So the defence clearly failed on the question of 'purpose'. Motion picture technology the likes of which used in *Hawkes v Paramount* had not been developed in 1911 and the courts could not be expected to stretch the express words of Parliament to such a degree. The judiciary was forced to reject the 'fair dealing' defence.

The defendants immediately began from a weak position. Nevertheless, on the face of it, it was difficult to argue that they had committed an obvious breach. Twenty bars of the music may or may not be a substantial taking, but even if it were, there would surely be a defence of 'fair dealing' in theory, as the defendants were not guilty of any *animus furandi*. They did not wish to cause any injury to the plaintiffs, financial or otherwise, nor were they generating any extra profit from the chance recording of the 'Colonel Bogey' march. The twenty bars or so merely constituted background noise in a news report, which was devoted to the coverage of the opening of the school not the music

⁸³ In *ibid* 595

⁸⁴ *Hawkes and Son* [1934], per Hanworth LJ p. 604; per Slesser LJ p. 608; per Romer LJ p. 609.

itself. Arguably, the better approach regarding the issue of ‘fairness’ was that adopted by Eve J at first instance. He opined that:

“[T]he introduction into the babble of sound, inseparable from any pageantry, of a few bars of some more or less appropriate piece of music... was merely incidental.”⁸⁵

However, the Court of Appeal was unanimous in its reversal of this aspect of Eve J’s judgment. The fact that the twenty bars was enough to be recognisable as the original tune was enough to make the taking substantial. More importantly, Lord Hanworth simply observed, “copyright is a right of property and (the plaintiff) is entitled to come to the court for the protection of that property even though he does not prove actual damage.”⁸⁶ This statement was also supported by Lord Romer. Following the line of *Weatherby & Sons v International Horse Agency and Exchange Limited*,⁸⁷ ‘fair dealing’ seemed barely worth considering if “all [the court had] to do is ascertain the rights of the plaintiff. If those [had] been infringed, the plaintiff [was] entitled to succeed.”⁸⁸ It is true that copyright is considered a property right, but it is also clear that in codifying ‘fair dealing’ Parliament had considered that certain exceptions to this rule should be recognised.⁸⁹ Therefore to treat the intangible property of a copyright in the same manner as an absolute right over a piece of land is not quite right. If one must insist on this analogy, it may be helpful to see ‘fair dealing’ as providing a public right of way across the pastures of copyright law. That is, no matter how valuable the land is to the landlord, other persons are still permitted to walk across the land provided they do not cause any damage to it thus causing harm to the landlord. Indeed, even this comparison between the two property rights is not accurate as under ‘fair dealing’ it is argued that a user may take a substantial part of the work or even the whole provided that the purpose is legitimate and the dealing is ‘fair’.⁹⁰ In all, it should be apparent that copyright is not a

⁸⁵ In *ibid* 598

⁸⁶ *Hawkes and Son* [1934] p. 603

⁸⁷ [1910] 2 Ch 297

⁸⁸ *Hawkes and Son* [1934] p. 608

⁸⁹ Copyright Bill 1911, House of Commons [43] 2R See the statement of President of Board of Trade

⁹⁰ Skone James, ‘Copinger on the law of Copyright’ p.122

traditional property right. However, this was not the line taken by the Court of Appeal. Factors of *animus furandi*, commercial harm, competition and the quantity of work taken, paled into insignificance. One might have thought that ‘fair dealing’ was designed to provide a defence even if the taking was substantial, provided the use was ‘fair’. Apparently not. On the contrary, Slesser LJ made it quite clear that the defence of ‘fair dealing’ could only succeed:

“[I]f the quantity taken be neither substantial nor material (and) if, as it has been expressed by some judges, a ‘fair use’ only be made of the publication...”⁹¹

It was put very plainly that the court would only consider ‘fair dealing’ from an objective standpoint. The state of mind of the defendant was irrelevant.⁹² The chips were stacked heavily against the defendant. The only way a ‘fair dealing’ claim could succeed is if the taking was insubstantial and harmed the plaintiff in no other way. This was a very narrow line to take.

Hawkes v Paramount was a poor outcome for those who sought to rely on ‘fair dealing’. Romer LJ admitted that though he concurred with his brethren, he could foresee this decision giving rise to great problems for news production teams in future.⁹³ The decision was a clear indication that the user would have been far better served if Parliament had favoured a general policy statement outlined by various factors that the court would consider rather than five discrete purposes they had enumerated. However, this would undoubtedly have to come with a distinct change in attitude towards ‘fair dealing’. *Hawkes v Paramount* demonstrates just how much the court saw circumstances from the point of view of the copyright owner. At no stage was there a consideration of what the defendant was trying to achieve.

⁹¹ *Hawkes v Paramount* [1925] p. 606

⁹² In *ibid* 607

⁹³ In *ibid* 609

It comes as something of a surprise therefore that a more user-friendly step was taken with the final case to be decided under the Copyright Act 1911, *Johnstone v Bernard* (1938).⁹⁴ The plaintiff claimed damages for infringement of copyright in coupon tables to be used in football competitions. The tables were to be found in two original literary works of which the plaintiff was the author. The tables were copied and appeared in a letter, written by another person, identified as a Mr. RIH from Birmingham, which was then printed in the newspaper called the 'Football Forecast'. The plaintiff sued for infringement of copyright. It was claimed that for a 'fair dealing' for the purpose of 'criticism and review' the criticism had to be a criticism of the specific work. In this case, it was submitted that the article in the 'Football Forecast' did not criticise the plaintiff or his work.⁹⁵ The defendants argued that they had a defence of 'fair dealing'. Though lacking in import, as a mere decision at first instance and not the Court of Appeal, Morton J displayed a more sound level of judgment.

Traditionally the issue of *animus furandi* appeared to be associated with the issue of 'fairness'.⁹⁶ In this case, however, it clearly seemed most important when assessing 'purpose'. Morton J readily accepted that RIH's letter was a 'fair dealing'. As he commented, "I think that RIH honestly desired to offer certain observations by way of comparing and criticising the two tables." This dicta is significant as it suggests that Morton J took a more subjective approach to the defence, which would facilitate the task of proving that one had a genuine intention to use the work for a specific purpose. However, whether the defendant had copied the letter with that honest purpose in mind was unclear. Although on the facts Morton J did not accept that the defendants were guilty in this respect, he nonetheless agreed with the plaintiff's earlier contention that a dealing was not just made unfair by the finding of *animus furandi*.⁹⁷ Instead Morton J accepted that *any* oblique intention or improper motive would suffice to undermine the

⁹⁴ *Johnstone v Bernard Jones Publications Ltd and Beauchamp* [1938] Ch 599

⁹⁵ In *ibid* 602

⁹⁶ See *Cary v Kearsley* 4 Esp 168 and *Mawman v Tegg* (1826) 2 Russ 385

⁹⁷ *Johnstone v Bernard* [1938], p. 603

defence. This was a definite expansion on the term that previously only covered a defendant who sought to cause harm to the plaintiff.

Moving to the issue of 'fairness', the judge took a more realistic approach than in *Hawkes v Paramount*. As he observed, in his opening statement:

"In my view the proviso to s2(1)(i) of the Copyright Act 1911 affords an additional protection to the defendants copyright action in the case of acts specified in that proviso. Even if a defendant's act would have been an infringement apart from the proviso, he is protected... by the proviso if his conduct comes within the terms of the proviso."⁹⁸

Despite the fact that there was a substantial taking, the 'fair dealing' defence for the purpose of 'criticism and review' was granted. This is a very significant decision, which clearly flies in the face of the ruling given by the Court of Appeal in *Hawkes v Paramount*. Whilst the Colonel Bogey case saw 'fair dealing' as a subordinate defence, which was only available if there had been no substantial taking, Morton J in *Johnstone v Bernard* regarded 'fair dealing' in a stronger light as permitting the substantial taking of a work as long as there was no oblique motive on the part of the defendant. Furthermore, His Lordship engaged in a more detailed assessment of how the work was to be treated and what was to be considered 'fair'.

"If a defendant published long and important extracts from the plaintiff's work and added to those some brief criticism upon them, I think the court would be ready to arrive at the conclusion that it was not 'fair dealing' within this section."⁹⁹

It is apparent that the *quality* of the work taken was just as important as quantity.¹⁰⁰ Compared to the preceding cases, *Johnstone v Bernard* is a very positive outcome and provided a clearer guide to how 'fair dealing' should be dealt with. The importance of intention was also noticeable, especially in comparison to earlier cases such as *Bradbury*

⁹⁸ *Ibid.*

⁹⁹ In *ibid* 605 Emphasis added.

¹⁰⁰ In *ibid* 605 Morton J referred to Lord Cottenham's dicta in *Bramwell v Halcomb* (1836) 3 My & Cr 737, 738 "It is not only quantity but value that is always looked to."

v Hotten, where it was not considered to have much relevance. It was evident that the existence of any oblique motive would be relevant to the issue of purpose, which seemed to hint at a subjective approach, whilst the objective length and quality of the work taken would be relevant to 'fairness'. It was also clear that the defence of 'fair dealing' would not necessarily be undermined merely because the taking was substantial. Morton J felt that the deciding factor was whether the defendants were guilty of an oblique motive, "for instance the motive of damaging the plaintiff or of taking an unfair advantage of his work."¹⁰¹ The absence of such a motive meant that the defence of 'fair dealing' had a much greater chance of succeeding.

Conclusion

The Copyright Act 1911 was a credit to the government in terms of codification and founding a unified copyright law. Moreover, the fact that 'fair dealing' made it onto the statute book demonstrates that there were certain exceptions to copyright that had to be observed. A copyright owner did not have a monopoly right to demand a fee for every conceivable use of his or her work. However, whilst s2(1)(i) was no doubt welcome it was by no means a central concern of the government at the time. The Copyright Act was designed to bring order to the copyright regime, establish a coherent law for the whole of the Empire and its self-governing colonies as well as incorporate the recent developments at Berne in one deft sweep. The international copyright union was, of course, a major development in the harmonisation of copyright. It too recognised the importance of exceptions to the copyright regime. But given the cultural differences of so many countries regarding this delicate subject, it is hardly surprising that Article 9 and 10 provided the barest of templates. It is difficult to see exactly how Berne influenced the drawing up of the 'fair dealing', but it is tempting to think that the simple statement of s2(1)(i) reflected the simple provisions of the Union. The 'fair dealing' legislation certainly reflected the sort of purposes seen as important pre 1911. The factors used to analyse the 'fairness' of the dealing were also evident in the post 1911 jurisprudence as seen in *University of London Press v University Tutorial Press*. However, despite this the courts did not give the impression that they were clear as to how 'fair dealing'

¹⁰¹ *Johnstone v Bernard* [1938], p. 607

functioned. Language used in *Sayre v Moore*, *Cary v Kearsley* and *Hanfstaengl v Empire Palace*, encouraging a broader view of the potential effects of copyright, was lost by 1934 in a decision which saw the enforcement of copyright triumph over common sense. The main problem seemed to be that judges viewed copyright as an absolute inalienable right of property, just as one may regard one's own tangible assets. *Hawkes v Paramount* is a case in point. It also demonstrated how adopting such a strict categorical formulation of the 'fair dealing' defence meant that it was unable to adapt to any technological changes. Perhaps the changes brought about by the 1911 Act – such as the enlarging of copyright protection along with the extension of the copyright term – subconsciously brought home the importance of the value of copyright and therefore encouraged an increasingly protectionist approach regarding 'fair dealing'.

The passing of the Copyright Act must not be underestimated. It was a major achievement which brought order to the confused "Augean Stable" of pre 1911.¹⁰² Nevertheless, with regard to the case law there were still many grey areas. The resulting case law proved a rather mixed bag. *Hawkes v Paramount* and *British Oxygen* warrant criticism, whereas *Johnstone v Bernard* was a clear step in the right direction. However, the fact remains that *Hawkes v Paramount* was the only Court of Appeal decision on 'fair dealing' decided under the 1911 Act, and it was one which enshrined an arguably incorrect approach to the defence, a mistake which would only be truly eradicated when 'fair dealing' was reviewed twenty years later.

¹⁰² JHG Bergne, 'The International Copyright Union' (1887) 3 LQR 14, 31 As Bergne stated the government that managed a successful reform of copyright law would earn "a lasting title to the gratitude of the literary, scientific and artistic world" *Ibid*

Chapter Two

The Rise of the Machines (?) The 1956 Copyright Act and Resulting Case Law

“...I think it excellent that we should be, as it were, legitimising the use of copyright material for educational purposes. In Committee we shall seek to try to apply more effectively the basic principle which governs our approach to the Bill. That is, the principle that the general good must prevail and I think that is the effect of the ‘fair dealing’ clauses in the 1911 Act.”

Mr. Anthony Greenwood MP, House of Commons, 1956¹

By the time of the Gregory Report² in 1952, the landscape of copyright law had undergone a marked change. The ‘preliminary’ of the report referred to the need to pay “particular regard to technical developments and to the revised international convention.”³ In particular, reprographic technology had made copying far more efficient and the need to deal with this weighed heavily on the minds of politicians seeking to guarantee greater protection for copyright owners. Although only a limited amount of case law regarding ‘fair dealing’ had passed through the courts, in what could be regarded as an implicit criticism of the judiciary’s handling of one case in particular,⁴ the Gregory Report indicated the need to “define and clarify certain aspects of ‘fair dealing’”⁵ and felt that the “probably unintentionally restrictive wording of the proviso” required attention. That is, concern was voiced over the confusion that had developed over the issue of substantiality, which had given rise to unnecessarily restrictive decisions such as *Hawkes and Son v Paramount Film Service* (1934). The Gregory Committee highlighted that the substantiality of the copying of

¹ Copyright Bill 1956, House of Commons 2R [553] 1955-6 (715-811) act col. 724

² Cmd 8662 1952 Report of the Copyright Committee: Board of Trade. Headed to begin with by Lord Reading, then Sir Henry Gregory

³ The Berne Convention had recently been reviewed in Brussels in July 1948

⁴ *Hawkes and Son v Paramount Film Service* (1934) 1 Ch 593

⁵ Cmd 8662 1952 Report of the Copyright Committee: Board of Trade. Part III p15 paragraph 39

the original work and ‘fair dealing’ were not directly related. The Report was concerned that in cases where a substantial part of a work was taken, the court had a tendency to focus too much on s1(2)⁶ rather than the appropriate ‘fair dealing’ provision of s2(1)(i);⁷ their Report stressed accordingly that:

“[U]nless there was a flagrant case, where under the guise of reviewing a given work, the author deliberately reproduced, say, the whole of a copyright poem, we doubt whether the courts would in fact hold that copyright in the work so quoted had been infringed.”⁸

It was also proposed that s2(1)(i) be modified to protect a work for any of the five categories of ‘fair dealing’ “whether of that work or another work”, thus introducing a degree of flexibility into the provision,⁹ whilst paragraph 41 recognised the concerns of the BBC in requesting a broader interpretation of ‘newspaper summary’ to encompass the growing broadcasting industry. More controversial however, were the suggestions under paragraph 43 relating to copying by reprographic means. The Gregory Committee thought these issues were “by far the most important considerations, which arise in relation to the ‘fair dealing’ proviso”.¹⁰ Of special concern was the copying of periodical publications and books in libraries. The 1911 Act was not equipped to deal with the possibility of increased and widespread replication. Indeed, the earlier legislation did not need to provide for this phenomenon, as the technology simply did not exist. It may have been assumed that ‘fair dealing’ provided a sufficient defence for all the reproductions which were likely to occur by say a research worker or librarian as most if not all copying would have been done by hand.¹¹ The main impetus for the new legislation was the concern to bring to heel what was felt would be a huge proliferation of copying in education as a result of contemporary technological advancement – something which the House of Lords clearly viewed with great suspicion! Although admittedly the Gregory

⁶ Section 1(2) of the 1911 Copyright Act: “For the purpose of this Act, copyright means the sole right to produce or reproduce the work or *any substantial part thereof*...” Emphasis added.

⁷ Cmd 8662 1952: paragraph 40

⁸ *Ibid*

⁹ *Ibid*

¹⁰ In *ibid* paragraph 43

¹¹ The only provisions of the 1911 Copyright Act was s15, which related to the delivery of books to libraries.

Committee did not see how ‘fair dealing’ could operate in relation to the copying of books within a library,¹² it certainly saw a role for the defence regarding the copying of periodicals. It recommended that “subject to [certain] conditions... any action which would come within the description of ‘fair dealing’ if done by a student himself should be so regarded if done by the librarian on his behalf”.¹³ However, as will be seen, ‘fair dealing’ contained in section 6 was to be totally irrelevant to the duties of librarians, who instead had to follow a complex set of library provisions was introduced through section 7.¹⁴

The Passage of the Bill – A Knee-jerk Reaction?

Section 6 of the 1956 Act contained the following ‘fair dealing’ provisions:

6(1) No fair dealing with a literary, dramatic or musical work for the purposes of research or private study shall constitute an infringement of copyright in the work.

(2) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work, if it is for the purposes of criticism or review, whether of that work or of another work and is accompanied by a sufficient acknowledgement.

(3) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of reporting current events –

- a) in a newspaper, magazine or similar periodical or
- b) by means of broadcasting, or in a cinematograph film, and in a case falling within paragraph (a) of this subsection, is accompanied by a sufficient acknowledgement.

It is immediately apparent that that the 1956 Act defined a far more detailed version of ‘fair dealing’. The five categories remained, but were placed into three discrete subsections. Some of the changes seen above were readily accepted. Most notably, in accordance with the Gregory Report, s6(2) included the words “whether of that work or of another work”. This gave ‘fair dealing’ a broader application and appeared to

¹² Cmd 8662 1952: paragraph 52 stated that “generally it is desirable to provide by means of rules for conditions of copying a ‘substantial part’ of a work which *would not in any circumstances* be covered by the existing ‘fair dealing’ exception.” Emphasis added.

¹³ In *ibid* paragraph 43

¹⁴ Clause 7 became section 7 in the new 1956 Copyright Act. s7(1) read: The copyright in an article contained in a periodical publication is not infringed by the making or supplying of a copy of the article, if the copy is made or supplied by or on behalf of the librarian or a library of a class prescribed by regulations made under this subsection. But the provision only applied to libraries conforming to s7(2)(a), which stated the library must not be established or conducted for profit. This was recommended by the Gregory Committee. s7(2)(b) stated that the work was only to be used for research or private study. Section 7 was a complex and detailed provision, allowing the use of copyright material under very strict circumstances.

recognise the thrust of Morton J's judgment in *Johnstone v Bernard* (1938).¹⁵ The 'newspaper summary' exception had also been widened to the 'reporting of current events' in order to take account of broadcasting and the birth of television.¹⁶ Regarding s6(1), the provisions of 'research and private study' remained intact, but whereas the 1911 Act permitted 'fair dealing' to be applicable to *any* work, clause 6(1) of the 1956 Copyright Bill limited this type of 'fair dealing' to three specific categories. Lord Chorley tried to re-introduce the breadth of application of 'fair dealing' to its 1911 position,¹⁷ but was brushed off by Lord Mancroft, who merely suggested a combined reading of clause 6(1) with clause 9(1) would guarantee the scope his learned colleague sought.¹⁸ Such an interpretation by no means provided the expansive reading Lord Chorley was looking for as clause 9(1) only covered artistic works. Moreover, and rather bizarrely, although s9(1) and s9(2) were virtually identical to the corresponding provisions of s6, there was no reference in s9 to 'fair dealing' for the purpose of reporting current events. It is not clear at all why the government chose to adopt this approach. Section 9 merely appears an unnecessary quirk of the 1956 legislation, which was later eradicated by the Copyright Designs and Patents Act 1988 (the CDPA).

More noticeably the 1956 legislation seemed to prevent any possibility of 'fair dealing' providing any protection to school teachers involved in general education.

¹⁵ *Johnstone v Bernard Jones Publications Ltd and Beauchamp* [1938] Ch 599 Moreover, it was suggested that in order to follow Article 10(3) of the Berne Convention, there should be a 'sufficient acknowledgement' provision "where the quotation was definitely and deliberately taken". Section 10(3) read: "Quotations and excerpts shall be accompanied by an acknowledgement of the source and by the name of the author, if his name appears thereon." The sufficient acknowledgement requirement was to be found in s6(10) of the 1956 Act. It read: "In this Act "sufficient acknowledgement" means an acknowledgement identifying the work in question by its title or other description and, unless the work is anonymous or the author has previously agreed or required that no acknowledgement of his name should be made, also identifying the author."

¹⁶ Clause 3 of the 1956 Copyright Act

¹⁷ Copyright Bill 1956, House of Lords Vol. 194 1955-56, Committee Stage col. 859-937 at col. 904. The amendment was prompted by the Libraries Association and proposed that the words "a literary dramatic or musical" to be replaced by the word "any".

¹⁸ In *ibid.* 905 Clause 9 or Section 9 as it became basically mirrored that of section 6, but was designed only for artistic works. It read:

s9(1) No fair dealing with an artistic work for purposes of research or private study shall constitute an infringement of the copyright in the work.

(2) No fair dealing with an artistic work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work and is accompanied by a sufficient acknowledgement.

Lord Burden's potentially expansive amendment, which stated "no 'fair dealing' with a literary dramatic or musical work for the purposes of teaching in establishments maintained or assisted by a local education authority... shall constitute an infringement"¹⁹ was deplored by Viscount Hailsham, even though it was later clarified that the proposal was only to cover "day to day things, which happen in the course of teaching".²⁰ Viscount Hailsham considered that the public, in its capacity as educator of the young, had no right to "deprive" an author of the benefit of his work. On the contrary, he opined that the author was entitled to a "reasonable fee". Put simply, "we should pay for what we use."²¹ The 1956 Bill clearly envisaged more regulation in the field of education. It appeared that the Act was designed to show just what types of uses could be free and just what types would have to be paid for. During the discussions in the committee stage of the Bill it was evident that the Lord Chancellor, Viscount Kilmuir, was not going to grant any amendment, the result of which would put teachers beyond the reach of copyright. Amendments that meant the copyright in a literary work was not infringed by acts, which occurred in the course of teaching were blocked.²²

Regarding the issue of 'fair dealing' in libraries, it is to be remembered that the Gregory Committee envisaged that the defence would certainly have a role to play. Lord Chorley was of the same opinion.²³ He moved an amendment in Committee to make it clear that the protection given to students and research workers by the 'fair dealing' provision extended to librarians when acting on behalf of such individuals. This was again shunned by Lord Mancroft as being far too broad an application of 'fair dealing'. 'Fair dealing', it was stated, was only concerned with the student's own private study. Undeterred, Lord Chorley returned with a slightly modified proposal attempting:

¹⁹ Copyright Bill 1956, House of Lords Vol. 194 1955-56, Committee Stage col. 859-937 at col. 905

²⁰ In *ibid.* 916 per Viscount Bridgeman

²¹ In *ibid.* 908

²² Copyright Bill 1956, House of Lords Vol. 195 1955-56, Report Stage at col. 927

²³ See above, page 3.

“[T]o have it made perfectly clear that ‘fair dealing’ should be clearly extended to include the doing for a student by a library of all those things which a fair dealing allows if he does them for himself.”²⁴

Again Lord Mancroft parried saying that this would be an “unjustifiable invasion of copyright and an indefensible repudiation of our convention obligations.” Therein lies the rub. The expansion of ‘fair dealing’, as a general defence, was not permissible as it would jeopardise British compliance with the Berne Convention. Lord Mancroft had stressed this earlier in his objection to the amendment, which would have protected acts done in the general course of teaching. As he put it, “The point I want to impress upon the committee is that in these cases, we are concerned with *the basic copyright* under the convention, which we are obliged to honour”²⁵. It is important to realise just how much weight he gave to the Convention. The Lord Chancellor went further commenting, “copyright is really a human right” and anything, which derogated from it was clearly viewed with the utmost suspicion. Nevertheless, to appreciate the exact impact that the Berne Convention had on the 1956 Act, one must understand the mood at Brussels in 1948. The 1908 Berlin Conference had been the most expansive. Since then there had been two revisions in 1928 in Rome and 1948. Whilst not much can be said of the Rome revision, more was achieved in Brussels with regard to Article 10, possibly demonstrating the increasing recognition of the need to respect the rights of the user.²⁶ However, the atmosphere in which the Berne negotiations took place was very different by 1948. The Second World War obviously meant that Germany, previously a key European player, was absent from the negotiating table. As Samuel Ricketson states, “in a sense the Brussels Conference was to be the last meeting of the old union... where the strong traditional Eurocentric orientation of the convention was to be clearly in the ascendancy.”²⁷ Unlike earlier meetings, the 1948 revision heralded no major changes to the text. Although

²⁴ In *ibid.* 931

²⁵ In *ibid.* 929

²⁶ Article 10(1) permitted the making of short quotations from newspaper articles and periodicals as well as their inclusion in press summaries. Article 10(2) guaranteed the basic position in relation to the inclusion of excerpts from literary or artistic works in educational or scientific publications. Article 10(3) introduced the requirement of sufficient acknowledgement. Samuel Ricketson, ‘Berne Convention for the protection of literary and artistic works 1886-1987’ Centre for Commercial Law Queen Mary College, Kluwer 1987 at page 104, paragraph 3.32.

²⁷ In *ibid.* 108, paragraph 3.36

negotiations continued to centre on creating an international law based firmly upon the rights of authors, other factors were hindering such progress. Ricketson draws attention, for example to the problems caused by technological developments such as reprography. So it is hardly surprising that such concerns were reflected in the drawing up of domestic legislation such as the Copyright Act 1956. The increase in membership of the Union and resulting diversity of interests of each state meant that drastic reform was made very difficult. Much was left, therefore, to the initiative of the national legislature. Accordingly, Samuel Ricketson makes clear that “the reality is that the [1948] conference was very much a holding operation: the rights of authors were maintained rather than advanced.”²⁸ It was not certain how the new technological developments would be dealt with in Brussels, so it was no revelation that these concerns were reflected in the 1956 Act. The rigid library provisions and the general discussions relating to the passage of the Bill should be seen in this light.

As for the exception of reporting current events, earlier in Committee, when Lord Lucas of Chilworth attacked clause 6(3), seeking to limit ‘fair dealing’ to sound broadcasting but not broadcasting in general nor cinematograph film, Lord Mancroft blocked his way.²⁹ Lord Lucas aimed to prevent an amendment, which would reverse the narrow approach taken in the ‘Colonel Bogey’ case.³⁰ Lord Mancroft, there too, explained his objection to the amendment in terms of adherence to the Berne Convention.³¹ The adherence to the 1948 Convention in this instance is understandable, as from the beginning the Convention had contained exceptions aimed at protecting the freedom of the press in order to promote the free flow of information.³²

²⁸ In *ibid.* 113, paragraph 3.48

²⁹ Copyright Bill 1956, House of Lords Vol. 194 1955-56, Committee Stage col. 923

³⁰ *Hawkes and Son v Paramount Film Service* (1934) 1 Ch 593

³¹ Copyright Bill 1956, House of Lords Vol. 194 1955-56, Committee Stage Lord Mancroft stated that “Article 10 of the Brussels Convention clearly envisages this type of thing.” at col. 924-925

³² Samuel Ricketson, ‘Berne Convention for the protection of literary and artistic works 1886-1987’ Centre for Commercial Law Queen Mary College, Kluwer 1987 at page 501, paragraph 9.29: “News of the day” and miscellaneous facts having the character of mere items of press info” were excluded from Article 2(8).

Two main influences characterised the 1956 Act. The Berne Convention had a large influence on the legislation of 1911 and continued to be a significant consideration forty-five years on. Related to this was the concern that had arisen in 1948 in Brussels over the proliferation of reprographic technology, which was seen to deprive the author of a significant amount of revenue. The introduction of the library provisions in section 7 of the 1956 Act was an attempt to deal with this threat in an area where the author stood to lose a great deal. Perhaps the legislation was not a knee-jerk response at all. It became clear during the Committee stage of the Bill in the House of Lords that ‘private study’ was not intended to operate in the field of general education.³³ On the contrary, ‘fair dealing’ was supposed to provide a limited exception to copyright firmly based on the Berne Convention. The new British copyright legislation was by no means as great a departure as in 1911. Like the Brussels Revision Conference of 1948, it was more of an Act of consolidation, dealing primarily with the development in reprographic technology.

Judicial Interpretation of the Copyright Act 1956

Under the 1911 Copyright Act, the main concern of the courts when faced with a case of ‘fair dealing’ appeared to be whether the defendant’s work was in danger of competing in the plaintiff’s market. The original copyright owner was in a strong position resulting from the fact that copyright was seen in the same light as an absolute right of property over a piece of land. It was not even necessary to prove any damage suffered by the plaintiff. However, throughout the life of the 1956 Act, new considerations came into play. Copyright itself had grown substantially and covered the new advancements of broadcasting and television. Furthermore, copyright was now not simply a means of protecting a literary work of any particular creative value, but also an extra tool, besides say, breach of confidence in protecting confidential information. As a result the common law ‘public interest’ defence became more important a means to counter this.³⁴ During the period after the Copyright Act 1956,

³³ Copyright Bill 1956, House of Lords Vol. 194 1955-56, Committee Stage col. 859-937 and 1016-1090 per Lord Mancroft

³⁴ Public Interest had been explored by Denning LJ in *Initial Services v Putterill* [1968] 1 Q.B. 396 see also *Seager v Copydex Ltd.* [1967] 1 WLR 973; *Fraser v Evans* [1969] 1 Q.B. 349

therefore, it was not uncommon to see a number of cases where ‘fair dealing’ was pleaded alongside the defence of ‘public interest’.

