

Users' Entitlements under the Fair Dealing Exceptions to Copyright

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

This thesis analyses current South African copyright law to ascertain the proper interpretation and application of the fair dealing provisions contained in the Copyright Act 98 of 1978. Copyright law ensures that authors' works are not used without their consent, which they can grant subject to compensation or conditions attached to the use. Fair dealing exceptions allow the general public to use copyright works for certain purposes without the copyright owner's consent and without paying compensation. These provisions are intended to balance copyright owners' interests with the interest that members of the public have in using copyright works for socially beneficial purposes. These provisions typically allow the use of a copyright work for the purposes of research or private study, personal or private use, criticism and review, and news reporting. Unfortunately there is no South African case law concerning the fair dealing provisions, and the application of these exceptions remains unclear. This study aims to clarify the extent of application of the fair dealing exceptions to copyright infringement so that courts may be more willing to consider foreign and international law and in doing so develop South African intellectual property law.

The social and economic policy considerations underlying the fair dealing exceptions are considered to determine their function. International conventions relating to copyright and neighbouring rights are examined, specifically the provisions allowing exceptions to copyright. The legislation and case law of Australia and the United Kingdom are analysed to determine the proper interpretation and application of these statutory defences. This knowledge is then used to inform South African law.

The Copyright Act 98 of 1978 does not contain a fair dealing exception for parody and satire. Australian legislation does contain such an exception, and it is analysed in that context. An exception for parody is proposed for South African law, and the need for and application of this provision is considered. The constitutionality of the proposed exception is evaluated in terms of its impact on the constitutional property rights of copyright owners.

Opsomming

Hierdie tesis ondersoek Suid-Afrikaanse outeursreg om die behoorlike uitleg en toepassing van die “billike gebruik”-bepalings in die Wet op Outeursreg 98 van 1978 te bepaal. Outeursreg beskerm die werk van ’n outeur teen ongemagtigde gebruik van haar intellektuele eiendom. Gebruik kan deur die outeur gemagtig word, òf teen vergoeding òf onderhewig aan bepaalde voorwaardes. Artikels 12-19B (die billike gebruik-bepalings) van die Wet op Outeursreg laat ander toe om sekere werke te gebruik sonder die toestemming van die eienaar van die werk en sonder om vergoeding te betaal. Die bepaling streef om ’n balans te tref tussen die belange van die outeur en die belange van die publiek. ’n Werk mag volgens hierdie bepaling tipies gebruik word vir die doeleindes van navorsing of private studie, persoonlike of private gebruik, beoordeling of resensie, of om nuus te rapporteer. Daar is tans geen Suid-Afrikaanse regspraak rakende hierdie uitsonderings nie, en hul toepassing is dus onseker. Hierdie tesis beoog om die werking van die billike gebruik-bepalings duidelik uiteen te sit om hoër gewilligheid in howe te skep om internasionale en buitelandse reg toe te pas, en sodoende Suid-Afrikaanse immateriële goederereg te ontwikkel.

Die sosiale en ekonomiese beleidsoorwegings wat die bepaling ondersteun word geanaliseer om die doel daarvan te bepaal. Internasionale outeursreg-verdragte word bespreek om ’n raamwerk vir die uitsonderings te skep. Wetgewing en regspraak van Australië en die Verenigde Koninkryk word ondersoek, en die kennis wat daar opgedoen word, word toegepas op die Suid-Afrikaanse bepaling.

Die Wet op Outeursreg 98 van 1978 bevat geen uitsondering vir die doeleindes van parodie en satire nie. Die Australiese Wet op Outeursreg 63 van 1968 bevat wel so ’n uitsondering, en dit word in hierdie verband beoordeel. ’n Uitsondering vir parodie en satire word voorgestel en oorweeg in die konteks van Suid-Afrikaanse outeursreg. Die grondwetlikheid van die voorgestelde uitsondering word bepaal na aanleiding van die impak wat dit sal hê op outeurs se eiendomsreg.

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1 Introduction

1.1 Introduction

Copyright grants the author of an intellectual creation a limited monopoly of exclusive rights over her product.¹ The owner can exploit these rights commercially, but as with ownership of tangible property these rights are limited by the rights and entitlements of others and by restrictions imposed in the public interest by state regulation.² In certain circumstances other persons have entitlements to use the owner's intellectual property without her consent; fair dealing exceptions protect these entitlements and limit copyright owners' exclusive rights to their works accordingly.³ Claims of copyright infringement are frequently invalid because the use of the work falls into one of the purposes that are considered fair.⁴ By invoking a fair dealing exception, a person is permitted to use copyright content for reasonable purposes without the consent of the copyright owner and without paying compensation.⁵

Fair dealing finds application when a substantial part of a protected copyright work is used in a way that seemingly conflicts with the exclusive rights in that work.⁶ Members of the public are permitted to use copyright works for certain predetermined purposes, which constitute an exhaustive list. Using a work for a purpose other than those that are statutorily embodied cannot be justified, regardless of the fairness of the use.

Fair dealing is not a precise notion and leaves much to the discretion of the court.⁷ The ambiguity of this statutory doctrine has contributed to many untenable threats of legal action, which may cause users to refrain from legitimate uses of copyright works.⁸ The South African fair dealing provisions are further confused by the section 13 Copyright

¹ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-1; Deazley R *Rethinking Copyright: History, Theory, Language* (2006) 106; Stokes S *Digital Copyright: Law and Practice* (3rd ed 2009) 18.

² Van der Walt AJ & Pienaar GJ *Introduction to the Law of Property* (6th ed 2009) 40-41.

³ S 12 of the Copyright Act 98 of 1978. See also ss 29-30 of the United Kingdom's Copyright, Designs and Patents Act of 1998 and ss 40-42, 103A-103C of the Australian Copyright Act 63 of 1968.

⁴ Cotter TF "Fair use and copyright overenforcement" (2008) 93 *Iowa Law Review* 1271-1318 at 1273-1274.

⁵ Ghosh S "The fable of the commons: Exclusivity and the construction of intellectual property markets" (2007) 40 *University of California Davis Law Review* 855-890 at 881.

⁶ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-65 – 1-68, 1-92.

⁷ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-93.

⁸ Cotter TF "Fair use and copyright overenforcement" (2008) 93 *Iowa Law Review* 1271-1318 at 1273; Olson DS "First amendment based copyright misuse" (2011) 52 *William and Mary Law Review* 537-606 at 557.

Regulations published by the Minister of Economic Affairs.⁹ The fair dealing exceptions, which act as defences to claims of primary infringement, are currently being ignored in many situations where they could find application. This can be as a result of many factors, notably the potentially exorbitant legal costs implicit in adjudicating disputes arising from the vagueness that characterises the provisions. This means that copyright owners are able to wield allegations of infringement without any prospect of judicial success, because the action is unlikely to be pursued.¹⁰

Fair dealing exceptions act as balancing mechanisms between the interests of copyright owners and the public interest in education, freedom of expression and honest public discourse, and the freedom of the media to report current events, and have become an indispensable part of copyright law globally. This thesis provides a reflective exposition of these provisions and suggests ways to develop South African copyright law by way of legislative intervention and judicial interpretation.

1 2 Research Problems, Hypotheses, Research Aims and Methodology

The South African Copyright Act contains fair dealing exceptions for research or private study, personal or private use, criticism or review and news reporting. The United Kingdom's Copyright, Designs and Patents Act of 1988 provides for the same categories except for personal or private use. The Australian Copyright Act 63 of 1968 does not contain this provision either, but contains more extensive fair dealing exceptions than the legislation of South Africa or the United Kingdom because of the inclusion of an exception for parody and satire.¹¹ All of the fair *use* factors in American copyright law have been included in the Australian Copyright Act to guide courts in deciding what constitutes a fair dealing, and extra-judicial thresholds have been introduced to aid users align their conduct with what the law allows *ex ante*.¹²

⁹ GN 2530 published in GG 6252 on 22-12-1978.

¹⁰ Lessig L *Free culture: How big media uses technology and the law to lock down culture and control creativity* (2004) 292; Olson DS "First amendment based copyright misuse" (2011) 52 *William and Mary Law Review* 537-606 at 541-542.

¹¹ See ss 40-42 & 103A-C of the Copyright Act 63 of 1968.

¹² Ss 40(2), 103C(2), 248A(1A) of the Copyright Act 63 of 1968. The American Copyright Act exempts any conduct that can be justified as fair according to four factors, but includes "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as examples of the type of activity that will be exempted: s 107 of the Copyright Act of 1976.

The fair dealing exceptions have been absent from South African litigation, and courts have at no time considered – let alone developed – the statutory defences. No legal precedent has been set to date and the concept has been left scantily reviewed in South African jurisprudence, and the resulting lacuna discourages the public from embracing fair dealing as a defence to a claim of copyright infringement. Similarly, courts in analogous jurisdictions are reluctant to develop the fair dealing defence because of its notorious vagueness.¹³ The main research question is how South African copyright law can be developed by way of legislative intervention and judicial interpretation to promote greater clarity about and beneficial use of the fair dealing defence.

