FAIR DEALING IN AUSTRALIAN COPYRIGHT LAW: RIGHTS OF ACCESS UNDER THE MICROSCOPE

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Copyright owners and users have conflicting interests in relation to the defence of 'fair dealing'. The defence allows users to reproduce substantial portions of copyright material without the need to seek permission to do so from copyright owners. The increasing use of digital technology, which allows copyright material to be easily reproduced and transmitted, has prompted calls by copyright owners for the repeal of 'fair dealing'. The rationale for 'fair dealing' and its applicability in the digital age are discussed, with a focus on the future of the defence and possible areas of reform.

I. INTRODUCTION

The extent to which the rights of copyright owners are limited by exceptions allowing free rights of use and access is likely to be one of the most important decisions made by the Copyright Law Review Committee (CLRC) during its current reference to examine the simplification and reform of the *Copyright Act* 1968 (Cth) (the Act).[1] Under Australian law, fair dealing allows for copyright material to be copied without permission for certain limited purposes, such as "research or study", provided it is "fair".[2]

However, for many copyright owners, fair dealing is perceived as a means by which the control over their material is reduced. This is arguably of most concern to copyright owners of material in digital form. Digitised material may be easily reproduced or manipulated, and then further disseminated by the user - potentially damaging the copyright owner's market. In some countries, these concerns over material in digital form have prompted calls for the strengthening of the copyright owner's rights and a concomitant reduction in the number of

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1 The CLRC must report to the Attorney-General by 30 June 1998

2 Section 40(1) of the Act

exceptions.[3] The opposing argument is that fair dealing has traditionally served an important role in copyright law and this role should be allowed to continue. Fair dealing allows users to access and reproduce portions of copyright material for purposes that many would acknowledge to be in the public interest. This, in turn, enhances the communication of ideas.

It is the purpose of this article to examine the fair dealing defence within Australian copyright law, and the future of the defence. More critically, this paper will investigate the rationale for fair dealing and query whether such justifications continue to exist. Although fair dealing in Australian law applies to subject matter other than works, the focus of this paper will be on the defence as it applies to works, and in particular literary works, for it is in relation to these works that much of the current debate has been focused.

II. THE DEVELOPMENT AND SCOPE OF FAIR DEALING

A. The Historical Basis

Even the very earliest of English copyright cases following the enactment of the *Statute of Anne* 1709 (UK)[4] recognised that there may be acceptable non-licensed uses of copyright material that are not infringing. It was clearly recognised that owning copyright in a work did not prevent anyone else from using the work; the right was simply to prevent the work's reproduction. In *Millar v Taylor*,[5] Aston J said that a purchaser of a book may "improve upon it, imitate it, translate it, oppose its sentiments: but he buys no right to publish the identical work".[6]

More specifically, English courts began to allow what became known as 'fair abridgment',[7] and a right allowing the illustration of a review with quotations.[8] It has been noted that this indicates an early acceptance that there existed a legitimate public interest in the creation of new, derivative works.[9]

Until 1911, copyright had been extended to other types of work, with statutory extensions and variations being made in an often ad hoc and clumsy manner. The *Copyright Act* 1911 (UK) (the 1911 Act) altered this trend and, in repealing many of the earlier statutes, became an all-embracing copyright statute. Under the *Copyright Act* 1912 (Cth) the 1911 Act was declared to be in force in Australia. This Act remained in force by virtue of s 4 of the Statute of

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3 See, for example, US Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure, The Report of the Working Group on Intellectual Property Rights*, September 1995 (the NII White Paper) and, in Australia, Commonwealth Copyright Convergence Group, *Highways to Change*, August 1994.

4 8 Anne c 19

5 (1769) 98 ER 201

6 *Ibid* at 226; see also at 251, per Mansfield LJ.

7 See, for example, *Gyles v Wilcox* (1749) 26 ER 489 and *Tonson v Walker* (1752) 36 ER 1017.

8 See, for example, *Mawman v Tegg* (1826) 38 ER 380 at 386, 387 per Eldon LJ.

9 G Fulton, "Fair Dealing in the Digital Age" (1996) 92 *Australian Copyright Council Bulletin* 8.

Westminster 1931 (UK) until 1968 (despite the UK Act being repealed in 1956).[10]

The 1911 Act expressly incorporated fair dealing terms for the first time, providing for "any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary".[11] This Act also removed the link between substantiality of reproduction and fair dealing. Previously the two concepts had been closely related, but in this Act an insubstantial reproduction of a work did not constitute infringement and fair dealing was only pleaded for a reproduction of a substantial part or more. This doctrine was repeated in the 1968 Act.

The replacement of the 1911 Act in Australia was largely a result of the 1959 report of The Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth (the Spicer Committee).[12] Among other things, this Committee recommended fair dealing be allowed for generally the same purposes as in the 1911 Act with the provisions also applying to artistic works.[13] The Spicer Committee also recommended the inclusion of a defence allowing the reproduction of a work for the purposes of judicial proceedings or for the purpose of a report of judicial proceedings.[14] These recommendations were subsequently included in the Act.

B. The Meaning of "Fair Dealing"

In Australia, as well as being 'fair', a dealing must be for at least one of the specific purposes set out in the Act.[15] This can be distinguished from the more general fair use defence set out in section 107 of the United States Copyright Act 1976.[16]

As with the scope of 'private use' exceptions in other jurisdictions, the drafting of the Australian 'fair dealing' provisions has been left broad. Only limited guidance is provided in the Act as to what is to be considered with respect to determining the 'fairness' or otherwise of a dealing. The advantages are, of course, that courts are provided with a broad discretion to shape the law based on varying factual situations.

For example, in *University of New South Wales v Moorhouse*, Chief Justice Gibbs said:

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10 By the *Copyright Act* 1956 (UK)

11 Section 2(1)(i)

12 *The Committee Appointed by the Attorney General of the Commonwealth to Consider What Alterations are Desirable to the Copyright Law of the Commonwealth*, AGPS, 1959 (the Spicer Report).

13 *Ibid* at [222].

14 *Ibid* at [109].

15 The purposes are: research or study (s 40), criticism or review (s 41), reporting news (s 42) and the giving of professional advice by a legal practitioner or patent attorney (s 43(2)) In the case of *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, it was argued, albeit unsuccessfully, that the Court should find a separate category of fair dealing for political discussion.