Hubbard v Vosper (1972) was the first case after the passing of the Copyright Act 1956 to discuss ‘fair dealing’ and remains the touchstone of the defence even today.³⁵ The defendant had been a member of the Church of Scientology for fourteen years. After leaving, he had written a book, highly critical of the cult, in which he had used substantial acknowledged extracts from various books on Scientology written by the plaintiff. The defendant had also included extracts from the plaintiff’s bulletin’s and letters, which had been given to people taking courses in the teachings of Scientology and which were regarded by the plaintiff as confidential. The plaintiff claimed an injunction for breach of copyright as well as breach of confidence, whilst the defendant relied on the defence of ‘fair dealing’ for criticism and review contained in s6(2) of Copyright Act 1956. Kilner Brown J stated that the plaintiff had made out a *prima facie* case and ordered continuation of the *ex parte* injunction. The Court of Appeal did not agree, stating that s6(2) did in fact afford the defendant protection against a claim for breach of copyright. It was also stated that there were grounds for strongly arguing that the publication of the defendant’s work was in the public interest.

The defendant argued that though a substantial part of the work had admittedly been taken, the case of *Johnstone v Bernard* (1938),³⁶ as well as Copinger and Skone James, recognised that a substantial part could be taken for ‘criticism and review’. In light of this, the interlocutory injunction requested by the plaintiffs should not be granted.³⁷ Lord Denning’s dicta helped to clarify a number of points. As regards, the ‘purpose’ of the dealing, the plaintiff had argued that the purpose of the defendant’s work was not to criticise the plaintiff’s work as such, but to criticise the ideas and doctrine of Scientology itself and this would never do.³⁸ Lord Denning with whom Megaw LJ agreed,³⁹ stated that a defendant could criticise both the work itself and the

³⁵ [1972] 2 QB 84

³⁶ *Johnstone v Bernard Jones Publications Ltd and Beauchamp* [1938] Ch 599

³⁷ *Hubbard* [1972], p. 89

³⁸ In *ibid.* 89

³⁹ In *ibid.* 98

doctrine or philosophy behind it.⁴⁰ It was clear therefore that the defendants were engaged in the ‘purpose’ of criticism and review. Moving onto the issue of ‘fairness’, Denning LJ opined in his often cited statement that:

“You must consider first the number and extent of the quotations and extracts. Are they altogether too long to be considered ‘fair’? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be ‘fair dealing’. If they are used to convey the same information as the author for a rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind but after all, it must be a matter of impression.”⁴¹

The *dicta* are very similar to the words of Morton J in *Johnstone v Bernard*. A number of factors were identified for consideration such as the number and extent of the quotations, the use made of them and, lastly, their proportions. These were clearly to be assessed from an objective standard. The motive of the defendant was a relevant factor. So even after a defendant had established he was using a piece of work for the purpose of ‘criticism or review’, it may still be established that he or she was guilty of some oblique motive, such as causing the plaintiff commercial harm, that would undermine the defence of ‘fair dealing’. Such motives were to be tested on an objective basis along with all the other factors relating to fairness. There is clearly some overlap here between establishing the ‘purpose’ of a particular dealing and then proving the motives behind that dealing. Perhaps the primary test of purpose was therefore subjective. However, Denning LJ by no means gave any explicit guidance on this. Nevertheless, the openness of the text laid down by the Master of the Rolls does not rule out the consideration of the defendant’s purpose from a subjective position.

The language used by his Lordship was very broad. Even if the two works were used to convey the same information as each other, it was only stated that this *may* be unfair. This is in contrast to the strong assumption made under the 1911 case law that if there was any hint of a rival purpose, it would almost certainly undermine a ‘fair dealing’ defence. Furthermore, it was stated that “other considerations may come to

⁴⁰ In *ibid.* 94

⁴¹ *Ibid.*

mind” in assessing such a case. In short, Lord Denning’s dicta was far more flexible than those of past authorities. The test was, after all, “a matter of impression”. Therefore, it would seem that a great number of factors were to be taken into account.⁴² Also relevant to the question of ‘fairness’ was whether the plaintiff’s work could actually be considered published or not. To this end, it was significant that Romer J’s dicta in *British Oxygen*,⁴³ relating to whether a work had or had not been published was also undermined. Lord Denning stated:

“Although a literary work may not be published to the world at large, it may however be circulated to such a wide circle that it is ‘fair dealing’ to criticise it publicly in a newspaper or elsewhere.”⁴⁴

Denning LJ gave the example of a group of shareholders being such a ‘circle’ or when “it is of such general interest that it is quite legitimate for a newspaper to make quotations from it and to criticise them or review them”.⁴⁵ What was to be regarded as being in the ‘general interest’ or indeed, how wide the circle had to be, was however left unclear. Nevertheless, the decision heralded a far broader interpretation of ‘fair dealing’. The court was still obliged to work within the five discrete categories of the defence, but within these confines it was apparent that the Master of the Rolls sought to encourage a greater degree of flexibility than had previously been acknowledged.

Hubbard v Vosper, however, did not simply turn on the issue of ‘fair dealing’. It was also argued by the defendants that Vosper’s work should be published under the defence of ‘public interest’ as it exposed the potentially dangerous practices of the cult of scientology. An argument based upon the ‘public interest’ is not to be confused with that of ‘fair dealing’; they were, and remain, entirely separate defences. However, it is useful to make mention of this common law phenomenon as it illustrates just how judicial attitudes to copyright were changing. Denning LJ made it clear that when a plaintiff sought an interlocutory injunction it was not merely a case of identifying who owned the copyright. It was necessary to weigh the strength of the

⁴² Megaw LJ was also of the impression that “the question of substantiality is a question of degree.” He argued that there were circumstances where it would indeed be ‘fair’ to copy 100% of a work. *Ibid.* 98

⁴³ *British Oxygen Co Ltd. v Liquid Air Ltd* [1925] 1Ch 383, 393

⁴⁴ *Hubbard* [1972], p. 95

⁴⁵ *Ibid.*

claim against the strength of the defence. “For instance, in *Fraser v Evans*,⁴⁶ although the plaintiff owned the copyright we did not grant an injunction, because a defendant might have a defence of ‘fair dealing’.”⁴⁷ Under the law of the 1911 Act, an interlocutory injunction was far more likely to be given and a ‘fair dealing’ defence refused merely because a plaintiff had proved good title to the copyright. In *Hubbard v Vosper* this was not the case.⁴⁸

The decision in *Hubbard v Vosper* proved something of a departure. Although still working within the confines set out by statute, Denning LJ had ensured that a court was encouraged to consider far more factors when assessing a ‘fair dealing’ defence. It was evident that there would be no overriding factor which would sway a ‘fair dealing’ claim. True, under the 1911 Act it was hard to pin down one single issue, but it seemed that the general approach to the cases was the strict protection of the author’s property and his commercial interests resulting from his work, paying little or no attention to the value of the users work, or whether the latter really did harm the original piece in any way. In contrast to cases such as *Hawkes*, Denning LJ encouraged a consideration of all the facts and an investigation as to whether on balance the work gave the ‘impression’ of being a ‘fair dealing’. Nor did a work have to be published. It appeared that an objective test would be used to assess both questions of ‘purpose’ and ‘fairness’. Although not clear, there was certainly no evidence of Lord Denning MR putting himself in the shoes of the defendant to assess his true intention. It is important to note the circumstances in which *Hubbard v Vosper* was decided. Clearly the defendant’s work disclosed information in the public interest about the Church of Scientology and the common law defence of ‘public interest’ was therefore relevant here. But Denning LJ was also careful to point out that just because the work was not published to the world at large did not mean that

⁴⁶ [1969] 1 QB 349

⁴⁷ *Hubbard* [1972], p. 96

⁴⁸ As Denning LJ stated, “Although Mr. Hubbard owns the copyright, nevertheless Mr. Vosper has a defence of ‘fair dealing’ and although Mr. Hubbard may possess confidential information, nevertheless Mr. Vosper had a defence of ‘public interest’”. In *ibid.* 96 Megaw LJ also made a distinction between a case where an interlocutory injunction was demanded over a piece of land when the defendant did not contest the plaintiff’s copyright and the case where the defendant had been granted a license over the land. In the former case, it is a normal case of trespass where the plaintiff need not prove any damage, but in the latter the competing rights would have to be weighed far more carefully. In *ibid.* 97 This change in attitude towards copyright was as much a phenomenon regarding the assessment of interlocutory injunctions as the defence of ‘fair dealing’.

such information could not be revealed through a 'fair dealing' defence. Perhaps, therefore, a writer of an investigative piece that happened to reveal previously undisclosed information could in certain circumstances rely on s6.

Like *Hubbard v Vosper*, the next case of *Beloff v Pressdram* (1973) was not so much concerned with commercial competitors, but with the use of copyright to prevent the release of (what the plaintiff considered to be) sensitive information.⁴⁹ The plaintiff was a member of staff at the 'Observer' newspaper, whilst the defendant was the proprietor of 'Private Eye'. The plaintiff had written an internal memo showing her intention to report on a certain member of Parliament – M – who had been tipped to become the next Prime Minister should anything happen to the current leader of the Conservative Party. The report was to be made in light of certain allegations made by Private Eye that M was involved in dubious business dealings with another individual, H. The plaintiff proceeded to write a rather scathing article about Private Eye, stating that their allegations were nothing but fabrications. However, the plaintiff's memo had since found its way into the hands of the defendants who then wrote a personal attack on the plaintiff, publishing the memo in full. The plaintiff brought a claim for copyright infringement against the defendant. The plaintiff's claim failed on a legal technicality.⁵⁰ However, so too did the defendant's attempt to prove that his use of the memo was protected under 'fair dealing' for the purpose of criticism and review and the reporting of current events. The defendant also mounted a defence in 'public interest' to combat the plaintiff's contention that the publication of the memo had been a breach of confidence. Indeed, Ungood-Thomas J stated that this case was more "an action for breach of confidence under the guise of an action for breach of copyright."⁵¹

⁴⁹ [1973] 1 All ER 241

⁵⁰ The plaintiff was employed under a contract of service and so did not own the copyright in the memo. Although the editor of the observer had purported to assign copyright to the plaintiff, this had not been proven to be successful on the evidence.

⁵¹ *Beloff* [1973] p. 259 Ungood-Thomas J reminded the court that copyright should be pleaded separately. "Fair dealing' is a statutory defence limited to infringement of copyright only. But 'public interest' is a defence outside and independent of the statute, is not limited to copyright cases and is based on a general principle of copyright law." He further supported the strict interpretation given to 'public interest' in *Initial Services v Putterill* [1967] 3 All ER 145. That is, the defence does not extend behind misdeeds of a serious nature and importance. See *Beloff* [1973], p. 261

It was accepted that the defendant had satisfied the requirement of ‘purpose’ for s6(2) and s6(3).⁵² The test seemed objective. Regarding the issue of reporting current events, once Ungood-Thomas J was convinced that the plaintiff’s memo could be considered news, the element of ‘purpose’ was fulfilled. There was no indication that the judge was investigating the honest subjective intentions of the defendant. Of particular interest was how Ungood-Thomas J regarded the issue of criticism or review. He commented with approval that:

“...(the) witnesses substantially agreed on what were the constituent elements of review and criticism of an article, namely, dealing with the articles literary merits, its truth, relevance, sources (including, as Mr Foot expressed it, how the research has been done) and how it came to be written.”⁵³

It is evident that there were numerous criteria to be satisfied unlike the reporting of current events, but how the literary merits of the work were to be assessed along with its relevance was unclear. It was further put beyond doubt that ‘fair dealing’ could not be used for any other purpose outside the five categories of section 6. As Ungood-Thomas J commented:

“The relevant ‘fair dealing’ is thus ‘fair dealing’ with the memo for the approved purposes. It is ‘fair dealing’ directed to and consequently limited to and to be judged in relation to the approved purposes.”⁵⁴

In other words, ‘fair dealing’ could not be used as a general defence to overturn copyright in order to promote and protect some broader principle. The use of the plaintiff’s work had to be for the purposes set out in s6(2) and s6(3). With the question of ‘purpose’ now answered, Ungood-Thomas J turned to the issue of whether the dealing was ‘fair’ and identified three factors to be considered under the general umbrella of fact and impression. They were: the extent of the original memo taken, in relation to the amount of criticism made; whether the plaintiff’s work had been published or unpublished; and the extent to which the plaintiff’s work had been circulated, although not published to the public at large. The first factor related to the

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ In *ibid.* 262

quantity of the plaintiff's memo, which had been copied. The full memo, which made up a quarter of the defendant's article, had been used. However, this did not itself seem to bother Ungoed-Thomas J as:

“the article was throughout dealing with the relationship of M and H and his companies; how the plaintiff's article came to be written; replying to the plaintiff's criticisms of Private Eye's attitude to Mr. Maudling (and) criticising the plaintiff's article on fact and on attitude...”

It was the two latter issues that proved to be the trickiest. The plaintiffs had argued categorically that the publication of the memo was totally unjustified, as it had not been made available to the public.⁵⁵ However, the judge stated clearly that ‘fair dealing’ applied to published and unpublished works. Ungoed-Thomas J preferred to follow the line taken by Lord Denning in *Hubbard v Vosper* doubting whether “Romer J [in *British Oxygen*] ever intended that his words should be read in the sense that an unpublished work should be automatically outside the provisions of the ‘fair dealing’ defence.”⁵⁶ What made this case different was that the memo was unpublished *and* was never *intended* to be published. That is, the memo was an internal document that was never supposed to see the light of day. It followed, therefore that the reason why ‘fair dealing’ failed was because the defendant's actions had been tarnished by the “vice of leak”.⁵⁷ Ungoed-Thomas J endeavoured to distinguish between different types of leak but was unable to do so. But the fact remains that there *are* cases where a leak will be seen as fair. Information is often released to the press in such ways. The difference is perhaps the information is firstly *intended* to be released anyway in the form of a government report, that is it is merely a matter of timing, or secondly it is a matter that is considered to be in the general public interest. The ‘public interest’ defence had failed due to the fact that the memo disclosed no iniquity or any other such information about which the public should be informed.⁵⁸ However, there are many instances where a piece of information, which although too trivial to be exposed in the ‘public interest’, is still revealed in the form of a leak. As Ungoed-Thomas J himself admitted, when the plaintiffs had argued that

⁵⁵ In *ibid.* 246

⁵⁶ In *ibid.* 263

⁵⁷ In *ibid.* 264

⁵⁸ In *ibid.* 261

the memo should not be printed as it contained the names of valuable sources within government:

“It might be thought that informants particularly if public representatives or public officials speaking on public affairs should not be concealed by anonymity.”⁵⁹

Therefore, one may hope that ‘fair dealing’ still provides a defence to those members of the press involved in true investigative journalism. Perhaps, another issue weighing against the defendants was that this case surrounded what had developed into a rather pathetic ‘tit for tat’ battle on the part of ‘Private Eye’. It is arguable that though the defendant had fulfilled the requirement of ‘purpose’, it was also his intention to spite the plaintiff in publishing the memo.

Hubbard v Vosper and *Beloff v Pressdram* did a great deal to demarcate the actual boundaries of the defence. Although there had been a danger that ‘public interest’ and ‘fair dealing’ would become “interwoven,”⁶⁰ it was clarified that the two defences were separate. Furthermore, ‘fair dealing’ did appear in certain circumstances to possibly offer a defence to any sort of investigative journalism. The two judgments had by no means blown the boundaries of the defence wide open, but *within* these boundaries, there had been a few subtle but significant changes. The test set out by Lord Denning, although centred around questions of substantiality welcomed the consideration of other factors. Copyright was no longer the absolute property right as had been indicated in *Hawkes v Paramount*, where the mere proof of infringement appeared sufficient to undermine the defence. It seemed that now the copyright owner’s claim was weighed more equally against that of the copyright user. Furthermore, the strength of the copyright owner’s claim to prevent a work from being published was not final. The words of Denning LJ and Ungood-Thomas J indicated that there could be some situations where a defendant may rely on ‘fair dealing’, even though the effect of that would be to bring the work into the public domain against the will of the plaintiff.

⁵⁹ *Ibid.*

⁶⁰ In *ibid.* 246

Nevertheless, where it was plainly shown that, due to the circumstances of the case the information should remain strictly confidential, no defence could be offered under ‘fair dealing’. This was the case in *Distillers Co. Biochemicals Ltd v Times* (1975).⁶¹ The plaintiffs had been responsible for marketing the dangerous thalidomide drug. During the legal action that ensued, information, which had been given to Dr. Phillips – a specialist adviser to the plaintiff – was sold on to ‘The Times’. The plaintiff filed for an interlocutory injunction to prevent the publication of an article based on the said documents; it was granted on the basis that the documents under consideration were protected as legal evidence that had been submitted during the trial. Nevertheless, the defendants, as part of their pleadings, had mounted a defence under s6(2), ‘criticism and review’, as well as s6(3), for the purpose of reporting current events. As to the first of these, Talbot J, followed the line taken by Lord Denning MR in *Hubbard v Vosper*. That is, he felt that there would be certain circumstances where, although the work had not been published, it could still be subject to criticism or review or reporting current events so long as it had been circulated to a wide enough circle of people. Indeed, Talbot J considered that a criticism of the ideas and events relating to the information within the documents by the Times could be a ‘fair dealing’. However, on the facts of the case, he doubted whether the documents could be considered to have been so published.⁶² The papers in question had been confidentially submitted and were therefore bound by the protection of the court.

As to s.6(3) Talbot J also refused to concede that the use of the documents could be regarded a ‘fair dealing’ for the purpose of reporting current events.⁶³ Doubtless he had been influenced by the fact that the Thalidomide case had been decided in 1968, whereas the article in the Times was published four years later. This demonstrates that in order to mount a defence under ‘reporting current events’, the particular story had to be in the ether at the time of the report. Although the subject of the thalidomide trials had been considered current events at one time, this was no longer the case and ‘The Times’ could not simply drag the story back into the limelight through the mere act of publishing their exposé. This may seem a little narrow. Although the trial itself

⁶¹ [1975] QB 613

⁶² In *ibid.* 625

⁶³ In *ibid.* 626

had ended, damage claims were still being made at the time the article was written, whilst a drama of this magnitude must have still been very fresh in the minds of many.

Kennard v Lewis (1983) proved to be the fourth in a series of fair dealing cases that had very little, if anything to do with, 'fair dealing' as such.⁶⁴ The plaintiffs represented CND who had published a pamphlet entitled "30 Questions and Answers about CND". The defendants represented an organisation called 'The Coalition of Peace through Security', who had published another pamphlet called "30 Questions and Honest Answers about CND", which employed a substantially identical layout. The plaintiffs sought an interlocutory injunction, which was refused. Like *Distillers* it appears that the injunction would not have been awarded, regardless of any 'fair dealing' defence. As a result, Warner J failed to explore the limits of the application of 'fair dealing' in any great detail. This is unfortunate as it appeared that a defence under 'fair dealing' for the purposes of criticism and review might well have succeeded. As Warner J stated, no financial harm had been caused to the plaintiff,⁶⁵ and it certainly did not seem that the taking of the original work was excessive in any way. However, Warner J felt that the relevant principle was not section 6 but that the use of an interlocutory injunction in this instance was threatening 'freedom of speech'. As he observed:

"What I am being asked to do is to limit the weapons available to the defendants to attack the plaintiff's cause; in other words to restrain political controversy."⁶⁶

Such issues did not involve 'fair dealing' as such. "It seems to me," Warner J continued, "that the relevant principle is that interlocutory injunctions should not restrain freedom of speech".⁶⁷ This is certainly a broader application of the 'public interest' defence. It is doubtful whether the defendants through making use of the plaintiff's work were revealing some grave iniquity as was previously required in

⁶⁴ [1983] FSR 346

⁶⁵ In *ibid.* 347

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

cases such as *Initial Services v Putterill*.⁶⁸ Although, Warner J undoubtedly arrived at the correct decision, it is submitted that 'fair dealing' would have provided an adequate defence. It is a shame that Warner J did not consider it in full. The defendant's use of the plaintiff's work seemed like a *bona fide* 'criticism and review'. There was no evidence of commercial harm to the plaintiff or motive to compete with his market. Furthermore, the original work had clearly been published and the defendants did not appear to have taken too much. The facts of the case, however demanded a stricter approach.

So far the cases have demonstrated some interesting changes in the way 'fair dealing' cases were to be approached, notably *Hubbard v Vosper*. Nevertheless, it is clear that none of the decisions thus far really turned on 'fair dealing'. Copyright was not being employed to ensure a commercial return for an authors or copyright owners work, but to restrain dissemination of information and prevent freedom of speech. These cases did not concern issues of commercial harm or whether a work could be reviewed or reported despite so much of the original being taken; they were not about questions of fact and degree, but *access* to the copyright work. In this light, the two remaining cases decided under the 1956 Act are the only real examples of the 'fair dealing' defence being invoked in more traditional circumstances concerning the commercial interests of two parties regarding the use of copyright material.

Sillitoe v McGraw-Hill Book Co. (UK) Ltd (1983) was such a case which involved neither issues of 'public interest' nor 'freedom of speech'.⁶⁹ The defendants were the company responsible for the distribution and sale in the UK of a number of educational study aids covering various works of English literature designed to help pupils through their English 'O' Level courses. The three particular guides in question covered 'The Loneliness of the Long Distance Runner', 'Cider with Rosie' and the play of 'St. Joan'. Seeking an injunction, it was argued by the plaintiff that these notes constituted an infringement of copyright. The defendants argued that even if the notes did constitute a substantial taking, they fell within 'fair dealing' for the purposes of 'private study' and 'criticism and review' under s6(1) and s6(2) respectively of the

⁶⁸ [1968] 1 Q.B. 396

⁶⁹ [1983] F.S.R. 545

Copyright Act 1956. Mervyn-Davies J, relying on *University of London Press v University Tutorial Press* (1916),⁷⁰ quickly dismissed the contention that the notes could be protected under ‘private study’, since the defendants were not actually engaged in ‘private study’ themselves, but were merely facilitating this for others.⁷¹ It is arguable of course whether *University of London Press* actually established such a precedent.⁷² However, since 1916, little guidance had been given by Parliament as to the interpretation of this provision.⁷³ In any case, Mervyn-Davies J probably gave the correct interpretation. After all, at most it had been mooted by Macgillivray that ‘private study’ *could* perhaps be relied upon by a school teacher giving instruction to a class of pupils but, admittedly, during the passing of the 1956 Act it was recognized that ‘private study’ was only aimed at the individual student.

As regards the issue of whether the notes constituted ‘criticism or review’ under s6(2), Mervyn-Davies J assessed whether this was indeed the genuine purpose of the defendants by reading the revision guides for himself. From this it was apparent in the first two study aids relating to the ‘St. Joan’ and ‘Runner’ notes that there had been no critical analysis in comparison to the lengthy extracts taken.⁷⁴ Although it was argued by the defendants that the extracts of the ‘Runner’ notes had been chosen to demonstrate the particular styles of writing, it was clear to the judge that this only came to light when explained by the academic who wrote them. That is, one had to rely on “the insight and perspicacity of Mr. Storey.”⁷⁵ The defendants could not argue that the extracts constituted ‘criticism and review’ by implication. In analysing whether the material taken had been used ‘for the purpose of criticism’ Mervyn Davies J asked himself whether the notes “when reproduced in extract, *show themselves* to be written for the purposes of criticism only or so predominantly for the purposes as to be regarded as works of criticism or anything else.”⁷⁶ No doubt the authors of both the ‘St. Joan’ and the ‘Runner’ notes *intended* to write in earnest for

⁷⁰ [1916] 2 Ch 601

⁷¹ *Sillitoe* [1983], p. 558

⁷² See Chapter One pp. 14-15

⁷³ See Copyright Bill 1956, House of Lords Vol. 194 1955-56, Committee Stage col. 859-937 per Lord Mancroft

⁷⁴ *Sillitoe* [1983] p. 560

⁷⁵ In *ibid.* 561

⁷⁶ In *ibid.* 560

the purpose of 'criticism or review', but there was no real evidence of this when reading the study aides. In this regard, it was made clear that the test to ascertain the exact purpose of the defendant's work was an objective one. Not surprisingly, the defence of s6(2) failed.

Of more interest, was the discussion relating to the issue of 'purpose' on the final set of notes. The plaintiffs attempted to hang Mr. Blakey on the fact that he had admitted that he had written the 'Cider with Rosie' notes for educational purposes. However, the attempt of the plaintiff to prove that the 1956 Act distinguished between critical purposes and education was not accepted by Mervyn-Davies J.⁷⁷ The judge stated that "the critic does not write simply to criticise. He may wish to enlighten or amuse." This point may not be of huge significance, but it does suggest a slightly broader interpretation of 'fair dealing'. That is, one was not so confined to the exact language of the five categories. Unlike the other two works, Blakey had certainly criticised and reviewed the text to a far greater degree and so had a potential defence under s6(2). Mervyn-Davies J was:

"satisfied that he (Mr. Blakey) in his own mind was not in the least unfair, in the sense that he was without any bias or improper motive."⁷⁸

However, where the last set of notes was to fail was on the issue of 'fairness' for Mervyn-Davies J was heavily influenced by the sheer amount of the original work taken. He reminded himself that he, "as *a tribunal of fact* (had) to decide whether in the context of the Copyright Act 1956 the dealing with the original work is a 'fair dealing'." Thus applying Denning LJ's test, he came to the conclusion that the extracts were too long to be considered fair. The judgment seems plausible apart from a couple of small points. Firstly, it could be argued that Mervyn Davies J decided the point of 'fairness' incorrectly. He had stated that the "defendants are enriching themselves by making use of the plaintiff's work, albeit in a manner, which may be lawful *apart from this question of fairness*."⁷⁹ So it is clear that a 'fair dealing' defence was possible at least for the last set of notes. However, Mervyn-Davies J was

⁷⁷ In *ibid.* 562

⁷⁸ In *ibid.* 563

⁷⁹ In *ibid.* 564 emphasis added

influenced by the fact that there was a general understanding within the Publisher's Association and the Society of Authors that an individual was permitted to take up to eight hundred words before he or she would be required to seek the consent of the copyright owner.⁸⁰ This is arguably an incorrect method of assessing 'fair dealing' as it places far too much emphasis on the substantiality of the taking alone. Surely the test should be one of fact and impression. As David Vaver comments, "literary or other criticism need not engage in word counts if the critic is plainly reviewing and criticising and not supplanting the copyright owner's market."⁸¹ It is arguable whether the defendants really were competing for the plaintiff's market. True the McGraw Hill Book Company clearly intended to make a profit from the sale of these study aides but not at the expense of the copyright owners. There is some strength in the contention that the defendants were not competing for the same market at all. The notes were certainly not aimed at the reading public in general. They were instead designed for the struggling 'O' level student. Furthermore, it is unlikely that the plaintiffs could seriously argue that they lost any revenue from students who would simply rely on the study notes alone. Doubtless, the students would be obliged by their teachers to purchase a full copy of the original for class, if the school did not itself supply one. Although the first two sets of notes admittedly did not fall under 'fair dealing' due to the sheer lack of criticism, the last set concerning 'Cider with Rosie' was a legitimate use of the original work. There was no unjust enrichment or competition arising from Mr. Blakey's notes.⁸² Moreover, it is submitted that where education is concerned, a slightly more lenient approach is permitted. Despite the need to respect the copyright regime, surely the promotion of learning is something that outweighs the necessity of the copyright owner to squeeze every penny out of his or her work.

There is one final point of interest to note about the decision in *Sillitoe*. During the judge's concluding statement, Mervyn-Davies J commented that he was not sorry to have come to the conclusion that the defence of 'fair dealing' had failed as no-one should be allowed to "make full and free use of an original work *without reference to*

⁸⁰ In *ibid.* 558

⁸¹ Vaver, 'Abridgements and Abstracts: Copyright Implications' [1995] EIPR 225-235, 230

⁸² In Vaver's opinion, what *Sillitoe* is saying is that every potentially harmful Act should be within the copyright owner's control. In *ibid.* 232

the copyright owner.”⁸³ Although, not a critical point, it is worth noting that the ‘sufficient acknowledgement’ test, the definition of which had been set out in s6(10) of the Copyright Act 1956,⁸⁴ was certainly being applied too harshly. Not content with the guidance given by parliament, Mervyn-Davies J consulted the Oxford English Dictionary. The definition therein set out the meaning of acknowledgement as “the act of recognising the positions or claims of ...”. In seeing that there was no recognition of the position or claims of the authors made throughout the study notes, his honour refused the defence of ‘fair dealing’. However, the Act was by no means so strict. As Jeremy Phillips complained, one need only identify the work as a whole and not the legal claims to it.⁸⁵ Indeed, Mervyn-Davies J interpretation made for “an almost insurmountable obstacle for the *bona fide* literary critic to overcome”⁸⁶ in order to be sure of the ‘fair dealing’ defence. It is also worth noting that the 1952 Gregory Committee stated that the requirement of sufficient acknowledgement was not to be regarded as a complex caveat.⁸⁷

A more straightforward application of the ‘fair dealing’ defence was the case of *Independent Television Publications Ltd. v Time Out Ltd.*⁸⁸ The plaintiffs published the TV Times and Radio Times and the defendants – using the plaintiff’s work – published a very similar set of listings in Time Out Magazine. Since the listings were regarded as a copyright work and since there had been a substantial taking, the defendants were forced onto the provisions of ‘fair dealing’ – in particular the proviso relating to the reporting of current events.⁸⁹ Though s6(3) had been referred to in *Beloff v Pressdram and Distillers*, the precise boundaries of what constituted ‘current events’ had not yet been explored. It was seen as broader than the 1911 equivalent of ‘newspaper summary’ but Whitford J saw it as meaning that it covered *current*

⁸³ *Sillitoe* [1983], p. 564 emphasis added.