At the outset of this study the originating theories of copyright and their role in contemporary society, especially those relating to the fair dealing exceptions, are considered with reference to the academic literature on the subject. The nature of users' entitlements under the fair dealing exceptions is imprecise, which compounds the uncertainty that shrouds the embodiment of the public interest in copyright exceptions. It is therefore necessary to systematically assess the proper interpretation and application of these important statutory provisions and the impact they have on allowing legitimate unlicensed uses of protected copyright works. The nature and function of copyright exceptions in general and the fair dealing exceptions specifically are examined to enable a critical analysis of the relevant legislative provisions and show how they operate. The underlying social and economic considerations determine whether the specific legislative provisions give proper recognition and protection to the policy concerns that they are intended to address.

For a discussion of this nature it is necessary to identify and analyse international conventions relevant to copyright; treaties governing neighbouring rights are considered additionally, as some of the exceptions discussed apply to audio-visual works and performances.¹⁴ This creates a framework that allows national legislation to be understood in terms of international mandates and concessions.

Apart from international law, the paucity of South African case law and academic contributions requires a comparative evaluation of the topic. A comparative basis is established by analysing the legislation of Australia and the United Kingdom and

¹³ Olson DS "First amendment based copyright misuse" (2011) 52 *William and Mary Law Review* 537-606 at 558-559.

¹⁴ See eg s 17 of the Copyright Act 98 of 1978; s 30 of the United Kingdom's Copyright, Designs and Patents Act of 1988; s 103A-103C of the Australian Copyright Act 63 of 1968.

ascertaining how fair dealing has been interpreted in case law in those jurisdictions. South African and Australian copyright law stems from British legislation and all three countries are under the same international obligations (for the purposes of this thesis), making them ideal for comparison. Courts in both Australia and the United Kingdom have applied the fair dealing exceptions on numerous occasions and have set precedents, which will be useful to South African courts when similar cases arise. The South African provisions are discussed by drawing on the conclusions from the analyses of case law and academic literature in the previous chapters. This thesis relies on academic commentary from all three jurisdictions to provide a comprehensive understanding of the functioning of the statutory exceptions.

The Australian Copyright Act expressly recognises parody as a form of fair dealing,¹⁵ but the South African Copyright Act and the United Kingdom's Copyright, Designs and Patents Act of 1988 do not contain this exception. No study of the need for an exception for parody has been undertaken in the South African context, although this has occurred in the United Kingdom.¹⁶ This thesis considers a parody exception in South African law and explains how such an exception could function. The relation between copyright owners' proprietary interests, exceptions to the application of copyright, and section 25 of the Constitution has not been addressed in existing academic discourse either and is therefore discussed here. A constitutional analysis of the impact that such an exception would have on the rights of copyright owners is employed to determine whether the promulgation of a parody exception would be constitutionally valid. The methodology expounded by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South*

¹⁵ S 41A.

¹⁶ See the existing academic commentary, which focusses mainly on trademark parody in the wake of the Constitutional Court's judgment in *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC): Rimmer M "The Black Label: Trade mark dilution, culture jamming and the No Logo movement" (2008) 5 *Scripted* 70-138; Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-140 – 42-144; Deacon J & Govender I "Trade mark parody in South Africa – The last laugh!" (2007) 32 *Journal for Juridical Science* 18-46; Illsley T "How to tell a take-off from a rip-off: Trade mark parody and freedom of expression in South Africa" (2006) 22 *South African Journal of Human Rights* 119-125; Dean OH "Trade-mark dilution laughed off" (2005) Oct *De Rebus* 18-22; Pistorius T "Trade-mark tarnishment: Should we 'Laugh It Off' all the way to 'Telkomsucks' and 'Hellcom'?" (2004) 16 *South African Mercantile Law Journal* 727-740; Smith A "Trade-mark dilution – You can't laugh it off" (2004) 12 *Juta's Business Law* 196-200. For parody of copyright in South Africa, see Stilwell V & Alberts W "Pretty women and copyright law" (2011) Jul *Without Prejudice* 52-53; Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-145 – 42-148; Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343.

*African Revenue Service*¹⁷ is followed to determine whether the proposed legislative action would constitute a deprivation of constitutional property rights, and if so whether this deprivation would be justifiable in terms of section 25(1).

By the conclusion of the study it should be possible to draw parallels between the fair dealing exceptions in South Africa and those in Australia and the United Kingdom regarding the way they are formulated and applied by the respective courts, and guidelines can be extrapolated for the benefit of the South African judiciary and academic community.

1 3 Overview of Chapters

The thesis starts by considering the theoretical justifications underlying copyright law and exceptions to copyright protection. The social and economic considerations for granting exclusive use rights over tangible and intangible property are investigated to illustrate the rationales for the reification of intellectual property. The nature of the fair dealing exceptions is explained to illustrate the operation of the entitlements that the law grants to users. The different approaches to constructing exceptions of this kind are compared to differentiate between fair dealing and the fair use doctrine. Chapter 3 turns to international law to create a framework in which to consider national legislation. The provisions relating to copyright protection and exceptions to copyright in the Berne Convention for the Protection of Literary and Artistic Works,¹⁸ the Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹⁹ and the WIPO Copyright Treaty²⁰ are examined, as well as the effect of the Rome Convention,²¹ TRIPS and the WIPO Performances and Phonograms Treaty²² on neighbouring rights. South Africa, Australia and the United Kingdom variously incur obligations in terms of these treaties, and the provisions regulating exceptions in these conventions are analysed accordingly.

¹⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹⁸ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886).

¹⁹ World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994).

²⁰ World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996).

²¹ World Intellectual Property Organisation *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (26-10-1961) 496 UNTS 43 (1961).

²² World Intellectual Property Organisation *Performances and Phonograms Treaty* (20-12-1996) 36 ILM 76 (1996).

Chapter 4 undertakes a comparative study of the copyright law of the United Kingdom and Australia. The chapter provides a concise history of the progress of copyright law in the respective jurisdictions, tracks the developments effected by case law, international obligations and legislative initiative, and compares the rights granted to copyright owners by the current statutes. The fair dealing provisions are analysed individually, with particular emphasis on the judicial interpretation and application that the foreign courts have followed. The construction of the Australian exception for parody is analysed to create a context to consider this exception in South African law.

Chapter 5 draws on the research conducted in the previous chapters as a basis for interpreting and understanding the fair dealing provisions of the South African Copyright Act. The exceptions for research or private study, personal or private use, criticism or review, and news reporting are analysed and the conclusions drawn from the United Kingdom and Australia are transposed, *mutatis mutandis*. The exceptions for quotations and illustrations are not traditionally associated with fair dealing, but nonetheless warrant brief discussion. The constituent elements of the fairness inquiry inherent in all fair dealing cases are discussed throughout the thesis by means of case law analysis, and brought together in chapter 5.²³ The most important factors consulted by foreign courts and the general objective standard against which fair dealing claims are measured are set out to illustrate the emphasis of the exceptions.

Chapter 5 examines the need for an exception for parody and postulates a hypothetical exception in South African law to determine how it would function. South African jurisprudence relating to intellectual property parody is scrutinised with reference to foreign cases and academic commentary. The seminal American case of *Campbell aka Skyywalker et al v Acuff-Rose Music Inc*²⁴ is incorporated into the discussion to illustrate where the emphasis of the exception should lie. The value of freedom of creative expression that the exception would represent is examined to shed light on the constitutional basis for its inclusion. After ascertaining the desirability of incorporating this exception into South African copyright law, the Constitutional Court's decision in *Laugh It Off Promotions CC v SAB International*²⁵ – which dealt with trademark parody – is considered in the context of property interests conflicting with freedom of expression. With this clarification of the parody exception in the South African setting, the exception is

²³ See section 2 3 6 of chapter 5.

²⁴ *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* [1993] 510 US 569.

²⁵ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC).

subjected to constitutional analysis to determine the legitimacy of the proposed provision. The methodology devised in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*²⁶ is followed to establish whether the hypothetical exception would constitute an unjustifiable deprivation of copyright owners' property rights. This systematic approach considers the impact that other Constitutional Court cases have had on the test, and accommodates the intangible nature of the property.

The concluding chapter demonstrates how the main hypotheses and research aims are approached throughout the thesis and brings together the respective conclusions drawn from the analyses in the previous chapters. Certain recommendations are made to assist courts when applying the fair dealing provisions and to move the legislature to develop the Copyright Act and bring South Africa in line with global developments in this area.

1 4 Scope

This thesis sets out to establish the limits of the South African fair dealing provisions. However, the relation between fair dealing and the moral rights of authors is not considered, and all references to copyright owners' rights should be construed as references to economic rights granted by copyright. The constricting effect that contract law may have on the application of fair dealing is not considered because of the broad scope of terms that are frequently imposed by means of licencing agreements. Technological protection measures and the impact that their application may have on users' entitlements also fall beyond the ambit of this thesis.²⁷ The implications of fair dealing in the digital realm have been extensively researched elsewhere.²⁸ The public interest defence, which is sometimes raised in conjunction with the defence of fair dealing,²⁹ will not be discussed separately. The fair dealing provisions of the Performers' Protection Act 11 of 1967 are also not included, as the research here focuses exclusively

²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

²⁷ For further reading on this topic, see generally Efroni Z *Access-Right: The Future of Digital Copyright Law* (2011) Oxford University Press: New York.

²⁸ See Schönwetter T *The Implications of Digitizing and the Internet for "Fair Use" in South Africa* (LLM thesis University of Cape Town 2005).