16 The fair use doctrine in the United States has also been described as an "equitable rule of reason" *Sony v Universal City Studios* (1984) 2 IPR 225 at 245

> The principles laid down by the Act are broadly stated, by reference to such abstract concepts as "fair dealing" (s 40) and "reasonable portion" (s 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case.[17]

In perhaps the most well-known description of fair dealing, Lord Denning in describing s 6 of the *Copyright Act* 1956 (UK) (fair dealing for criticism or review), stated:

> [I]t is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be 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 a 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 ... But after all is said and done, it must be a matter of impression.[18]

Such a wide discretion in the law does, however, have the disadvantage of reducing certainty for the application of the law by copyright users. Such uncertainty was at least partly the reason why the Copyright Law Review Committee on Reprographic Reproduction (the Franki Committee) recommended the introduction of the factors now set out in s 40(2), and the deeming provisions in s 40(3) of the Act. For reasons unstated, these factors only relate specifically to instances of a fair dealing for research and study. For the remaining categories of fair dealing with works, that is, a fair dealing for criticism and review (s 41), reporting news (s 42) and the giving of professional (legal or patent) advice (s 43(2)), there is no such legislative guidance. Any assistance as to the circumstances when dealing with a work for those purposes will be "fair" must be gleaned from the common law.

C. Fair Dealing for Research or Study - Section 40

The most contentious of the fair dealing provisions is s 40 of the Act which states that 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 work.[19]

Publishers, particularly those of educational material, believe that in a digital environment students could utilise s 40 to access, copy and transmit significant portions of their works without fear of infringement, possibly causing irreparable damage to the publishers' markets. This view is largely based on the changing use of copyright material by institutions of higher education. With their increasing need to attract student revenue, particularly from external students, the university sector has become a significant user of new technologies in recent years. By utilising digital technology, many universities have sought to provide access to student resources via on-line networks. This potentially allows students to make their own personal copies of course materials provided by the

17 (1975) 133 CLR 1 at 12.

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

19 Section 40(1).

institution as a fair dealing rather than the university paying for copies made and supplied to students under the statutory licence in Part VB of the Act.

Businesses also increasingly use digital reproduction and communication technologies to access information available on-line, or to scan print material into digital form, and provide access to employees to read and download via in-house servers. Many would purport to do so under s 40.

The provision has been defined according to the ordinary dictionary meanings of "research" and "study". In *De Garis v Neville Jeffress Pidler Pty Ltd*[20] (*De Garis*), the Federal Court relied upon the Macquarie Dictionary to define *research* as being:

> ... diligent and systematic enquiry or investigation into a subject in order to discover facts or principles: research in nuclear physics ...[21]

Similarly, *study* was defined as:

> (1) application of the mind to the acquisition of knowledge, as by reading investigation or reflection.
> (2) the cultivation of a particular branch of learning, science, or art: the study of law.
> (3) a particular course of effort to acquire knowledge: to pursue special medical studies...
> ...
> (5) a thorough examination and analysis of a particular subject...[22]

However Beaumont J in *De Garis* held that the purpose of the copier in that case (a media monitoring business) was not to conduct research or study, but was purely commercial - to supply a photocopy of material already published in return for a fee.[23] This was an activity the Court classified as being in the ordinary course of trade, and therefore not a fair dealing.

In the New Zealand case of *Television New Zealand Ltd v Newsmonitor Services Ltd* (*Television New Zealand*)[24] Blanchard J of the High Court of New Zealand found that, in the equivalent New Zealand provisions, a fair dealing for the purpose of research and study did not encompass activities in which the material is simply copied and passed on to others for the commercial profit of the copier.[25]

D. The Assessment of Fairness of Copies Made for Research and Study

A dealing with a work for the purpose of research or study that is not deemed to be fair by virtue of ss 40(3) and (4) will be assessed for fairness by reference to the factors set out in s 40(2). These factors are very similar to those that are applied in the US to assess the equivalent provision of 'fair use'.

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20 (1990) 18 IPR 292.
21 *Ibid* at 298, per Beaumont J
22 *Ibid* at 298-9.
23 *Ibid* at 298
24 (1994) 27 IPR 441
25 *Ibid* at 464, per Blanchard J

The factors set out in s 40(2) are:

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

Unfortunately the lack of relevant case law in Australia means that the factors do not provide any substantial assistance to either the user or owner of copyright material to judge what may be a fair dealing under this provision. Some guidance can, however, be obtained from certain US decisions. The US Supreme Court, for example, in their most recent determination as to fair use in *Campbell v Acuff-Rose*,[26] (*Campbell*) said that each factor is to be understood as a subset of the overall goal of copyright law: to bring intellectual enrichment to the public by giving authors limited control over their writings to provide them with the necessary inducement to create.[27]

(i) Purpose and Character of the Dealing

Ascertaining the purpose and character of a dealing with copyright material has often been more of a question of determining if there has been a commercial dealing with the work. It is commonly believed that a commercial use of a work prevents that use being considered to be a fair dealing. Although there is no doubt that a commercial use of a work is unlikely to favour a finding of fair dealing, this will not be conclusive.

The Australasian cases that best illustrate the intolerance with which courts will generally perceive purely commercial uses with copyright material are *De Garis* and *Television New Zealand.* In *De Garis*, considerable emphasis was placed on the commercial nature of the press clipping service. In that case, Beaumont J said that to have copied the whole of the work, and for a purely commercial purpose without making any payment, could not be characterised as a fair dealing.[28]

In *Television New Zealand*, a similar, although more confined, approach was taken by the High Court of New Zealand. In that case Newsmonitor Services taped broadcasts of television and radio news and current affairs programs, and supplied transcripts of extracts for its customers. Like the Federal Court in *De Garis*, the Court did not believe that the appropriation of copyright material for the profit of the media monitor amounted to a fair dealing. As Blanchard J stated in that case, "... news monitoring business is parasitic. Why should it have a free ride on a broadcaster?"[29] In both *De Garis* and *Television New Zealand*, it

26 114 S Ct 1164 (1994).
27 *Ibid* at 1171.
28 Note 20 *supra* at 302, per Beaumont J.
29 Note 24 *supra* at 466.

was important to the Courts that the copyright material was not being transformed, or used in the creation of a new work, but simply sold to customers.