⁸⁴ s6(10) an acknowledgement identifying the work in question by its title or other description and, unless the work is anonymous or the author has previously agreed or required that no acknowledgement be made, should be made so identifying the author.

⁸⁵ J. Phillips, ‘Sufficient Acknowledgement of Literary Works,’ (1984) 100 LQR 179, 180

⁸⁶ *Ibid*

⁸⁷ Paragraph 42 stated simply “where a large part of a work is reproduced by way of fair dealing ... due acknowledgement should be made of the source and the author from which the quotation, passage, reading or recitation is drawn.”

⁸⁸ [1983] Ch. D. 64

⁸⁹ s6(3) of the 1956 Copyright Act.

developments. Similar to Mervyn Davies J, Whitford J took an objective line in assessing the purpose of the defendants. In studying the selections, dates, titles and times of transmission, he clearly felt that the true purpose was not to report current events, but provide a listing service.⁹⁰ Whitford J followed Mervyn Davies J also in the sense that he did not see that a defendant could include an extract for a work that simply spoke for itself. The taking of the substantial amount of the original had to be done “in order to illustrate his criticism or comments.” In looking at the true purpose of the defendants, Whitford J decided that it was to provide a listing service and nothing more. The fact that *Time Out* was in obvious competition with the plaintiffs was an important factor and it is not surprising that Whitford J ruled in favour of the latter. The mere use of a work to provide a rival listings service seems hardly fair. Furthermore just as the technical requirement of sufficient acknowledgement was a pitfall for the defendants in *Sillitoe*, so too was it in *Time Out*.⁹¹ Unfortunately Whitford J went further than was necessary and made a rather flippant comment, which if followed in later case law, would have revived the confusion of *Hawkes v Paramount*. “Indeed”, he incorrectly opined, “once the conclusion is reached that the whole or a substantial part of the copyright work has been taken, a defence under s6(2) or (3) is unlikely to succeed.”⁹² The defendants had already failed on the requirement of purpose, but supposing they had not, it is worrying to think that their use of the plaintiff’s work would have been seen as ‘unfair’ on this reasoning. Thankfully this statement has never been followed, but considering he had five years earlier headed the Whitford Committee,⁹³ this seems a rather foolish blunder. Moreover, it demonstrates the tendency of the judiciary to lean in favour of the copyright owner, thus resulting in an interpretation which is quite unworkable or worse, ruling the whole defence out of existence. As David Bainbridge criticised, if Whitford J’s statement was correct, there would be no such thing as a ‘fair dealing’ defence.⁹⁴

⁹⁰ *Independent Television Publications Ltd. v Time Out Ltd* [1983] Ch. D. 64, 75

⁹¹ It was observed that if the defendants wished to rely on ‘fair dealing’, they should “at least try to make some appropriate acknowledgement”. In *ibid.* 75

⁹² *Independent Television Publications Ltd.* [1983] p. 75

⁹³ Cmnd 6732 1977: Copyright and Designs Law: Report of the Committee to consider the law of Copyright and Designs.

⁹⁴ David Bainbridge, ‘Intellectual Property,’ *Financial Times Pitman Publishing* 4th ed. p.170

Conclusion

The parliamentary developments during the advent of the 1956 Act were concerned with a number of very particular issues such as the need to adhere to the revised Berne Convention of 1948 and the need to modify the law in order to cope with the revolutionary technology of reprography. The impact of Berne resulted in the introduction of the requirement of 'sufficient acknowledgement', whilst the rise in reprographic technology led to the development of the rather complicated library provisions of s7. However, parliament also broadened the 'fair dealing' defence. The introduction of the words 'whether of that or another work' broadened the scope of s6(2) and s6(3), whilst the alteration of the 'newspaper summary' exception to 'current events' gave flexibility to s6(3) and eradicated the symptoms of the poor decision of *Hawkes v Paramount* following the guidance given by the Gregory Committee.⁹⁵ It is difficult, nevertheless, to offer up an explanation for the strange aberration that was the difference between s6 and s9.

It is hard to tell whether the government was focused on the right issue when the Bill was passing through Parliament. Whether the amendments designed to deal with reprographic technology were successful is unclear. On the one hand, it could be argued that the fact that there has been no case law regarding the misuse of copyright for educational purposes, for example relating to library use may mean that the provisions within s7 of the 1956 Act have been a success. However, on the other hand, it could mean that there was no real problem in the first place and that 'fair dealing' was quite capable of marshalling this area. Perhaps it would have been better to spend more time at this point on investigating the general balance between copyright user and owner rather than reacting to this specific issue. This is said, of course, with the benefit of hindsight. The fact was that reprographic technology was perceived at the time as a real threat looming on the horizon, both nationally and internationally and the government did its best to address the problem.

As regards judicial developments, the nature of copyright case law had changed. Most of the cases under the 1956 Act did not concern simple issues of copyright piracy and

⁹⁵ Cmd 8662 1952 Report of the Copyright Committee paragraph 40

free riding, but issues where various plaintiffs attempted to restrict the dissemination of information. Nevertheless, the dicta of Denning LJ and Ungood-Thomas J provided some very valuable guidance, whilst expanding the defence within the confines of the specific purposes laid out in the statute. However, as stated, *Hubbard v Vosper* and *Beloff v Pressdram* were not typical 'fair dealing' cases. So it is with disappointment that one observes the two cases of *Sillitoe v McGraw* and *Time Out*, which, though they arguably came to the correct conclusion, contained two worrying errors, which would lead one to doubt whether certain members of the judiciary really understood the nature of the 'fair dealing' defence. Once again the lack of case law decided under the Act meant that by the late 1980s the 'fair dealing' defence seemed rather tired and the fact that only two cases had directly concerned the defence, neither of which had reached the Court of Appeal seemed to suggest it had rather a dull future ahead of it. However, the 1990s were to see a major revitalisation of the defence.

Chapter Three

Thatcher's Legacy and The Commercialisation of Copyright. The 1988 Copyright Designs and Patents Act and Resulting Case Law.

"This Bill will make the intellectual property system more accessible and relevant to the needs of British business. This Bill will encourage creativity and enterprise and the growth of fair competition."

**Chancellor of the Duchy of Lancaster,
House of Commons, 30th Oct. 1987¹**

Although the passing of the Copyright Act of 1911 witnessed some consternation over the introduction of the concept of originality as a general requirement, as well as the extension of the copyright term to life of the author plus fifty years,² the 'fair dealing' provision of s2(1)(i) went unnoticed. The 1911 legislation was without doubt important as an Act of codification preventing unauthorised copying and seeking to implement Berne, but the Lloyd George Liberal government of 1905-1916 had bigger fish to fry and unsurprisingly the Copyright Act was occluded by far more important issues.³ Seventy-seven years on and copyright was viewed very differently. Swept in on a cosy majority of forty-three in 1979, the Conservatives, with Margaret Thatcher at the helm, promised a much yearned for economic renaissance, driven by a strong ethos of free market economy and the spirit of free enterprise. It is against this backdrop that the passage of the Copyright Designs and Patents Act 1988 (the CDPA) must be analysed. Copyright law was now considered to be one aspect of Intellectual

¹ Comment of Chancellor of the Duchy of Lancaster quoted verbatim by Lord Lloyd of Kilgerran Copyright Designs and Patents Bill 1988, House of Lords Vol 489 2R col. 1474-1540, 1483

² Copyright Bill 1911, House of Commons 2R [23], col. 2616 -2657

³ In particular, the National Insurance Act, Old Age Pensions Act and of course the controversial Parliament Act of 1911. During the period of 1905-15, the Liberal Government devoted much of its time to the foundation of the Welfare State. Peter Rowland, 'The last of the Liberal Governments, Unfinished business 1911-1914,' Bernie & Jenkins London 1971.

Property,⁴ an area of law with growing social and economic importance. The value of copyright as an economic commodity of national significance was apparent. It is to be noted that the statement of the Chancellor of the Duchy of Lancaster, beginning this chapter, refers not to the individual author, but to the interests of business and commerce. Paragraph 3 of the 1981 Green Paper⁵ stated “copyright plays a significant role in commercial life and has a considerable impact in areas such as education where there is also a public interest.” Furthermore, accompanying the appreciation of the monetary worth of copyright was an apparent increased emphasis on the balance between copyright owner and user. The Green Paper noted that exceptions to copyright are “of obvious importance in that they seek to establish a proper balance between the legitimate interests of copyright owners and legitimate desires of users.” That these influences were noted at such an early stage should not go unnoticed. But it soon became apparent that out of these two factors, the former was to prove the overriding concern.

The 1956 legislation had already been amended on several occasions and was due for a major face-lift.⁶ Movements towards this end had started under the Labour administration with the Whitford Report 1977.⁷ By this time Lord Denning MR had considered the defence of ‘fair dealing’ in some detail in *Hubbard v Vosper*⁸ and the development of computer technology also raised questions.⁹ The Whitford Report noted that there was little interest in limiting section 6 of the Copyright Act 1956. On the contrary, “the call was for clarification and some enlargement; people wanted to

⁴ The term can actually be found in the 1952 Gregory Report Cmd 8662, paragraph 7

⁵ Cmnd 8302 1981 Reform of the Law relating to Copyright, Designs and Performers Protection: A Consultation Document

⁶ The 1971 amendment was designed to modify the 1956 Copyright Act so as to make provision for the subsequent variation by the Performing Right Tribunal of orders made pursuant to s27 of that Act. In 1982, s21 was amended to make it an offence to be in possession of an infringing copy of a sound recording or cinematograph film by way of trade. Section 21 was again amended in 1983 to provide new penalties for offences relating to infringing copies of sound recordings and cinematograph films; and to provide for search warrants in relation to such offences. Finally, in 1985, the 1956 Copyright Act was amended in its application to computer programs and coputer storage. None of these amendments affected s6.

⁷ Cmnd 6732 1977 Copyright and Designs Law: Report of the Committee to consider the law of Copyright and Designs.

⁸ [1972] 2 QB 84

⁹ Cmnd 6732 1977 Copyright and Designs Law, paragraph 16

know where they stood.”¹⁰ The Report must have seemed far more encouraging to copyright users. Paragraph 40 sought to breathe a degree of flexibility back into any prospective legislation saying,

“... In dealing with the question of exceptions, the object of any fresh legislation should be to frame general principles (and form) exceptions applicable to all classes of works... Only in so far as it is absolutely necessary should there be special exceptions relating to particular categories of work.”

By comparison with the strict five-category approach of the traditional wording of the ‘fair dealing’ exception this seemed highly expansive. However, this is not to say that the report identified an existing imbalance in the relationship between copyright owner and user.¹¹ It did not represent a fundamental shift in emphasis regarding the protection given to copyright owners and users. Nor did it hint at an approach similar to the American defence of ‘fair use’. The reason for the more flexible line taken in paragraph 40 to exceptions came as a result of the influence of the Berne Convention. The Whitford Report suggested a reconstruction of ‘fair dealing’ along the lines of Article 9(2) and Article 10 of Berne.¹² In other words, the report recommended “a general exception in respect of ‘fair dealing’, which does not conflict with the *normal exploitation* of the work or subject matter.” The incorporation of Article 9(2) into a new ‘fair dealing’ defence seems all the more interesting as it was the UK that suggested, during the negotiations of the 1967 Stockholm revision conference of the Berne Convention, that it should be adopted in what is now its present format.¹³

¹⁰ In *ibid.* paragraph 668

¹¹ In *ibid.* paragraph 16

¹² In *ibid.* paragraph 658. Article 9(2) permits reproduction of works in certain special cases provided that such reproduction does not conflict with the normal exploitation of the works and does not unreasonably prejudice the legitimate interests of the works. Article 10(1) states that quotations may be permitted provided it is compatible with fair practice and the extent of the quotations is justified by the purpose. Article 10(2) provides a similar exception for literary and artistic works.

¹³ Samuel Ricketson, ‘Berne Convention for the protection of literary and artistic works 1886-1987’ Centre for Commercial Law Queen Mary College, Kluwer 1987. The text of Article 9(2) had originally read:

“It shall be a matter for legislation in the countries of the union to permit the reproduction of such works:

- a) For private use
- b) For judicial or administrative purposes

Although it has been noted that Article 9(2) is to be read cumulatively giving it a narrow effect,¹⁴ the modification would afford the ‘fair dealing’ defence far greater flexibility.

The Whitford Committee had received many submissions from interest groups who wished to see a more powerful ‘fair dealing’ defence. “It was submitted that ‘fair dealing’ should be permitted not only for the purpose of criticism or review but also in discussion, commentary, analysis or elaboration of ideas.”¹⁵ In particular a newspaper publishing group requested a reformed section 6, in order to aid in investigative journalism.¹⁶ Undoubtedly there were other reasons behind the Berne orientated amendment. Firstly, such a broad wording of the defence would eradicate the quirkiness of sections 6 and 9 of the 1956 Act. Paragraph 671 stated there was no reason for this distinction between literary, dramatic and musical works on the one hand and artistic works on the other.¹⁷ Secondly, the Berne Convention had been a major consideration during the passing of the last two Acts, so what better way than to adhere to the latest version than to borrow directly from Articles 9 and 10. There were already signs of European harmonisation in this area and any forward looking government would have to consider such developments.¹⁸ Thirdly, the advent of the computer age would benefit greatly from a flexible ‘fair dealing’ defence that could adapt more easily than a category specific exception.

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- c) In certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.

It was due to the number of disagreements regarding this Article, that the UK suggested that s9(2) should merely consist of part ‘c’. This was accepted.

¹⁴ Samuel Ricketson, ‘The Boundaries of Copyright: Its proper limitations and exceptions: International Conventions and Treaties’, [1999] IPQ 56-95, 69 also in ‘Berne Convention for the protection of literary and artistic works 1886-1987’, 482, paragraph 9.6

¹⁵ Cmnd 6732 1977 Copyright and Designs Law, paragraph 666

¹⁶ In *ibid.* paragraph 667

¹⁷ In *ibid.* paragraph 667 Incidentally, the general exception expounded by Whitford would encompass research and private study.

¹⁸ In 1974, a document of the European Parliament asked the executive to “propose to be taken by the council in order to approximate the national laws on copyright and neighbouring rights”. See further Julian Rodriguez Pardo, ‘Highlights of the Origins of the European Union Law on Copyright’ [2001] EIPR 238. In 1977, the Commission published a communication to the Council considering harmonisation in copyright law, ‘Community Action in the Cultural Sector’. Bulletin of the European Communities supplement 6/77.

The Whitford Committee Report was never to be followed in full. The 1981 Command Paper complained in paragraph 4 that the line taken in the Report “implies a shift of emphasis from *purpose* to *effect* and would seem to have the consequence that the defence of ‘fair dealing’ is extended to new purposes.”¹⁹ Instead, the government papers which followed focused upon the commercial importance of copyright within the national economy. The Nicholson Report highlighted the need for the UK to obtain full value from its Intellectual Property resources,²⁰ whilst paragraph 4 related to the “commercialisation of ideas”. More importantly, the report demanded “a major statement of policy” with which to herald the intellectual property age.²¹ The nature of this policy was all too obvious in the 1981 Green Paper, which sought to change the ‘private study and research’ exception proposal “to exclude research carried out for the business ends of a commercial organisation”.

This proposal found its way into the 1986 White Paper,²² one year after the publication of a Green Paper, which had detailed the intention to place a levy on blank audio tapes in an attempt to recoup the money made from extensive home copying.²³ To complement these moves to commercialise copyright, the 1986 White Paper told of the establishment of the Copyright Licensing Authority to bring about licensing schemes in schools colleges and other institutions,²⁴ and announced the creation of a copyright tribunal to regulate such areas. All this must have been warmly welcomed by copyright owners and seemed to represent the beginnings of a pay per use society. Mention was made of exceptions to copyright and the need to strike an “appropriate balance” between user and owner but this was more to “stimulate competition and allow the use of modern technology”²⁵ rather than a general commitment to the free trade of information.

¹⁹ Cmnd 1981 8302 1981 Reform of the Law relating to Copyright, Designs and Performers Protection: A Consultation Document, paragraph 4

²⁰ Cmnd 9117 ‘Intellectual Property Rights and Innovation’ at paragraph 2

²¹ In *ibid.* paragraph 7

²² Cmnd 9712 1986 White Paper, ‘Intellectual Property and Innovation.’

²³ Cmnd 9455 1985 Green Paper, ‘The Recording and Rental of Audio and Video Copyright Material’ A Consultative Document

²⁴ Cmnd 9712 1986 White Paper, at paragraph 8.4

²⁵ In *ibid.* paragraph 3

The Passing of the Copyright Designs and Patents Act 1988

The government entered Parliament with a very clear battle plan. However, they were to come up against fierce opposition from the Lords during which the house was witness to many a heated debate, provoking sharp words between sparring politicians, who held such issues close to their hearts. Lord Graffham's opening gambit was indicative of the government's stance. In striving towards a truly competitive market, "we must enable people with ideas, to protect those ideas against those who would steal them. But at the same time, we must be sure we are not overly protective in a manner, which hinders competition."²⁶ It was quite clear that the balance to be struck was not between the right of the owner to take full advantage of his or her copyright and the creative right of the user. Instead, the real balance was between the copyright owner on the one hand and the importance of competition, for the sake of business enterprise on the other. The biggest issue was the question of non-commercial research. Clause 29 of the 1988 Bill read:

- 29(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of –
 (a) private study, or
 (b) research other than commercial research,
does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.
- (2) Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement.
- (3) The fair dealing mentioned in subsection (1) or (2) may be done by the student or researcher himself or by another person acting on his behalf.

A similar commercial restriction was also found in clause 38 and 39.²⁷ A number of their Lordships did not see clause 29 as a problem. The Earl of Stockton regarded paying for research as simply another cost, like heat, light, salaries or equipment.²⁸ Though Viscount Eccles had already branded the proposal as a major "defect" of the Bill,²⁹ it was Lord Mottistone who tackled it in Committee.³⁰ He claimed that clause

²⁶ Copyright Designs and Patents Bill 1988, House of Lords, vol. 489 2R col. 1474-1540 at 1476 (secretary of state for trade and industry.)

²⁷ Clause 38(2)(a) related to copying in libraries regarding articles in periodicals, whilst clause 39(2)(a) related to literary, dramatic or musical works. Basically they would have made it impossible for any commercial organisation to use the services of the British libraries or other prescribed libraries until licensing schemes had been established.

²⁸ Copyright Designs and Patents Bill 1988 House of Lords, vol. 489 2R col. 1474-1540 at col. 1520

²⁹ In *ibid.* 1492

29 was unworkable, would place too much of a burden on industry and the beneficiaries of the system would not be the authors or copyright holders but the administrators of the licensing agreements.³¹ The British Library voiced a similar concern through Lord Lloyd of Kilgerran.³² American researchers were afforded the ‘fair use’ defence for any sort of research and they were the largest exporter of copyright. It would surely put the UK at a considerable disadvantage if its own research based industries had to pay an extra tariff on all copyright information.

At first glance, the idea of a commercial research restraint appears acceptable. However, little was said regarding the individual user. Presumably it was intended that he/she should benefit from the private study exception. A certain Mr. Blair commented that such copying for private individuals was obviously ‘fair’. It was the copying by the large plcs with their own research departments, which was considered untenable.³³ However, an obvious problem was what was actually considered commercial research. Clause 161 defined it as “research done for the benefit of a trade or a business carried on for profit.” Such a wide definition was hardly helpful. Furthermore, no guidance was given as to the distinction between ‘private study’ and ‘research’ and research for a commercial purpose. Lord Beaverbrook ventured that one should look at the “primary purpose of the research”.³⁴ If, therefore, after a researcher began his work for non-commercial ends, it suddenly became apparent that it was of use in industry and as a result sponsorship was offered, his or her work would still be regarded as *non-commercial* so enabling the researcher to rely on the defence of ‘fair dealing’. Nevertheless, no such guidance as given by Lord Beaverbrook was to be found anywhere in the Bill.

The Thatcher administration found it difficult to balance the competing interests of the right to personal wealth and property on the one hand and the promotion of the free market economy and the concept of lessening the burden on business on the other. In the end, the latter won the day. As Lord Beaverbrook conceded: “It is clearly

³⁰ Copyright Designs and Patents Bill 1988 House of Lords, vol. 491 Committee Stage at col. 91

³¹ Also see Lord Quinton. In *ibid.* 94

³² In *ibid.* 95

³³ Copyright Designs and Patents Bill 1988, House of Commons vol. 138 3R at col. 130

³⁴ Copyright Designs and Patents Bill 1988 House of Lords, vol. 491 Committee Stage, col. 99

vital for our economic well being that the research effort is not hindered and that the flow of information that business needs is not unduly obstructed.” The fact that the government had put so much emphasis on its ‘enterprise initiative’ clearly played on the minds of those trying to pass the Bill through Parliament. The Lords who opposed the introduction of a commercial caveat in clause 29 did not have the welfare of the struggling researcher in mind nor the creative user, but the importance of business efficacy. Lord Williams of Elvel reminded the house that the reason why he was so opposed was not because he did not believe that the copyright owner did not have a right to exploit his work to the full. His argument was based “on the grounds of difficulty of enforceability – that we could not tell what was commercial research and what was not commercial research.”³⁵

Since 1956, there had been a number of judgments, which had been decided at the boundaries of ‘fair dealing’ and that saw the influence of other factors such as public interest creeping into the balance. Following cases such as *Hubbard v Vosper*³⁶ and *Beloff v Pressdram*³⁷ it is hardly surprising that an amendment was proposed which would modify ‘fair dealing’ to encapsulate a general ‘public interest’ defence. It was Lord Morton of Shuna who introduced this potentially expansive reform. Before clause 29, he advocated inserting the phrase: “Public Interest. Copyright is not infringed by anything done in the public interest.”

This seemed plausible. Common law public interest had been pleaded in a number of cases alongside ‘fair dealing’³⁸ so to insert it here would make it clear that such a shield was available to those trying to mount a defence in copyright law. The law would be balanced and autonomous. It would contain, within its own boundaries, the means with which to defend against an abuse of copyright. Lord Morton’s

³⁵ Copyright Designs and Patents Bill 1988 House of Lords, Vol. 493 col. 1129-1192, 1155 During the discussions regarding clause 36, concerning reprographic copying at an educational establishment, a simple amendment which would have allowed a greater degree of flexibility when copying in school was met with harsh criticism. “I do not trust (people) at all,” Lord Willis muttered. “Once you open the door just that little bit, they start taking everything.” Such paranoid utterances are a good indication of the mood felt towards exceptions of any sort, let alone ‘fair dealing’. See Copyright Designs and Patents Bill 1988 House of Lords, Vol. 491 col. 163 at 163

³⁶ [1972] 2 QB 84

³⁷ [1973] 1 All ER 241

³⁸ *Hubbard v Vosper* [1972] 2 QB 84 and *Beloff v Pressdram* [1973] 1 All ER 241

modification was not a success. Lord Denning responded contemptuously saying it should be “laughed out” of the House.³⁹ The fact that the public interest defence was recognised as an inherent power in the common law was good enough for him and to put it on a statutory level would do nothing save create further confusion.

It is difficult to understand Lord Denning’s objection. The amendment only sought to clarify the existing situation, not to strengthen the ‘fair dealing’ defence. This can clearly be shown by the re-worked amendment moved by Lord Lloyd of Kilgerran during the third reading of the Bill. This time it was proposed that the following phrase be inserted after clause 30:

“copyright is not infringed by anything done in the public interest to disclose a matter of grave public concern or the existence of crime, fraud, abuse or authority, neglect in the performance of official duty or other misconduct.”⁴⁰

The new amendment showed clearly that this was not to be a broad defence to be granted at the whim of any judge. Perhaps what perturbed the Lords was the possibility that the press may take advantage. After all, the media had been pressing for a similar extension of the ‘fair dealing’ defence in the Whitford Report.⁴¹ Such anxiety was unfounded. The fact that an act of ‘grave public concern’ had to be committed before it was triggered surely should have allayed any fears that the defence would open to abuse. Perhaps, this is precisely the sort of restrictive amendment that Denning LJ sought to avoid and his motive for thwarting Lord Morton’s and Lord Lloyd’s efforts was in order to preserve the notion of a public interest defence within the realm of the more flexible common law. This seems all the more likely given his tendency to engage in judicial activism from the bench.

The same cannot be said of a very simple amendment to clause 29 moved by Lord Williams of Elvel, which had the potential to change the whole ‘fair dealing’ concept in preparation for the rapidly altering landscape of copyright law. His Lordship

³⁹ Copyright designs and Patents Bill 1988, House of Lords, Vol. 491 1987-88 Committee col. 72-78, 75

⁴⁰ Copyright Designs and Patents Bill 1988, House of Lords, vol. 495 1987-88 3R col. 607-681, 630

⁴¹ Cmnd 6732 1977, paragraph 667

wanted to replace “fair dealing with” and insert “fair practice in respect of”.⁴² No doubt his Lordship was aware that such a departure would ruffle a few feathers in the House of Lords, but Part I of the Bill had made it perfectly clear that the 1956 Copyright Act was to be replaced by “a fresh statement of the law on a more logical and consistent basis.”⁴³

The purpose of the amendment was quite ingenious. ‘Fair practice’ was to be a halfway house, between ‘fair dealing’ and the American equivalent of ‘fair use’.⁴⁴ Although, the term was already present in Article 10 of the Berne Convention,⁴⁵ it is clear that Lord Williams intended his amendment to have a far broader impact. For example, his Lordship was hoping to modify ‘fair dealing’ to enable it to adapt to new technological advances. In particular, he spoke of the problem of back-up copies of computer programmes – an issue which had been tackled already by the US and Australia, but not England. In an endeavour to embrace the technological age his Lordship expressed that he “was trying to look forward to the next twenty or thirty years.”

His perspicacity however was given short shrift. The opposing Lords were loath to part with ‘fair dealing’ and Lord Denning and the Earl of Stockton were waiting in the aisles to pounce. It is rather odd to see the Lords clinging so vehemently to the wording. Lord Hailsham of Saint Marylebone asserted “there is a fairly well articulated and definite jurisprudence about the expression of ‘fair dealing’”.⁴⁶ To a certain extent this is true. The case law had certainly identified a number of key factors relevant to a defence of ‘fair dealing’. For example, the existence of commercial competition, or an oblique motive on the part of the defendant or the fact that simply too much of the original piece had been taken to be considered ‘fair’. Nevertheless, the sheer lack of case law meant that it was difficult to argue that there

⁴² Copyright Designs and Patents Bill 1988 House of Lords vol. 491, 1987-88 Committee col. 85

⁴³ *Ibid.*

⁴⁴ Contained in section 107 USC.

⁴⁵ Article 10(1) states “It shall be permissible to make quotations from a work which has already been lawfully made available to the public provided that their making is compatible with ‘fair practice’ and their extent does not exceed that justified by the purpose including quotations from newspaper articles and periodicals in the form of press summaries.”

⁴⁶ Copyright Designs and Patents Bill 1988, House of Lords, vol. 491, 1987-88 Committee col. 72-78

was a well-developed jurisprudence from which it was difficult to change. The Earl of Stockton's complaint that a 'fair practice' defence was unacceptable as this would expand the scope of the exception and thus cause a great deal of "blurring at the edges" also seems bizarre, especially since it had been accepted that it was "impossible to define what is fair dealing."⁴⁷ Possibly the Lords objected as they felt that exceptions to copyright should be confined to defined purposes as they had been since 1911. Or perhaps they were averse to the introduction of an American style 'fair use' defence. Indeed, it soon became obvious that Lord Williams intended to model 'fair practice' on the transatlantic model. Although his Lordship had described 'fair practice' as a halfway house between 'fair dealing' and 'fair use',⁴⁸ he certainly gave the impression that he favoured the introduction of the 'fair use' concept.⁴⁹ Quoting it in its entirety he probed their Lordships as to why they objected so strongly to the American defence. Lord Beaverbrook, for one, had serious misgivings on transplanting 'fair use' into the new Act. His Lordship complained that the new exception would require interpretation by the British courts and criticised the fact that s107 USC provided little guidance on how to interpret 'fair use'. "It may well be a case of better the devil you know," he sighed.⁵⁰ With respect, such words, given the importance of the statute, do sound a little hollow. Indeed, writing academically, Laddie J expresses a degree of support for 'fair use'.⁵¹ Although there was no definition of 'fair use', there was certainly a deal more statutory guidance as a result of the four guidelines laid down in s107.⁵² Moreover, there had been a wealth of case

⁴⁷ *Hubbard* [1972], p. 94 per Lord Denning MR

⁴⁸ Copyright Designs and Patents Bill 1988, House of Lords, vol. 491, 1987-88 Committee, col. 85

⁴⁹ In *ibid.* 89.

⁵⁰ In *ibid.* 88

⁵¹ Laddie, 'Copyright: Overstrength, Over-regulated, Over-Rated?' [1996] EIPR 253 As he wrote, "a comparison between that system and our own is not flattering." In *ibid.* 258

⁵² 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 non-profit or 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 market for or value of the copyrighted work.

law decided under the American jurisdiction in comparison to 'fair dealing'. Doubtless the English courtrooms were familiar to the phrase 'fair dealing'. Agreed it could even be considered a term of art. But to say that by 1988 a coherent, water-tight jurisprudence had developed, from which it would be foolish to depart from was an exaggeration. In sticking stubbornly to the familiar term of 'fair dealing' Lord Beaverbrook was missing the point. The aim of the amendment was to adopt a more flexible exception to deal with the technological age. What little law had been decided under 'fair dealing', Lord Kilgerran observed, had had nothing to do with the sorts of questions to be faced over the coming decades.⁵³

A more justified criticism would have been whether a 'fair practice' or 'fair use' type defence would have been compatible with the Berne Convention. A year after the passing of the CDPA, America finally acceded to the Berne Convention. However there have since been in depth discussions, as Ruth Okediji comments,⁵⁴ on whether the 'fair use' doctrine is actually compatible with Article 9(2).⁵⁵ Due to its inherent open-ended nature, the exception is very broad. As Okediji observes, 'fair use' unlike 'fair dealing' is potentially available to every defendant against any claim for copyright infringement. With its strict five category approach, and limited scope, 'fair dealing' fits far more readily into one interpretation of Article 9(2), that is exceptions may be provided to the reproduction right in certain 'specific cases'. On these lines, a rejection of a 'fair practice' defence, endeavouring to bring in the American approach, would have been far more believable. Nevertheless, it is possible to interpret Article 9(2) more expansively as was seen in the proposals of the 1977 Whitford Report.⁵⁶ So perhaps, a fair practice defence of the like proposed by Lord Williams would have been acceptable. However, it is arguable whether the government were really paying as much attention to Berne as they had done in previous years. The Tory administration had already made its policy on copyright very clear through its Green

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.