²⁹ See eg *Ashdown v Telegraph Group* [2002] Ch 149 CA; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143; *Beloff v Pressdram* [1973] 1 All ER 241; *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA.

on the Copyright Act 98 of 1978. The terms “phonogram” and “sound recording” are used synonymously throughout this thesis, as are “typographical arrangements” and “published editions”, depending on which term is used by the legislation or convention in question. When a copyright work is referred to, it is assumed that copyright subsists in the work in question and no consent has been obtained for the use of that work.

2 Theoretical Analysis of Fair Dealing

2.1 Introduction

Copyright law strives to balance the rights of creators of copyright works and the interests of the public. This chapter creates the context for considering the role of exceptions to copyright, particularly the fair dealing exceptions. The abstract nature of property rights is considered to provide an understanding of their primary functions in the context of both corporeal and incorporeal property. The rationales for awarding property rights to authors are then explained to demonstrate the purpose of copyright law and the objectives it aims to achieve. It is shown that copyright law functions as a legal device employed to encourage the socially beneficial activity of creating cultural and intellectual products, and how the system would be fundamentally flawed and unworkable without exceptions to limit copyright owners' rights. The immanent paradox that exists is analysed to illustrate the need for curtailing copyright.

Economic arguments for the promulgation of fair dealing exceptions are analysed to measure the effect that the fair dealing exceptions have on protecting the interests and fundamental rights of the public. The exposition then considers policy arguments for limiting copyright and the effect that limitation will have on the incentive to create. Exceptions could assume various possible legal constructions, but the internal modifier role that statute plays leads to a definite conclusion. The legal nature of fair dealing exceptions is explained in Hohfeldian terms to illustrate the way that users are protected against the overzealous application of copyright owners' property rights.

Two possible linguistic constructions of the exceptions are shown, each with its own benefits and drawbacks. The difference in construction between the unitary system and the particle system is explained, leading to the conclusion that a hybrid construction is preferable. The difference between fair dealing and fair use is demonstrated against this framework. The notion of fairness inherent in both fair dealing and fair use provisions is not discussed here, but is discussed in subsequent chapters in light of the meaning that judicial interpretation gives this concept.¹

¹ See chapters 4 and 5 in this regard.

2 2 Reification of Intellectual Property Rights

The nature of modern copyright is defined by statute to be proprietary.² The reason for defining intellectual property rights generally (and copyright specifically) as proprietary is because the law awards authors a negative exclusionary right similar to ownership of corporeal objects. The legal consequences attached to intellectual property resemble those of property law; the owner of a copyright work is granted a real right akin to the exclusionary rights in property law.³ In the case of intellectual property, the law creates a legal object by attaching real rights to it, while the object of the rights can be an abstract legal conception.⁴ This view is best understood through the process of dematerialisation of property, which allows the rights in property to be viewed as abstract and independent of the corporeality of the object. This paradigm has obvious benefits to the area of copyright law, which protects the expression of an idea rather than the medium through which it is expressed. These rights enable a copyright owner to authorise or prohibit various acts in relation to a work (which is the object of the rights). The rights are enforceable against third parties without their prior consent, which is a characteristic of real rights.⁵

The distinction between civilian and common law property traditions provides a better grasp of the concepts inherent in intellectual property law. The notional ambit covered by the two systems is the same, although the approach is markedly different.⁶ The civilian tradition is based on the Roman law concept of ownership (*dominium*), which is the most complete entitlement to an object with the principal remedy being the *rei vindicatio*.⁷ The English law system relies on relative title, where the strongest among competing entitlements succeeds. The South African common law approach to property incorporates

² S 1 of the Copyright, Designs and Patents Act of 1988 states that “[c]opyright is a property right”. As will be shown in later chapters, both other jurisdictions considered share their ancestry and basis with the Copyright, Designs and Patents Act. Although it is generally accepted that copyright is a property right, several theorists have expressed doubt as to whether copyright is properly defined as proprietary: see Harris JW *Property and Justice* (1996) 42-47; Drahos P *A Philosophy of Intellectual Property* (1996) 200, 210-213; Penner JE *The Idea of Property in Law* (1996) 119-120; McFarlane B *The Structure of Property Law* (2008) 134-136.

³ Gray K “Property in thin air” (1991) 50 *Cambridge Law Journal* 252-307 at 301.

⁴ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 10.

⁵ The moral rights that attach to the author of a work are not discussed, as fair dealing is raised as a defence to a claim of infringement of the economic rights in a work.

⁶ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 9.

⁷ Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 9; Van der Walt AJ & Pienaar G *Introduction to the Law of Property* (6th ed 2009) 40-41.

Roman-Dutch law (and thus the concept of *dominium*),⁸ but the law of copyright does not adhere to this approach; South African copyright law's genesis is in the statutes of the United Kingdom, as will be seen in chapter 5.⁹ Furthermore, where the object of a right is incorporeal even civil law systems find it necessary to rely on tortious remedies rather than proprietary remedies, as there is no object to vindicate, although the manner in which it differs from the *rei vindicatio* is practically insignificant.¹⁰ Accordingly, the nature of title in copyright law is best classified as relative and the remedies tortious.¹¹ This context is fundamental to a proper understanding of the nature of the rights that subsist in copyright works, and more importantly the nature of exceptions to these rights.¹²

The justifications for protecting intellectual property by statute are based on social benefit, rather than the idea of the natural rights of authors to their works.¹³ The various theories substantiating the moral justifications for granting property rights over the expression of ideas are therefore not discussed;¹⁴ the focus falls instead on the justifications for limiting the statutory rights. In order to comprehensively understand the legitimacy of curtailing the application of an owner's rights, a discursive overview of the law and economics elements underlying the rights is necessary. These policy considerations comprise a completely independent basis of justification to natural rights theories and moral justifications.¹⁵

2.3 Policy and Theory

The social objectives of the law of (physical) property are relevant considerations for granting property rights in intellectual creations.¹⁶ Without exclusive rights in physical property, two major economic problems are foreseen. Firstly, in the absence of exclusive

⁸ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 6-7; Mostert H & Pope A (eds) *The Principles of the Law of Property in South Africa* (2010) 9.

⁹ Chapter 5 section 2 1.

¹⁰ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 9-10.

¹¹ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 9.

¹² The constitutional aspects are considered in chapter 5 section 3 2.

¹³ Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 118; Fisher WW "Reconstructing the fair use doctrine" (1988) 101 *Harvard Law Review* 1659-1795 at 1687-1692; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 27.

¹⁴ A thorough examination can be found in Drahos P *A Philosophy of Intellectual Property* (1996) 22-28, 41-117.

¹⁵ Drahos P *A Philosophy of Intellectual Property* (1996) 25.

¹⁶ Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 158.

use rights, land and other property will be overused.¹⁷ The allegory of the tragedy of the commons is often incited to demonstrate the need for allocating common (corporeal) resources to individual entities in an effort to guard against the overconsumption of property held in common.¹⁸ However, the intrinsic risk of the tragedy of the commons is not applicable to intellectual property for the simple reason that the products of the intellect are non-rivalrous and therefore cannot be consumed, obviating the potential for overconsumption.¹⁹ The use of a copyright work by one person does not reduce its value to another, as is the case with corporeal property. Stated in economic terms, the marginal cost of intellectual property approaches zero, and can even be negative.²⁰ Accordingly, it is more accurate to define intellectual property as a public good in the economic sense, and physical property as a private good.²¹ The non-exclusive character of intellectual property is important to all justificatory theories of copyright, both for granting rights and limiting them.²²

The second economic consideration is that without exclusive rights in property there will be insufficient incentive to improve the property, and land would be allowed to lie fallow.²³ Again this consideration carries less weight in the context of intellectual property, as it is

¹⁷ Posner RA “The law and economics of intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 158.

¹⁸ The tragedy of the commons was first demonstrated in the context of the natural sciences: Hardin G “The tragedy of the commons” (1968) 162 *Science* 1243-1248. The point illustrated by the article is that when each member of a community has unregulated access to unallocated resources held in common, every rational actor consumes as much of the commons as he can in order to maximise his own utility at minimal costs, leaving insufficient resources for the remainder of the community. See Ghosh S “The fable of the commons: Exclusivity and the construction of the intellectual property market” (2007) 40 *University of California Davis Law Review* 855-890 for an exposition of how this tragedy relates to distributive justice in the field of intellectual property. See also Heller M “The tragedy of the anticommons: Property in the transition from Marx to markets” (1998) 111 *Harvard Law Review* 621-688 for a demonstration of the transactional inefficiency that results from awarding too many rights over physical or intellectual property.

¹⁹ Freedom in the commons would not be ruinous to existing resources (as it would be with rivalrous resources), but it will remove most of the incentive to contribute to existing resources. Alternative methods of stimulating the production of copyright works which do not restrict the availability and use of the works are conceivable, but current statutes utilise the economic incentive theory described below. For an alternative theory, see Hettinger EC “Justifying intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 108-109; Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 2 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

²⁰ Posner RA “The law and economics of intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 159; Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 1 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

²¹ Posner RA *Economic Analysis of Law* (8th ed 2011) 52.

²² Hettinger EC “Justifying intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 100.

²³ Posner RA “The law and economics of intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 158.

more inefficient to have unowned land than it is to have unowned intellectual property.²⁴ Furthermore, the incorporeal nature of copyright works prevents deterioration and spoilage of the products. Accordingly, a different theoretical basis is needed to justify the reification of non-rivalrous, abstract objects.