The High Court of New Zealand in *Television New Zealand* was, however, sympathetic to a use of copyright material for research or study in a commercial setting, an approach that has not yet been tested in Australia. In obiter dicta, Blanchard J stated:

> So I conclude that a fair dealing for the purposes of research within s 19(1) can be something with a commercial end in view. Nor can I see any reason to exclude research for political purposes in the widest sense.[30]

The difficulty for courts adjudicating the research functions of a corporation in a digital environment will be the increased value that will be obtained from individual works if copied into a database. A central database of works in digital form networked to employees would become a considerable asset to a company. Being able to search, access and transmit the works is a significantly more powerful use of the copyright owner's intellectual property than that of employees merely photocopying the work and archiving a hard copy. As a consequence, the greater value of a digital copy in a database compared to a hard copy may weigh against a finding of fair dealing in virtually any commercial setting where such a use was being made.

(ii) Nature of the Work

This is perhaps the least contentious of the factors. It is generally accepted that dealings with works of a factual nature are more likely to be fair than dealings with works which are fictional.[31] Thus, copying from journals that include articles of a scientific nature may be more likely to be fair than copying from a work of fiction.[32]

It has been suggested that works not intended for publication are open to greater use as a fair dealing because they are not created for purposes compatible with the public benefit objective of copyright law,[33] but judicial authority would not appear to support this proposition.[34]

(iii) The Possibility of Obtaining the Work or Adaptation Within a Reasonable Time at an Ordinary Commercial Price

This is the one factor that is not included in the US fair use factors, and the reasons for its introduction into the Australian Act are difficult to ascertain. It would appear that where a work is commercially available, it will be more difficult for a dealing with the work to be fair. Obviously this is to ensure that copying of works for research or study does not impact too heavily on the market for the original work. What is less clear is how the copier is to know if they

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30 *Ibid* at 463.

31 This is most likely because 'facts' are not seen as original and therefore ineligible for protection, see the NII White Paper, note 3 *supra* at 14.

32 *American Geophysical Union v Texaco* (1994) 29 IPR 381 at 399

33 Australian Council of Libraries and Information Services (1994) 2 *Copyright Bulletin* 5.

34 S Ricketson, *The Law of Intellectual Property*, Law Book Company (1984) p 245

have made sufficient inquiries as to the availability of the work, or if the availability of second-hand copies of the work must also be ascertained.

(iv) Effect of the Dealing Upon the Potential Market for, or Value of, the Work or Adaptation

A number of US 'fair use' cases have consistently emphasised the importance of this factor in determining fairness.[35] This is most likely because it is the factor that most clearly identifies the economic implications of a fair use with respect to the value of the original work. However courts in the US when determining the effect of the dealing upon the potential market for the work, or its value, will consider not only the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in an adverse impact on the potential market for the original.[36]

In *Texaco*,[37] when discussing the equivalent US factor to s 40(2)(d), the Court emphasised the ability of the defendant corporation, Texaco, to obtain a licence for its copying of journal articles, rather than copying them for free. Thus, the Court held that a use will be considered less fair when there is a ready market or means to pay for the use.[38] The existence of a collecting society, the Copyright Clearance Centre (CCC) in the US which offered licences to corporations for the copying of its members' works was highly persuasive.

Under this reasoning, copyright owners who can demonstrate that they have suffered, or are likely to suffer, a loss of licensing revenues as a result of a failure by a user of copyright material to obtain a copying licence, will have a strong case for rebutting the defence of fair dealing. Interestingly, the Court of Appeals amended their decision in July 1995, nine months after the decision was handed down. In that amendment, the Court limited their decision to "institutional" or "systematic" copying and left open the question of photocopying by an individual for their own research in a commercial setting.[39]

It is worth noting the dissent in *Texaco* which received some support in the original decision of the US Court of Appeals for the 6th Circuit in *Princeton University Press v Michigan Document Services*.[40] Justice Jacobs took the view that the availability of a CCC licence had little to do with fair use. His Honour said that since the only harm to a market is to the assumed market in photocopy licences, "there is a circularity to the problem": the market will not crystallise unless the court rejects the fair use defence; but the court cannot find that the use infringes unless there is a market to be harmed.[41]

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35 For example, *Harper & Row Publishers Inc v Nation Enterprises* (1985) 471 US 539 at 566.
36 Note 32 *supra* at 402
37 Note 32 *supra*
38 *Ibid.*
39 *Ibid* (decision amended 17 July 1995)
40 855 F Supp 905 (1996)
41 Note 32 *supra* at 412.

(v) Amount and Substantiality of the Work Taken

Clearly the more substantial a part taken by a copier, the less likely a dealing will be considered fair. In *Campbell*, in the context of a musical parody of a song, the US Supreme Court relied on this factor to inquire whether the quantity and value of the materials used were reasonable in relation to the purpose of the copying, and that the "extent of permissible copying varies with the purpose and character of the use".[42]

(vi) The Other Categories of Fair Dealing with Works

The remaining categories of fair dealing, relating to the purposes of criticism or review (s 41), reporting the news (s 42) and giving legal advice (s 43(2)) are, in comparison to s 40, relatively straightforward and have been adequately described elsewhere.[43] However it is worth noting the possible existence of an implied category of fair dealing for the purpose of political discussion. This was raised by Mason J in *Commonwealth of Australia v Fairfax*.[44] Justice Mason suggested a new approach to the concept of fair dealing as applied to the copyright in government documents. His honour's approach[45] considered that:

> ... a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because that dealing promotes public knowledge and public discussion of government action.[46]

Although Mason J felt that it would be inappropriate to adopt the argument because of the interlocutory nature of the application, his Honour's comments signal the potential for expansion of the fair dealing defence if to do so would enhance communication of matters in the public interest. In light of the recognition by the High Court of an implied constitutional right to political discussion,[47] it is conceivable that there are now even stronger claims to such a construction of fair dealing.

IV. IS THERE A RATIONALE FOR FAIR DEALING?

Finding a rationale for fair dealing is the present task for those advocating its retention. It is submitted that there are at least three important justifications for fair dealing:

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42 Note 26 *supra* at 1175.

43 P Brudenall, "The Future of Fair Dealing in Australian Copyright Law" (1997) 1 *Journal of Information Law and Technology* <http://elj.warwick.ac uk/jilt/copright/97_brud/>

44 (1980) 147 CLR 39.

45 Mason J limited this to ss 41 and 42 of the Act, but it would also most likely apply to s 40 of the Act.

46 Note 44 *supra* at 55

47 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (*Australian Capital Television*); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 272, *Lange v Australian Broadcasting Corporation* (unreported, High Court, Full Bench, 8 July 1997).