⁵³ Copyright Designs and Patents Bill 1988, House of Lords, Vol. 491, 1987-88 Committee, col. 88

⁵⁴ Ruth Okediji, 'Toward an International Fair Use Doctrine', *Columbia Journal of Transnational Law* [39:75:2000], 123

⁵⁵ See Council for TRIPs Review of legislation on Copyright and Related Rights – Replies to questions posed to US by Brazil, the EC and its Member States, Australia and Korea. October 30th 1996 WTO Doc.

⁵⁶ See above, page 3

Papers and 1986 White Paper and though deviation from the Convention would have been unthinkable, it is unclear just how much the CDPA was influenced by the Convention. Furthermore, simply because the American attitude may have clashed with the Berne Convention, does not mean that the British courts could not have interpreted 'fair use' through 'fair practice' in a narrower, more acceptable fashion.

As for the other changes to the 'fair dealing' legislation, a more positive move was the introduction of s29(3). The thrust of this section was that the 'fair dealing' defence was now applicable to protect copying done by a person other than the researcher or student himself unlike in the 1956 Act where 'fair dealing' had no role at all. However the provision was worded negatively and structured narrowly and was hardly a broad expansion of the exception.⁵⁷ both s6(1) and s6(2) of the 1956 Copyright Act relating to 'criticism and review' and 'reporting current events' respectively were modified and appeared in s30(1) and s30(2) of the CDPA.

30(1) Fair dealing with a work for the purpose of criticism or review of that or another work does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright provided that (subject to subsection 3) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film broadcast or cable programme.

Whereas s6(2) specifically outlined that "no fair dealing with a *literary, dramatic* or *musical* work shall constitute an infringement...", s30(1) simply referred to 'fair dealing' with "a work". This certainly infused s30 with a degree of flexibility enabling it to cover works such as sound recordings, film broadcasts and cable programmes. Section 6(3) of the 1956 Act was also simplified in a similar way. Both s30(1) and s30(2) required a sufficient acknowledgement as defined in s178. An exception was made for the reporting of current events. Presumably this was in order to prevent the hindrance of journalists who maybe would not have enough time to

⁵⁷ See Appendices

search around for the name of a particular author in time for a report to be put out. Time would tell if these changes were enough to deal with the type of case to be brought before the courts in the next 15 years.

Judicial Interpretation of the Copyright Designs and Patents Act 1988

In light of the attitudes surrounding the passage of the Copyright Designs and Patents Act 1988, not to mention the rather sedate approach of the courts under the 1956 Act, it is surprising that the period after 1990 saw such a marked revival of the ‘fair dealing’ defence. In a string of decisions, a number of which came from the Court of Appeal, the courts not only appeared far more adventurous,⁵⁸ but also more aware of the delicate balance that needed to be struck between the copyright owner and user. It will be argued that this had much to do with the changing nature of cases under examination. As media companies began to flex their intellectual property muscles, the courts were faced with disputes which had a very real and immediate impact on the dissemination of information to a huge audience. Such a copyright claim could not be decided merely between the parties to the suit, but had to have regard to the wider interests of the public. The European Convention of Human Rights and the Human Rights Act 1998 looked set to have a major impact. The common law defence of public interest, now enforced through s171(3) of the 1988 Act also received further consideration alongside ‘fair dealing’.

British Broadcasting Corporation v British Satellite Broadcasting Ltd (1992) was the first case of this new departure.⁵⁹ Not only did Scott J give an expansive interpretation of the wording of s30(2), which covered reporting current events, but he saw the defence as capable of promoting commercial goals by using the defence to prevent a

⁵⁸ *Time Warner Entertainments Co Ltd v Channel 4 Television Corp plc* [1994] EMLR 1; *Pro Sieben Media v Carlton UK Television Ltd* [1999] FSR 610; David Bradshaw comments that if *Sillitoe* and *Time Out* can be seen as a dip in the fortunes of the ‘fair dealing’ defence, then *Time Warner* represents the revival of the defence’s fortunes. However, he may be just a little too optimistic in assuming that such decisions meant that the defence was “ready to meet the technological advances of the 21st century.” See Bradshaw, ‘Fair Dealing as a defence to Copyright Infringement in UK Law: An historical excursion from 1802 to the Clockwork Orange case 1993’ *Denning Law Journal* 67-90 In *ibid* 90.

⁵⁹ [1992] Ch. 141 It was the first time that the judiciary had to consider s30(2) of the ‘fair dealing’ defence – relating to reporting of current events – since the passing of the 1988 Copyright Designs and Patents Act.

monopoly, which parliament had sought to destroy, as well as overriding the BBC's contractual arrangements that it had acquired by FIFA to give the BBC exclusive coverage of the World Cup in the UK. The case concerned the World Cup of 1990 and basically turned on issues of competition.

As far as 'fair dealing' was concerned, the case appeared straightforward. Scott J took an objective line regarding the question of whether the defendants had made use of the clips of football coverage for the 'purpose' of reporting current events. Having viewed the extracts for himself, he opined that each of the clips fell squarely within the 'fair dealing' defence.⁶⁰ In considering the test of 'fairness' it appeared to the judge that "the quality and quantity of BBC copyright material... (was) consistent with the nature of the news report." The plaintiff had argued that the defendant was guilty of an oblique motive by commercially competing with the BBC and wishing to build up audience loyalty of its own. It was not disputed that the two parties were in competition with each other, but as Scott J stated, "the fact that the other broadcaster is a commercial rival of the copyright owner does not ipso facto take the case outside 'fair dealing'".⁶¹ This is quite an expansive interpretation, given the issue of whether the defendant's work competed or caused commercial harm to the original has always been viewed as an important underlying consideration. He went further, stating that "the building up of audience loyalty is no more an oblique motive than the retention of audience loyalty."⁶² So the defendants were clearly allowed protection under s30(2). But the case went far further than this. In general terms the "cosy duopoly" that the BBC and ITV had enjoyed for so long had been ended as a result of the Cable and Broadcasting Act 1984, which had heralded a new era of competition in the broadcasting industry and Scott J meant to see that it was enforced. The CDPA had after all made the defence of 'fair dealing' applicable to sound recordings, films, broadcasts and cable programmes. The BBC had a contractual arrangement with FIFA that they would be the sole British Broadcasters of World Cup 1990. Indeed, there existed a news access license, which would have enabled the British Satellite Broadcasting Corporation to gain access to the footage of the relevant matches for a

⁶⁰ *British Broadcasting Corporation* [1992] p. 150

⁶¹ In *ibid.* 158

⁶² *Ibid.*

fee. Alternatively, the defendants could have purchased a right to use the BBC's material.⁶³ The BBC therefore thought it unfair that British Satellite Broadcasting should be able to use the football clips without the BBC's consent and without paying for them.⁶⁴ Despite this, Scott J was adamant that 'fair dealing' should prevail. Section 30(2) had to be given the effect intended by Parliament even if it did undermine the contractual arrangement agreed on by the BBC.

British Broadcasting Corporation v British Satellite Broadcasting Ltd heralded a new approach regarding the interpretation of 'fair dealing', which was no doubt related to fact that the nature of the decisions given during the 1990s and early twenty first century all centred around the media. The early 1990s experienced a boom in cable and satellite programmes. In keeping with the contemporary ethos of free market economy Scott J was anxious to promote this. Scott J rejected the strict interpretation of the defence on which the plaintiffs had based most of their claim.⁶⁵ The emphasis no longer appeared to lie so heavily on commercial competition, though the defendants clearly had a commercial motive. The judge was more interested in taking a broader look at what the defendants were hoping to achieve. In this light a more lenient view of the endeavours of the defendant was possible and so Scott J was prepared to allow the taking of the clips despite the obvious presence of an alternative license agreement.

The fact that certain violent scenes were allowed to be taken by the defendants during a critique of Stanley Kubrick's controversial masterpiece, 'A Clockwork Orange' under s30(1) in the Court of Appeal decision of *Time Warner* (1994) caused something of a stir.⁶⁶ At first instance, Harman J ruled in favour of the plaintiffs on the grounds of 'fairness' in that the programme had picked out the plums of violence

⁶³ In *ibid.* 144

⁶⁴ In *ibid.* 158

⁶⁵ As evidence of such a restrictive interpretation, counsel for the plaintiffs relied on *Bradbury v Hotten* (1872) L.R. 8 Ex 1; *Smith v Chatto* (1875) 31 L.T. 775; *Walter v Steinkopff* (1892) 3 Ch 489; *Weatherby & Sons v International Horse Agency and Exchange Ltd.* [1910] 2 Ch 297; *Hawkes and Son v Paramount Film Service* (1934) 1 Ch 593; *Hubbard v Vosper* [1972] 2 QB 84; *Sillitoe v McGraw-Hill Book Co. (UK) Ltd.* [1983] F.S.R. 545; *Independent Television Publications Ltd. v Time Out Ltd* [1983] Ch. D. 64 and the textbook of Laddie, Prescott and Vitoria, 'The Modern Law of Copyright' paragraph 2.84 and 2.110

⁶⁶ *Time Warner Entertainments Co Ltd v Channel 4 Television Corp plc* [1994] EMLR 1, 10 The vice of the leak was not present.

and was therefore not a proper representation of the film as a whole.⁶⁷ The plaintiffs' four principal arguments in the Court of Appeal were the fact that the laser disc copy containing the film had been obtained in an underhand manner; that the scenes shown did not accurately depict the film as a whole; that the sheer amount of the film copied made it impossible to rely on the defence. Finally, the plaintiffs were aggrieved at the fact that certain extracts had been taken, not for the purpose of criticism or review, but for the reason of airing some of the most controversial clips of 'A Clockwork Orange', in order to attract a large curious audience. The issue of 'purpose' will be considered first.

Neill LJ in the leading judgment dealt with the issue of purpose rather quickly. More interestingly it appears that although purpose was usually seen from an objective point of view as in *Sillitoe v McGraw* and *Time Out*, Neill LJ seemed to be leaning towards a more subjective approach. Giving a value judgment, he opined that "'A Clockwork Orange' is too good to be buried alive... (and) the producers of the programme clearly regard the film as a work of long term significance."⁶⁸ It appeared to follow that because the defendants honestly believed they were dealing with a film of great worth, they were engaged in 'criticism and review'. Admittedly, there is nothing explicit in his analysis, but the general tenor of Lord Neill's dicta suggests that he was quite happy to accept that the defendant's believed what they were doing was 'fair dealing' for the purpose of 'criticism and review'. If all that was needed was to honestly believe that one was using part of an original work for 'criticism and review', this would tip the scales in favour of the defendants. Henry LJ also agreed that the Channel 4 was genuinely using the clips of 'A Clockwork Orange' for the purpose of criticism or review and, following the dicta of Lord Denning in *Hubbard v Vosper*,⁶⁹ stated that the defendants were entitled to criticise the decision to withdraw the film from the public domain and not just the film itself. Henry LJ had ruled earlier in his judgment:

⁶⁷ *Ibid.*

⁶⁸ In *ibid.* 13

⁶⁹ [1972] 2 QB 84, 94

“Fair dealing in its statutory context, refers to the true purpose (that is the good faith, the intention and the genuineness) of the work... is the incorporating the infringing material a genuine piece of criticism or review?”⁷⁰

The true intentions of the defendants were therefore very important, and just perhaps, it could again be said that this too erred on the side of a subjective approach but nothing was explicit. The issue of ‘fairness’ received far more attention. Neill LJ agreed with Harman J over the obtaining of the laser disc. That is, the fact that the film had been introduced into the public domain once in 1972 and 1973 for 61 weeks, meant that even though Time Warner had withdrawn the film, extracts could still be broadcast for the sake of criticism and review.⁷¹ The Act was concerned with the way in which the work was treated not how it was obtained.⁷² This is all very well, but the whole point of the ban was that the film could not be shown no matter how small the amount. Perhaps the Court of Appeal were not so concerned whether the film had been published or not, but were more interested in the merits of the defendant’s review and the impact that this had on the viewing public. The main point on which the court at first instance and the Court of Appeal disagreed was that it was not necessary to give a fair representation of the film. Contrary to Harman J, Neill LJ permitted the taking of large excerpts as it was accompanied by narration, as this was necessary to do justice to the film.⁷³ One explanation for this is the growth of the media industry required a greater degree of flexibility regarding the substantiality of the taking in order that a ‘criticism or review’ of a work be susceptible.

Nevertheless, Channel 4 was allowed to reproduce eight per cent of the movie despite the clear intention of the copyright owner never to show any of the picture at all. This prompted some to state that ‘fair dealing’ had become something of a ‘Thieves Charter.’⁷⁴ It is submitted that there was something more to the case of *Time Warner*

⁷⁰ *Time Warner* [1994] p. 14

⁷¹ In *ibid.* 10 Neill LJ maintained “criticism and review of a work already in the public domain, which could otherwise constitute ‘fair dealing’ would seldom be rendered unfair because of the method used (to obtain the work)”.

⁷² *Ibid.* per Henry LJ

⁷³ In *ibid.* 12

⁷⁴ David Putnam in the Independent, Saturday 23 October 1993 p. 3 Quotation taken from article by David Bradshaw, ‘Fair Dealing and the Clockwork Orange Case: “A Thieves’ Charter?”’ [1994] Ent. L.Rev 6-11, 6

than a simple application of the 'fair dealing' principles. It is submitted that in allowing the film to be criticised the judges were implicitly elevating s30(1) to protect the importance of criticism and review in the general public interest as related to freedom of expression. Indeed, on a point of common sense a significant amount of the film needed to be reproduced as the criticism would not have been effective without it. As Januszak stated, "It is surely one of the ironies of the situation that the more serious your ambition to review properly, the more clips you need; the more trivial the fewer."⁷⁵ Neill and Henry LJ were putting the artistic, social and political importance of the film above copyright protection. As Neill LJ stated, "A Clockwork Orange is... a comic masterpiece..."⁷⁶ They were engaged in a far more qualitative act of assessing whether Time Warner really had a legitimate reason for using copyright to restrict the showing of a movie and in so doing deny others a right of criticism and review. Henry LJ had referred to the fact that "the film was once in the public domain *and was still so abroad*".⁷⁷ It is tempting to assume that the judges would have relied on this fact should it have been the case that 'A Clockwork Orange' had never been shown in the UK.

To label 'fair dealing' a 'thieves charter' seems, with respect, a little melodramatic. 'Fair dealing' still did not simply permit any extract to be taken for no better reason than to make profit from it. If copyright had been infringed to gain a commercial advantage and nothing more then 'fair dealing' would not apply.⁷⁸ As Henry LJ opined,

"If the intention was to *profit* from the breach of copyright (in 'A Clockwork Orange') under the pretence of criticism, no matter how fair or balanced or representative the infringing excerpts might be, the purpose would not be that of criticism or review."⁷⁹

⁷⁵ Waldemar Januszak, 'Defending a Critical Freedom' Sunday Times 31st Oct. 1993

⁷⁶ *Time Warner* [1994] p. 13

⁷⁷ In *ibid.* 14

⁷⁸ A good example is Lightman J's decision in *Barnier v NGN* [1997] F.S.R. 812 which prevented 'The Sun' from relying on s30(1) to use the pictures of Princess Caroline of Monaco, taken by the plaintiff, to attract readers. Lightman J stated clearly that 'fair dealing' was reserved for those who "wish to use the copyright material to illustrate his review or criticism." There was also the fact that Banier had already permitted 'The Times' to publish his photographs and the defendants were not allowed to use the 'fair dealing' defence as a way of getting around this.

⁷⁹ *Time Warner* [1994] p. 15

Nevertheless, the emphasis was not concentrated on the issue of commercial harm. To sum up, the assessment of purpose, especially in the leading judgment of Neill LJ, seemed to possibly hint at a subjective approach. He clearly saw that the general public interest in the film was significant and was prepared to accept that the defendants had honestly believed they were engaging in criticism and review even though the commercial object of attracting large audience figures is a major concern in all aspects of the media. The private competing interests of the two parties to the case could not be considered in isolation; there was now a viewing public to consider. The Court of Appeal saw that the work of the defendants was more valuable than respecting the copyright owners claims and so despite the clear ban on the film, the court permitted eight per cent to be used under s30(1). The decision of *Time Warner* was no doubt very expansive for 'fair dealing'.

In *PCR Ltd. v Dow Jones Telerate Ltd*, (1998)⁸⁰ the plaintiffs brought a copyright action against the defendants for breach of copyright and breach of confidence. The plaintiff company collected data and produced reports and forecasts about the current status of cocoa crops around the world. The plaintiff distributed reports, based on this data, to paying subscribers who used the information to trade on the futures market in London and New York. The defendants were using the information in the plaintiff's report as the basis for their own analysis of the progress of cocoa crops. The defendants mounted a defence under s30(2) – 'fair dealing' for the purpose of reporting current events – and common law 'public interest'. Lloyd J held that it was necessary to order an enquiry as to damages for infringement of copyright, but refused to grant an injunction against the defendants. Although the defence of 'fair dealing' as well as 'public interest' failed, the case is still rather interesting.

The judge was satisfied that the defendants were indeed engaged in the purpose of reporting current events, namely the PCR reports having come out into the market and their impact on the market.⁸¹ Questions of whether the report actually included some commentary or analysis were relevant to the issue of 'fairness'. Indeed Lloyd J considered a number of factors on this latter point. That is the quantitative test of how

⁸⁰ [1998] F.S.R. 170.

⁸¹ In *ibid.* 185

much of the original work had been taken, whether the defendant and the plaintiff were in commercial competition with each other and whether the defendant was guilty of any oblique motive. He felt that purpose was also relevant. This seems a little confusing. After all, once the test of purpose has been fulfilled there is no point in it being considered again. One interesting point however, was that Lloyd J did not consider the two parties to be in commercial competition with each other. On the contrary, he stated that the fact that the defendant wanted to use the plaintiff's to provide the defendant's subscribers with better and more detailed information did not make the dealing unfair.⁸² If the plaintiff's information had been considered confidential and therefore unpublished, this would have weighed heavily against a finding that the dealing was fair. However, this argument was quickly dismissed. The journalist producing the report on the defendant's behalf had never been told that the information contained in the plaintiff's crop reports was confidential. Moreover, despite the fact that the reports were only available for a subscription fee, this did not mean that they could not be used for the purpose of criticism or review. Lloyd J considered the defendants could use the plaintiff's work as there was "no evidence of any deliberate limitation of the range, number or identity of the subscribers in 1996." That is the subscribers did not represent a closed limited group.⁸³ The fact that the plaintiff's reports had been published meant that the information was not restricted per se. So the presence of the existing subscription arrangement did not prevent the defendants from relying on 'fair dealing'.

More importantly perhaps, *PCR Ltd. v Dow Jones* was of special interest due to the consideration of the relationship between s30(2) covering the 'reporting of current events' and Article 10 of the ECHR regarding 'freedom of expression'. Lloyd J stated that a balance needed to be struck between the rights of the reporter and the copyright owner. In doing this, he recognised:

⁸² *Ibid.*

⁸³ As Lloyd J stated "A limit to subscribers is not inconsistent with the recipients being the public." In *ibid.* 184

“the importance of news reporting, and in relation to this (bore) in mind also the submissions which were made to (him) in relation to Article 10 of the European Convention on Human Rights...”⁸⁴

To link ‘fair dealing’ with Article 10 of the ECHR is a very encouraging step to take and emphasises that there were wider considerations outside the interests of the private parties to the claim. However, despite this connection Lloyd J still thought it important that the copyright owner’s rights should be respected. As he continued, “I do not see that the reporter can expect to have immunity from a copyright action if he or she takes more of the copyright material than is reasonable or appropriate.”⁸⁵ Ultimately, therefore the issue was whether “the nature and extent of the copying did or did not go beyond that which was reasonable and appropriate for the report.”⁸⁶ Despite taking into consideration Article 10 of the ECHR, therefore, Lloyd J still paid close attention to the fundamental issue of ‘fairness’ of which the quantity of the taking was an important part⁸⁷ and although he recognised the importance of weighing up the competing interests, it was clear that the case would be considered from the copyright owner’s point of view. As the judge stated, “the requirement of ‘fair dealing’ involves some limitation on the new reporter’s freedom of action in order to respect the copyright owner’s rights.”⁸⁸ In this sense, *PCR v Dow Jones* seems a little stricter than the preceding case as Neill LJ seemed less concerned with the actual quantity of the film taken.

However, it is submitted that the relevance of Human Rights should not be underestimated. Although the common law defence of ‘public interest’ also failed, this too was seen as being “consistent with and reinforced by Article 10 of the ECHR.” It is to be remembered that ‘public interest’ was previously only available in the severest of circumstances.⁸⁹ This was no longer the case. The defendants pointed to the cases of *Observer v UK*⁹⁰ and *Goodwin v UK*,⁹¹ where the ‘public interest’ had

⁸⁴ In *ibid.* 186

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ In *ibid.* 187

⁸⁸ In *ibid.* 186

⁸⁹ *Gartside v Outram* (1857) 26 LJ Ch (NS) 113 and *Initial Services v Putterill* [1968] 1 QB 396

⁹⁰ (1991) 14 EHRR 153

been exercised far more liberally.⁹² Nevertheless, Lloyd J stated that s30(2) provided an adequate defence in these circumstances and so there was no need for the common law defence. The link with Article 10 is important. Although, one must still endeavour to fairly respect the claims of the copyright owner when applying s30(2), the relevance of the ECHR means that one could envisage circumstances whereby, although the amount of work taken would normally be considered unfair, Article 10 might swing the balance in favour of the defendants.

The infamous multiple pregnancy of Mandy Allwood was another case which demonstrated how far the courts were willing to interpret 'fair dealing' in the media industry.⁹³ Pro Sieben had secured the exclusive right to broadcast an interview with Mandy Allwood in Germany. The Plaintiff brought an action for copyright infringement and at first instance Laddie J ruled in their favour after forming what was later described as "an unjustifiably adverse view of the defendant's witnesses". However, the Court of Appeal reversed the decision and ruled that Carlton TV did have a defence in 'fair dealing' under s30(1) and s30(2) of the CDPA 1988 and therefore could use the thirty second teddy bear clip. Laddie J stressed that the CDPA 1988 laid down strict exceptions to copyright.⁹⁴ In this light, the 'fair dealing' provisions were not to be regarded as a mere example of a "general unfettered right to refuse to enforce copyright, where the court thinks that to do so would be fair."⁹⁵ However, Laddie J was also, despite his unfavourable ruling, aware of the fine balance between copyright owner and user and that copyright hampers the dissemination of information.⁹⁶

⁹¹ (1996) 22 EHRR 123

⁹² *PCR Ltd. v Dow Jones* [1998] p. 188

⁹³ *Pro Sieben AG v Carlton UK Television Ltd.* [1997] EMLR 509 (First Instance) [1999] F.S.R. 610 (Court of Appeal)

⁹⁴ Perhaps this explains his restrictive reading of sufficient acknowledgement. Even though he admitted that in most cases "it will not make a hap'worths difference whether the author is identified or not." Contrary to the defendant's argument that the showing of the Taff logo was enough, Laddie argued that both the TAFF and the Pro Sieben logo – which was thought to be rather unclear – had to be able to be understood by the alert members of the audience to indicate who the authors of the TAFF extract were.

⁹⁵ *Pro Sieben* [1997] p. 516

⁹⁶ *In ibid.* 515

Robert Walker LJ concurred with much of what Laddie J had said at first instance.⁹⁷ He agreed that s30(2) was to be interpreted broadly,⁹⁸ and that the law was clearly set out in statute and that ‘fair dealing’ could not be used at the whim of any judge seeking to overhaul an owner’s copyright protection.⁹⁹ Robert Walker LJ also recognised that Laddie J had in mind:

“[T]hat the wide variety of uses of copyright material permitted by the 49 sections comprised in Chapter III are all directed to achieving a balance between protection of the rights of a creative author and the wider public interest of which free speech is a very important part.”¹⁰⁰

This is in itself an important recognition, as it demonstrates that judges at all levels were increasingly aware of the potentially restrictive effects of a claim of copyright. Where his Lordship differed was in that Laddie J had paid far too much attention to the actual purposes, intentions and motives of those involved in the planning of the programme. That is, the purpose of the defendant should have been evaluated on a more objective basis.

Robert Walker LJ felt that the phrase “for the purpose of” should be left alone and was not in any need of further dissection.¹⁰¹ He was more interested in assessing the purpose of the dealing by investigating the impact of the defendant’s work on the audience and whether, from this it would be considered that the defendant’s programme was for the purpose of chequebook journalism. This did not mean that the intentions and the motives of the user had no relevance. However, Robert Walker LJ saw such factors as most relevant in relation to the issue of ‘fairness’.¹⁰² Rebutting defence counsels argument, his Lordship stated:

⁹⁷ However, his Lordship took a more realistic view regarding sufficient acknowledgement, saying the TV transmission of a company logo could constitute identification for the purposes of s178 of the Act, especially if the logo was the means by which the author of a TV programme was accustomed to identifying himself, even if the correct name of the company was unlikely to have any significance to the bulk of the audience. *Pro Sieben* [1999] pp. 624-625

⁹⁸ *In ibid.* 617

⁹⁹ *In ibid.* 618

¹⁰⁰ *Ibid.*

¹⁰¹ *In ibid.* 620

¹⁰² *Ibid.*

“It is not necessary for the court to put itself in the shoes of the infringer of the copyright in order to decide whether the offending piece was published for the purposes of criticism and review. This court should not in any way give encouragement to the notion that all that is required for the user is a sincere belief, however misguided that he or she is criticising a work or reporting current affairs.”¹⁰³

In *Time Warner*, Neill LJ gave a judgement in favour of the defendants, which also seemed to be based on the perceived impact of the work on the viewing public. And yet, as previously stated, his approach to the test of purpose given the mood of the judgment seemed to leave it open to adopt a subjective test. One may wonder therefore whether the dispute over whether purpose is to be tested subjectively or objectively actually has any real significance. A subjective assessment of purpose certainly makes it easier for a defendant to fulfil the first requirement of the ‘fair dealing’ defence and prevents the defendant from being needlessly tripped up at the first hurdle if his or her work had some genuine merit. Neill LJ was more interested in the impact of the defendant’s piece of work. The main focus for the court in *Time Warner* was the test of ‘fairness’. Robert Walker LJ in *Pro Sieben* believed it would give an undesirable incentive to journalists if a subjective approach was taken in analysing purpose. No doubt Robert Walker LJ was concerned about not giving press such an open opportunity for abusing s30, but even if a defendant was given an easier ride due to this, he would still have to satisfy the objective test of ‘fairness’. Furthermore there are those who feel that a subjective approach to the question of purpose was entirely reasonable. For instance, Bradshaw criticised Robert Walker LJ’s rebuttal by stating “there is a venerable line of cases stretching back to, at least the early 19th century”, which demonstrates the fact that judges were using a subjective test to identify the intentions of the user.¹⁰⁴ However, it is submitted that this argument is not quite right. It is true that all the cases Bradshaw lists demonstrated the importance of paying attention to the intentions of the defendant in using the work of the plaintiff. Nevertheless, the assessment of intention does not necessitate a subjective test. On the contrary, intention can be assessed objectively in accordance to the ‘reasonable man’. Admittedly, in some judgments it may be said

¹⁰³ *Ibid.*

¹⁰⁴ David Bradshaw, ‘Copyright, fair dealing and the Mandy Allwood case: The Court of Appeal gets the max out of a multiple pregnancy opportunity’, *ENTLR REV* 1999 10(5) 125, 131

that the test of intention seemed to lean in favour of subjectivity due to the way the case was decided. *Time Warner* is a case in point. But nowhere was it explicitly put forward as it was at Laddie J's judgment at first instance that a judge was to place himself directly in the shoes of the defendant when considering the question of 'purpose'. It is perhaps the case that the subjective test does not share the strong heritage that Bradshaw is so keen to suggest.

However, perhaps this argument over whether the test for 'purpose' is subjective or objective is something of a red herring. *Pro Sieben* may or may not differ on the question of the test for purpose in relation to immediately preceding cases such as *Time Warner* or indeed *British Broadcasting Corporation v British Satellite Broadcasting*. That said, what is certain is that the cases all share a characteristic in that they are media cases and therefore, as *Time Warner* demonstrated, the judges show an increasing tendency to be more concerned – whether they take a subjective stance regarding purpose or not – with the overall perceived impact of the defendant's work on the public. That is, whether if on viewing the piece, it would be considered a genuine use of the 'fair dealing' defence. Bradshaw opined that very little significance should be given to the perceived impact of a particular work on an audience. However, such a statement totally ignores the changing character of the case law and the fact that the courts were now dealing with media cases, which by their very nature demanded some sort of investigation into the effect of the work on this third party. Copyright cases can no longer be seen as disputes between two competing parties. The new media environment and the power of copyright to restrict the flow of information demand that the third party, that is the audience, be taken into account.