The rationale for granting exclusionary rights over intellectual property is based on the utilitarian objective of encouraging socially beneficial activities.²⁵ This is achieved by providing an economic incentive to create works.²⁶ The law creates (proprietary) authorisation rights that hold economic benefit to incentivise the creation and disclosure of copyright works.²⁷ This utilitarian approach predicts that without guaranteed protection of (property) rights, there would be no incentive to create works.²⁸ The rationale therefore revolves around providing works for the users of intellectual products, not rewarding the creators; the economic incentive is merely a means to serve the public.²⁹ However, this social policy model has transformed into arguments for individual entitlement.³⁰ An inherent tension exists between the exploitation of the rights granted and the purpose for which they were granted (allowing the public to make use of these works), as private property rights enhance one person's freedom at the expense of everyone else's.³¹ This approach is paradoxical, as it prevents many of the uses that it purports to promote.³²

²⁴ Posner RA *Economic Analysis of Law* (8th ed 2011) 52.

²⁵ Drahos P *A Philosophy of Intellectual Property* (1996) 25; Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 107-108. See also art 1 s 8 of the Constitution of the United States of America 1787. The role of utilitarian considerations is apparent in s 15 (3A) of the South African Copyright Act, which permits reproductions of three-dimensional artistic works if they "primarily have a utilitarian purpose and are made by an industrial process".

²⁶ This is therefore an instrumentalist justification: Drahos P *A Philosophy of Intellectual Property* (1996) 25. Incentives other than economic, such as the desire to be recognised as the author of a work, are often embodied by moral rights (eg the right to claim paternity).

²⁷ Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 122.

²⁸ Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 107-108. It is clear that this economic incentive model has no interest in rewarding natural rights or moral desert: Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 122-123.

²⁹ Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 120.

³⁰ Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 124.

³¹ Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 100.

³² Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 108.

Property must serve a social function and the individual rights in property must be measured against the social justifications for granting them.³³ Property rights should be limited when they start hindering the pursuit of more highly valued social objectives.³⁴ Exclusive rights have the obvious effect of limiting the distribution and use of intellectual property. As a counter-measure to excessive privatisation of copyright works, the law sets a limit on the scope of the rights to prevent the copyright owner from exercising her economic rights in instances where doing so would be contrary to the public interest. This is achieved by limiting the scope of application of the owner's rights and specifically allowing the public to use a work without authorisation or compensation. However, just as the award and reification of rights in a copyright work require justification on social policy grounds, creating exceptions to these rights must also be justified by policy considerations.³⁵ The *raison d'être* of every exception lies in the calculation that the social benefit it provides is greater than the private loss it causes.³⁶ The exceptions are a necessary condition for the subsistence of the property rights that vest in a copyright work, as they seek to address mutual interferences between the owner of the work and public users.³⁷

The law awards authors a limited monopoly over the exploitation of their works in exchange for the public disclosure thereof.³⁸ This monopoly takes the form of a number of core rights to use the work in different ways, which is described as ownership. Key among them are the rights to make reproductions of a work, publish a work, broadcast or publicly perform a work, make an adaptation of a work, and the right to commercially rent a work to the public.³⁹ The economic nature of these rights is evident. The author's property rights compete against several other fundamental rights vested in the public, such as the right to freedom of information and freedom of expression, as well as the public interest inherent in promoting education. In the face of these conflicts, property rights are often limited to avoid infringing other basic human rights and freedoms.⁴⁰ Exceptions such as fair dealing (or fair

³³ Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 116.

³⁴ Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252-307 at 297.

³⁵ Waldron J "From authors to copiers: Individual rights and social values in intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 127.

³⁶ Aufderheide P & Jaszi P *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011) 24.

³⁷ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 140.

³⁸ Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 100.

³⁹ The exclusive rights vary slightly from one statute to the next, but these are some of the core rights embodied in the legislation of the three jurisdictions considered in this thesis.

⁴⁰ Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252-307 at 297.

use, depending on the jurisdiction in question) manage to mediate much of the tension between copyright law and rights like freedom of expression.⁴¹

The creation of real rights over incorporeal objects results in various social and economic problems arising, which are partially addressed by the exceptions to copyright. The fees involved in the use of copyright works could cause some users to resort to other products instead, which may cost society more to produce.⁴² This then leads to a loss of efficiency, as the marginal cost to the copyright owner of allowing the use is around zero.⁴³ Moreover, creators of works routinely rely on existing works as an impetus for their creative process.⁴⁴ If potential creators are precluded from using existing products by expansive intellectual property rights, the creation of new intellectual property is obstructed, which is counterproductive and economically inefficient.⁴⁵ Limiting the effect of real rights may therefore be necessary to maximise the creation of intellectual property. In this case the conflict between the creation interest and use interest disappears, as they are both served by the limitation of rights.⁴⁶ Copyright law therefore allows unlicensed use of copyright material to enable new creators to contribute to the culture of works that spawned their own.⁴⁷ These arguments for unconstrained access to and use of available works weigh in on the balance of interests embodied in copyright policy. Copyright owners should be empowered to recoup their initial investment, but the rights granted should not prohibit legitimate public use.⁴⁸

⁴¹ Denicola RC "Copyright and free speech: Constitutional limitations on the protection of expression" (1979) 67 *California Law Review* 283-316 at 297. For a discussion of the relationship between fair use and free speech, see generally Netanel NW *Copyright's Paradox* (2008) 30-194; Benkler Y "Free as the air to common use: First Amendment constraints on enclosure of the public domain" (1999) 74 *New York University Law Review* 354-446; Denicola RC "Copyright and free speech: Constitutional limitations on the protection of expression" (1979) 67 *California Law Review* 283-316.

⁴² Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 162; Landes WM & Posner RA "An economic analysis of copyright law" (1989) 18 *The Journal of Legal Studies* 325-363 at 357-358.

⁴³ The marginal cost can even be negative, meaning that certain benefits to the copyright owners exist in allowing the reproduction of a work: Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 159.

⁴⁴ This is particularly true of parodies. See Aufderheide P & Jaszi P *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011) 16, 22-23; Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 101; Boyer M "The economics of copyright and fair dealing" (2007) *CIRANO Scientific Publications* 1-48 at 3 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁴⁵ Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 162.

⁴⁶ Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 164.

⁴⁷ Aufderheide P & Jaszi P *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011) 17.

⁴⁸ Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 162; Waldron J "From authors to copiers: Individual rights and

In addition to the economic problems that are mitigated by the limitation of intellectual property rights, various prominent economic rationales in support of the fair dealing exceptions specifically can be identified and require consideration. The market for copyright works is riddled with obstacles ranging from imperfect information to exorbitant costs resulting from monopolistic markets (which lead to the price being too high and distribution being too low).⁴⁹ Fair dealing helps alleviate these difficulties by allowing limited productive uses of copyright works by removing the obstacle of obtaining all of the relevant licences, which would require significant time and resources.⁵⁰ Fair dealing also restrains the potential market power that copyright owners exert over the imperfectly competitive market.⁵¹ Copyright owners are able to exercise their market power unabatedly if there is no substitute for a work, restricting public access to a work that could prove valuable to many who cannot afford the price set by the owner.⁵² Fair dealing allows limited uses of these works without the consent of the copyright owner, thereby harnessing the market power they would otherwise be able to exert. However, imperfect substitutes for most copyright works do exist, which limits the force of this rationale.⁵³

The dissemination of ideas, knowledge and information constitutes a strong economic and social justification both for awarding property rights and curtailing them.⁵⁴ Excessive protection can lead to the tragedy of the anticommons,⁵⁵ where the high number of individual copyright owners acts as a deterrent to using any combination of their works because of the transaction costs involved in the use.⁵⁶ If permission had to be sought prior to the use of a copyright work in every instance, very few uses would prevail. Copyright works will therefore be underused, which is economically inefficient. This frustrates the

social values in intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 122.

⁴⁹ Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 3, 31-36 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵⁰ Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 31 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵¹ Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 28-30 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵² Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 29 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵³ Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 30 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵⁴ Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 30 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵⁵ Initially proposed by Michelman FI “Ethics, economics, and law of property” in Pennock JR & Chapman JW (eds) *NOMOS XXIV* (1982) 3-40 and expanded to the field of intellectual property in Heller M “The tragedy of the anticommons: Property in the transition from Marx to markets” (1998) 111 *Harvard Law Review* 621-688.

⁵⁶ Boyer M “The economics of copyright and fair dealing” (2007) *CIRANO Scientific Publications* 1-48 at 30 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

social objective of abundant dissemination of information, which in turn has a devastating effect on the initial goal that copyright law sets out to achieve.⁵⁷ Fair dealing exceptions counter the detrimental effects of the absence of efficient markets by allowing certain legitimate uses without the consent of the copyright owner.⁵⁸ The exceptions embody one of the social objectives underlying copyright law by promoting the free flow of information where the market fails to sufficiently allocate this resource.