(a) it is in the public interest as an important device to ensure that information is both widely accessible and may be freely communicated;
(b) it supports the overall economic arguments that copyright provides incentive to create; and
(c) it encourages competition.

A. Public Interest Arguments

In the current reform process, consideration must be given to ensuring that not only is on-line content present, but that equitable means of access and use of that content is permitted. At present, regulation of the most valuable copyright material on the Internet is largely ensured via contract with credit card payments required by those seeking to charge for access. Other organisations and groups appear happy for their material to be copied, and perhaps the majority of those making material available rely on existing laws to control use of their works - uncertain of their application to the Internet. Given the origins of the Internet as a forum for sharing research it is perhaps not surprising it has developed in this way.[48] What is most significant, however, is that the Internet has developed, thus far, with little regulation of any kind.

Current fair dealing laws go some way towards ensuring that users may access and use copyright material in a print environment, and may have a similar role for information provided via networks.[49] Although the traditional basis of fair dealing may have been to assist in the creation of new works from existing works, rather than as a means of providing access to existing works, this will change in a digital environment. A right of fair dealing may be the only legal means of obtaining access to material in digital form without a licence. Should a right of transmission be added to the copyright owner's bundle of rights, and a copy in a computer's RAM be deemed to be a reproduction in material form, then access to material becomes dependent on the copyright owner or on the existence of a statutory licence.

Recognition of the significance of fair dealing was made recently by former High Court Chief Justice, Sir Anthony Mason, who stated that:

> ... the "fair dealing" exception to infringement of copyright is, and always has been, squarely based on recognition of the paramount public interest in the copying or reproduction of copyright material for certain purposes such as research and study, criticism or review, news reporting, court proceedings and the provision of legal advice.[50]

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48 Lyman has commented that "net-culture - if that isn't an oxymoron - has become hostile to the concept of intellectual property ... [and] although the Internet has become more sociologically diverse, it still reflects the academic view that knowledge is properly governed by a gift culture in which each of us gives away what we know for free, and takes what we know for free..." P Lyman, "Copyright and Fair Use in the Digital Age" (1995) (Jan/Feb) *Educom Review* 33.

49 The system of legal deposit is another important policy designed to ensure access to publications, and likely to become more important for digital information; see the National Library of Australia, *National Strategy for Provision of Access to Australian Electronic Publications: A National Library of Australia Position Paper*, September 1996

50 A Mason, "The Australian Library and Information Association Library Week Oration, State Library of NSW" (1996) 45 *The Australian Library Journal* 81 at 89

In addition, the former Chief Justice has been critical of a recent CLRC report for failing to highlight the public interest in the "free flow of knowledge, ideas and information".[51] Implicit in this criticism is a belief that without a right of fair dealing, copyright has the potential to impede the public's right to access and use the ideas of others.

This public interest has also been reflected in descriptions of the US fair use provisions. Fair use has been described as:

> ... an affirmative defence to copyright infringement that, properly applied, strikes a delicate balance between an author's interest in commercially exploiting her work and the public interest in the free flow of information and ideas.[52]

This captures what many may regard as the most important justification for a right of fair dealing: its importance as an aid in communication. The judiciary in the US have generally accepted copyright as being a necessary and acceptable limitation on communication, and have not been sympathetic to arguments that the US constitutional right to free speech is significantly limited by copyright. As Bannister points out, copyright and rights of communication have often been seen to be mutually exclusive concepts.[53]

That this may be so is largely because copyright policy has built-in safeguards against communication being overly restricted by the statutory monopoly given to the copyright owner, in particular, the so-called idea/expression dichotomy and the fair dealing defence. The distinction between ideas and their expression is, however, too difficult to define for most judges and arguably is a legal fiction.[54] It is not clear, for example, whether the "look and feel" of computer software is the idea or the expression of the idea.[55]

This conceptual difficulty, particularly in the area of computer programs, suggests the idea/expression dichotomy cannot be relied upon in the digital environment to ensure ideas will always be in the public domain and freely accessible.[56] Being able to use and re-work ideas contained within copyright material involves both access to the material, and the concomitant right to use at least some of what has been accessed. To a large extent, the public interest in the free access to ideas can be maintained through rights of fair dealing.

B. The Economic Justifications of Fair Dealing

For the economic justification for copyright law to be a realistic and persuasive model, the extent of copyright protection should be limited to only

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51 *Ibid* at 87.

52 D Hartnett, "A New Era for Copyright Law: Reconstituting the Fair Use Doctrine" (1992) 39 *Copyright Law Symposium* 167 at 167.

53 J Bannister, "It Ain't What You Say, Its the Way That You Say It; Could Freedom of Political Expression Operate as a Defence to Copyright Infringement in Australia?" (1996) 14 *Copyright Reporter* 22 at 31.

54 P Drahos, "Decentring Communication The Dark Side of Intellectual Property" in T Campbell and W Sadurski (eds), *Freedom of Communication* (1994) 249 at 257.

55 See CLRC, *Report on Computer Software Protection*, 1995 at [9.24]-[9.42] and *Data Access Corporation v Powerflex Services Pty Ltd* (1996) 33 IPR 194 where the Federal Court appeared not to distinguish between ideas (the function of a program) and their expression (source code and object code).

56 Other than those protected by other forms of intellectual property protection such as patent law, or by contract

what is necessary to provide sufficient incentive to create works not otherwise provided by the unregulated market. Anything that goes beyond this is likely to create a market inefficiency because of the strength of the monopoly enjoyed by the creator. This dilemma is explained by Cooter and Ulen:

> Put succinctly, the dilemma is that without a legal monopoly not enough information will be produced but with the legal monopoly too little of the information will be used.[57]

Thus, too much copyright protection has the potential to impede creativity or commercial investment in new development. Producers of multimedia works, for example, often seek to incorporate elements of existing works in an original setting. Material that is already subject to protection may have to be re-edited, rearranged or repackaged. Increasing copyright protection, or reducing limitations on the owner's rights, could therefore be detrimental to the interests of creators such as multimedia producers by preventing such uses of existing works.[58] Thus, any expansion of the rights of the author as a creator will also hinder the creative scope of the author as user.[59]

Similarly, development of essentially functional goods such as computer programs, where protection may extend to the ideas in the program, is hindered if those ideas are treated as being protected, or access to those ideas is prevented. This was recognised in the US case of *Sega Enterprises Ltd v Accolade Inc*[60] in which the US Court of Appeals recognised that it would not be in the public interest for the object code of a computer program to be protected. The Court allowed the disassembly of the copyrighted object code as being "a fair use of the copyrighted work if such disassembly provides the only means of access to those elements of the code that are not protected by copyright and the copier has a legitimate reason for seeking such access."[61]

The analysis of economists Landes and Posner[62] supports this notion. They argue that "the less extensive copyright protection is, the more an author, composer or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work."[63] The converse, they argue, is also true - the more extensive copyright protection becomes, the higher the costs of creating a new work, which may in fact work against the incentive ideal.[64] Extensive protection may also lead to the lack of an efficient industry standard where such a standard would be in the public interest.