The significance and impact of the subject covered ie that of chequebook journalism was clearly something that Robert Walker LJ bore in mind. Robert Walker LJ not only permitted a defence under s30(1) but also s30(2) as the events “were on any view current events of real interest to the public.”¹⁰⁵ This is more remarkable when one considers that the thirty second clip added nothing directly to the criticism of cheque book journalism. At most the staged showing of the couple buying eight teddy bears

¹⁰⁵ *Pro Sieben Media* [1999] p. 625

under the pretence that Mandy Allwood was to give birth to eight children enabled the defendants to add a flavour of what chequebook journalism was all about.

As for the test of ‘fairness’, his Lordship was of the opinion that the extent of original material taken was quite short. Furthermore, he did not believe that the taking of the thirty second clip represented any sort of unfair competition.¹⁰⁶ Indeed, earlier in his decision, he had stated

“the degree to which the challenged use competes with the exploitation of copyright by the copyright owner is a very important consideration, but not the only consideration...”

All in all Robert Walker LJ adopted a very balanced approach when deciding *Pro Sieben*. Although one could argue that a subjective test for purpose would have been more appropriate, it is not clear whether this actually would make a great deal of difference. What is important is that in considering a case of ‘fair dealing’ the court seemed to be engaging in a more balanced assessment of the facts than had hitherto been the case.¹⁰⁷

The preceding judicial pronouncements represented a major change in emphasis regarding ‘fair dealing’. The growth of the media industries had perhaps exerted an indirect influence on the courts as the information being taken not only had a literary or creative value, as in *Time Warner*, but also served to inform the public.¹⁰⁸ These cases had also possibly been easier to grapple with as they involved a copyright battle between large companies rather than a scenario where one large corporation was trying to exert pressure on the individual copyright holder or copyright user. The influence of the ECHR and more notably its embodiment in the Human Rights Act

¹⁰⁶ In *ibid.* 624

¹⁰⁷ In *Newspaper Licensing Agency v Marks & Spencer plc* [2001] Ch 257, Gibson LJ highlighted, once more the fine balance between the right of the copyright owner and the rights of the user. It was “not in dispute”, he said agreeing with the first instance decision of Lightman J, “that the defence of ‘fair dealing’ is directed to achieving a proper balance between protection of the rights of a creative author and the wider public interest of which free speech is a very important ingredient.” *ibid.* at page 271 The case turned on whether the defendant had copied a substantial part of the typographical arrangement of the plaintiff’s work. In the Court of Appeal and later in the House of Lords, it was decided that a substantial part had not been copied. Therefore, in the Court of Appeal, the points relating to ‘fair dealing’ were mere *obiter dictum*.

¹⁰⁸ *Pro Sieben* [1999] p. 625

1998 has presented an opportunity to achieve an equilibrium previously not attainable through the 'fair dealing' doctrine alone. However, it had only been alluded to in *PCR Ltd. v Dow Jones Telerate Ltd.* The two remaining cases are therefore of great significance as they witness the court's struggle with 'fair dealing' and 'freedom of expression' in the Court of Appeal.

In *Hyde Park v Yelland* s30(2) 'fair dealing' was raised as well as the defence of 'public interest'.¹⁰⁹ The plaintiff was the provider of security services at the Parisian house owned by Mr. Mohammed Al Fayed. On August 30th 1997, the day before they were both killed in a car accident, Diana, Princess of Wales and Dodi Al Fayed visited the house. They were pictured on the security cameras, which showed that the length of their stay had been less than twenty-eight minutes.

In 1998, Mr. Al Fayed published a number of newspaper articles saying that at the time Diana and Dodi had visited the house with an Italian designer for a period of around two hours with a view to moving in together. The chief security officer at the house claimed that he had been asked by Mohammed Al Fayed to lie in order to support this story. However, the security officer, a Mr. Murrell, refused and shortly before leaving his employment took stills from the security film, showing the exact time of the couple's arrival and departure and gave them to 'The Sun' newspaper. 'The Sun' then published these stills in an article attempting to undermine the contemporary statements made by Mr. Al Fayed in another paper that his son and the Princess of Wales were planning to move in together.

The plaintiffs failed in their action for summary judgement for copyright infringement against the defendants who consisted of the editor and proprietors of 'The Sun' and Mr. Murrell. The defendants relied on s30 of the Copyright Designs and Patents Act 1988 relating to the reporting of current events and also maintained that the publication of the stills was in the public interest. It is submitted that Jacob J took the correct approach.

¹⁰⁹ [1999] R.P.C. 655

Despite the fact that the events surrounding the death of the couple were a year old this did not prevent them being considered current events for the purpose of s30(2). On the contrary, Jacob J reminded the court that the provisions of ‘fair dealing’ were of wide and indefinite scope following the decision of *Pro Sieben*¹¹⁰ and firmly believed that it was “close to necessary” that the stills should be published.¹¹¹ The fact that Mohammed Al Fayed had made these statements, had brought the circumstances surrounding Diana and her relationship with Dodi back into the public eye. Jacob J’s dicta on this point helped to establish just when an event could be considered current even though the time of its happening had slipped well into the past. Although it was by no means necessary that the question of ‘public interest’ be considered, Jacob J commented on it nonetheless, saying that such a defence was available to the defendants, contrary to counsel for the plaintiffs.¹¹² The defence was recognised not only by the courts in *Hubbard v Vosper*¹¹³ and *Beloff v Pressdram*¹¹⁴ but also in the well known textbooks of Cornish,¹¹⁵ Copinger¹¹⁶ and Dworkin and Taylor¹¹⁷ and of course in the CDPA 1988 itself under s171(3).¹¹⁸ *Hyde Park* appeared clear cut. The use of the work fell under s30(2) and as for the test of ‘fairness’, there was no commercial harm inflicted on the defendant and the fact that the stills were obtained for a sum of money did not cast doubt on the legitimacy of the dealing.¹¹⁹ The only point that Jacob J failed to properly address was the fact that the stills remained

¹¹⁰ *Pro Sieben* [1999] p. 662

¹¹¹ *Ibid.* He continued, to have not published the photos and to have merely challenged Al Fayed, saying they had proof of his lies “would not have had anything like the same impact and force as actual publication of the stills. A picture says more than a thousand words.”

¹¹² In *ibid.* 663 Counsel found support from Laddie, Prescott and Vitoria ‘The Modern Law of Copyright’ 1995 paragraphs 2.150 – 2.153. that a defence of ‘public interest’ did not exist.

¹¹³ [1972] 2 QB 84

¹¹⁴ [1973] 1 All ER 241

¹¹⁵ Cornish, ‘Intellectual Property: Patents, Copyright, Trademarks and Allied Rights,’ 3rd. ed. London, Sweet & Maxwell 1996

¹¹⁶ Copinger, ‘Copinger and Skone James on Copyright,’ 14th ed. London Sweet & Maxwell 1999.

¹¹⁷ Dworkin and Taylor, ‘Blackstone’s Guide the Copyright Designs and Patents Act 1988: The Law of Copyright and Related Rights,’ London Blackstone 1989

¹¹⁸ *Hyde Park* [1999] pp. 669-671 Furthermore His Honour noted that a number of foreign jurisdictions – although not recognising the defence themselves – had recognised the British defence of ‘public interest’. Judge Jacob refers to the Australian case of *Collier Constructions v Foskett* (1990) 97 ALR 460 per Gummow J. as well as the Canadian case of *R v James Lorimer & Co Ltd.* (1984) 77 CPR 2d 262 Federal Court of Appeal of Canada per Maloney JA

¹¹⁹ In *ibid.* 663 Jacob J stated that the “press are not philanthropists.”

unpublished. Presumably, he did not consider this a problem. It may be that he felt that there did not seem to be any reason why a piece of security footage should be kept private. Unless, of course, one was trying to hide the truth.

Aldous LJ took a much stricter line in the Court of Appeal. Regarding the issue of purpose, Aldous LJ followed the lead of Robert Walker LJ in *Pro Sieben*. That is, the Article within 'The Sun' containing the images was analysed objectively and read over to ascertain what was the perceived purpose of printing the driveway stills.¹²⁰ After an in-depth study of the layout of the paper, Aldous LJ came to the conclusion that the purpose was not to report current events but to expose the false statements and vilify Mr. Al Fayed. However, to study a newspaper in such detail, including captions and headlines, may indeed give a misleading result. Newspapers, especially 'The Sun' regularly engage in sensationalism and eye catching headlines in order to attract readers. There is nothing dishonest in this, nor does it necessarily undermine the articles worth as a piece of news coverage. Furthermore to say that when one is relying on s30(2), one is only allowed to report current events with no other motive whatsoever is not realistic. In *PCR v Dow Jones Telerate* the defendants relied on the same 'fair dealing' provision, but it was also their clear intention to make money from their reports. Moreover, a defendant may intend to educate and amuse and still rely on the defence of 'criticism and review'.¹²¹

Turning to the issue of 'fairness', one of the major issues of *Hyde Park* was the fact that the photos had never been published before.¹²² It was originally assumed that 'fair dealing' would apply to published and unpublished works, but in the exceptional case of *British Oxygen*¹²³ it was established that the letter was a business correspondence and so it could not be the object of a 'fair dealing' claim. However, neither of the judges in *Hubbard v Vosper*, nor *Beloff v Pressdram* were willing to follow Romer J to the letter. Indeed, Jacob J apparently did not consider it a problem either. Lord Aldous would not be swayed. Instead "the general thrust of the conclusion of Romer J

¹²⁰ *Hyde Park v Yelland* [2000] EMLR 363, 374

¹²¹ *Sillitoe v McGraw-Hill Book Co. (UK)* [1983] F.S.R. 545

¹²² *Hyde Park* [2000] p. 377

¹²³ *British Oxygen Co Ltd. v Liquid Air Ltd* [1925] 1Ch 383

remained”¹²⁴ and so the fact that the stills were considered unpublished weighed heavily against a finding of ‘fair dealing’. Relying on the guidance laid down by Robert Walker LJ, Aldous LJ believed it appropriate, when deciding ‘fairness’:

“to take into account the motives of the alleged infringer, the extent and purpose of the use and whether the extent was necessary for the purpose of the use of reporting current events. Further, if the work had not been published or circulated to the public that is an important indication that the dealing was not fair.”¹²⁵

Also included in the test was an investigation into the actions of the defendant in how the stills had been dealt with. In objectively assessing the defendant’s actions against those of the reasonable and honest man, his Lordship came to the conclusion that to allow ‘The Sun’ to rely on ‘fair dealing’ would be to “give honour to dishonour”.¹²⁶ The extent of the photos taken was also seen as too much covering the whole of page 4. The defence of s30(2) was doomed to failure. Evidently, Aldous LJ had a very low opinion of ‘The Sun’ newspaper, but it is submitted his approach was hardly realistic. The fact that the stills were obtained through payment was a regular practice of the press and presenting the story in a sensationalist light to sell the story was hardly surprising. As Jacob J pointed out at first instance, the press are not philanthropists.¹²⁷ *Hyde Park* was decided very much from the point of view of the copyright owner. True the work had not been published, but this is simply because it was a security film and would have gone unnoticed had the security guard at Villa Windsor not realised it cast serious doubt on Al Fayed’s statements. Copyright exists in published and unpublished works. However, it is doubtful whether an individual should be able to use this right to prevent the absurdity of his vacillations being discovered. Mohammed Al Fayed did not wish to receive payment for the use of his property. Nor were the parties to the claim in commercial competition. Though it was feebly argued that the publication of the stills destroyed their intrinsic value due to the fact that the pictures were the last taken of Princess Diana, this is a highly tenuous submission.¹²⁸

¹²⁴ *Hyde Park v Yelland* [2000] EMLR 363 at page 378

¹²⁵ In *ibid.* 379

¹²⁶ *Ibid*

¹²⁷ *Hyde Park* [1999] p. 663

¹²⁸ [2000] E.M.L.R 363 at page 373

Indeed, it is unlikely that the stills would ever be published as they would immediately undermine the rash claims made by Al Fayed. The work was not a private business correspondence as in *British Oxygen* or an internal memo as in *Beloff v Pressdram*. More accurately, copyright was being exercised as a right of private censorship.¹²⁹

If 'The Sun' was to be afforded any sort of defence it would have to come under the common law defence of 'public interest.' Although not directly related to the defence of 'fair dealing', the treatment of 'public interest' is indicative of the struggle to find a balance between the owner and the user. To that end, it had been interpreted more and more widely. However, Aldous LJ gave it a very narrow interpretation. His Lordship stated that s171(3) should not be interpreted to interfere with a *private property* right without compensation.¹³⁰

"It would therefore be wrong for a court, which had for example rejected a defence of 'fair dealing' because there was no sufficient acknowledgement to uphold a defence because publication was in the public interest."¹³¹

Relying on the idea/expression dichotomy, his Lordship reminded the court that copyright is concerned with the protection of *form* in which information is displayed and not the protection of the information itself.¹³² In reiterating the importance of respecting statutory copyright, he made it clear that "the 1988 Act does not give a general power to use another's property, namely his copyright in the public interest". His Lordship saw s171(3) as not a direct codification of the defence but a recognition that 'public interest' *may* have some relevance in this area and if so it had been recognised by parliament. Such a reading falls in line with Meena Sayal, in whose opinion the public interest defence had grown too powerful.¹³³ Aldous LJ, though his arguments were not entirely sound,¹³⁴ brought it to heel saying that it could only be

¹²⁹ Robert Burrell, 'Defending the Public Interest' [2000] EIPR 394-404, 401

¹³⁰ *Hyde Park v Yelland* [2000] E.M.L.R 363 at page 381

¹³¹ In *ibid.* 384

¹³² *Ibid.*

¹³³ Meena Sayal, 'Copyright and Freedom of Media: A Balancing Act,' [1995] ENT L. REV 263-275

¹³⁴ *Hyde Park v Yelland* [2000] E.M.L.R 363 at page 385 Lord Aldous made reference to the fact that recognition of the public interest defence would be contrary to the UK's responsibilities under Berne.

used when the protection of copyright offended a policy of law.¹³⁵ Burrell has criticised the failure of the Court of Appeal to recognise this defence, seeing s171(3) as a positive recognition ‘public interest’.¹³⁶ Indeed, Mance LJ thought that his learned friend had taken too strict a line,¹³⁷ but even he was of the opinion that copyright was of no threat to ‘freedom of speech’. It is a great pity that considering the growing importance of Human Rights, the defence was not even raised. But as his Lordship stated, copyright,

“does not lie in the same continuum as, nor is it the antithesis of freedom of expression. The force of an owner’s interest in the protection of his copyright cannot be weighed in the same direct way against a public interest in knowing the truth... there is an obvious need for caution in recognising any wider public interest in the same general area as s30.”¹³⁸

Aldous LJ stated that for much of his judgment, he was following Lord Robert Walker in *Pro Sieben*. This is true to a certain extent. Both were decided along an objective line for ‘purpose’ and ‘fairness’. But it is submitted that though Robert Walker LJ did not see that the court had a general discretion to overrule copyright protection where it saw fit, he was engaged in a far more balanced weighing up of the competing interests between copyright owner and user. Aldous LJ, however, viewed copyright far more from the perspective of the copyright owner. It is clear that he paid little regard to the perceived impact of the defendants work on the general public. On the contrary, the case was seen as strictly between the plaintiff and defendant.

However this is not strictly true. Robert Burrell observes that Article 17 of Berne could easily encompass the s171(3) public interest defence. See Burrell, ‘Defending the Public Interest,’ [2000] EIPR 394 at page 396. Indeed Ruth Okediji makes a similar point when comparing the American defence of ‘fair use’ to ‘fair dealing’. She states that s171(3) is similar to the continental provision of ‘ordre publique’ as recognised under Article 17. See Okediji, ‘Toward an International Fair Use Doctrine,’ *Columbia Journal of Transnational Law* (2000) [39:75:2000]

¹³⁵ *Hyde Park* [2000] p. 389 Lord Aldous based his argument on traditional cases such as *Lion Laboratories* [1985] QB 526, *Fraser v Evans* [1969] 1 Q.B. 349 and *Initial Services v Putterill* [1968]. That is the defence of public interest would only be available where the work was immoral or contained something scandalous or contrary to family life or was injurious to public life, public health or safety or administration or administration of justice or encouraged others to act in that way. In other words even Aldous LJ returned the position of where the defence could be invoked to the position of *Gartside v Outram*.

¹³⁶ Burrell, ‘Defending the Public Interest,’ p. 398

¹³⁷ *Hyde Park v Yelland* [2000] E.M.L.R 363 at page 395 His Lordship envisaged circumstances where a defence may not be allowed under ‘fair dealing’ but would still be allowed under the public interest.

¹³⁸ In *ibid.* 392 per Mance LJ

Few cases could be of more interest than *Ashdown v Telegraph*.¹³⁹ The defendants used everything in the arsenal to defend the publication of the minute taken by the leader of the Liberal Democrats, Paddy Ashdown in a crucial meeting with the Prime Minister and other key members of the Labour Party, which had taken place at Number 10. It concerned the possibility of a Lib-Lab coalition cabinet. After the meeting, Mr. Ashdown had taken the minute and placed a copy with his diaries. The minute was leaked to the 'Sunday Telegraph' shortly after Mr. Ashdown had given an interview on BBC Radio 4 in November 1999 where he had mentioned he was considering publishing his diaries after his retirement from political life.

The Telegraph pleaded a defence under s30(1) and s30(2), s171(3) and s12 of the Human Rights Act 1998 which in turn incorporates Article 10 of the European Convention of Human Rights. Regarding 'fair dealing', Sir Andrew Morritt VC was not convinced that the defendant had satisfied the requirement of 'purpose' under s30(1). On the contrary, he felt that the criticism was not directed towards the minute itself, but was a criticism of the actions of the P.M. This is rather a strict line to take as *Pro Sieben* had demonstrated that this section should be interpreted broadly.¹⁴⁰ Morritt V-C was willing to concede that the defendant was engaged in the genuine 'purpose' of reporting current events and so, *prima facie*, there was a defence under s30(2) was. However, this too failed as it was not considered that the taking was 'fair' under the guidelines laid out in *Laddie Prescott and Vitoria*. The Court of Appeal Agreed so unless the Sunday Telegraph could successfully defend itself through the Human Rights Act 1998, they would fail.

The real significance of the case turned on the application and resulting impact that the Human Rights Act would have on the 'fair dealing' defence. Andrew Morritt V-C admitted that copyright claims did amount to a restriction on the right to freedom of expression and it was necessary to achieve some sort of balance between freedom of expression and private property, but he felt that the balance was already achieved by the provisions of the 1988 Copyright Designs and Patents Act, which satisfied Article

¹³⁹ [2001] Ch. 685 at First Instance; [2002] Ch.149 in Court of Appeal

¹⁴⁰ As had already been noted this case allowed the reproduction of the 30 second clip even though the clip itself was not being criticised. It is submitted that it was permitted merely to add flavour to the defendants work criticising chequebook journalism.

10(2) of the ECHR.¹⁴¹ The approach of the Court of Appeal was curious. On the one hand, Lord Phillips MR displayed a more encouraging attitude towards the application of the Human Rights Act 1998, but on the other hand, this was coupled with a very simplistic interpretation of copyright, in comparison with previous jurisprudence. The positive aspect of the decision was that the door to Human Rights was opened. Indeed, contrary to the attitude of the Court of Appeal in *Hyde Park*, Lord Phillips immediately recognised that copyright is:

“[A]ntithetical to freedom of expression. It prevents all save the owner of the copyright from expressing information in the form of the literary work protected by the copyright.”¹⁴²

Furthermore, whereas Morritt V-C had endorsed Aldous LJ’s strict application of ‘public interest’ in *Hyde Park*,¹⁴³ Phillips LJ preferred Lord Mance’s interpretation. Indeed, his Lordship seemed to imply that ‘freedom of expression’ could be protected through s171(3). “Now that the Human Rights Act 1998 is in force” he said “there is the clearest public interest in giving effect to the right of freedom of expression.”¹⁴⁴ Such comments clearly demonstrate that the interpretation of s171(3) in *Hyde Park* was far too strict. Moreover, it is an indication of just how much common law public interest had ingratiated itself in copyright law since *Hubbard v Vosper*. However, freedom of expression was not only to be considered in light of ‘public interest’.

“We would also add that the implications of the Human Rights Act 1998 must always be considered where the discretionary relief of an injunction is sought and this is true in the field of copyright *quite apart from* the ambit of the public interest defence of 171(3).”¹⁴⁵

It appeared that the relevance of the Human Rights Act 1998, would become a major consideration in many a copyright claim. Lord Phillips MR’s decision could be seen to be along the same lines as *PCR v Dow Jones Telerate*. In that case, the judge felt

¹⁴¹ *Ashdown* [2001] p. 696 Andrew Morritt considered the Strasbourg jurisprudence of *Jersild v Denmark* 119 EHRR 1; *Goodwin v UK* 22 EHRR 123; and *Fressoz and Roire v France* 5 BHRC 654. But in the end his interpretation was very simplistic. That is his judgement revolved around the principle that copyright is a simple right to prevent reproduction of the copyright owner’s work.

¹⁴² *Ashdown* [2002] pp. 170-171

¹⁴³ *Ashdown* [2001] p. 700

¹⁴⁴ *Ashdown* [2002] p. 170

¹⁴⁵ In *ibid.* 170-171

that s30(2) enjoyed a more direct relationship with the ECHR, and that ‘freedom of expression’, although not a right that should automatically trump the copyright owner’s claim, should always be in the mind of the judge when considering s30. However, the Human Rights Act was not endorsed as fully as one may hope. Although it was conceded that the relevance of Article 10 of the European Convention of Human Rights could not be ignored, in most cases it was deemed that the provisions of the CDPA would prove adequate. Furthermore, ‘freedom of expression’ came at a price. As Lord Phillips MR opined, “if a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author for any loss to him.”¹⁴⁶ His Lordship went on, “Freedom of expression should not normally carry with it a right to make free use of another’s work.”¹⁴⁷ The same rule applied to ‘fair dealing’. As Lord Phillips MR opined, “The ‘fair dealing’ defence under s30 should lie where the public interest in learning of the very words written by the owner of the copyright is such that publication should not be inhibited by the *chilling factor* of having to pay damages or account of profits”.¹⁴⁸ The Court of Appeal explained itself by saying that damages would be merely compensatory. Nevertheless, in adopting this ethos, ‘fair dealing’ was effectively being equated with ‘fair *compensation*’. It seems odd to recognise the significance of a fundamental right such as ‘freedom of expression’ and then to impose such a strong economic caveat upon it. The nature of ‘fair dealing’ is surely that it is used when the cost of drawing up some sort of licence for the use of a piece of information would out way the small use to which the extract is put.

It appeared that in considering the effect of Human Rights, the defence of ‘fair dealing’ had been re-aligned somewhat. Perhaps, this is due to the simplistic way in which Phillips LJ saw copyright as a whole. In interpreting *Ashdown*, he made clear from the outset that copyright was a negative right that protects the form of a work and not the ideas behind it. The European case law was hardly relevant. Cases such as *Fressoz and Roire v France* did not turn on the issue of copyright at all. The cases concerned circumstances where one party was actively trying to restrict freedom of

¹⁴⁶ In *ibid.* 167

¹⁴⁷ *Ibid.*

¹⁴⁸ In *ibid.* 173

the press. *Ashdown* concerned the case of one individual trying to exercise his apparently legitimate copyright to control the publication of his work and the effect on freedom of expression was an indirect result of this. The tenor of the argument in *Ashdown* was the same at first instance as in the Court of Appeal. That is, because copyright is a negative right, the right of the copyright owner was centred around his ability to prevent reproduction of his work. In the earlier case law, though aware of the importance of respecting copyright, the courts had also been willing to consider the other factors outside the interests of the two parties involved. Earlier jurisprudence seemed to at least endeavour to achieve a balance the rights of the copyright owner and the general public. Indeed the courts of the early 1990s did not refer to the idea expression dichotomy at all in resolving these issues of fair dealing. It has already been stated that, in cases such as *British Broadcasting Corporation v British Satellite Broadcasting Ltd*, *Time Warner* and *Pro Sieben*, the commercial element was by no means the main factor.

The same could not be said however for *Ashdown* in which the Court of Appeal adhered strictly to the three factors laid out in *Laddie*, *Prescott* and *Vitoria*, that is: whether the defendant work was in commercial competition with the original; whether the minute had remained unpublished and whether too much of the minute had been used by ‘The Sunday Telegraph’. Regarding the issue of commercial competition, Phillips LJ was in full agreement with Morritt V-C. With respect it is ridiculous to argue that the publication of the minute resulted in any commercial harm to Mr Ashdown. On the contrary a document of such intrigue would without any doubt act as an advertisement for his new book. In reality the printing of part of Paddy Ashdown’s minute should have been treated as a political leak like any other. The fact that the minute had remained unpublished was admittedly a more significant factor.¹⁴⁹ However, ‘fair dealing’ did appear to apply to published and unpublished works.¹⁵⁰ Furthermore, although Unged-Thomas J had not managed to come to a satisfactory conclusion on the matter in *Beloff*, it is submitted that this is the type of circumstance where the release of the information could be excused as a political leak. The value of the information and the nature of intrigue was such that there was certainly a general

¹⁴⁹ *Ashdown* [2002] p. 174

¹⁵⁰ *Hubbard* [1972] per Lord Denning MR

public interest in releasing the information. The final point made against the defendant was that 'The Sunday Telegraph' had taken a greater quantity of the minute that was considered 'fair'. It was submitted by the plaintiff that the minute had been "deliberately filleted" to extract the most colourful passages.¹⁵¹ However, this is surely to be expected. The Sunday Telegraph like other papers is bound to ensure that its stories grab the attention of the reader. This is part and parcel of the journalist's job. It seemed that Morritt V-C was effectively telling the defendant how to set out its newspaper.

Conclusion

The influence of 'thatcherism' is evident on studying the passage of the 1988 Bill through Parliament. The tussle between the desire to grant the right for the individual copyright owner to exploit his intellectual property to the full on one hand and to establish a healthy competitive market on the other was plain in the heated discussions pertaining to clause 29. The government was more aware of the value of copyright to its economy. However, despite the Green Paper, the drawing up of the CDPA clearly did not involve any significant re-consideration of 'fair dealing' or the rights of the individual user. The changes made to s30 did admittedly broaden its scope, allowing 'fair dealing' to be applied in the burgeoning media environment. Nevertheless, the fact that so many other opportunities to modernise the defence were missed especially with the developing software industry in mind leads one to assume that 'fair dealing' as a real defence to user rights was not a genuine concern. Despite this, the 1990s saw a revival in judicial activism. It is submitted that the fact that all the cases decided involved the media industry was very significant. This encouraged judges to look at each case as a whole, taking into consideration not just the right of the two parties concerned, but also the interests of the wider public. The fact that a plaintiff had a right to a copyrighted piece of work and that a substantial part of a work that been taken, was not enough to ensure the declaration of an interlocutory injunction as in *Hawkes v Paramount* or *Time Out*. Undoubtedly, the judiciary made a great many value judgments when assessing each claim. The importance of a worldwide event such as the World Cup affected the outcome of *British Broadcasting*

¹⁵¹ *Ashdown* [2002] p. 176

Corporation v British Satellite Broadcasting Ltd, whilst Neill LJ and Robert Walker LJ clearly believed that the information involved in the cases of *Time Warner* and *Pro Sieben*, being in the general public interest, should not be suppressed. Section 30 of the 1988 Act received a far more expansive interpretation than before. In *British Broadcasting Corporation*, the 'fair dealing' defence was permissible despite the availability of a contractual license agreement. The defendants were able to use the BBC's footage without payment, in spite of the obvious commercial motive. Likewise in *Time Warner* where a defence under s30 was accepted though showing of the film had been banned. 'Fair dealing' was experiencing a marked revival. Furthermore, despite the fact that it was recognised that a copyright claim could not be so easily swept aside, by the time *Pro Sieben* was decided judges realised that copyright could indeed restrict 'freedom of speech'. The dynamics of a claim for copyright infringement seemed to have greatly altered.

Seen in this light, therefore, the last two cases of *Hyde Park* and *Ashdown v Telegraph* appear all the more disappointing. Perhaps one explanation for the severity of these decisions lies in the fact that they both involved the print press. Attitudes towards papers such as 'The Sun' have soured as journalists have become more aggressive. *Hyde Park* and *Ashdown* were decided in an environment coloured by cases such as *Douglas v Hello*, where attempts were made to curtail the invasive actions of the press. Moreover, the Court of Appeal may have been tempted in both instances to decide in favour of the plaintiffs, as they concerned individual or personal claims to copyright. That is, unlike the other decisions which involved large companies fighting between each other, the remaining two, especially *Ashdown*, saw the plaintiff endeavouring to exercise his copyright over a work he himself had produced. Whatever the reasons, the fortunes of 'fair dealing' appeared to move into decline, especially as far as *Hyde Park* was concerned as copyright was used as a form of private censorship. *Ashdown* may be regarded in a slightly more positive light as, although the Court of Appeal could have been a little more adventurous regarding the question of 'freedom of speech', the relevance of the Human Rights Act 1998 and the case law of the European Court of Human Rights was at last recognised. Nevertheless, the introduction of the idea that some sort of compensation should be paid to the plaintiff if the defendant wishes to use the exact words of a particular work, even if that defendant fulfils the 'fair dealing' requirements goes against the

principle of the defence. In *Broadcasting Corporation v British Satellite Broadcasting Ltd*, *Time Warner* and *Pro Sieben* copyrighted material was used under s30 at no cost to the defendant. The change from 'fair dealing' to fair compensation is indeed damaging. Following this last decision Jonathan Griffiths commented that it seemed as though the judges have lost their resolve.¹⁵² Indeed there is growing concern over the strength of the copyright regime in general.¹⁵³ Perhaps it is possible to argue that the last two decisions to come out of the Court of Appeal were merely examples of the courts endeavouring to curtail the print media. Even so, the case of *Ashdown* does not give a good indication for the future. Given the present climate of concern to respect the copyright owned by large multinational companies,¹⁵⁴ it will require a more robust approach from the courts if they are to prevent the 'fair dealing' defence from becoming nothing more than a quaint footnote to the British copyright regime.