Apart from the role that exceptions play in alleviating various social and economic problems that arise from extensive property rights in copyright works, a reasonable limitation on the owners' rights could actually aid their interests in certain ways.⁵⁹ Fair dealing for the purpose of criticism or review is one concrete example of this contention. This exception allows users to reproduce portions of a (or even the entire) work without consent to properly review or level criticism against it.⁶⁰ If consent had to be obtained before the work could be used in this way, it would invalidate all credibility of the review, as the copyright owner would not allow such use if the review were negative.⁶¹ By obviating the need for authorisation (and the concomitant influence that the copyright owner could exert over the review) fair dealing allows users to give their honest and accurate opinion of a work.⁶² Even unfavourable reviews can stimulate sales (which is obviously in the interest of the owners) if the alternative is no review at all.⁶³ Moreover, when an unfavourable review negatively impacts on the demand for the work, it is not because it acts as a substitute for the work (and therefore does not directly infringe the owner's economic rights). The detriment would be caused by drawing attention to various flaws of the work, thus increasing the available supply of information, without undermining the reward incentive for creating worthwhile intellectual products.⁶⁴ This form of harm is not what the law tries to prevent by encouraging the production of intellectual property.⁶⁵ It can therefore be concluded that fair dealing exceptions embody a multitude of legitimate economic and social policy considerations.

⁵⁷ Boyer M "The economics of copyright and fair dealing" (2007) *CIRANO Scientific Publications* 1-48 at 31 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵⁸ Boyer M "The economics of copyright and fair dealing" (2007) *CIRANO Scientific Publications* 1-48 at 34 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

⁵⁹ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

⁶⁰ See the discussion of this exception at chapter 4 sections 2 3 3 & 3 3 3 and chapter 5 section 2 3 3.

⁶¹ Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 164; Landes WM & Posner RA "An economic analysis of copyright law" (1989) 18 *The Journal of Legal Studies* 325-363 at 358-359.

⁶² Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

⁶³ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

⁶⁴ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

⁶⁵ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

Economic reward is the method used to “promote the Progress of Science and the useful Arts”, as it is phrased in the Constitution of the United States of America.⁶⁶ There can be no objection to using a work in a way that does not impact on the economic exploitability, which is the primary incentive to continue creating works.⁶⁷ It follows that in situations where no economic harm is suffered there is a vested public interest in using copyright works that outweighs the private interests of copyright owners. The fair dealing provisions aim to provide the basis for such use. This is evidenced by the current international standard which legislation must comply with, requiring that all exceptions must be special cases that do not conflict with the normal exploitation of a work or unreasonably prejudice the legitimate interests of the owner.⁶⁸ Exceptions that conform to this standard will therefore only allow uses of a work that do not detract from the economic incentive to create works. This is a reflection of the chief social objective of copyright law and an essential embodiment of the public interest. The fair dealing exceptions therefore perform a vital role in copyright law.

2 4 Nature of Exceptions

The nature of copyright exceptions is a topic of academic disagreement. The legislative effort at restricting owners’ rights can be succinctly described as “a chaos theory-like line that encloses the notional area of the property right”.⁶⁹ It has been suggested that the proprietary nature of the rights in a copyright work necessarily means that the exceptions also have a proprietary nature.⁷⁰ This follows from the contention that exceptions limit an owner’s full ownership of her work in specific situations.⁷¹ The exceptions are therefore properly classified as limited real rights, akin to servitudes in the context of corporeal property. However, this construction is untenable. A major problem that immediately arises is the imprecise boundaries that such a limited real right would have. It becomes evident later in this thesis that the scope of the fair dealing exceptions remains unclear because it allows for judicial discretion in the determination of the fairness of each use. This

⁶⁶ Art 1 s 8 of the Constitution of the United States of America 1787. See Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-1 – 1-2.

⁶⁷ As will be seen in chapters 3 and 4, economic detriment is an important factor when determining the fairness of a use, although it is not dispositive.

⁶⁸ Art 9(2) of the World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886), restated and extended in art 13 of the World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994). See the discussion in chapter 3 section 2 2 relating to the expansion of the three-step test.

⁶⁹ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 142.

⁷⁰ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 140.

⁷¹ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 138.

undermines the desire for property rights to be clearly defined, because they are binding on third parties.⁷² The general approach to constructing the exceptions in legislation and treaties also does not suggest that the public has a property right entitling them to use works in certain specified instances.⁷³ Furthermore, the holder of a right is entitled to institute an action on the basis of that right; as will be seen in the paragraphs that follow, this is not the case with fair dealing exceptions. It would therefore be tenuous to say that the law confers property rights on every member of the public to use copyright works.

There is support for the contention that fair dealing provisions constitute rights: the Supreme Court of Canada held that these exceptions create users' rights,⁷⁴ a stance that has been hailed as a positive development.⁷⁵ Unfortunately, the court merely alluded to the exceptions as being better understood as users' rights (and continued to refer to them as such) without providing an explanation of why this is the case. This characterisation obviously does not mean that the rights are real. Instead, these rights should be seen as public entitlements granted by legislation that form an integral part in the balance of copyright if they are to be considered rights.⁷⁶

It is submitted that the most accurate view is that the property rights of authors are intentionally demarcated to fall short of the uses framed by the exceptions to copyright (such as fair dealing provisions). The copyright owner retains her property rights to exploit her work in the normal way, but these rights do not extend to certain prescribed instances. This is demonstrated by the phrase "copyright shall not be infringed [by the use of a work for certain purposes]", which is consistently employed in fair dealing provisions.⁷⁷ In cases of internal modification (or "immanent limitation"), the law notionally restricts the scope of

⁷² If the boundaries of the rights are not clearly defined, the public is prone to use works unlawfully in good faith: Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 142

⁷³ The specific constructions of the various limitations clauses and exceptions are discussed in chapters 3, 4 and 5. See also section 5 of this chapter.

⁷⁴ *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13 paras 12, 48. The fair dealing provisions in s 29 of the Canadian Copyright Act of 1985 are substantively identical to the South African counterparts (discussed in chapter 5), meaning that the nature of the Canadian exceptions have direct bearing on the South African position.

⁷⁵ Boyer M "The economics of copyright and fair dealing" (2007) *CIRANO Scientific Publications* 1-48 at 19, 47 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012). Vaver clearly supports the contention that these exceptions constitute users' rights: Vaver D *Copyright Law: Essentials of Canadian Law* (2000) 171; Vaver D "Publishers and copyright: Rights without duties?" (2006) 40 *Bibliotheksdiens* 743-750 at 747.

⁷⁶ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 140.

⁷⁷ See ss 29(1), 30(1) of the Copyright, Designs and Patents Act 1988; ss 40(1), 41(1), 41A, 42(1) of the Australian Copyright Act 63 of 1968; s 12(1) of the South African Copyright Act 98 of 1978.

the rights from the outset without limiting any specific rights.⁷⁸ This methodology perfectly describes fair dealing provisions, as the phrase “copyright shall not be infringed” limits ownership and does not differentiate between specific rights. The statutory source of the rights acts as an internal modifier, delimiting certain uses from the content of the rights and thus rendering these exceptions outside of the ambit of the author’s property rights.⁷⁹ The law itself is the most important indicator of the limitations of the right,⁸⁰ and indicates that these specific instances fall outside the scope of the copyright owner’s property rights. The statute restricts the content of the rights *ab initio* by determining their limits and describing conduct that falls outside of these boundaries.⁸¹

The legislation that grants the rights delimits them from certain spheres of application, leaving a protected array of privileges out of the control of the rights holders. Members of the public therefore enjoy privileges (or “liberties”)⁸² which they can rely on to use a copyright work without consent for purposes that are deemed fair. The legal conception of a privilege entails the permission to act in a certain way without being liable for damages.⁸³ A privilege has as a no-right as a correlative, meaning that no person has a right to summon state intervention to prevent the holder of the privilege from engaging in certain conduct.⁸⁴ The view that the exceptions amount to users’ privileges is prevalent in academic discourse.⁸⁵ The nature of a right is cited to support this view: the existence of a right necessarily implies that another party owes the holder of the right a concomitant duty.⁸⁶ It is argued that because a user who relies on an exception to use a work is not

⁷⁸ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 73 n 165; Rautenbach IM *General Provisions of the South African Bill of Rights* (1995) 105-106.

⁷⁹ Van der Walt AJ “The limits of constitutional property law” (1997) 12 *South African Public Law* 275-330 at 280.

⁸⁰ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 159; Van der Walt AJ “The limits of constitutional property law” (1997) 12 *South African Public Law* 275-330 at 280.

⁸¹ Van der Walt AJ “The limits of constitutional property law” (1997) 12 *South African Public Law* 275-330 at 280-281; Van der Walt AJ *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 75.

⁸² Hohfeld WN “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale Law Journal* 16-59 at 36.

⁸³ Hohfeld WN “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale Law Journal* 16-59 at 30-32; Singer JW *Entitlements: The Paradoxes of Property* (2000) 132.

⁸⁴ Hohfeld WN “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale Law Journal* 16-59 at 30, 32; Singer JW “The legal rights debate in analytical jurisprudence from Bentham to Hohfeld” (1982) 1982 *Wisconsin Law Review* 975-1059 at 986-989.

⁸⁵ See Benkler Y “Free as the air to common use: First Amendment constraints on enclosure of the public domain” (1999) 74 *New York University Law Review* 354-446; Waldron J “From authors to copiers: Individual rights and social values in intellectual property” in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 114-154 at 126; Cahir J “The public domain: Right or liberty?” in Waelde C & MacQueen H (eds) *Intellectual Property: The Many Faces of the Public Domain* (2007) 35-52.