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57 R Cooter and T Ulen, *Law and Economics*, Harper Collins (1988) p 135

58 Office of Regulation Review, *Submission to the CLRC*, October 1995 at 20-2

59 W Van Caenegem, "Communications Issues in Copyright Reform" (1995) 13 *Copyright Reporter* 72 at 82.

60 977 F 2d 1510 (9th Cir, 1993)

61 *Ibid* at 1514-15 The CLRC has doubted the applicability of *Sega* to Australian law because it considered that fair use was in certain respects different to and broader than fair dealing. note 55 *supra* at [10.28]

62 W Landes and R Posner, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325.

63 *Ibid* at 332.

64 *Ibid*

Gordon[65] has proposed a three part test in order to determine when fair use should be allowed. That is, where:

(a) market failure is present;
(b) transfer of the use to defendant is socially desirable; and
(c) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner,

then the court should consider a defendant's use to be fair.[66]

Gordon further suggests that a court should consider the wider social implications of determining a use to be fair. She says that:

> ... the court should also inquire into the extent of the losses likely to follow in the market as a whole from a grant of fair use, both from this defendant and from other similarly situated persons... [T]hus, the inquiry into substantial injury should include consideration of cumulative harm.[67]

Consideration of the cumulative harm that may result from allowing fair dealing of digital works is reflected in art 9(2) of the International Convention for the Protection of Literary and Artistic Property 1886 (the Berne Convention), and art 10 of the recently determined World Intellectual Property Organisation (WIPO) Copyright Treaty 1996.[68] These Articles require exceptions to rights to be confined to special cases that do not conflict with the "normal exploitation of the work".[69] It is one of the main concerns of copyright owners of works in digital form that fair dealing will interfere with the market of works distributed on-line. It is argued that potential losses to rights holders will be greater if fair dealing is permitted for private copying from personal computers.

Access and the re-use of information through fair dealing assists in the realisation of the goal of copyright policy to encourage the production of new works to the benefit of society. This is because the rights granted to copyright owners allow control over a work's dissemination. For example, a commercial advantage may be obtained by competitors from withholding material, or there may be a desire to exploit existing products for a longer period to avoid making which is currently available redundant.[70] In the case of *Commonwealth v John Fairfax & Sons Ltd*[71] it was the Australian Government's desire to restrain publication of sensitive governmental information. However, rights to access and use protected material facilitate the creation of new works. Provided that the incentive to create original works is sufficient, then it will be in the public interest to ensure that some means of free access to those works is made possible.

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65 W Gordon, "Fair Use as Market Failure A Structural and Economic Analysis of the Betamax Case and its Predecessors" (1982) 82 *Columbia Law Review* 1600.

66 *Ibid* at 1614

67 *Ibid* at 1620

68 Australia approved the text of the WIPO Copyright Treaty 1996 in Geneva, in December 1996 but as at July 1997 was yet to sign the treaty

69 For example, art 10(1) of the WIPO Copyright Treaty 1996.

70 M Blakeney and J McKeough, *Intellectual Property Commentary and Materials*, Law Book Co (2nd ed, 1992) p 13.

71 (1980) 147 CLR 39.

C. Fair Dealing as a Means of Encouraging Competitive Activity

Related to the economic arguments outlined above is the idea that unless there exist certain restrictions and exceptions to the copyright owner's monopoly, then anti-competitive conduct becomes more likely. Fair dealing assists competitive activity by encouraging the use of copyright material to be used in the development of new products and in circumstances where the copyright owner may otherwise wish to restrict or prevent such use. Although there may be situations where trade practices legislation would provide a remedy in cases where, for example, a licence is refused,[72] a right of fair dealing can also assist to ensure that for purposes where the public interest is sufficiently great, there is a means of ensuring that access will be available.

The concept of "reverse engineering"[73] is one method by which ideas can be extracted from works and then re-used in order to produce new goods. The US Court of Appeals in *Sega*[74] recognised that it would be in the public interest to allow Accolade to use Sega's object code as it would result in greater production of video games for use with Sega's console. Obviously this activity concerns the manufacturers of computer programs because it provides an opportunity for competitors to clone the ideas contained in computer programs and compete in the same markets.

The CLRC agreed that reverse engineering should not generally be permitted, and recommended the prohibition of reverse engineering unless it otherwise comes within the fair dealing defence.[75] However, the CLRC did recommend that fair dealing should allow the decompilation of computer programs in order to "understand techniques" subject to the qualification that only "non-commercial" activities be governed.

Nevertheless, the principles of reverse engineering can apply to traditional works, such as literary works, when in digital form. The process of research into a particular subject matter requires the browsing, reading and copying of other works, and often the incorporation of some of the ideas contained in those other works into the result of the research. Fair dealing currently extends to such a process, and thereby encourages new works to be created, and ideas disseminated.

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72 For example, by virtue of s 46 of the *Trade Practices Act* 1974 (Cth).

73 Note 55 *supra* at [10 22]: the CLRC described reverse engineering as being "the study or analysis of a computer product (including a computer program) in order to reveal the underlying idea or principle on which it operates".

74 Note 60 *supra*

75 Note 55 *supra* at [10.26], although the CLRC doubted that s 40 of the Act would allow reverse engineering primarily because of s 40(2)(c) which the CLRC said would weigh against a conclusion that all types of copying in the course of reverse engineering could be justified as fair dealing [10.30]-[10 31]. See also G Evans, "The Role of the Court in Limiting Program Copyright" (1994) 5 *Australian Intellectual Property Journal* 56 who also considered s 40 to be too narrow to support a successful defence of reverse engineering of a computer program.