¹⁵² Griffiths, 'Copyright Law After Ashdown – Time to deal fairly with the Public,' [2002] IPQ 240-264, 262

¹⁵³ Laddie, 'Copyright: Overstrength, Over-regulated, Over-Rated?' p. 260

¹⁵⁴ MacMillan, 'Copyright and Culture: A Perspective on Corporate Power,' (1998) 10 Media & Arts Law Review 71

Chapter Four

The European Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society¹

“The digital revolution has crept up on this world of de facto exemptions... like a thief in the night... The critical question for this committee is whether digitisation should close down those exemptions to protect rights holders... This is the dilemma at the heart of Article 5 of the proposed directive.”

Roberto Barzanti²

“Unfortunately copyright has come to have less and less to do with the rights of individual authors and more and more to do with the interests of powerful industrial actors including large ... media conglomerates.”

T.C. Vinje³

The last three chapters concentrated on the domestic fortunes and vicissitudes of the British defence of ‘fair dealing’ to the present day. It is apparent that the rise in new technologies and the growth in media industries have led to changing attitudes with regard to the defence. The development of the digital environment must surely be the greatest challenge yet regarding the subject of exceptions to the copyright regime. As the commercial value of copyright continues to grow,⁴ the role of exceptions becomes increasingly uncertain. It is therefore necessary to explore the recent European

¹ Directive 2001/29/EC of the European Parliament and of the Council of May 2001 on the harmonisation of certain aspects of Copyright and Related Rights in the Information Society

² The Legal Affairs and Citizens Rights Committee 28th January 1999 on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 0628 – C4-0079/98 – 97/0359 9 (COD)) Rapporteur: Mr Roberto Barzanti. General Comments at page 66

³ T.C. Vinje, ‘Should we begin Digging Copyright’s Grave?’ [2000] EIPR 551-562, 558

⁴ The Department of Culture’s ‘Creative Industry Mapping Document 2001’ states that the creative industries including software and computer services, publishing, TV and radio, and other media industries account for 5% of Britain’s GDP. Between 1997 and 1998 the output of these industries grew by 16% compared to the general growth of the economy which was under 6%. The report can be obtained at www.culture.gov.uk

developments relating to copyright in order to put the 'fair dealing' defence into context. Technology is developing at an exponential rate. Fifteen years ago few would be able to imagine the full potential of the Internet or digital technology. The 'web' has created a world, which transcends national boundaries. Information is instantaneously transmittable from opposite sides of the globe, whilst great swathes of digital matter can be downloaded in the blink of an eye. The information super-highway has benefited research, business and may even be considered a valuable tool of democracy. It is, however, treated with much suspicion. Perhaps it is because "it is at once one of the world's largest libraries and surely the world's largest copying machine."⁵ For this reason it has thrown copyright into disarray. Subtleties, pivotal to copyright law are suddenly blown apart. One of the main casualties of the digital world is the 'first sale doctrine'.⁶ At its simplest level, each time access is gained to an electronic document a copy is made which technically constitutes a breach of copyright. At the same time, the digital environment awards a right holder greater control over his or her work, permitting economic monopolies. The problem is the development of digital technology has been seen in a very cynical light. Rather than a fantastic opportunity for the spread of information, large companies are convinced that this phenomenon should be treated with the utmost pessimism as allowing criminals to steal information and thus deprive the honest right holder of his deserved income. As a result, the exceptions to copyright, such as 'fair dealing,' are now being viewed with increasing suspicion. We seem to have moved to an era, which favours license agreements to ensure that all uses of a work are accounted for regardless of the financial or physical encumbrances that may be placed upon an individual trying to make an honest use of only a part of that work. Somehow the argument has become warped. But it does not follow that simply because there are the means nowadays to afford copyright owners increased control over their works exceptions should be outlawed by license agreements. On the contrary, it could be argued that exceptions are needed now more than ever in order to safeguard creativity. After all,

⁵ 'The Digital Dilemma, Intellectual Property for the Information Age', Committee on Intellectual Rights and the Emerging Information Infrastructure. See Chapter 1, 'The emergence of the digital dilemma.' www.nap.edu/html/digital_dilemma/ch1.html

⁶ Traditionally, once copyright owners have consented to the initial publication of the work they lose control over it. Subsequent sales of the same work – say as a second hand book – would not concern the original copyright owner and they would have no right to demand a royalty on the subsequent sale.

“much of the reason for ‘fair dealing’ rights is that the cost of negotiating a license for the non-commercial activities would be far higher than the value of the use”.⁷

Towards Harmonisation

Given the trans-national nature of copyright, movements soon began for the harmonisation of law on a European level, which, amongst other initiatives, culminated in the Information Society Directive. Furthermore, it is no surprise that one of the main areas of concern is the question of exceptions. A harmonised copyright system could hardly be achieved if different states permitted varying levels of exceptions. However, the method used to bring about such harmonisation appears to be a rights-maximisation approach aimed at putting the copyright holder in a very strong position. A good example can be seen with regard to the Berne Convention. On the international plane it has always been regarded from the first Berne Conference that exceptions to copyright are of great importance. The rights of all parties have to be considered. Since 1886, Berne has endeavoured to bring a degree of uniformity to the law of copyright,⁸ not only regarding exclusive rights but also the exceptions and limitations to those rights. It was recognised in the First Diplomatic Conference during the advent of Berne that limitations and exceptions to copyright had an important part to play in maintaining a balance in the copyright regime. For example, in 1884 Numa Droz stated that “limitations on absolute protection are dictated... by the public interest.”⁹ This implies that right from the very beginning, although the protection of a right holder’s copyright was very important, so too was the maintenance of exceptions for general public benefit. But Berne has never been regarded as anything of a straitjacket.¹⁰ Article 19 of the 1908 Berlin Revision

⁷ Foundation for Information Policy Research (fipr). Respose to the Patent Office Consultation on implementing the EU Copyright Directive Nov. 2002 www.fipr.org/copyright/FIPR.html

⁸ 1896 Paris Revision Conference; 1908 Berlin Revision Conference; 1928 Rome conference; 1948 Brussels revision Conference; 1967 Stockholm Revision Conference; 1971 Paris Conference.

⁹ See Samuel Ricketson, ‘The Boundaries of Copyright: Its proper limitations and exceptions: International Conventions and Treaties’, [1999] IPQ 56, 61

¹⁰ Jane C. Ginsburg, ‘International Copyright: From a bundle of national copyright laws to a Supranational Code?’ Journal, Copyright Society of the USA pp 265 – 289 At the first meeting of Berne in 1883 there was a shift towards international uniformity. But the 14 nations chose to retain a substantial degree of

Conference emphasised that the Convention only embodied “the minimum of protection”.¹¹ Samuel Ricketson further observes that the fact that the Convention provided national legislators with a degree of flexibility enabled the exceptions to be implemented in many different jurisdictions.¹² Furthermore, he opines that such exceptions will always be necessary and it is preferable that they are drawn up according to clear, if generalised, criteria rather than by a rigid prescription of situations and circumstances. The Berne Convention as it stands makes provision for a number of specific exceptions. For example, Article 10(1) guarantees a right of quotation,¹³ whilst Article 10(2) covers teaching exceptions.¹⁴ Article 10 bis (1) provides for an exception for reproduction by the press, and Article 10 bis (2) covers the reporting of current events.¹⁵ There is also an exception in relation to the public interest or ‘ordre publique’ under Article 17.¹⁶ By far the most important is the general exception concerning the reproduction right encompassed in Article 9(2)¹⁷. It has become the general yard stick by which all exceptions to the reproduction right should be measured. As previously stated, the three component parts of the Article are to be read cumulatively. Nevertheless, it takes the form of a general exception, as the Stockholm Conference did not think it wise to list all the possible exceptions that might be made under national legislation.¹⁸ Since

national independence. Therefore the 1885 draft of the Convention was far less universalist than that of 1883.

¹¹ Samuel Ricketson, ‘Berne Convention for the protection of literary and artistic works 1886-1987’ Centre for Commercial Law Queen Mary College, Kluwer 1987. At page 95, paragraph 3.19

¹² Samuel Ricketson, ‘The Boundaries of Copyright.’

¹³ Article 10(1): Quotations can be made “available to the public so long as their making is compatible with fair practice and their extent does not exceed that justified by the purpose.”

¹⁴ Article 10(2) states that “the utilisation to the extent justified by the purpose of literary or artistic works by way of illustrations in publications, broadcasts or sound or visual recordings for teaching provided that it is compatible with fair practice.”

¹⁵ Article 2 bis (2)

¹⁶ Article 17: “The provisions of this Convention cannot in any way affect the right of the government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.”

¹⁷ Article 9(2) reads “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.”

¹⁸ Samuel Ricketson, ‘The Boundaries of Copyright,’ p.71

then, the three factors of Article 9(2) have become a major standard by which to judge the validity of national exceptions to copyright.

However, as copyright has become more important to the world economy and efforts have increased to bring about a greater degree of harmonisation it is noticeable that the international keystone with regard to exceptions, that is Article 9(2), has been interpreted more and more restrictively whilst at the same time being applied more generally. Given the importance of Article 9(2), it is hardly surprising it has been taken up by both the TRIPs Agreement 1994 and the WIPO Copyright Treaty 1996. That said, it has undergone some subtle changes in order to make the exception that much tighter. For instance, the first WTO Panel report giving an indication of the true scope of Article 9(2) noted that the language of Article 9(2), which found its way into Article 13 of TRIPs, was ever so slightly different:¹⁹

“Members shall *confine* limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the *right holder*.”²⁰

Article 9(2) spoke of Member states being able to *provide* exceptions in accordance with Berne as well as the interests of the *author*. The WTO Panel Report also pointed out that though Article 9(2) was limited to the reproduction right, Article 13 was applicable to all copyright rights.²¹ Article 9(2), once restricted to the reproduction right, now provides a general formula to be applied before the introduction of any new exception. The emergence of digital technology could pose a real problem as it renders any exploitation a normal exploitation.²² So under Article 9(2) and Article 13, the introduction of a new exception would be instantly seen as interfering with the ability of the owner to exploit his right. Thankfully Article 10 of the WIPO Copyright Treaty enabled countries to bring in new exceptions into the digital environment through the ‘agreed statements’. Notably,

¹⁹ See the WTO Panel Report on the US s110 (5) of the US CA June 15th 2000 WT/DS 160/R

²⁰ Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) 1994

²¹ WTO Panel Report on the US s110 (5)

²² Thomas Heide, ‘The Berne Three-Step test and the proposed Copyright Directive,’ [1999] EIPR 105-109

the ‘agreed statement’ “should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital environment.” To this end, the ‘agreed statement’ appears to complement the Preamble of the WIPO Copyright Treaty. On the one hand the latter was designed:

“to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible.”

This was done by:

“Emphasising the outstanding significance of copyright protection as an incentive for literary and artistic creation.”

On the other hand it appeared that at the same time the Preamble of the Treaty recognised

“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.”

There was a slight difference in wording between Article 10(1)²³ and 10(2).²⁴ The former adopted the wording of the Berne Convention and talked of legislation of members of union being able to “provide for limitations” to the exclusive rights granted. The latter carried through the wording of the TRIPs Agreement and instructed contracting parties that when applying the Berne Convention, they must “confine” any limitations or exceptions to certain special cases that do not conflict with a normal exploitation of a work.²⁵ Why there is this obvious disparity is unclear. Perhaps the drafters were worried about the confusion which might occur between the guidelines set out by Berne and the

²³ Article 10(1): Contracting parties **may**, in their national legislation **provide** for limitations of or exceptions to the rights granted to authors of literary and artistic works under this treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

²⁴ Article 10(2): Contracting parties **shall**, when applying Berne, **confine** any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

²⁵ H.L. MacQueen, ‘Copyright and the Internet’ in ‘Law and the Internet’ L. Edwards and C Waelde (eds.) Hart Publishing 2000 MacQueen states that “the scene is thereby set for the elimination or whittling down of user rights and the assertion of greater produce over the use of the internet.” p. 212

more modern WIPO treaty. It seems as though in choosing the language of Article 10(2), the legislators were possibly seeking to encourage the fading out of Berne and encouraging Member States to rely more on the WIPO Treaty. By 1996, Article 9(2) of Berne had undergone a marked change and assumed a new international significance. The three-step test had “graduated from a mere rule of referral... to a rule of mandatory application... in both TRIPs and the WIPO Copyright Treaty”.²⁶ But at least the freedom to grant new exceptions under Berne in the digital world had been safeguarded through Article 10 of the WIPO Copyright Treaty. One might have hoped that the Information Society Directive would have adopted a similar policy.

European Harmonisation

The need to deal with the evolving digital world provided one of the key aims of the Information Society Directive.²⁷ As copyright revealed its increasing commercial significance on the global economy, it attracted the attention of the EC. This is hardly surprising as the community has always been a commercially driven organism and the harmonisation of copyright would seem a natural progression from the four fundamental freedoms already established under the 1957 Treaty of Rome.²⁸ According to the 1995 Green Paper the estimated GDP generated by copyright and related rights was between 3% - 5%.²⁹ Moreover, the follow-up Green Paper stated that the media market was predicted to grow by 16% per year over the next five years.³⁰ The European harmonisation of copyright is by no means a new initiative. Julian Rodriguez Pardo traces such developments back to 1973.³¹ By 1987 the European Community had devised a plan

²⁶ Thomas Heide, ‘The Berne Three Step test’ p. 106

²⁷ Directive 29/2001 EC designed to implement the WIPO Copyright Treaty and the Performance and Phonograms Treaty

²⁸ Free movement of goods, services, workers and capital.

²⁹ Green Paper, ‘Copyright and Related Rights in the Information Society’ COM (95) 382

³⁰ Follow-up to the Green Paper on Copyright and Related Rights in the Information Society. COM (96) 568 Final Chapter 1 at page 6.

³¹ Julian Rodriguez Pardo, ‘Highlights of the Origins of the European Union Law of Copyright,’ [2001] EIPR 238-243. In May 1973 the European Parliament proposed measures to be taken that would approximate the national laws on Parliament and Neighbouring rights, DOC 62/74; [1974] O.J. L62/6, p.

from 1988-1992 focusing on the new communication technologies.³² However, it was the 1993 White Paper on Growth, Competitiveness and Employment,³³ which heralded a quickening in the pace towards copyright harmonisation. Furthermore, it was this document in which the curious term ‘Information Society’ was coined. Unfortunately, it is neither obvious what this phrase actually means nor what individuals are entitled to expect as citizens of this community. It does not merely consist of copyright. On the contrary, the Information Society Directive provides just another instalment in a list consisting of a number of directives in this area.³⁴ However, there is more to the Directive than merely completing the *acquis communautaire* and providing big business with a means of taking full advantage of its intellectual property resources. At least that was the impression given by the Green Paper. It is to be remembered that the beginnings of copyright harmonisation came as a result of the development of the European Community’s cultural policy.³⁵ Just as the WIPO Copyright Treaty, through its preamble, appeared to maintain the important balance between copyright holder and user, the rhetoric of the 1995 Green Paper did not disappoint:

“The protection of copyright and related rights is vital to the internal market and has cultural economic and social implications for the Community.”³⁶

As well as referring to the traditional remit of the EC in paragraph 11 and 12 of the Green Paper,³⁷ there was a clear commitment to cultural considerations in the formulation of the Information Society. Indeed, paragraph 13 went a good deal further in stressing this new community would be:

240. In 1982 the European Commission spoke of the desire to harmonise Member State laws on copyright. At the same time it declared its intention to push for the harmonisation of the term of copyright to 70 years

³² The 1988 Green Paper on Copyright and the technology Challenge COM (88) 172 Final (Brussels 1989)

³³ COM (93) 700

³⁴ The Computer Program Directive: Council Directive 91/250/EEC of 14th May 1991. The Database Directive: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996. Directive 92/100. Finally Directive 93/83/EEC

³⁵ Julian Rodriguez Pardo, ‘Highlights of the Origins of the European Union Law of Copyright,’ p. 240

³⁶ Green Paper on Copyright and Related Rights in the Information Society COM (95) 382, paragraph 10

³⁷ Free Movement of Goods, People and Services

“For the improvement of knowledge and dissemination of the culture and histories of the European Peoples, the promotion of cultural exchanges and artistic creativity and recognition of the value of common cultural heritage.”

Such heady rhetoric implies, just as with Berne Convention and the WIPO Copyright Treaty, that member states were to safeguard their own cultural differences through their own exceptions. Nevertheless, although the Green Paper seemed to underline the importance of exceptions, it conveniently failed to adumbrate how this was to be achieved. The Green Paper guaranteed that in this new Information Society, “the public at large, ie private users, professional users and institutional users will play an important role”.³⁸ But neither this role, nor how it was to be supported was explained. The follow-up Green Paper of the next year gave a more telling indication of the true motives behind such harmonisation.³⁹ It stated that the intention was to create:

“a favourable environment that protects and stimulates creativity... In doing so the traditionally high level of copyright protection in Europe must be maintained and further developed... reflecting that the subject matter is property and is as such guaranteed by the constitution in many countries.”⁴⁰

In other words, greater protection would lead to the stimulation of more creativity. It is vital to grasp this point, as it forms the crux of the Directive. The argument is one that rests on the notion of market failure and that literary and artistic works of all mediums are forms of public good which, were it not for copyright, would not be produced. The balance between the right level of protection to guarantee a sufficient amount of innovation has been a question, which has been wrestled with by legal economists for some time.⁴¹ Roger Van den Bergh insists: “Copyright protection should be limited to the

³⁸ COM (95) 382, paragraph 63

³⁹ COM (96) 568 Final

⁴⁰ In *ibid.* paragraph 3

⁴¹ Landes and Posner, ‘An Economic Analysis of Copyright Law’, [1989] JLS 325 “striking the balance between access and incentives is the central problem in copyright law.” See also Thomas Heide, ‘The Approach to Innovation under the proposed Copyright Directive: Time for Mandatory Exceptions [2000] IPQ 215. Heide states that although the Directive enthusiastically embraces the importance of

scope necessary to provide incentives to create and should minimise restrictions on access to works.”⁴² This does not appear to be the balance achieved by the Information Society Directive. Indeed, if one accepts that greater creativity is driven by increased protection, one immediately loses the opportunity of achieving any sort of equilibrium between the copyright owner and user. There was some recognition of the need to maintain user rights. The 1996 Follow Up Green Paper observed that, “a fair balance of rights and interests between the different categories of rights holder as well as rights holders and users must be safeguarded.”⁴³ But a look at the Information Society Directive itself will reveal a very different picture.

Directive 29/2001 EC – The Information Society Directive (ISD)

Introduction

There is a great deal riding on the ISD. Not only does it implement two WIPO Copyright Treaties,⁴⁴ which in turn carry with them aspects of the Berne Convention – notably article 9(2) – but it must provide a touchstone for the new digital age. It embraces three fundamental rights, a very strong reproduction right,⁴⁵ a communication to the public right⁴⁶ and a distribution right.⁴⁷ However, also of real import, are Articles 5 (covering exceptions to the reproduction right) and Article 6 (regarding technological protection measures). For the time being the provisions of particular concern are Article 2 and Article 5. Together they are responsible for creating the balance between the copyright owner and user, but of considerable significance also are the preceding list of recitals,⁴⁸

competitiveness and innovation, it does not sufficiently ensure the application of limitations and exceptions, therefore actually hindering innovation and creativity.

⁴² Roger Van den Bergh, ‘The Role and Social Justification of Copyright: A Law and Economics Approach’ [1998] IPQ 17-34, 21

⁴³ COM (96) 568 Final, paragraph 3

⁴⁴ WIPO Copyright Treaty adopted by the Diplomatic Conference on 20th December 1996 and the WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference on 20th December 1996

⁴⁵ See Directive 2001/29/EC Article 2

⁴⁶ In *ibid.* Article 3

⁴⁷ In *ibid.* Article 4

⁴⁸ There are 61 in total.



designed to help the interpretation of the provisions. For instance Recital 4 sets the tone by stating that the Directive hopes to achieve:

A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry...

Here again the link between protection, creativity and competition is noted. However it is clear that Hugenholtz does not share the opinion expressed in the recital of 'increased legal certainty', denouncing the directive as "a badly drafted, compromise ridden, ambiguous piece of legislation."⁴⁹ Indeed there is much to be critical about before any individual analysis of the relevant provisions. A great deal of the legislative agenda mentioned in the 1995 Green Paper was left out including the important issue of moral rights.⁵⁰ There is also no distinction between analogue and digital copying.⁵¹ Indeed the true motives behind the ISD are exposed by noting what was left out of the Directive just as much as what was included. One of the most important areas, which the 1995 Green Paper failed to address, was whether copyright law posed a potential threat to freedom of expression encompassed by the European Convention of Human Rights. Although there had not been a great deal of case law covering the matter at the time, the fact that Member States were becoming increasingly aware of the role of Human Rights meant this was a fantastic opportunity to give national judiciaries guidance on how such rights

⁴⁹ Bernt Hugenholtz, 'Why the Copyright Directive is unimportant and possibly invalid' [2000] EIPR 499-505, 500 He complains that the directive is technology specific and did not deal with some of the main issues as mentioned in the 1995 Green Paper such as moral rights. Dietz agrees. See Dietz, 'The protection of Intellectual Property in the Information Age. The Draft Copyright Directive of November 1997,' [1998] IPQ 335 In fact Hugenholtz is so disappointed with the directive that he suggests it should be struck out using an Article 230 action. In *ibid.* 501

⁵⁰ Directive 2001/29/EC Recital 19: The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. *Such moral rights remain outside the scope of this Directive.* Emphasis added.

⁵¹ Save a rather weak one in Article 5(o): use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

might affect the copyright regime. On studying the 1995 Green Paper, the Legal Advisory Board (LAB) observed “with concern that considerations of informational privacy and freedom of expression and information are practically absent”.⁵² The LAB highlighted the fact that freedom of expression is a right recognised and protected by Article 10 of the ECHR and therefore part of community law. Although the LAB requested that the right to freedom of expression be taken more seriously, no such recognition appeared in the follow-up Green Paper of 1996.⁵³ The Legal Affairs and Citizens’ Rights Committee proposed an amendment, similar to that of the LAB, but this too was not recognised⁵⁴ This is a grave pity, as it would have made a direct link between copyright and its potential effects on freedom of expression, putting the relevance of the case law of the European Court of Human Rights beyond doubt. If the Court Of Appeal decision in *Ashdown v Telegraph*⁵⁵ really did represent an opportunity to recognise the relevance of the Human Rights Act 1998 in copyright cases, this would have been much aided by the explicit recognition of the relevance of Human Rights at European level.

Article 2 – The Reproduction Right

Article 2 provides that:

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- a) for authors of their works;
- b) for performers, of fixations of their performances;
- c) for phonogram producers, of their phonograms;

⁵² Legal Advisory Board Reply to the Green Paper on Copyright and Related Rights in the Information Society Brussels Sept. 1995 www2.echo.lu/legal/ipr/reply/reply.html

⁵³ COM (96) 568 Final

⁵⁴ See Report 28th January 1999 on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 0628 – C4-0079/98 – 97/0359 9 (COD)) Rapporteur: Mr Roberto Barzanti. Amendment 3 relating to Recital 6a (new) at page 5. ‘The harmonisation of the rules on copyright... must be compatible with fundamental legal principles and principles common to the Member States according to which these rights **are not absolute** and their protection must not be allowed to jeopardise the fundamental principles of an open and modern society, in which **freedom of expression and the public interest must be fully achieved...** and may prevail over the restriction arising from the enjoyment of these rights.’

⁵⁵ [2002] Ch.149

- d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

It is immediately obvious just how broad Article 2 really is. It covers every conceivable type of reproduction, “*direct or indirect, temporary or permanent.*” It follows that even the transient reproductions that occur when operating a computer and surfing the web would be covered and therefore such reproductions would be considered a breach of copyright. In order to prevent Article 2 becoming unworkable, there is an exception to this seemingly all encompassing rule to be found in Article 5(1) which reads:

Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- a) a transmission in a network between third parties by an intermediary, or
- b) a lawful use

of a work or other subject-matter to be made and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

It is certainly a move away from the WIPO Copyright Treaty, which neglected to deal with the issue of temporary reproduction altogether. Nevertheless, exactly what Article 5(1) permits is unclear. It appears that it allows the kind of temporary copying without which the Information Society would collapse. That is the kind of ephemeral copying which occurs when one is, say, browsing a website. It certainly does not allow permanent copies to be made. Therefore this would seem to outlaw, at least in principle, the printing out of a hard copy or the long-term storage of information whether on a hard or floppy disk drive. A number of criticisms can be levelled at this provision. Notably, it is evident that Article 5(1) is not really a typical type of exception. Instead, it is specific to technological processes and directed towards the sort of reproductions that occur within and between computers. Academics have queried therefore why this provision has not been built into Article 2. After all, the issue of temporary reproduction seems more an

element of definition than exception.⁵⁶ Moreover, Article 5(1) is too narrow and somewhat confusing. It may well be wondered what constitutes an “integral and essential part of a technological process”. At the same time it is very difficult to think of any copying which has no “independent economic significance”. The overall effect, therefore, is that Article 2 encompasses a formidable right only failing to cover the most insignificant of reproductions. Vinje argues Article 2 combined with Article 6 has had the effect of replacing copyright law with technological monopolies.⁵⁷ Put simply Article 2 is far too broad.

“It would have been far preferable to adopt a more general, broadly formulated reproduction right that left it to future case-by-case elaboration in specific technological circumstances.”⁵⁸

Article 5 – Exceptions and Limitations

Given the obvious strength of the reproduction right and the fact that the importance of exceptions has been repeatedly stressed on an international level,⁵⁹ one would assume that in an area as changeable as the digital environment, the Directive would provide a flexible basis on which to modify or control new exceptions as the need arose. Article 5 falls pitifully short. This provision sets out an exhaustive list of piecemeal exceptions to the reproduction right. Article 5(1) has already been dealt with as a provision that seems alien to the general group of exceptions. It is Article 5(2) which contains the first list of possible exceptions to Article 2. A selection of provisions from Article 5(2) reads: Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

⁵⁶ Dietz, ‘The protection of Intellectual Property in the Information Age. The Draft Copyright Directive of November 1997,’ [1998] IPQ 335-349, 341

⁵⁷ T.C, Vinje, ‘Should we begin Digging Copyright’s Grave?’ p. 551

⁵⁸ *Ibid.* As Hart argues “such a broad reproduction right is more akin to controlling the use of works rather than copying.” Michael Hart, ‘The Copyright in the Information Society Directive,’ [2002] EIPR 58-64, 58

⁵⁹ The Preamble of the WIPO Copyright Treaty recognises “the need to maintain a balance between the rights of authors and the larger public interest.”

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive *fair compensation*;⁶⁰
- (b) in respect of reproductions on any medium made by a natural person for *private use* and for ends that are *neither directly or indirectly commercial*, on condition that the rightholders receive *fair compensation* which takes account of the application or non application of technological measures referred to in *Article 6* to the work or subject matter concerned;⁶¹

It is immediately apparent from just these two provisions that the exceptions themselves are very carefully restricted. Whilst Article 5(2)(a) demands that the right holder receives ‘fair compensation’, there are even more factors to consider in applying an exception under Article 5(2)(b). For example the use must be private as well as neither directly nor indirectly commercial. There is also a necessity of ‘fair compensation’. But more interestingly, in applying Article 5(2)(b), one must also consider the relevance of Article 6.⁶² However, how one is to gauge the effect of a technological protection measure on the amount of compensation to be paid to the right holder is completely unclear. Article 5(2) does not contain exceptions relating to specific purposes, but more generalised ones. That is, it discusses the actual methods of reproduction not the purposes. It is Article 5(3) that contains a list of exceptions referring to specific *purposes* or *uses*. A selection of provisions from Article (5)(3) reads: “Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:”

- a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the *non commercial purpose* to be achieved;⁶³

⁶⁰ Directive 2001/29/EC Article 5(2)(a) Emphasis added.

⁶¹ In *ibid.* Article 5(2)(b) Emphasis added.

⁶² Article 5(2)(b) permits exceptions “in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non application of technical measures referred to in Article 6 to the work or subject-matter concerned.”

⁶³ In *ibid.* Article 5(3)(a) Emphasis added.

- c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works... in cases where such use is *not expressly reserved* and as long as the *source including the authors name is indicated* or use of works or other subject matter in connection with the reporting of current events, to the *extent justified by the informatory purpose* and as long as the source including the authors name, is indicated, unless this turns out to be impossible;⁶⁴
- d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been *lawfully made available to the public*, that, unless this turns out to be impossible, *the source, including the authors name, is indicated*, and that their use is in accordance with '*fair practice*', and to the extent required by the specific purpose;⁶⁵

These three provisions were simply chosen by the author as they endorse the purposes encompassed by s29 and s30 of the CDPA 1988 and are, of course, part of a far longer list of specific exceptions to the reproduction right. Here again, there is a commercial restriction on subsection (a), whilst both (c) and (d) are heavily qualified. Article 5(2) and Article 5(3) cover between them quite a number of exceptions, but unfortunately this is of little consequence. Unlike Article 5(1) the exceptions contained in Article 5(2) and 5(3) are optional. Member States are at liberty to apply all the exceptions, cherry pick between them or indeed refuse to draw any at all into their national legislation. There are numerous criticisms surrounding Article 5. First of all, far from maintaining the flexibility of Article 10 of the WIPO Copyright Treaty,⁶⁶ Article 5 prohibits Member States from adopting new exceptions outside the exhaustive list which could curtail the reproduction right any further. This in turn prevents Member States from making modifications as required in the future. Extensive lobbying after the original draft in 1997 led to the expansion of the list,⁶⁷ but there are a great many amendments that were not accepted, which could have maintained the flexibility of these exceptions. For instance,

⁶⁴ In *ibid.* Article 5(3)(c) Emphasis added.