⁸⁶ Hohfeld WN “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale Law Journal* 16-59 at 30-34; Singer JW *Entitlements: The Paradoxes of Property* (2000) 132; Cahir J “The public

owed a duty by the copyright owner (or anyone else), the exceptions cannot constitute rights.⁸⁷ The absence of a duty precludes the possibility of a right in terms of Hohfeldian correlatives.⁸⁸ This contention is supported by the interest theory used to inform the substance of rights, according to which the holder of a right is a passive beneficiary of supportive duties owed to her by others.⁸⁹ Accordingly, copyright owners are not entitled to succeed in legal action against users because the latter have the benefit of privileges, which renders their conduct lawful, while the copyright owner has a no-right in these instances. Everyone has the freedom to use copyright works in line with the content of the privileges, and no party has the right to stop anyone else from doing so. However, copyright owners are under no duty to enable the use of their works. Privileges do not necessarily entail correlative duties imposed on other people (because other persons may also enjoy liberties), meaning that third parties have no obligation to allow the holder of the privilege to exercise it.⁹⁰ This conception does not exclude the possibility of duties being imposed on others to respect a user's privilege (which is what the Supreme Court of Canada implicitly held),⁹¹ but it does not require it. A privilege can exist without any correlative duties on others to respect it; whether such concomitant duties exist is a matter of policy and justice, to be expressed in statute.⁹² Legislation will have to be clear when and on whom such a duty is imposed.

The privilege acts as an affirmative defence, exempting the beneficiary from liability for copyright infringement by rendering the activity lawful. Accordingly, the exceptions justify the user's conduct, instead of excusing it.⁹³ However, privileges do not entitle the

domain: Right or liberty?" in Waelde C & MacQueen H (eds) *Intellectual Property: The Many Faces of the Public Domain* (2007) 35-52 at 36.

⁸⁷ Cahir J "The public domain: Right or liberty?" in Waelde C & MacQueen H (eds) *Intellectual Property: The Many Faces of the Public Domain* (2007) 35-52 at 40-41.

⁸⁸ Cahir J "The public domain: Right or liberty?" in Waelde C & MacQueen H (eds) *Intellectual Property: The Many Faces of the Public Domain* (2007) 35-52 at 40.

⁸⁹ Rainbolt GW "Rights theory" (2006) 1 *Philosophy Compass* 1-11 at 4; Cahir J "The public domain: Right or liberty?" in Waelde C & MacQueen H (eds) *Intellectual Property: The Many Faces of the Public Domain* (2007) 35-52 at 38.

⁹⁰ Hohfeld WN "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale Law Journal* 16-59 at 30, 32; Singer JW "The legal rights debate in analytical jurisprudence from Bentham to Hohfeld" (1982) 1982 *Wisconsin Law Review* 975-1059 at 988.

⁹¹ *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13 paras 12, 48. The court expressly referred to the exceptions as constituting "users' rights", necessarily implying that a duty to respect the right is imposed on others.

⁹² Hohfeld WN "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale Law Journal* 16-59 at 36.

⁹³ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 140.

beneficiary to state intervention to enforce his entitlements;⁹⁴ they do not act as a foundation for a cause of action if encroached upon, unless correlative duties are imposed.

Users should be able to use works freely for certain purposes without fear of judicial recourse. However, this is only possible with extra-judicial certainty regarding the precise ambit of the conduct that is deemed lawful, which would detract from the flexibility of the exceptions (which allows the judiciary to achieve just results on every set of facts). The approaches to constructing exceptions need to be examined to find the optimal balance between flexibility and certainty.

2.5 Construction of Exceptions

Limitations of rights are predominantly set out in the statute that grants the author the economic rights, giving them the same authority as the rights themselves. Two approaches are prevalent in the construction of exceptions in copyright law, sometimes distinguished by the civil/common law divide.⁹⁵ The first approach, known as the “unitary system”,⁹⁶ establishes a general rule or principle that prescribes the characteristics of the conduct that the law exempts from liability.⁹⁷ International treaties are exemplary of this approach, as it is a sensible model to use when trying to cater for a large variety of legal systems. The three-step test contained in article 9(2) of the Berne Convention,⁹⁸ which has three criteria that exempting legislative provisions must conform to, is a clear demonstration of this construction.⁹⁹ The second approach, known as the “particle system”,¹⁰⁰ forsakes the generalised construction of exemption for a specific set of purposes for which a copyright work can be used. Countries with legislated fair dealing provisions fall into this category.¹⁰¹

⁹⁴ Hohfeld WN “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale Law Journal* 16-59 at 36; Singer JW “The legal rights debate in analytical jurisprudence from Bentham to Hohfeld” (1982) 1982 *Wisconsin Law Review* 975-1059 at 988.

⁹⁵ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141.

⁹⁶ Also referred to as the “hedgehog” system: Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141.

⁹⁷ The German provision is a prime example of this approach: see s 24 UrheberGesetz 1965.

⁹⁸ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886).

⁹⁹ See the discussion in chapter 3 section 2.1.

¹⁰⁰ Also referred to as the “fox” approach: Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141-142.

¹⁰¹ Accordingly, the United Kingdom, Australia and South Africa are examples of this system.

A large number of jurisdictions that adopt the unitary system also have detailed subdivisions providing a clearer exposition of the general rule.¹⁰² The United States of America has a general fair use principle – which is distinguished from fair dealing precisely on this basis – that allows uses for any purpose if they can be justified in terms of four factors used to determine the fairness.¹⁰³ However, the general rule in the principal provision is supplemented by a set of specific purposes which are issued as a list of practices that will often qualify as fair. This hybrid model is to be preferred, as it allows for an open range of uses to be justified while providing a degree of legal certainty with regard to certain specific uses that will regularly be justified.

Exceptions allowing certain individual uses (like the fair use exceptions) are generally quite vague. Framing an exception with open-ended application has the benefit of allowing the exception to be applied in a flexible manner to each factual situation, enabling a judge to apply the consideration of overall fairness to achieve a just result while gradually developing the law by establishing precedent. However, this approach has the obvious pitfall of legal uncertainty, leaving users unclear as to whether their actions (which may be undertaken with honest intentions) will be exempted by law. It is necessary that the fair dealing exceptions remain flexible to accommodate legitimate uses and deny exemption to brazenly illegitimate uses. Accordingly, it is desirable to circumscribe guidelines illustrating the type of conduct that will be found permissible, without removing the element of judicial discretion to determine the overall fairness of the action or restricting the types of permitted uses to a *numerus clausus*. Extra-judicial certainty can be achieved to some extent by providing such guidelines, which could operate as an efficient and inexpensive mechanism to alleviate much of the inherent tension and uncertainty while protecting the intrinsic flexibility of the exceptions as they stand.¹⁰⁴ The concept of fairness, which is an indispensable requirement of the exceptions, is discussed in later chapters in light of the meaning that it has been given by the judiciary.¹⁰⁵ Policy considerations play a pivotal role in the determination of whether conduct should be exempted from copyright protection, and are manifested in certain factors that courts take into account when deciding a fair

¹⁰² Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141.

¹⁰³ S 107 of the Copyright Act of 1976.

¹⁰⁴ See s 40(5) of the Australian Copyright Act 63 of 1968, where precise guidelines are set out that deem conduct that complies with the standards automatically fair, failing which the usual test for fair dealing can proceed.

¹⁰⁵ See chapter 4 sections 2 2 & 3 2 and chapter 5 section 2 3 5.

dealing case.¹⁰⁶ It is possible to legislate factors to serve as guidelines without jeopardising the inherent flexibility of these exceptions, as has been done in Australia.¹⁰⁷

2 6 Conclusion

Copyright law promotes the creation of works that are socially desirable. The proprietary nature of copyright provides strong protection for owners of works, but presents a paradox between the rights granted and the reasons for granting them. Fair dealing exceptions attempt to regulate copyright owners' property rights to balance the interests of the public and the interests of copyright owners. The exceptions allow valuable uses of works that do not materially impact on the commercial exploitation of the work, thereby alleviating part of the initial paradox.

The various rationales proposed for these exceptions show that each exception is calculated to achieve a greater social benefit than the individual loss it causes by taking account of the economic incentive necessary to promote the creation of copyright works. It is suggested that certain unauthorised uses may even be beneficial to the economic interests of copyright owners.¹⁰⁸ In this way copyright owners' interests are protected and the dissemination of ideas and information is promoted. Furthermore, fair dealing allows derivative use of copyright works in the process of creating new works (parody being a prime example), which promotes the philosophy underlying copyright law.

The analysis of the nature of the exceptions shows that fair dealing provisions create public law entitlements to use protected works for certain socially beneficial purposes. These entitlements stem from the internal modification that copyright legislation performs, defining copyright owners' rights to fall short of these prescribed instances. These entitlements take the form of privileges (in terms of Hohfeldian conceptions) which justify users' actions rather than excusing them. This view is supported by the fact that fair dealing is an affirmative defence, not a negating defence. The exceptions declare the user's conduct to be lawful, and form a constituent part of the proprietary nature of copyright. Policy considerations can necessitate the imposition of correlative duties, which would serve to protect users' privileges, although this is not achieved by the legislation of

¹⁰⁶ See the cases discussed in chapter 4.

¹⁰⁷ See s 40(2) of the Copyright Act 63 of 1968.