V. THE DIGITAL ENVIRONMENT AND REFORM

Copyright reform has traditionally been reactive rather than proactive. The development of new ways of expressing and communicating ideas will always occur ahead of legislative change. However it is true that copyright laws and policies have, in the past, generally adapted fairly well to new uses of creative works. For example, the development of photography, sound recordings, broadcasting and photocopying technology all caused tension to the then existing copyright laws.

Those who believe that copyright law will evolve without serious difficulty in the new digital environment will point to this historical experience to argue that copyright can continue its evolution without radical alteration. Others have described the onset of digital works as creating a crisis with which current laws are inadequate to deal. The apparent rush to draft the WIPO Copyright Treaty 1996 to ensure copyright protection is extended to digital works indicates that there are many at an international level that share this view.

In Australia, these issues are generally being examined through the work of the CLRC. Whilst at the time of writing very little at a legislative level has occurred,[76] the CLRC is releasing Issues Papers setting out the major issues in discrete areas requiring reform, including fair dealing. In January this year, the CLRC released an Issues Paper, *Simplification of the Fair Dealing Provisions of the Copyright Act 1968*, in which the CLRC raised the possibility of simplifying the provisions to one, general fair use provision akin to section 107 of the United States Copyright Act 1976. Significantly, the Paper did not suggest the abolition of fair dealing.

More recently, in July 1997, a Discussion Paper, *Copyright Reform and the Digital Agenda*, was released by the Attorney-General's Department and the Department of Communication and the Arts. Chief among the proposals set out in the Paper is the introduction of two new rights for copyright owners: a broad-based technology-neutral transmission right, and an exclusive right of making available to the public. One of the most important issues raised in the Paper is the application of existing exceptions, such as fair dealing, to the proposed new rights. In addition, the Paper queries whether the Act should be amended to provide for certain exceptions for libraries and archives in relation to the exercise of the proposed rights, including whether the on-line 'browsing' of works should be permitted as of right.

The CLRC held a public forum concerning access to copyright materials in Sydney in late April 1997. The aim of the forum was essentially to provide an opportunity for users of copyright material, and copyright owners, for further discussion matters that have arisen from the Committee's reference to advise on simplifying the Act. Whilst fair dealing was not discussed in any depth at the forum, it was clearly the view of many copyright owners that unremunerated access to copyright material in digital form was now generally unacceptable.

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76 Although not affecting the fair dealing provisions, a Copyright Amendment Bill was introduced by the Government in June 1997

According to Michael Fraser, the Chief Executive Officer for Copyright Agency Limited (CAL), a copyright collecting society representing authors and publishers, the rights of users to access material should be supported, but only in return for a 'fair' payment to owners. Fraser considered that photocopying and digital technology have created a 'primary' market for copies of works, whereas previously such copies only formed 'secondary' markets. In other words, the market for the copy of a work in digital form is no less important to the copyright owner than the market for the original work.

Those who spoke from a 'users' perspective generally acknowledged the importance of the fair dealing provisions but without necessarily being able to suggest how the doctrine could be applied fairly in a digital context.

A. The Control Over Private Use

Fair dealing has traditionally been accepted as being a private dealing with copyright material, such as an individual reproducing a work for their own research purposes. Hence few cases of commercial dealings with works, such as where works have been copied and then on-sold, have succeeded as being a fair dealing. Similarly, copyright owners have most often been concerned to litigate against infringements when they perceive some intrusion on their commercial market. Thus an informal public/private distinction has developed which has assisted in determining what is likely to be a permissible act with a work.

However, digitisation of works, and more particularly the inclusion of works on a digital network, may render this distinction obsolete. Personal use may interfere with the copyright owner's 'public' market over which the owner seeks control.[77] The same equipment that allows a work to be accessed also permits its dissemination. Even if not done for financial gain, an accumulation of users each using the work for their own individual purposes could reduce the market value of the work.[78] Consequently:

> ... the dividing line between (private) enjoyment of protected works, which has so far between copyright-free, and the (public) commercial re-utilisation of protected works subject to copyright becomes more and more blurred.[79]

A further example of how digital technology will alter the public/private distinction is likely to be the increased impact of contract law in dealings between rights-holder and user. The Copyright Convergence Group acknowledged in 1994 the difficulty that copyright law has in dealing with new forms of creative endeavour when it stated that:

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77 See *APRA v Telstra Corp Ltd* (1995) 31 IPR 289 in which the Full Federal Court took a very wide view of what constituted the copyright owner's 'public' for the purpose of interpreting the meaning of *broadcast*, T Dreir, "Copyright Issues in a Digital Publishing World" presented at Joint ICSU Press/UNESCO Expert Conference on Electronic Publishing in Science, Paris, 19-23 February 1996 <http //www.lmcp.jussieu fr /icsu/information/Proc_0296/dreier.html>

78 N Elkin-Koren, "Public/Private and Copyright Reform in Cyberspace" (1996) 2(2) *Journal of Computer-Mediated Communication* <http://www.usc.edu/dept/annenberg/vol2/issue2>.

79 T Dreir, "Copyright Digitised: Philosophical and Practical Implications for Information Exchange in Digital Networks" presented at WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, Harvard University, 31 March - 2 April 1993

> ...it is no longer possible to adequately protect copyright owners or to facilitate the development of industries based around the exploitation of copyright material under the existing Act.[80]

As rights-holders move to disseminate material on-line, they will attempt to ensure that usage is governed by contractual terms in private transactions as well as those provided by copyright laws because of the extra protection contractual rights will bring. Protecting material by contract may, for example, protect both copyrightable material such as the expression of ideas, as well as non-copyrightable material, such as factual information or data. This has been noted by Ginsburg who states that:

> ... from the provider's point of view, contract may therefore prove a more attractive means of obtaining the same, or more, protection than that available under copyright law... However, from the user's point of view, a contract regime, if it eludes user-rights available under copyright, drives a one-sided bargain for access to information, to the detriment of the balancing of rights set forth under copyright.[81]

If copyright law is perceived as inadequate, or providing too many exceptions, copyright owners may ignore copyright altogether and rely on contractual remedies. Although access to material via contract may provide contracted users with greater certainty as to the scope of permissible "private uses",[82] use of contract law, together with technological forms of protection, such as encryption, will weaken current rights to access and reuse ideas. However it should be noted that potential problems may exist under contract and trade practices law when imposing harsh or unreasonable contractual terms in relation to information or copyright material deemed essential to the production of new goods.[83]

B. The Application by CAL to the Copyright Tribunal

Arguments of rights of access, fair dealing and equitable remuneration in the context of educational institutions will be raised in a case currently before the Copyright Tribunal. CAL has applied to the Copyright Tribunal to have revised the rate of equitable remuneration paid by Australian universities for copying under the statutory licence set out in Part VB of the Act. Traditionally, educational institutions such as universities have used the statutory licence to, for example, provide photocopies of copyright material to students, or to include copies within the reserve collection of the institution's library.