⁶⁵ In *ibid.* Article 5(3)(d) Emphasis added.

⁶⁶ It is to be remembered that Article 10 of the WIPO Copyright Treaty 1996 was coupled with an 'Agreed Statement' which not only permitted contracting states to extend existing copyright exceptions into the digital environment but also permitted "Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment".

⁶⁷ The Draft Directive – COM (97) 628 final – only contained three exceptions in Article 5(2) and six exceptions in Article 5(3).

the Committee on Economic and Monetary Affairs proposed an amendment providing for “a *non exhaustive* enumeration of exceptions to the reproduction right...”.⁶⁸ The Committee on the Environment, Public Health and Consumer Protection wanted a similar alteration, requesting “a minimum mandatory list of exceptions to the reproduction right... without prejudice to the Member States’ right to authorise *additional exemptions* under national law...”⁶⁹ As it is, the optional nature of Article 5(2) and Article 5(3) means that such exceptions have little weight. Furthermore, it is noted once again that the language of Article 9(2) of the Berne Convention has been altered to increase its scope. Article 5(5) of the ISD states:

The exceptions and limitations provided for in paragraphs 1,2,3 and 4 shall only be applied in certain special cases, which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholder.

It would appear that the words “or other subject matter” were adopted to take account of the burgeoning digital age to ensure that when adopting any of the provisions of Article 5 there is no possibility that the resulting work will conflict with the original or any other related subject matter to the original, making Article 5(5) a sort of catch-all phrase. Moreover, whilst Article 10 of the WIPO Copyright Treaty had to be read in light of the ‘agreed statement’, a very different sort of guidance is laid out in recital 44 of the Copyright Directive:

“The provision of such exceptions or limitations by Member States should in particular duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be *even more limited* when it comes to certain new uses of copyright work and other subject matter.”⁷⁰

⁶⁸ See Report 28th January 1999 on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 0628 – C4-0079/98 – 97/0359 9 (COD)) Rapporteur: Mr Roberto Barzanti. Amendment 7 relating to Recital 22 at page 37.

⁶⁹ In *ibid.* Amendment 6 relating to Recital 22 at page 51 See also T.C. Vinje, ‘Should we begin digging Copyright’s grave,’ p. 552 Vinje argues that there should at least be a core of exceptions which are agreed upon.

⁷⁰ Directive 2001/29/EC Recital 44. Emphasis added.

That is, a restrictive view of the exceptions is actively encouraged. Member States are not free to think of the importance of exceptions regarding the general public interest and the flow of information. A real bone of contention is the fact that Article 5 constitutes a blanket restriction on commercial use. Article 5(1) is an example, but the restriction on commercial use appears no less than four times and includes exceptions relating to teaching and scientific research⁷¹ libraries, educational establishments, museums and archives,⁷² hospitals and prisons.⁷³ More worrying is the intense regulation of “private use”. Without actually clarifying the term, the Directive goes as far as possible without saying directly that private use is illegal. The exception is accompanied by the need to provide ‘fair compensation’ to the right holder.⁷⁴ Recital 35 is supposed to provide some guidance. It states that:

“... a valuable criterion would be the possible harm to the rightholders resulting from the act in question... the level of fair compensation should take full account of the degree of use of technological protection measures referred to in this directive.”

However, what is meant by ‘harm’ is unclear as is how one is supposed to relate the degree of technological protection in Article 6 to the degree of compensation in Article 5. Perhaps the more protection afforded to a work the greater the amount of compensation. The overall impression from the Directive is that rights holders should be able to charge for every penny associated with their work. Recital 52 does encourage, regarding Article 5(2)(b), voluntary agreements to be set up between user and right holder, in the absence

⁷¹ In *ibid.* Article 5(3)(a) Incidentally rather than the proposed wording of this Article which referred to the ‘sole purpose of illustration for teaching or scientific research’ (which seemed a little bizarre) both the Committee on the Environment, Public Health and Consumer Protection and the Committee on Economic and Monetary Affairs pushed for an amendment using the words ‘for the sole purpose of education, learning and research’. The Committee on the Environment went further and stated that Member States should be able to provide limitations for ‘private purposes’ also. See Report 28th January 1999 on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 0628 – C4-0079/98 – 97/0359 9 (COD)) Rapporteur: Mr Roberto Barzanti. At page 43 and 58.

⁷² In *ibid.* Article 5(2)(c)

⁷³ In *ibid.* Article 5(2)(e) Article 5(3)(n) seems broader than Article 5(2)(c). But in order to benefit from latter, one has to be at a designated outlet.

⁷⁴ Appears in Article 5(2)(a), (b), (e)

of which a Member State may intervene, but this hardly provides any comfort with regard to a provision which surely should be provided for very simply.⁷⁵

Despite the positive sounds that came from the Green Paper regarding exceptions a truer, indication of the intention of those drafting the directive is found in paragraph 15, where it is stated that the right holder is entitled to a financial return “at every link in the chain, between the author and the public”.⁷⁶ This is indeed a very telling statement that shows the real drive behind the Directive. A similar criticism can be made of the very anglo-american provision, which appears in Article 5(3)(d) of ‘fair practice’ and relates to the use of quotations for purposes such as criticism or review.⁷⁷ ‘Fair practice’ operates alongside even stricter confines than ‘fair dealing’. Firstly, the work must have been made lawfully available to the public. Secondly, ‘fair practice’ comes with an even stricter version of sufficient acknowledgement. Frustratingly, a far more flexible version of ‘fair practice’ could have been construed if the amendment proposed by the Committee on the Environment had been accepted.⁷⁸ This version was more in tune with

⁷⁵ Recital 52 states: When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member states should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightsholders, including agreements between rightsholders and other parties concerned, as well as measures taken by Member States, do not prevent rightsholders from using technological measures, which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of ‘fair compensation’ under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

⁷⁶ COM (95) 382 at paragraph 15

⁷⁷ Article 5(3)(d) (states Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases): quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose

⁷⁸ See Report 28th January 1999 on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 0628 – C4-0079/98 – 97/0359 9 (COD)) Rapporteur: Mr Roberto Barzanti. Amendment 28 relating to Chapter II Article 5(3a) (new) at page 59

the US defence of 'fair use'. Amendment 28 referred to four very similar factors in order to decide a 'fair practice' as well as an extra fifth point.⁷⁹

This was not the only discrepancy within the ISD. At no point does Article 5(2) distinguish between digital and analogue copying save in the rather weak provision of Article 5(3)(o). Thus the presumption is that the same strict standard of protection applies to both. One major concern, particularly regarding the UK, as it has a history of steering away from them, is that the European Directive does nothing to clear up the cumbersome question of levies.⁸⁰ On the contrary, contractual provisions and license agreements are actively encouraged as a way of ensuring just remuneration.⁸¹ It is clear that the strength of Article 2 coupled with the obvious weakness of Article 5 and the favourable way contracts and licenses are looked upon will result in many concerns, especially as the strictness of the European Directive contrasts starkly with the other pieces of legislation that make up the information society. For example exceptions to the Computer Program Directive are mandatory. Article 5(1), 5(2) and 5(3) of the said directive appear to cover issues of private use, the most important being Article 5(3), which permits an individual to "observe, study or test the functioning of the program in order to determine the ideas and principles any of the acts of loading, displaying, running transmitting or storing the programs, which he is entitled to do." Article 9(1) is equally significant as it states that

⁷⁹ These factors were:

- i) The purpose and character of the use, including whether such use is of a commercial nature or is for a non-profit making or private purpose and, in the case of reproduction, the number of copies to be made;
- ii) The nature of the copyright work;
- iii) The amount and significance of the part used in relation to the copyright work as a whole;
- iv) The effect of the use upon the potential market for, or value of, the copyright work including the right holder's ability to share in any remuneration claimed by the agency of reproduction;
- v) The explicit acceptance by the beneficiary of any of the above exceptions of the right holder's legal ownership of any such copyright work.

⁸⁰ The proposal to introduce a levy on blank tapes in the 1985 Green Paper Cmnd 9455, did not make it into the 1988 Copyright Designs and Patents Act.

⁸¹ Directive 2001/29/EC Recitals 26, 38, 40, 45

any contractual provisions, contrary to Article 6 of the Computer Directive⁸² or Article 5(2) and 5(3) shall be null and void. Likewise Article 15 of the Database Directive carries a similar restriction.⁸³ The ISD contains no such safeguards. Any suggestions of a provision similar to Article 9(1) of the Computer Directive made by the Committee of the Environment were ignored.⁸⁴ Furthermore, whereas Article 7 of the Computer Program Directive⁸⁵ shows that the use of technological measures cannot override exceptions to copyright, Article 6 of the Copyright Directive contains no similar declaration. It is observed that the European Commission regards copyright as a valuable commercial commodity and therefore have provided a directive, which will allow rights holders maximum commercial gain. However, for this to be successful, the directive must achieve its primary goal of pan European copyright harmonisation. This brings us on to the interesting point of assessing just how successful the Directive has been in harmonising copyright exceptions. The Directive has received much criticism. Copyright law can never be harmonised, it has been argued, when Member States are free to pick and choose their own exceptions.⁸⁶ However, it is submitted that this is not necessarily the case. Perhaps, it is possible to give too much credit to the drafters of this directive, but by drawing up such a piecemeal Article 5, they will no doubt achieve a great deal of harmonisation. Creating an incredibly powerful reproduction right in Article 2 with an equally powerful right of technological protection under Article 6, leaves Member States no other option but to restrict the number of exceptions in order to achieve the goal of the ISD. No government, knowing that copyright is a growing contributor to the country's

⁸² Article 6 of the Computer Directive – Council Directive 91/250/EEC of 14th May 1991 on the legal protection of Computer Programs – concerns decompilation.

⁸³ It states that any contractual provision contrary to Article 6(1) – relating to the normal use of the database by a lawful user – and Article 8 – concerning the rights and obligations of lawful users – shall be null and void.

⁸⁴ See Report 28th January 1999 on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 0628 – C4-0079/98 – 97/0359 9 (COD)) Rapporteur: Mr Roberto Barzanti. Amendment suggested by the Committee on the Environment, Public Health and Consumer Protection. Amendment 30 relating to Chapter II, Article 5(4a) (new): 'Any contractual provision contrary to Article 5 shall be null and void.'

⁸⁵ Article 7 of the Computer Directive addresses the use of technological protection measures.

⁸⁶ Bernt Hugenholtz, 'Why the Copyright Directive is unimportant and possibly invalid' Hugenholtz sarcastically refers to Article 5 as the "piece de resistance of the directive", p. 500 and declares the Directive a "total failure" p. 501 Also T.C, Vinje, 'Should we begin Digging Copyright's Grave?'

GDP will wish to weaken the system by adopting exceptions that would be at odds with other members of the EU. To this end, France, Italy and Spain in indicating their disappointment with Article 5, have shown their intention to “ensure that the optional exceptions are interpreted strictly in order to prevent the risk of substantial disparities between Member States”.⁸⁷ In short, whether intended or not, the EC has created a directive which offers awkward exceptions to very clear exclusive rights therefore encouraging them to turn their back on any realistic treatment of Article 5 and nudging them towards a truly rights maximalistic style of harmonisation. In this respect, the directive is admittedly more of a success.

Article 6 – Obligations as to Technical Measures⁸⁸

This set of provisions concerns technical measures and is therefore more relevant to the digital environment. Although not directly related to the exceptions, as under Article 5, a slight digression into Article 6 demonstrates just how much the freedom to introduce exceptions is being crushed between a very strong reproduction right and the introduction of technological protection measures, the latter giving large copyright owning companies the power to impose technological restrictions thus effectively giving them “carte blanche to write their own copyright law.”⁸⁹ After all, there is little point in trying to adapt exceptions to the digital environment if, technical protection measures prevent access to copyright works in the first place. Recital 51 appear to encourage right holders and users to come to some sort of voluntary arrangement. For example recital 51 states that:

The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member states should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take

⁸⁷ H.L. MacQueen, ‘Copyright and the Internet’ in ‘Law and the Internet’ L. Edwards and C. Waelde (eds.) Hart Publishing 2000 182-224, 215

⁸⁸ See Joanna Perritt, ‘Protecting Technology over copyright: A step too Far?’ ENTL REV 2003, 14(1) 1-4

⁸⁹ eurorights.org: Your rights on line, ‘Why the EUCD is bad.’ <http://eurorights.org/eudmca/WhyTheEUCDIsBad.html>

appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.

However, failure to reach such voluntary measures is not illegal. Indeed, there is not much for the user to fall back on. It is up to the Member State government to intervene, and this may lead to a very tiresome process. The provision related to the above recital is Article 6(4). It is designed to ensure that despite the tough technological protection measures, the set of exceptions encompassed in Article 5 is respected. The first paragraph states that, in spite of the legal protection against the circumvention of any effective technological measures,⁹⁰ if right holders fail to agree on voluntary arrangements with copyright users, thus allowing the latter to benefit from the exceptions in Article 5(2)(a), (2)(c), (2)(d), (2)(e), 3(a), 3(b) or (3)(e), then the Member State may intervene.⁹¹ The second paragraph contains a similar instruction relating to Article 5(2)(b).⁹² This seems to ensure that, despite the strict technological protection measures of Article 6, the exceptions under Article 5 will survive. However, there are a couple of problems with this approach. Firstly it relies on the intervention of the Member State should the copyright owner be abusing his or her position. Secondly and more fundamentally, the fourth paragraph of Article 6(4) states clearly that should there be a license agreement, making the work available to the public, already in place, the first and second paragraphs

⁹⁰ See Directive 2001/29/EC Article 6(1)

⁹¹ The first paragraph of Article 6(4) reads: Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

⁹² The second paragraph of Article 6(4) reads: A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

of Article 6(4) do not apply.⁹³ In other words it is quite possible to contract out of the use of limitations and users will be forced to rely on contracts drawn up by rights holders who are in a very strong bargaining position. In all therefore, the Information Society Directive falls woefully short of providing any sort of meaningful balance between the rights of the user and the rights of the owner and poorly prepares Member States for the rapidly changing environment of the digital age.

Implementation of the Copyright Directive into UK Law: Back to the Future.

In 1911, the call was for a simplification and codification of the law on copyright. In 1956, the government was more concerned with consolidating the legislation in light of improved reprographic technology, whereas the 1980s witnessed a drive towards the commercialisation of copyright. In implementing the ISD, however, the impetus appears to be the threat of piracy. That is, the Directive was not so much concerned with *creating* an environment in which the copyright industry could flourish, but responding to the concerns of business in order to protect an already strong market position.⁹⁴ Acutely aware of the supposed damage this phenomenon is causing the music, software and film industry, the British Government stressed the implementation of Directive 2001/29/EC as way of combating this growing problem. If the Patent Office is to be believed, the recording industry witnessed an increase in the number of counterfeit CDs by 150% in the year 2000.⁹⁵ The Patent Office insists that current UK legislation provides a sound

⁹³ The provisions of the first and second subparagraphs shall not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

⁹⁴ See Vinje, 'Should we begin Digging Copyright's Grave?' p. 558 There is nothing new in kowtowing to the might of the media industries, which rely so heavily on strong copyright protection. Jessica Litman complains that in the US, "congress for its part, has since the turn of the century been delegating the policy choices involved in copyright matters to the industries affected by copyright." See Litman, "The Exclusive Right to Read," 13 *Cardozo Art & Entertainment Law Journal* 29 (1994)

⁹⁵ It was estimated that the number of fake CDs stood at around 2.9 million. It was further estimated that piracy was costing the UK recording industry £20 million and that such piracy was responsible for a reported fall in world sales by 7%. See Annex C of Draft Regulatory impact Assessment, paragraph 3.2 www.patent.gov.uk/about/consultations/eccopyright/annexc.htm

basis to meet the challenges of new technology and that all that is required is a number of “adjustments”.⁹⁶ Indeed it is the Patent Office’s submission that:

“It has always been the government’s intention to maintain as far as possible the existing exceptions regime in the UK and thereby continue the present balance in the law between the interests of all the key Stakeholders.”

Nevertheless, it is submitted that these adjustments produce a large overall effect, especially when put in context with the other changes made as a result of Article 2 and Article 6, leaving the ‘fair dealing’ defence in a very weakened state. The current ‘fair dealing’ provisions have been amended several times since 1988 in answer to Directive 91/250/EEC on the legal protection of computer programs⁹⁷ and Directive 96/9/EEC on the legal protection of databases.⁹⁸ The former in particular curtailed the use of s29. As for the proposals of the Information Society Directive, regarding the implementation of Article 2, there is very little to be said. Section 17 of the present 1988 Act is already of such an all-encompassing nature so as to not require any amendment as such. Indeed s17(6) ensures that any kind of copying no matter how insignificant does not escape.⁹⁹ The implementation of Article 5.1, which is expressed as s31A in the proposed CDPA 1988,¹⁰⁰ transposes the narrowness of the Directive into British legislation. However, the important changes relating to ‘fair dealing’ are brought about by Article 5.2 – 5.5.

⁹⁶ The implementation of the *aquis communautaire* – made up of the computer and database directives – already provides a firm basis for bringing UK law within the bounds of the information society directive, whilst the Copyright Designs and Patents Act section 296 goes further than most other countries regarding the issue of technological protection measures.

⁹⁷ Directive 91/250/EEC was implemented by SI 1992/3233 and introduced ss4 into s29. See appendices.

⁹⁸ Directive 96/9/EC was implemented by SI 1997/3023 and amended ss(1) of s29 and introduced ss(1A) as well as ss5. See appendices.

⁹⁹ s17(6) reads “copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.”

¹⁰⁰ Section 31A reads “copyright in a literary work other than a computer program or database or in a dramatic musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film is not infringed by the making of a temporary copy which is transient or incidental which is an integral and essential part of a technological process and the sole purpose of which is to enable

- a) a transmission of the work in a network between third parties by an intermediary or
- b) a lawful use of the work

Changes to Research and Private Study

One of the more significant modifications to the CDPA 1988 concerns the research and private study provision contained in s29 of the Act. The original provision has been split into two discrete exceptions. Article 5.3(a) introduces a restriction similar to the one pushed for during the passage of the 1988 Act. The proposed amendment to section 29(1) reads:

s29.—(1)“Fair dealing with a literary dramatic, musical or artistic work for the purposes of research for a non commercial purpose does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement.”

Subsection 1(A) would be deleted and the following new subsections would be added

(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

The private study exception has been isolated to s29(1)(C), which reads:

(1)(C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.¹⁰¹

However, all of the old problems of fifteen years ago may well return to haunt the government if the CDPA is amended in this way. It is still not clear when the research is to be considered non commercial – a problem with which Lord Beaverbrook spent some time trying to remedy in 1988.¹⁰² It will be remembered that during the passage of the

and which has no independent economic significance. (In schedule 2 of the CDPA 1988 a similar provision will be added by a new s3A.)

¹⁰¹ Adheres with Directive 2001/29/EC Article 5.2(b)

¹⁰² See Chapter 3 at page 7, Copyright Designs and Patents Bill 1988 House of Lords, Vol. 491 Committee Stage at col. 99

original 1988 Act, it was proposed that only non commercial research should be excepted under the ‘fair dealing’ defence and that this proposal was rejected. However, it was only dismissed as it was thought that it would prove to be an unbearable burden on enterprise; that it would shackle business making it impossible for British industry to compete.¹⁰³ Times have changed and it could well be that, the digital environment allows this provision to be implemented effectively. The growth of online resources paid for via license agreements means that it is far easier to charge the research departments of large corporations. However, one cannot escape the fact that the amendment to s29 will place a massive financial burden on the research environment. Disagreeing with the Patent Office’s contention that the effect of the new law would be broadly neutral, the British Library predicted that the cost of obtaining copyright clearance for higher education and further education would rise by fifty per cent whilst the cost to commercial organisations would be an extra two million pounds.¹⁰⁴

Changes to Criticism and Review

The amendments in this area are important not only because section 30 of the CDPA 1988 is the most heavily relied upon provision of ‘fair dealing’ but also because it has recently involved more interesting issues of freedom of speech and the public interest. Any alterations to this provision could have serious implications for those who rely on s30 such as members of the press. The proposed s30(1) reads:

“Fair dealing with a work for the purpose of criticism or review of that or another work or of a performance of a work does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.”

In ss1A a work has been made available to the public if it has been:

¹⁰³ See Chapter 3 at page 6, per Lord Mottistone, Copyright Designs and Patents Bill 1988 House of Lords, Vol. 491 Committee Stage at col. 91

¹⁰⁴ Submission made by the British Library to the Patent Office Consultation on the Implementation of Directive 2001/29/EC in the UK. The Chartered Institute of Librarians and Information Professionals (CILIP) also stated that s29 will cause “great problems to users.”

“made available by any means including

- a) issue of copies to the public
- b) made available by means of an electronic retrieval system
- c) made available by rental or lending
- d) performance or exhibition
- e) communication of work to the public

but in determining generally for the purposes of that subsection whether a work has been made available to the public, no account shall be taken of any unauthorised act.

At first blush, it appears that this amendment may be of major significance when interpreted by the courts. The proposed s30(1) makes it clear that the copyright owner’s work must be published if it is to be criticised under ‘fair dealing’. Since it was originally the case that ‘fair dealing’ applied to published and unpublished works, it would therefore mean that cases involving situations such as *Hubbard v Vosper*¹⁰⁵ could be decided differently. In *Hubbard v Vosper*, Denning LJ accepted that though a work may not be published to the world at large, it might have been circulated to a wide enough group to be considered in the public domain and therefore be subject to the defence of ‘fair dealing’. The issue is, whether this work is considered to have been ‘published’ as such. If Lord Denning was saying that in distributing the work to a wide enough circle the work was therefore published, then the amendment to s30 may make no difference to the interpretation of the provision given by the courts. However, if it was generally considered by the judiciary that, *in spite of* being unpublished, by communicating it to a sufficient closed group of people, it was still available to be criticised under ‘fair dealing’, then the new s30 will have a significant result. The amendment does not really clarify the situation, as it does not state *who* are to be considered members of the public, it merely talks about the *method* of issuing the work to the public. Either way, however, it may be that on reading the provision judges will be influenced to take a stricter approach simply because the statute stresses that a particular work must be published if the defence of ‘fair dealing’ is to be successful. Indeed, the courts seem to have already arrived at this position regarding Aldous LJ’s decision in *Hyde Park v Yelland*.¹⁰⁶

¹⁰⁵ [1972] 2 QB 84

¹⁰⁶ [2000] EMLR 363, 378

Furthermore, an amendment which appears to build on the preceding modification is the addition of the phrase ‘in determining generally for the purposes of that subsection whether a work has been made available to the public, no account shall be taken of any unauthorised act’. The suggestion is, therefore, that should some individual place a particular copyright work into the public domain, for example by an unauthorised leak, the work is not to be considered to be published and as a result subject to the ‘fair dealing’ defence. It follows that in a case similar to *Ashdown*¹⁰⁷ and *Hyde Park*, a newspaper could not reprint any unpublished work which had been made available in an underhand manner. This could be construed as a curtailment of the freedom of the press. The amendment no doubt ensures that the press will not be able to rely on ‘fair dealing’ for any real investigative journalism and will instead have to mount a defence in ‘public interest’. However, the effect of this modification is to further bolster the idea that copyright can be used as a right of private censorship.

Considering the changes made to s30, the amendments do not seem to add so much in the way of clarity. It is clear that the main thrust of these amendments is that all commercial uses of a copyrighted work should be paid for, the original work has to be published in order to be subject of ‘fair dealing’ and that any use of a right holder’s work must be acknowledged. Such changes are found in the provisions of s32 relating to things done for the purposes of instruction or examination.¹⁰⁸ More puzzling is the introduction of ‘fair dealing’ into s32 (2B),¹⁰⁹ as it does not appear to add much. Perhaps it gives a little

¹⁰⁷ [2001] Ch. 685 at First Instance; [2002] Ch.149 in Court of Appeal

¹⁰⁸ Section 32(2A) basically stresses that any use of a copyright work must be for non commercial ends. Section 2A states that the instruction given must be

- a) provided by an educational establishment or for a non commercial purpose
- b) If not provided by such an establishment must be for a non commercial purpose

¹⁰⁹ Copyright in a literary, dramatic, musical or artistic work which has been made available to the public is not infringed by its being copied in the course of instruction or of preparation, providing the copying is

- a) is a fair dealing with the work
- b) is done by a person giving or receiving instruction
- c) is not done by means of a reprographic method

more flexibility, but it is negligible. Another rather unnecessary amendment is section 67 of the CDPA 1988. It currently permits not-for profit bodies to raise money by playing sound recordings in public. However, it is now considered that the exceptions should only apply where the proceeds of any admission charge do no more than cover the costs of the event. Paragraph 15 of Schedule 2 has been similarly amended.

The Patent Office has clearly tightened up a great deal of the law but it is significant to point out that it has not gone as far as it could have done especially regarding the implementation of the three step Berne Test as encouraged by recital 44 and Article 5.5 of Directive 29/2001, originally contained in Article 9(2) of the Berne Convention. On the contrary, the Patent Office made it clear that:

“It is not proposed to introduce the test as such into UK Law as a general constraint on exceptions; rather it is proposed to continue with the existing practice in the Act of using the test as a standard in framing exceptions to rights.”

The UK has traditionally avoided writing Article 9(2) directly into the legislation. Perhaps this continual refusal is indicative of the reluctance to use the three-step test as a general test for all exceptions.

Having spent so much time commenting on the changes to the ‘fair dealing’ defence it is worth considering any changes that may have been brought about by the government to safeguard the defence in the digital environment. However, it is clear that little effort has been expended to this end. In implementing Article 6(4) with a new section currently labelled the XXX provision, the amendment merely states: The following new section would be added in an appropriate place in the Act, probably in part VII:

Remedy where effective technological measures prevent permitted acts.

d) accompanied by sufficient acknowledgement of a work.

XXX.—(1) Where the application of any effective technological measure to a copyright work other than a computer program prevents a person from benefiting directly from [*reference will be made here either to articles 5(2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b), (3)(e) of the Directive or to provisions of the Act covering the exceptions permitted under these articles*] in relation to that work, then that person may issue a notice of complaint to the secretary of State.

(2) The secretary of state may, following receipt of a notice of complaint, give to the owner of that copyright work or an exclusive licensee such directions as appear to the secretary of state to be requisite or expedient for the purpose of

- (a) establishing whether any voluntary measure or agreement relevant to the copyright work the subject of the complaint subsists ; or
- (b) (in the event it is established there is no subsisting voluntary measure or agreement) enabling the complaint to benefit from [those articles or sections]referred to in subsection (1) to which the complaint relates.

The problem with this provision apart from the fact that it has yet to be properly worded, is that the onus is completely on the individual user to make the complaint. One may well ask just how many complaint will the secretary of state have to receive before he acts upon an imbalance between the user and right holder. Further it is not clear that the Secretary of State will do anything at all. He is certainly not obliged to. In criticising this rather ambiguous provision, the LACA also pointed out that there was no representative body to which a class of users could make a complaint. Nor did there appear to be any procedure for appeal against the secretary of states decision. Indeed, there was no penalty for failure to comply with a direction from the secretary of state.¹¹⁰ All in all this is a very disappointing provision that undoubtedly leaves users unsure of where they stand.

Conclusions

The treatment of exceptions on an international level has undergone a marked change since the establishment of the Berne Union, which left the Member States a great deal of discretion. The delegates no doubt recognised that a unified set of exceptions could not

¹¹⁰ Submission made by the LACA to t the Patent Office Consultation on the Implementation of Directive 2001/29/EC in the UK.

be achieved in light of such a diversity in copyright culture across the board. Since the last revision of Berne in 1971, there has been a growing movement to achieve greater international copyright harmonisation. The ISD therefore builds on Berne, TRIPS and the WIPO Copyright Treaty to complete the *aquis communautaire*, and adapt copyright measures to the digital environment. However, unlike say the WIPO Treaty, which permitted member states to develop their own exceptions in the digital world, Article 5 of the Directive is very limiting. The Directive structures copyright along clear commercial lines. This is seen clearly with the blanket ban on commercial use in Article 5. The exhaustive list approach contained therein appears to be typical of European codes. Furthermore Article 5 encourages the use of license agreements. The argument that, due to its optional nature, Article 5 does not achieve harmonisation also may be weak. It has already been submitted that faced with such a strong reproduction right and robust technological protection measures, many Member States have already adopted a rights maximalist approach, which will in itself bring about a great deal of harmonisation.¹¹¹ However, the provisions in Article 5 have an important role to play. Hugenholtz highlights the importance of exceptions and states that instead of being seen as an exception to a rule, they should be regarded as important instruments in *fine tuning* the law of copyright.¹¹² There is a lot more to copyright than economic rights as the Green Papers pretended to recognise. It appears that the social and cultural differences between member states have in reality been ignored. It may even be argued that Article 5 openly conflicts with the freedom to develop new exceptions as granted by the Agreement Statements in the WIPO Copyright Treaty.¹¹³ Furthermore a real chance of adopting a set

¹¹¹ H.L. MacQueen, 'Copyright and the Internet' p. 215

¹¹² Bernt Hugenholtz, 'Fierce Creatures Copyright Exemptions: Towards Extinction.' In 'Rights Limitations and Exceptions: Striking a Proper Balance.' The IFLA / IMPRIMATUR CONFERENCE 30th-31st October, 1997 Institute for information Law, University of Amsterdam. Hugenholtz notes the existence of Article 10 and Article 8 of the ECHR as well as competition Law, but states that whilst these may be of assistance in helping to redress the balance between user and owner, it is better that copyright law contain such means of maintaining this balance within its own limits. He states that there are different categories of exceptions. Firstly, there are the fundamental rights, such as 'freedom of expression and information' and the 'right to privacy. These should always be protected. Then there are those exceptions of the general public interest such as those for educational purposes, as well as library privileges and archival exemptions. These present a more difficult problem, because advancement in reproduction technology has made copying so much easier. However if such exemptions promote innovation, then such exemptions should be maintained. "Diversity is the sine qua non for evolution".