¹⁰⁸ See section 3.

the jurisdictions considered. Accordingly, users are left without the ability to protect their liberties from outside interference.

The two statutory constructions that are traditionally used demonstrate the different approaches to embodying the objectives of fair dealing. The type of conduct allowed is similar, although the unitary system permits a larger range of uses than the particle system. It is suggested that the merits of both systems should ideally be combined by making use of a hybrid system, like the American fair use provision. This allows a greater scope of exemption for genuinely deserving conduct, without compromising on legal certainty.

The context that this chapter creates allows a meaningful analysis of the way in which fair dealing exceptions function to follow. Against this background, the next chapter examines the international law framework that informs national copyright legislation. It is then possible to provide a comparative analysis of fair dealing exceptions in the United Kingdom and Australia. This comprehensive theoretical, normative and comparative foundation enables a reflective analysis of the exceptions contained in South African legislation.

3 International Law on Copyright and Neighbouring Rights

3.1 Introduction

The purpose of this chapter is to examine the most prominent international instruments relating to the protection of intellectual property, more specifically copyright, that are binding in South African law. This will serve to create a framework of international law mandates informing national legislation, which will be examined in subsequent chapters. Specific attention is paid to provisions in international instruments concerning the rights granted to copyright owners, the exceptions to and limitations on these rights and the effect on users' entitlements to use such works. The development of international copyright law is traced to serve as a framework for the analysis of national legislation that follows.

Section 231(2) of the South African Constitution declares that international agreements are binding on the Republic of South Africa once parliament has ratified or acceded to the text.¹ South African courts, tribunals and forums are also mandated to consider international law when interpreting the Bill of Rights.² International agreements as referred to in these provisions are synonymous with treaties and the terms are therefore used interchangeably.³ International agreements become law in South Africa once national legislation is enacted that gives effect to the obligations.⁴ South Africa nonetheless remains bound by all treaties which were binding at the time of the adoption of the Constitution.⁵ Courts are instructed to interpret legislation in a manner that is consistent with international law when possible.⁶ Accordingly, a dualist approach to international law is followed.⁷ South African copyright law is integrated into the international framework of

¹ The Constitution of the Republic of South Africa, 1996.

² S 39(1)(b) of the Constitution.

³ Dugard J *International Law: A South African Perspective* (4th ed 2011) 61.

⁴ S 231(4) of the Constitution of the Republic of South Africa, 1996. See Dugard J *International Law: A South African Perspective* (4th ed 2011) 60-62 for a discussion of international agreements that are not enacted into law by Parliament.

⁵ S 231(5) of the Constitution of the Republic of South Africa, 1996.

⁶ S 233 of the Constitution of the Republic of South Africa, 1996.

⁷ Dugard J *International Law: A South African Perspective* (4th ed 2011) 42-43.

copyright protection, with legislation modelled according to the standards entrenched by a variety of treaties.⁸

The World Intellectual Property Organisation (WIPO), along with the United Nations (UN) and World Trade Organisation (WTO), is the driving force behind some of the most weighty treaties and conventions concerning copyright protection. The Universal Declaration of Human Rights assures that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.⁹ This statement is reiterated in article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights,¹⁰ which recognises the right of everyone “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.¹¹ The instruments that expand on these provisions are, for the purposes of copyright and neighbouring rights, primarily the WIPO Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),¹² the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention),¹³ the Copyright Treaty (WCT),¹⁴ the Performances and Phonograms Treaty (WPPT),¹⁵ and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁶

These international treaties and covenants have fostered a global regime of intellectual property standards and have been integral in transforming many national regimes on the intellectual property legislative front.¹⁷ It is necessary to examine the provisions of these treaties relating to the fortification of copyright and the most prevalent effects that this

⁸ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-162. See chapter 5 generally for a detailed discussion of the provisions of the South African legislation.

⁹ Art 27(2) of the United Nations *Universal Declaration of Human Rights* (1948) GA Res 217A (III), UN Doc A/810 at 71 (1948), adopted on 10-12-1948.

¹⁰ United Nations *International Covenant on Economic, Social and Cultural Rights* (16-12-1966) 993 UNTS 3 (1976), entered into force 3-1-1976.

¹¹ The twin of ICESCR, the United Nations *International Covenant on Civil and Political Rights* (16-12-1966) 999 UNTS 171 (1976), entered into force 23-3-1976, makes no mention of any intellectual property interests.

¹² World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886).

¹³ World Intellectual Property Organisation *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (26-10-1961) 496 UNTS 43 (1961), entered into force 18-5-1964.

¹⁴ World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996).

¹⁵ World Intellectual Property Organisation *Performances and Phonograms Treaty* (20-12-1996) 36 ILM 76 (1996), entered into force 20-5-2002.

¹⁶ World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994).

¹⁷ Raustiala K “Density and conflict in international intellectual property law” (2007) 40 *University of California Davis Law Review* 1021-1038 at 1022, 1025, 1031.

fortification has had on what is traditionally seen as “fair dealing” with such works.¹⁸ By examining these instruments in conjunction with national legislation, it is possible to create a contextual framework for the subsequent chapters that provide comparative analyses.¹⁹

The UN Universal Copyright Convention (UCC)²⁰ is a treaty that has little relevance today but was an important stepping stone during the latter part of the twentieth century. For this reason the discussion of the treaty can be confined to a few general observations. The primary aim of the convention was to provide common guidelines between various states in the Americas and the member states of the Berne Convention.²¹ The UCC is not (nor was it intended to be) a comprehensive model of regulation, but rather an introductory step towards the Berne Convention which could later be built upon.²² A general approach is adopted regarding the obligations of contracting members instead of the more specific and rigid mandates imposed by the Berne Convention.²³ As a result, many of the provisions of the UCC are less arduous and impose lighter requirements to be adopted in legislation.²⁴ Furthermore, there is no mention of any exceptions to copyright, or any general protection of moral rights.

The greatest impact of the UCC is considered to be the adherence of the United States of America, who at that time was not party to the Berne Convention, and “the entry of that important country into general international copyright relations”.²⁵ Today the UCC is of little significance as the shift towards the Berne Convention has practically enveloped the need

¹⁸ “Fair dealing” should be construed to include the American corollary “fair use” for the purposes of this chapter only.

¹⁹ Specifically chapter 4 dealing with the copyright law of the United Kingdom and Australia and chapter 5 dealing with South African law.

²⁰ United Nations *Universal Copyright Convention* (6-9-1952) 216 UNTS 132 (1952). Although South Africa is not party to either the Geneva or the Paris text, Australia, the United Kingdom and the United States all are. See generally the discussion of this convention in relation to the Berne Convention in Jaszi P “A garland of reflections on three international copyright topics” (1989) 8 *Cardozo Arts & Entertainment Law Review* 47-72 at 53-54.

²¹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1171.

²² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1184.

²³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1185.

²⁴ Eg the general term of protection contained in art IV(2) is 25 years *post mortem auctoris* and the only protected right in terms of art V is the right of translation of a work, compared to the heavier protection of 50 years *post mortem auctoris* and the array of rights provided for in arts 7(1) and 5, 6^{bis}, 8, 9, 11-12, 14-15 of the Berne Convention respectively.

²⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1202.

for the former, with all UCC members now having acceded to the more comprehensive framework of the Berne Convention.²⁶

The respective sets of legislation in force in Australia, the United Kingdom and South Africa have followed the international standards set by the instruments discussed in this chapter, and are analysed in chapters 4 and 5 concurrently. The treaties discussed in this chapter operate as the link between the assorted national legislative schemes.²⁷ The countries are variously parties to the same agreements, and authors therefore enjoy the benefit of protection in foreign territory under the principle of national treatment.²⁸ Contracting states to a particular convention are required to provide certain minimum standards of protection, which can then be claimed by a qualifying national of another contracting state. This means that the legislation promulgated by one member state can be used to enforce the rights of a national of a different member state.²⁹

The rights granted to authors of works are discussed separately to those that attach to the performance of a work, reducing that performance to a phonogram, and broadcasting a performance generally. The act of creating a work is the focus of section 2, while section 3 discusses the legal aspects of the subsequent performance of the work. These latter rights are supplementary to and in no way detract from the rights of the author of a work, rather operating completely autonomously.³⁰ Some of the legislation discussed in later chapters deal with these neighbouring rights together with copyright, making a discursive overview of the international framework of neighbouring rights necessary.

3 2 Copyright

3 2 1 Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)

The Berne Convention – originating in 1886 – has been redrafted, revised and amended eight times since its inception. The current text, the Paris Act,³¹ was last amended on 28

²⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1202-1203.

²⁷ See Wallace RMM *International Law* (5th ed 2005) 262 in this regard.

²⁸ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-166.

²⁹ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-166.

³⁰ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-191.

³¹ 1161 UNTS 3 (1971).

September 1979.³² For the sake of concision, reference to the Berne Convention should be construed as reference to the latest text as amended, unless another version of the text is cited. The Republic of South Africa and Australia signed the Berne Convention on October 3, 1928 and April 14, 1928 respectively, while the United Kingdom and the United States signed the treaty on December 5, 1887 and March 1, 1989 respectively. South Africa has ratified the Brussels text of 1948 regarding substantive provisions and the Paris Act of 1979 regarding administrative provisions. Nonetheless, the South African Copyright Act 98 of 1978 was drafted to comply with the latest text and although no formal steps have been taken to accede to the Paris Act, the required legislative measures are in place.³³ For this reason, and because of the effect of article 9 of TRIPS and article 1(4) of the WIPO Copyright Treaty,³⁴ the latest text of the Berne Convention is analysed in this chapter.