However, many if not all universities now wish to use the statutory licence to scan and store material into electronic databases and allow students to access and download copies.[84] CAL is likely to argue that a student who views such a stored copy on screen at a terminal within the library, or elsewhere, is making a

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80 Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment*, Commonwealth of Australia, August 1994.

81 J Ginsburg, "Surviving the Borders of Copyright", presented at WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights, Paris, 1-3 June 1994 at 221.

82 Note 9 *supra* at 52

83 See M Wyburn, "Copyright, Databases & Misuse of Market Power" (1997) 15 *Copyright Reporter* 46

84 Australian Vice-Chancellor's Committee, *Key Issues in Australian Electronic Publishing*, 1996, p 57.

licensed copy which should be paid for by the university.[85] Clearly such an argument will be opposed by the university respondents to the application who will argue that this is a typical example of the defence of fair dealing applying to works in digital form. As an act of fair dealing, such uses of a work by a student would not be an infringement by the student, and are therefore not remunerable.

CAL will additionally seek to argue that the inherent flexibility of being able to network access to digital works should come at a higher cost per copy to the institution than is presently charged for copies to be made of copyright material under the statutory licence. The present rate of $0.02 per page was set by the Copyright Tribunal in 1985 when copying by educational institutions of copyright material was generally paper based and often in a quite different context. In addition, the Copyright Tribunal had little guidance in that case to assist it in formulating a rate. CAL's subsequent experience in administering the statutory licence, and collecting and distributing equitable remuneration, will now be available to the Tribunal when considering the current value of copyright material when used by educational institutions.

Some of the arguments likely to be raised by CAL will raise fundamental questions about rights of access to information, and the importance of the on-line market for educational publishers. In an educational context, viewing copyright material, and not necessarily downloading the work for storage or printing, is likely to be an increasingly important method by which information is both disseminated to students by educational institutions, and used by students for their own research and study. Whether any distinction should be made between 'browsing' a hard copy such as a book on a library shelf, which is presently an unremunerated act, and 'browsing' a work in a digital form, which CAL may argue should be a remunerated act, will be one of the more difficult questions for the Tribunal.[86] If the Tribunal were to determine that any access by a student of material contained on a university network was remunerable under the statutory licence it may well signal the death of fair dealing as a defence of any importance within an educational context. However, for the Tribunal to determine that students may continue freely to use copyright material for certain purposes without it being remunerable could be significant in shaping reform of the Act in the digital environment.

C. Australia's International Obligations

The most critical factor in determining the shape of reform to Australian copyright law will be the policies undertaken by Australia's trading partners, particularly in relation to exceptions such as fair dealing. With the extension of

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85 Sir Anthony Mason has stated that according to preliminary calculations the cost to the University of NSW alone of screen displays being remunerable under the licence would be in the order of $2 8 million per year; note 50 *supra* at 81

86 It may be that if a right of transmission is introduced into the Act, that the act of browsing becomes clearly remunerable, unless such a right of transmission is qualified by it being a transmission "to the public" which will invoke a separate analysis of what is meant by "the public" See the discussion in *Australasian Performing Right Association v Commonwealth Bank of Australia* (1993) 25 IPR 157 at 172, per Gummow J.

multilateral trade agreements to intellectual property,[87] Australia is part of a global economy that is becoming increasingly centred around intellectual property as industrial economies are transformed into information economies. This will place immense pressure on the Commonwealth government to conform to international standards. Vast differences in exceptions to copyright are not likely to be tolerable where the exploitation and dissemination of material occurs without respect for international borders.

Australian laws on copyright are intended to conform with principles established by various international conventions and treaties. The most important international copyright instruments to which Australia is a signatory is the Berne Convention for the Protection of Literary and Artistic Works, although the recently concluded Copyright Treaty will achieve similar prominence should it be signed and ratified by Australia.[88] The other significant instrument is the Rome Convention for the Protection of Performers, Producers of Literary and Artistic Works.

Despite the emphasis that these Conventions give generally to protecting creative effort, the need for exceptions has been recognised. The Berne Convention, for example, in art 9(2) provides:

> 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.

This three part test is also included in art 10 of the WIPO Copyright Treaty. This will have the result of ensuring that exceptions to copyright protection may continue, but difficulties of their application to material in digital form remain unresolved. The normal exploitation of works will certainly change as copyright owners seek to deliver material over computer networks. The scope of what may be privately copied has increased dramatically. The substantial increase in the ownership of personal computers further adds to the ability of individuals to copy material available in a digital form, particularly literary works. The normal means of exploiting works online is likely to be through transmissions of goods to the personal computer of the individual consumer.

This will lead to discussion as to the scope of any existing exceptions should they conflict with art 10 of the Copyright Treaty. For example, libraries seeking to provide material via digital network to individuals are also likely to impair the market of the copyright owner. If publishers and collecting societies are successfully able to collect moneys for such copying, art 10 would suggest that exceptions to the copyright owner's rights will have to be reduced to allow for copyright owners to satisfactorily exploit their works.

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87 The Trade Related Aspects of Intellectual Property Rights (TRIPS) was concluded at the Uruguay Round of the General Agreement on Trade and Tariffs (GATT) in December 1993.

88 Concluded at the WIPO Diplomatic Conference in Geneva on 20 December 1996, but yet to be signed and ratified by Australia

D. Other Relevant International Obligations

Australia is a signatory to other international agreements that may impact on how copyright laws are drafted. For example, art 19 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to freedom of opinion and expression ... and to seek, receive and impart information and ideas through any media and regardless of frontiers". Similarly, art 19 of the International Covenant on Civil and Political Rights provides that "[e]veryone shall have the right to freedom of expression...to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." These two provisions could be viewed as significant if rights under the Act were strengthened to the point that barriers imposed accessing or using information protected by copyright.