¹¹³ Thomas Heide, 'The Berne Three-Step test and the proposed Copyright Directive,' p.108

of exceptions more suitable to the digital environment was lost in ignoring the reasonable amendments proposed by the Committee on the Environment.

In implementing the proposals of the Directive, the Patent Office expressed its desire to maintain as far as possible the existing exceptions. Clearly this has not been done. However, it is evident that in many ways the British copyright regime is already quite similar to the Directive. Section 17 is already as all encompassing as Article 2, whilst the blanket ban on commercial use was already something which had been debated with regard to s29 when the Copyright Designs and Patents Act 1988 was originally passed. A more active attitude to exceptions could have been hoped for. The Patent Office proposed no new exceptions as allowed by Article 5. There is still, therefore, no new provision that takes account of parody.¹¹⁴ Even though it is no doubt an important exception which should be protected. Of more concern is the rather dubious 'XXX' provision which seems a half hearted attempt at implementing Article 6(4) designed to protect exceptions in light of strong technological protection measures. From a purely practical point of view the most obvious gripe is that the CDPA 1988 has become something of an eyesore. The proposed amendments to 'fair dealing' alone produce such a mutilated set of rules that it will be difficult to make sense of them without the aid of an IP lawyer.¹¹⁵ The proposed restrictions on commercial research and the fact that a work must be published before a defence under s30 may be mounted could have a serious impact on the way cases are decided in the courts in future. Indeed, perhaps the most important impact will be one of perception and judicial response.

¹¹⁴ As provided for in Article 5(3)(k): use for the purpose of caricature, parody or pastiche

¹¹⁵ David Bainbridge, 'Implementing the Directive on Copyright in the Information Society' *Intellectual Property & IT law* Vol. 7 Issue 5 page 9

Conclusions

“It is as if every tiny exception has to be hard fought for, prised out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high immutable walls.”

Laddie J.¹

If the amendments proposed by the Patent Office are accepted, ‘fair dealing’ will be seriously weakened. As far as research is concerned it will no longer be possible to regard s29 of the Copyright Designs and Patents Act 1988 as a true royalty free exception. The same may well be said of s30 in future if the jurisprudence of *Ashdown* is followed.² Fair dealing, as previously stated could become a question of ‘fair compensation’. The changes which will no doubt follow as a result of the European Copyright Directive – including the rather feeble attempt to protect free use in the digital environment in light of technical protection measures through the strangely termed XXX provision – can only drive another nail into the coffin of British ‘fair dealing’. The defence has been increasingly undermined over the years in favour of a copyright system that jealously guards the right of the owner to exploit the commercial potential of his copyright to the full. However, copyright is not simply a commercially oriented right. The fact that this had been recognised in the early cases of *Sayre v Moore*,³ *Cary v Kearsley*⁴ and *Hanfstaengl v Empire Palace*,⁵ makes the present state of affairs all the more frustrating. It is difficult to know exactly where to place the blame. On the one hand recent case law indicates that the judiciary could have been far more protective of user interests when deciding the two cases of *Hyde Park* and *Ashdown*. After all, ‘fair dealing’ has been seen

¹ Laddie, ‘Copyright: Overstrength, Over-regulated, Over-Rated?’ [1996] EIPR 253, 258

² *Ashdown* [2002] p. 173

³ (1785) 1 East 361

⁴ (1802) 4 Esp 168

⁵ [1894] 3 Ch. 109

as the remit of the courts.⁶ However, it is perhaps fair to state that when codifying the defence in 1911, Parliament hardly chose a structure which favoured expansive interpretation. The fact that the defence was limited in its operation to five discrete categories could have been said to have hamstrung the courts from the very start. Nevertheless, although a great deal of case law under the 1911 and 1956 Copyright Acts was hardly inspiring, the judiciary appeared to demonstrate a wider appreciation of the copyright dynamic when deciding the media industry orientated cases under the 1988 CDPA. It seemed that the courts applied the ‘fair dealing’ defence with far greater gusto in *BBC v British Satellite Broadcasting*, *Time Warner* and *Pro Sieben* than in any previous decisions. As a result, however, the outcome of *Hyde Park* and *Ashdown* seems all the more restrictive and lends weight to Jonathan Griffith’s assertion that perhaps the courts have lost their nerve in applying ‘fair dealing’.⁷ If this is true, the situation is all the more serious. It is clear that if the balance between owner and user interests is to be redressed, it will only come as a result of judicial activism. The tenor of the debates surrounding the passage of the 1988 Act, not to mention the proposed amendments of the Patent Office in implementing the Information Society Directive confirm that a highly protectionist, rights maximalist approach is irreversibly entrenched in British copyright legislation.

However, one may wonder whether the Directive adopts a path so different from the one which the legislature was so keen to take fifteen years earlier. Indeed, this protectionist approach is not merely characteristic of Europe, but is a worldwide phenomenon. As Wing and Kirk comment, it seems that recently a copyright arms race has developed between the two trading blocks of Europe and the US.⁸ Perhaps in this environment, it is inevitable that ‘fair dealing’ will struggle to survive. A brief look across the Atlantic shows that even the open-ended,⁹ flexible¹⁰ and constitutionally endorsed¹¹ defence of

⁶ See above p. 10

⁷ Griffiths, ‘Copyright Law After Ashdown’ p. 262

⁸ Wing and Kirk, ‘European /US Copyright Law Reform: Is a Balance Being Achieved?’ [2000] IPQ 138

⁹ USC s107 is not restricted to an exhaustive list of purposes, but is left as a broad defence to be interpreted in light of four factors. See above pp. 62 – 63

'fair use' has a few dark clouds on the horizon. The first is that, as has been mentioned before, it is not clear whether 'fair use' is compatible with Berne. Ruth Okediji has already warned that since signing on to the international union in 1989 it is unclear whether s107 is compatible with Article 9(2).¹² The second is the Digital Millennium Copyright Act 1998, which like Article 6 of the European Copyright Directive covers the issue of Technological Protection Measures.¹³ Despite these genuine concerns, however, the fact remains that 'fair use' remains a far more robust defence than 'fair dealing'. Though it could be argued that the growth of inexpensive license agreements could undermine the 'market failure' argument upon which s107 is based, it is unlikely that 'fair use' will disappear as it is so firmly entrenched as a rule of social policy within the copyright regime.¹⁴

Perhaps it would be more interesting to investigate a similar jurisdiction to that of the UK assessing the way it has maintained the copyright balance. It is to be remembered after all that the 1911 Act provided the foundation for a number of intellectual property legal systems.¹⁵ One in particular, though apparently restricted by the British brand of 'fair dealing', has done its best to ensure that a balance is struck between copyright user and owner as it enters the digital age and may have further radical plans for 'fair dealing' in the future.

The Australian brand of 'fair dealing', contained in section 40-43 of the 1968 Copyright Act, is indeed similar to that of the UK. As regards common law jurisprudence, cases

¹⁰ *Campbell v Acuff Rose* 510 US 569 (1994) demonstrates that although the economic competition element is a serious factor it is by no means always the overriding concern. The case demonstrated the flexibility of the defence of 'fair use' as it offered protection to works of parody.

¹¹ US Constitution, Art 1 ss8 cl. 8

¹² See above p. 63, note 55

¹³ Nimmer, 'A Riff on Fair Use in the Digital Millennium Copyright Act,' *University of Pennsylvania Law Review* Vol. 148 Jan. 2000 No. 3 pp. 673-742

¹⁴ J E Cohen, 'WIPO Copyright Treaty Implementation in the US: Will Fair Use Survive?' [1999] *EIPR* 236

¹⁵ Canada, New Zealand and India are all examples of nations whose copyright law is still based on the 1911 Copyright Act.

such as *De Garis v Neville Jeffress Pidler*,¹⁶ *John Fairfax*¹⁷ and the most recent decision of *TCN Channel Nine v Network Ten*¹⁸ draw heavily on British precedent. However, on studying the relevant legislation relating to 'fair dealing', it is clear that there are a number of differences.¹⁹ Like the UK, Australian 'fair dealing' encompasses a similar set of closed purposes.²⁰ Although Australia's copyright legislation was clearly based on the British Copyright Act of 1911, there are a few differences between the two nationalities, brought about by a more genuine attempt to guard user interests and which seem to be influenced by developments in copyright law in the US. For instance, in 1976 the Franki Commission appeared to take note of the debates surrounding the yet to be passed 1976 US Copyright Act containing s22 relating to the defence of 'fair use'.²¹ The Franki Commission recommended the introduction of four factors specific to the research and study provision to aid judges in deciding whether the reproduction could be considered 'fair'. These guidelines have remained to the present day and are very similar to the four general principles laid out in s107. Another amendment proposed by the 1976 Commission and accepted by the government²² led to the dropping of the word 'private' from 'research and private study'.²³ It was thought that there was little point in the distinction made in the British legislation. Whilst the debates surrounding the passage of the 1956 British Copyright Act indicated a real worry concerning the increase of copying in education since the development of advanced reprographic technology, the Franki Commission accepted there would be a degree of photocopying for educational purposes, but as long as it was kept in check by 'fair dealing', the eradication of the '*private study*'

¹⁶ (1990) 18 IPR 292

¹⁷ *Commonwealth of Australia v John Fairfax & Sons Ltd.* (1980) 147 CLR 39

¹⁸ [2002] FCA 146 (Fed Court Aus)

¹⁹ For details of the Australian legislation see Appendix.

²⁰ Though s42 refers to reporting news instead of current events as in the CDPA 1988 the Australian provision has been interpreted broadly in *Commonwealth of Australia v John Fairfax & Sons Ltd.* (1980) 147 CLR 39 per Mason J There is also a separate provision relating to reproduction for the purpose of judicial proceedings or professional advice in s43.

²¹ Franki Commission paragraph 2.57

²² These proposals were brought in through the Copyright law Amendment Act of 1980.

²³ Franki Commission, paragraph 2.64

exception could not cause copyright owners any real harm.²⁴ There is therefore a real indication at least that the Australian defence of ‘fair dealing’ is constructed slightly more in favour of the copyright user. Moreover, the government seems to have taken this line right through to the digital age.

Just as both the UK and US have had to adopt changes to adapt their law to the digital environment, thus bringing their own copyright regimes into line with the international agreements of the WIPO Copyright Treaty as well as the WIPO Performances and Phonograms Treaty, Australia saw it was necessary to follow suit introducing the Digital Amendment Act 2000 which came into force on the 14th March 2001.²⁵ However, unlike the recommendations of the Patent Office, implementing the Information Society Directive, which clearly tipped the scales in favour of the copyright owner, the Australian government did its best to maintain a clear balance between owner and user. So whilst it was recognised in the second reading of the Bill that the protection of intellectual property through copyright was vital to Australia’s new economy,²⁶ it was also made clear that:

“the Bill will contain an important package of exceptions and they, as far as possible, will replicate the balance struck between the rights of owners and the rights of users as they apply in the print environment.”²⁷

Indeed the whole balance of the Act is different as unlike the copyright directive, the centrepiece of the DAA is not a strong reproduction right as in Article 2 of the European Directive, but the right of communication to the public, which is based on Article 8 of the WIPO Copyright Treaty and replaces the former broadcast and diffusion rights. This in itself displays a more positive attitude towards user interests as the focus on the communication right “directly addresses the connection between the author/copyright

²⁴ *Ibid.*

²⁵ Though the Act is not a direct endorsement of WIPO as Australia is not a signatory to it.

²⁶ Copyright (Digital Agenda) Bill 1999 House of Representatives Second Reading, June 27th 2000 at page 18342 per Mr. McClelland.

²⁷ In *ibid.* page 18343

holder and the public audience and draws attention to parties on either side of the copyright balance.”²⁸ Furthermore, the government made a genuine effort to adapt exceptions that had existed in the analogue world into the digital environment. So library and archive exceptions as well as license schemes were adapted accordingly.²⁹ Most importantly, ‘fair dealing’ was modified to function in the digital environment also. This included the reasonable portion provision of s40(3).³⁰

The DAA is not without its drawbacks, however. Just as Article 6 of Directive 2001/29/EC and s1201 of the US DMCA has left copyright owners perplexed regarding the matter of technological protection measures, similar problems have arisen in Australia. Tanya Alpin mentions for instance that although the DAA does make provision for certain acts which will not be considered an infringement,³¹ no reference is made to ‘fair dealing’. On the other hand, Simon Fitzpatrick argues that this is of no moment. In comparing the DAA with the American DMCA, he observed that the TPMs of the former piece of legislation were not as strict as they focus on the preparatory activities such as manufacture and supply and not on the act of circumvention itself as with the DMCA and indeed Directive 2001/29/EC.³²

All in all a concerted effort has been made to safeguard fair dealing in the digital environment. Indeed, in comparing the European Directive, to which UK legislation must adhere, the Australian Digital Millennium Act, Fiona MacMillan observes that it is the Information Society Directive which is responsible for “a considerable erosion of the

²⁸ Fitzpatrick, ‘Copyright Imbalance: US and Australian Responses to the WIPO Digital Copyright Treaty,’ [2000] EIPR 214-228, 223

²⁹ Regarding library and archive exceptions see s49, s50, s51A, s51AA, s110A and s110B; Regarding statutory licences see Part VA, and Part VB of the Digital Amendment Act 2000

³⁰ See s10(2A), (2B) and (2C), which applies the reasonable portion test to digital copying.

³¹ Tanya Alpin, ‘Contemplating Australia’s Digital Future: The Copyright Amendment (Digital Agenda) Act 2000,’ [2001] EIPR 565-575, 574. Provision is made for the supply of circumvention devices to be used regarding computer programs (s47D, s47E and s47F), library and archives (s49, s50, and s51A), Crown Use (s183) Parliamentary Use (s48A) and the reproduction and communication of works by educational institutions assisting people with disabilities (Part VB).

³² Fitzpatrick p. 224

traditional exceptions allowing royalty free copying”.³³ A glance at the reformed 1968 Australian Copyright Act reveals that unlike the amendments proposed for the CDPA 1988, there is no restriction on commercial research, nor has ‘fair dealing’ been statutorily limited to published works.³⁴

However, the reason for mentioning Australia is not simply because in comparison to the UK they seem to have preserved ‘fair dealing’ to a greater extent, but also because there seems to be a drive to strengthen the defence even further. This is certainly the impression given by the recent Copyright Law Review Committee report on simplifying the 1968 Act.³⁵ The Report was conducted against the background of the passing of the DAA and reveals a very different tack on adapting exceptions for the digital environment. The CLRC sees it as vital that the ‘fair dealing’ provisions should be adapted in order to cope with the new digital environment. To this end the Committee feels that ‘fair dealing’ should be afforded greater flexibility.³⁶ In its report, it regarded that free flow of information as important to the political, economic and social life as well as the education of all Australians.³⁷ In a provision which could completely alter the ‘fair dealing’ defence, the CLRC suggests that ‘fair dealing’ should not be limited to an exclusive set of purposes as such a defence would be difficult to apply to the evolving technologies of the twenty first century.³⁸ The main proposals involve an expansion of ‘fair dealing’ provisions to an open-ended model. Although ‘fair dealing’ would still list the four discrete defences of research and private study, criticism and review and news reporting, it would also leave the defence open to cover other actions of a user should they develop. The four guiding factors that previously only marshalled s40,³⁹ are moreover to be

³³ Fiona Macmillan, ‘Striking the Copyright balance in the Digital Environment,’ *International Company and Commercial Law Review* 1999 10(12) 350-360, 359

³⁴ See Appendices, p.141

³⁵ Copyright Law Review Committee: *Simplification of the Copyright Act 1968 (Commonwealth of Australia)* September 1998. The Report can be obtained at: <http://clrc.gov.au/www/clrHome.nsf/AllDocs/>

³⁶ In *ibid.* Chapter 6, paragraph 6.04

³⁷ In *ibid.* at paragraph 6.17

³⁸ In *ibid.* at paragraph 6.07

³⁹ Section 40 covered research and study.

applied generally to all applications of the 'fair dealing' defence. The result would be an exception which is "akin to, but more precise, than the open-ended fair use".⁴⁰

The amended 'fair dealing' provision would read:⁴¹

- 1) Subject to this section a fair dealing with any copyright material for *any* purpose, *including* the purposes of research, study, criticism, review, reporting of news and professional advice by a legal practitioner, patent attorney or trade mark attorney is not an infringement of copyright.⁴²
- 2) In determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following.
 - a) the purpose and character of the dealing
 - b) the nature of the copyright material
 - c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
 - d) the effect of the dealing upon the potential market for, or value of, the copyright material; and
 - e) in a case where part only of the copyright is dealt with – the amount and substantiality of the part dealt with considered in relation to the whole of the copyright material.
- 3) The use of a literary, dramatic, musical or artistic work or a cinematograph film, in the course of reporting the news by means of photography, communication to the public or in a cinematograph film shall be a 'fair dealing' only if that material forms part of the news being reported.

It was also proposed that the following provision be substituted for s40(3):⁴³

- 1) A dealing with copyright material being a literary, dramatic or musical work or an adaptation of such a work, for the purpose of research or study, being a dealing where:
 - a) the copyright material is contained in an article in a printed periodical publication – of the whole or part of the copyright material, or

⁴⁰ Report of the Copyright law Review Committee: paragraph 6.10

⁴¹ In *ibid.* at paragraph 6.143

⁴² Emphasis added

⁴³ Report of the Copyright law Review Committee: paragraph 6.144

- b) the copyright material is contained in a printed published edition of 10 pages or more than a 'prescribed portion' of the copyright material,

shall not be an infringement of copyright in that copyright material.

As the proposed amendment shows, 'fair dealing' would no longer be restricted to a closed set of exceptions. The provision would cover "any purpose, *including* the purposes of study, criticism, review, reporting of news." The CLRC also suggested the removal of the requirement of sufficient acknowledgement in relation to 'fair dealing' for the purpose of news reporting.⁴⁴ The Committee was well aware that the digital environment would enable copyright users to monitor their works even more closely through license agreements and the like. Nevertheless, it was adamant that this contract culture did not justify the limitation of the 'fair dealing' defence in any way.⁴⁵ Therefore, a proposal from the Copyright Agency Ltd. to replace free use with license agreements was firmly rejected.⁴⁶ There is no doubt that these are remarkable proposals at once simplifying, increasing the scope and strengthening the 'fair dealing' defence and with it the position of the copyright user in general. As Ricketson puts it, "the exceptions report can be likened to an enthusiastic sheep dog rounding up all the disparate and specific copyright exceptions into the one corral entitled 'fair dealing'."⁴⁷ One possible problem is that such a broad defence would immediately clash with s9(2) of the Berne Convention. However, the CLRC shrugged off these issues,⁴⁸ saying that exceptions could still be confined to special cases. Furthermore, it cited Article 10 of the WIPO Treaty, which clearly permits Member States to adopt appropriate new exceptions to copyright in the digital environment.

Lord Mansfield's dicta in *Sayre v Moore* recognised as long ago as 1785 that there was a critical balance to be observed in the copyright regime. The defence of 'fair use' or 'fair

⁴⁴ In *ibid.* paragraph 6.11

⁴⁵ In *ibid.* paragraph 6.19

⁴⁶ In *ibid.* paragraph 6.22

⁴⁷ Sam Ricketson [1999] EIPR 537 at 542

⁴⁸ Report of the Copyright law Review Committee: paragraph 6.14

dealing' as it became later was a valuable tool in maintaining this delicate equilibrium. However, over the years its ability to function effectively was eroded and the dicta of the old case law forgotten. British 'fair dealing' is in a fragile state and the proposals for implementing the European Directive will not improve the situation. If there is to be any improvement in its fortunes it will undoubtedly come from the courts, from more liberal minded judges such as Laddie and Jacob JJ. Time will tell if they can claw back a little ground. But elsewhere perhaps the future of this defence is not quite so bleak. It may be a long while till the Australian government responds to the CLRC's report. Nevertheless, the fact that, despite the arrival of the digital age and the competition between Europe and the US, Committees such as the CLRC are engaging in a more radical review of copyright exceptions demonstrates that not all the jurisdictions have forgotten the words of Lord Mansfield nor are prepared to allow the 'fair dealing' to be bullied out of all existence.

Appendix

UK LEGISLATION

The 1911 Copyright Act

2(1) Copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is by this Act conferred on the owner of the copyright: provided that the following acts shall not constitute an infringement of copyright:

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary

The 1956 Copyright Act

6(1) No fair dealing with a literary, dramatic or musical work for the purposes of research or private study shall constitute an infringement of copyright in the work.

(2) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work, if it is for the purposes of criticism or review, whether of that work or of another work and is accompanied by a sufficient acknowledgement.

(3) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of reporting current events –

- a) in a newspaper, magazine or similar periodical or
- b) by means of broadcasting, or in a cinematograph film, and in a case falling within paragraph (a) of this subsection, is accompanied by a sufficient acknowledgement.

The Copyright Designs and Patents Act (1988)

Research and private study.

29.—(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if –

- a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under s40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or
- b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

Criticism, review and news reporting.

30.—(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.

The Copyright Designs and Patents Act 1988 (With amendments relating to Directive 91/250/EEC on computer programmes and Directive 96/9/EEC)

Research and private study.

29.—(1) Fair dealing with a literary work, other than a database, or a dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(1A) Fair dealing with a database for the purposes of research or private study does not infringe any copyright in the database provided that the source is indicated.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if—

- a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under s40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or
- b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

(4) It is not fair dealing –

- a) to convert a computer program expressed in a low level language into a version expressed in a higher level language, or
- b) incidentally in the course of so converting the program to copy it, (these acts being done in accordance with s 50B (decompilation)).

(5) The doing of anything in relation to a database for the purposes of research for a commercial purpose is not fair dealing with the database.

30.—(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.

Relevant Draft UK Government Proposals for Implementing the Information Society Directive¹

Amendments relating to Article 5.1 of the Directive

The following new section would be added in Part I of the Act:

"Making of temporary copies

31A. Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable--

- (a) a transmission of the work in a network between third parties by an intermediary; or
- (b) a lawful use of the work;

and which has no independent economic significance."

The following new paragraph would be added in Schedule 2 of the Act:

"Making of temporary copies

3A. The rights conferred by Part II are not infringed by the making of a temporary copy of a recording of a performance which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable--

- (a) a transmission of the recording in a network between third parties by an intermediary; or
- (b) a lawful use of the recording;

and which has no independent economic significance"

Amendments relating to Articles 5.2 - 5.5

Section 29 (Research and private study)

Subsection (1) would be reworded as follows:

¹ Taken from the Patent Office website: www.patent.gov.uk/

"29.--(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement."

Subsection (1A) would be deleted, and the following new subsections would be added:

"(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

(1C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work."

Subsection (2) would be reworded as follows:

"(2) Fair dealing with the typographical arrangement of a published edition for the purposes of research or private study does not infringe any copyright in the arrangement."

[Subsections (3) and (4) would not be amended]

Subsection (5) would be deleted.

Section 30, Sch.2, para.2 (Criticism, review and news reporting)

Subsection (1) of s.30 would be amended by inserting additional wording after "acknowledgement" at the end, and adding a new subsection (1A), as follows:

"30. --(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.

(1A) For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including--

- (a) the issue of copies to the public;
- (b) making the work available by means of an electronic retrieval system;
- (c) the rental or lending of copies of the work to the public;
- (d) the performance, exhibition, playing or showing of the work in public;
- (e) the communication to the public of the work;

but in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act."

[Subsection (2) would not be amended]

Subsection (3) would be amended as follows:

"(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise."

Paragraph 2 of Schedule 2 would be amended as follows:

"2.--(1) Fair dealing with a performance or recording for the purpose of criticism or review, of that or another performance or recording, or of a work, does not infringe any of the rights conferred by Part II provided that the performance or recording has been made available to the public.

(1A) Fair dealing with a performance or recording for the purpose of reporting current events does not infringe any of the rights conferred by Part II."

AUSTRALIAN LEGISLATION

The Copyright Act 1968 (Prior to the amendments of the DAA)

Fair dealing for the purposes of research or study

S40(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work for the purpose of research or study does not constitute an infringement of the copyright in the work.

(2) For the purposes of this Act, the matters to which regard shall be had in determining whether a dealing with a literary, dramatic or musical work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or part of the work or adaptation constitutes a fair dealing with the work or adaptation for the purpose of research or study include

- 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.

(3) Notwithstanding sub-section (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the copying for the purposes of research or study –

- a) if the work or adaptation comprises an article in a periodical publication – of the whole or a part of that work or adaptation; or
- b) in any case – of not more than a reasonable portion of the work or adaptation,

shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

Fair Dealing for the purpose of Criticism or Review

S41 a fair dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review whether of that work or another work and a sufficient acknowledgement of the work is made.

S42(1) a fair dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work does not constitute an infringement of the copyright in the work if –

- a) it is for the purpose of, or is associated with the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
- c) it is for the purpose of, or is associated with the reporting of news by means of broadcasting or in a cinematograph film

(2) The playing of a musical work in the course of reporting news by means of broadcasting or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

(3) This section applies where a literary, dramatic, musical or artistic work, or an adaptation of a literary, dramatic or musical work, is caused to be transmitted to subscribers to a diffusion service in like manner as it applies where such a work or adaptation is broadcast.

Reproduction for purposes of judicial proceeding or professional advice

43(1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceedings or of a report of a judicial proceeding.

(2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by a legal practitioner or patent attorney.

The Copyright Act 1968 (following amendments of the DAA)

Fair dealing for the purposes of research or study

S40(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work for the purpose of research or study does not constitute an infringement of the copyright in the work.

(1A) A 'fair dealing' with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of or associated with an approved course of study or research by an enrolled external student of an educational institution.

(1B) In subsection (1A), the expression lecture notes means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.

(2) For the purposes of this Act, the matters to which regard shall be had in determining whether a dealing with a literary, dramatic or musical work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or part of the work or adaptation constitutes a fair dealing with the work or adaptation for the purpose of research or study include:

- f) the purpose and character of the dealing;
- g) the nature of the work or adaptation;
- h) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- i) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- j) 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.

(3) Notwithstanding sub-section (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the copying for the purposes of research or study –

- d) if the work or adaptation comprises an article in a periodical publication – of the whole or a part of that work or adaptation; or
- e) in any other case – of not more than a reasonable portion of the work or adaptation,

shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

(4) Subsection 3 does not apply to a dealing by way of reproducing the whole or a part of an Article in a periodical publication another article in that publication being an article dealing with a different subject matter is also reproduced.

Fair Dealing for the purpose of Criticism or Review

S41 a fair dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review whether of that work or another work and a sufficient acknowledgement of the work is made.

S42(1) a fair dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work does not constitute an infringement of the copyright in the work if –

- a) it is for the purpose of, or is associated with the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
- f) it is for the purpose of, or is associated with the reporting of news by means of broadcasting or in a cinematograph film

(2) The playing of a musical work in the course of reporting news by means of broadcasting or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

Reproduction for purposes of judicial proceeding or professional advice

43(1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceedings or of a report of a judicial proceeding.

(2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by

- a) a legal practitioner practicing as a patent attorney under the Patents Act 1990.
- b) a person registered as a trade mark attorney under the Trade Mark Act 1995

Proposal of the Australian Copyright Law Revision Committee

- 1) Subject to this section a fair dealing with any copyright material for *any* purpose, *including* the purposes of research, study, criticism, review, reporting of news and professional advice by a legal practitioner, patent attorney or trade mark attorney is not an infringement of copyright.²
- 2) In determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following.
 - a) the purpose and character of the dealing
 - b) the nature of the copyright material

² Emphasis added

- c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
 - d) the effect of the dealing upon the potential market for, or value of, the copyright material; and
 - e) in a case where part only of the copyright is dealt with – the amount and substantiality of the part dealt with considered in relation to the whole of the copyright material.
- 3) The use of a literary, dramatic, musical or artistic work or a cinematograph film, in the course of reporting the news by means of photography, communication to the public or in a cinematograph film shall be a 'fair dealing' only if that material forms part of the news being reported.

It was also proposed that the following provision be substituted for s40(3):³

- 1) A dealing with copyright material being a literary, dramatic or musical work or an adaptation of such a work, for the purpose of research or study, being a dealing where:
- a) the copyright material is contained in an article in a printed periodical publication – of the whole or part of the copyright material, or
 - b) the copyright material is contained in a printed published edition of 10 pages or more than a 'prescribed portion' of the copyright material,

shall not be an infringement of copyright in that copyright material.

S42(2) The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

Reasonable portion is defined non exhaustively in s10(2):

S10(2) if the page copied in relation to a published addition of a literary, dramatic or musical work

- a) do not exceed, in the aggregate, 10% of the number of pages in that edition.
- b) in a case where the work is divided up into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain the whole or part of a single chapter of the work

³ In *ibid.* paragraph 6.144

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