VI. THE FUTURE OF FAIR DEALING

Elsewhere, I have discussed possible ways in which future legislation could provide for limited rights of fair dealing.[89] It should, however, be recognised that even if fair dealing is to continue in a digital environment, copyright owners are likely to regulate access themselves by making their copyright material available subject to contract. The extent of free access may therefore depend on the economic model of online publishing perceived by publishers as being most likely to maximise revenue.

A. Access Models

The two models currently used by commercial publishers for providing access to their copyright material on the Internet can be described as the subscription model and the advertising model.[90] The subscription model controls access to material by ensuring only those who have paid a subscription fee receive the password or code guaranteeing entry. Very few publishers have earned significant revenue using this model. With access being controlled by contract, there is little likelihood of users being able to rely on statutory rights such as fair dealing in order to browse or reproduce copyright material controlled in this way.

Alternatively, the advertising model relies on readers viewing the maximum number of the publisher's own pages, each page containing advertising, in order to view the sought information. At present, this is perhaps the most common method used by publishers to generate revenue on the Internet. With no 'gateway' control over access, users are generally free to browse and reproduce limited amounts of copyright material if done so for a prescribed purpose. What

89 Note 43 *supra*

90 M Holderness, "The Librarian of Babel: The Key to the Stacks", (1997) 9 *Ariadne* <http://www.ariadne.ac uk/issue0/babel/>

remains to be seen is whether publishers will make their publications available online relying only on advertising revenue. Certainly newspaper publishers are doing so, and indications are that advertising revenue is increasing.[91] However it may be different for the publishers of books and journals. Advertising relies on a web site being popular, and academic journals appealing to esoteric tastes may struggle to attract attention.

Many such publishers will most likely wait for universal standards of encryption and electronic cash to be implemented to allow works to be disseminated for a work-based fee.[92] For example, in order for an article from TIME magazine to be downloaded off the Internet, a fee would automatically be paid via my Web browser. It would be a fast and automatic process involving no long-term subscription arrangements, nor ubiquitous advertising.

Where does this leave fair dealing provisions? There appears little room for legislators to ensure free access to works in digital form if transactional payments become the standard means of providing material to users. One measure to counter this may be to allow browsing of works in digital form from within public non-profit libraries. With a limited budget, libraries may have to choose between continuing paper subscriptions to journals and purchasing books, or instead, diverting funds to enabling users to browse articles and books with royalties paid to the copyright owner.

In any respect, there is general agreement among both owners of copyright material and users that the fair dealing provisions should be simplified. The CLRC has suggested as an option that they be simplified to a single provision as is the case in the US.[93] However, this may only be suitable if sufficient guidance is provided to users and rights-holders as to the intended scope of the provision. As it is likely to apply to works in both digital and paper form, careful consideration will need to be given to the breadth of the provisions.

For example, non-profit uses that are either 'transformative' or do not allow a use that competes with the market of the copyright owner should be allowed. That is, if a work is being used to create another work, or is being used to illustrate the original, as in the review of a book, it should be deemed as being fair. Copyright owners do not lose revenue from such uses, which can be perceived as generally being in the public interest. Such a provision would also, for example, allow works of parody to be created without concern over copyright infringement.

B. A Statutory Licence for Research-Based Copying

As part of the simplification process, thought should be given to the introduction of a statutory licence for research-based copying. One of the current problems with fair dealing is the uncertainty over who may benefit from its provisions. In particular, it is not clear whether people in quasi-commercial

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91 J Riley, "Advertising Dollars Start to Flow into Web Sites", *The Australian (Computer Supplement)*, 27 May 1997

92 *Ibid*

93 CLRC, *Simplification of the Fair Dealing Provisions of the Copyright Act 1968*, 1997 at 3.

occupations such as academics, doctors, technicians and scientists may utilise the fair dealing provisions in order to reproduce copyright material for their own research. It is an important component of such occupations that individuals are aware of the latest developments in their field, and there is a clear public interest in their being able to do so.

Copyright owners would argue, however, that such occupations have a commercial element to them, and therefore should not be able to benefit from provisions that enable copying for free. Significantly, however, a licence negotiated with copyright owners or a collecting society will not be a satisfactory means of providing such groups with the right to copy material. When access to information is needed quickly, it is not always appropriate that occupational groups providing services with a clear public benefit, such as the medical profession, should have to wait for the copyright clearance to make a photocopy or to download an article.

The most desirable solution is for the introduction of a statutory licence for copying done for the purpose of research. As with the compulsory licence scheme for educational institutions, any work would become available to be copied for research provided that equitable remuneration is paid. Access to works is therefore guaranteed. The rate of equitable remuneration payable for copying for research would, as for other statutory licences, be determined by the Copyright Tribunal. Although, traditionally, copyright owners do not favour compulsory licence regimes because of the subsequent lack of control over their material, there is little doubt that few copyright owners currently receive any substantial royalties for copying undertaken for research.

The current s 40 (fair dealing for research or study) could then be amended so as to reflect what many believe to be its intended scope: private study by enrolled students. This could be achieved most easily through re-introducing the word "private" before the word "study" in section 40 as had been the case prior to 1980. This would also bring the provision into line with other jurisdictions such as the United Kingdom.

VII. CONCLUSION

Finding the right balance between encouraging creativity, rewarding innovation and ensuring access has seemingly come easily for legislators in the non-digital environment. However when placed in a digital context, rights of free access have justifiably caused concern for copyright owners. The increased variety in the methods by which publishers are able to market their works, for example, by providing consumers with individual articles or chapters rather than the more traditional format of an anthology or book , means that fair dealing has the potential to cause direct interference with owners' markets.

It is, however, equally important to ensure that users have access to copyright material to learn from, reuse and transform that material for justifiable purposes. It is only through such uses that many potential creators are able to transform their ideas into a tangible product. Furthermore, there are real concerns that

works 'locked' in a digital format reveal their expressed ideas to only those who can afford to pay. Such a notion is the antithesis of traditional copyright policy which ensures a fair return to copyright owners, but allows creative uses that build upon an author's work. The solution to ensuring access may best be achieved through a combination of simplified fair dealing laws for students and individuals using works for non-commercial purposes, and the introduction of a statutory licence for uses that have a clear public benefit such as medical research. In both cases there should be sufficient flexibility to allow the judiciary the means to shape the law.