The Berne Convention is based on the principle of national treatment, according to which the primary method of enforcement is through national legislation.³⁵ The protection is therefore dependent on the national legislation of the country in which protection is being asserted.³⁶

Article 2 of the Berne Convention delineates the categories of works that are endowed with protection which, in terms of the treaty, extends territorially to every signatory party.³⁷ This extensive, although not exhaustive,³⁸ list essentially corresponds with the categories of works enumerated in the South African Copyright Act,³⁹ the Australian Copyright Act,⁴⁰ and the United Kingdom's Copyright, Designs and Patents Act.⁴¹ Article 2(8) of the Berne Convention, however, explicitly excludes news of the day and miscellaneous facts of press

³² The 1886 text was the first to introduce minimum standards of protection. See generally Jaszi P "A garland of reflections on three international copyright topics" (1989) 8 *Cardozo Arts & Entertainment Law Review* 47-72 at 50.

³³ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-166.

³⁴ These articles incorporate the substantive provisions of the Paris Act; see the discussions in sections 2 2 and 2 3 respectively.

³⁵ Jaszi P "A garland of reflections on three international copyright topics" (1989) 8 *Cardozo Arts & Entertainment Law Review* 47-72 at 59.

³⁶ Art 5.

³⁷ Art 2(1) explains "literary and artistic works shall include every production in the literary, scientific and artistic domain".

³⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 504; Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 44.

³⁹ S 2(1)(h)-(i) of the Copyright Act 98 of 1978.

⁴⁰ Ss 32 & 89-92, read with s 10, of the Copyright Act 63 of 1968.

⁴¹ S 1 of the Copyright, Designs and Patents Act of 1988 (hereafter CDPA).

information from being protected. As facts are not protected by copyright in any event,⁴² this provision is thought to reinforce the dichotomy between the subject matter and the expression.⁴³

The Berne Convention provides for minimum standards of protection, meaning that exceptions to the rights of authors must also be provided for.⁴⁴ The primary limitations on the protection granted by article 2 are contained in article 2^{bis}. The works provided for in these exceptions are not free of copyright protection; rather, an exception is made that allows the use of the copyright material in certain circumstances, as discussed in chapter 2.⁴⁵ Article 2^{bis}(1) aims to exclude public political speeches and speeches made in legal proceedings from copyright, which means that they can be reproduced without fear of infringement. Subsection (2) of article 2^{bis} allows national legislators to provide for further exceptions where it is deemed to be in the public interest for certain expressions (namely “lectures, addresses and other works of the same nature which are delivered in public”) to be reproduced and relayed to the public.⁴⁶ It is clear from the formulation and scope of the provision that it is the manifestation of the public interest in information that makes it possible for media actors to disseminate public speeches without fear of infringing copyright.⁴⁷ However, the subsequent provision curbs the effect of the article by providing that “[notwithstanding], the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs”.⁴⁸ This mandate prohibits publications such as journals and other anthologies by any entity other than the author.

Article 9(2) deals with exceptions to the exclusive right of reproduction by establishing a three-step test setting out the requirements to be met by any legislative provision granting

⁴² Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-25.

⁴³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 498-499. See also art 9(2) of TRIPS, discussed in section 2.2.

⁴⁴ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 54.

⁴⁵ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 54. See also chapter 2 section 4.

⁴⁶ Art 2^{bis}(2) states that “[i]t shall also be a matter for legislation in countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11^{bis}(1) of this Convention [which relates to rights in broadcasting], when such use is justified by the informatory purpose.”

⁴⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 807-808. Only the South African Copyright Act embodies this provision in s 12(6), while in the other jurisdictions reliance will have to be on fair dealing for purposes of reporting news and current events.

⁴⁸ Art 2^{bis} (3).

exemption from infringement of the right to reproduce.⁴⁹ In terms of this test, exceptions relating to the reproduction of a protected work must (i) be confined to special cases, (ii) not conflict with a normal exploitation of the work, and (iii) not unreasonably prejudice the legitimate interests of the author.⁵⁰ This test has subsequently been extended to all rights granted to copyright owners by the Agreement on Trade-related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, thus becoming the international baseline for exceptions to any and all rights.⁵¹

Article 10 – entitled “Certain Free Uses of Works” – provides the international minimum fair dealing standards to be implemented by member states. This article is aimed at the protection of public interest rather than the protection of the author’s rights.⁵² Subsection (1) provides as follows:

“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.”

This provision can be related to article 2(8), discussed above, both having the aim of free global dissemination of information.⁵³ While article 2(8) withholds copyright protection from facts, article 10(1) does not derogate from the protection of works, but allows certain uses of these works. It is argued that these limitations and exceptions constitute imperative mandates for member states to allow deviation from the protection of authors’ rights, and if copyright protection is indeed given in these circumstances it will be contrary to the Berne Convention.⁵⁴ This is known as the principle of maximum protection, which obliges national legislatures to cap the protection given to copyright owners according to certain provisions.⁵⁵ The mandatory exception therefore serves to grant a minimum entitlement to

⁴⁹ Sheat K “Libraries, copyright and the global digital environment” (2004) 22 *The Electronic Library* 487-491 at 488.

⁵⁰ Art 9(2).

⁵¹ See sections 2.2 and 2.3 of this chapter respectively.

⁵² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 331-332.

⁵³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 330.

⁵⁴ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 330, 783, 788-789.

⁵⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 330; Efroni Z *Access-Right: The Future of Digital Copyright Law* (2011) 327-329.

users.⁵⁶ It is submitted that this principle necessitates application to other exceptions of a permissive nature to create the intended balance.⁵⁷

The provision sets out three requirements that must be met before the exception can be applied. Firstly, the work must have been lawfully available to the public, indicating that the author consented to its disclosure. This clause has a wider scope than what is envisioned by the term “published” and includes the lawful availability through any means, not only by means of copies of the work.⁵⁸ It follows that if a work is lawfully (with the consent of the author) performed in public, it is open to quotation by critics and reviewers.

Secondly, the quotation must be made in a manner that is compatible with “fair practice”. The elementary meaning given to the phrase “fair practice” corresponds with the implicit intention of limiting “free” uses of a work as contained in this provision to socially beneficial purposes, such as encouraging further creativity and innovation.⁵⁹ This interpretation is consistent with allowing users the liberty of exploiting the work without consent when the use outweighs the copyright owner’s interest in excluding such use.⁶⁰ This is usually implemented with fair dealing or fair use provisions. Among other factors, the length of the extract will be objectively considered when determining whether the quotation is compatible with fair practice, although this criterion is not dispositive.⁶¹ Moreover, two of the constituent factors of the three-step test of article 9(2) are also applicable to this consideration: is the use in conflict with the normal exploitation of the work, and does the use unreasonably prejudice the legitimate interests of the author?⁶²

The third requirement is that the extent of the quotation does not exceed the justifying purpose. No list of such purposes is provided in the Berne Convention, and member states are therefore left without context as to what might constitute one. Ricketson and Ginsburg contend that, based on the preparatory work of the Paris Act, a number of contexts would

⁵⁶ Kur A & Ruse-Khan HG “Enough is enough – The notion of binding ceilings in international intellectual property protection” *Max Planck Institute for Intellectual Property, Competition and Tax Law Research Paper Series No 09-01* (2008) 1-69 at 18 <available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429> (accessed 27-9-2011).

⁵⁷ Efroni Z *Access-Right: The Future of Digital Copyright Law* (2011) 334.

⁵⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 785.

⁵⁹ Meyer BG “Filtering systems or fair use? A comparative analysis of proposed regulations for user-generated content” (2009) 26 *Cardozo Arts & Entertainment Law Journal* 935-956 at 949.

⁶⁰ Cotter TF “Fair use and copyright overenforcement” (2008) 93 *Iowa Law Review* 1271-1318 at 1280.

⁶¹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 786, 788.

⁶² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 786.

give proper meaning to this clause.⁶³ These include scientific, critical, informative and educational purposes, as well as quotations made for judicial or political, or even entertainment purposes.⁶⁴ While not confined merely to literary works,⁶⁵ this clause makes it possible for works to be reproduced without the consent of the copyright owner for a purpose that can be justified as “fair practice”. This exception serves the public interest in the dissemination of literary and artistic works.

Article 10(2) strives to prevent the stringent application of copyright law in cases where copyright works are used for educational purposes. The provision states:

“It shall be a matter for legislation in the countries of the Union ... to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”

The purpose of this statement is to promote education by precluding possible objections of copyright infringement when protected works are included in materials used for teaching. Again, this exception is predicated on the otherwise-infringing act falling within the boundaries of fair practice, which leaves a broad spectrum of interpretation as with article 10(1).⁶⁶ The word “utilization” supersedes the term “excerpts” contained in the Brussels Act of 1948, meaning that the entire work may now be used instead of only a part of a work, as long as it is justified by the purpose.⁶⁷ Furthermore, a wide array of uses is permitted by the provision, enabling teachers to make full use of “publications, broadcasts or sound or visual recordings”. This provides educators with the discretion to make use of a variety of mediums of expression, given the rapidly progressing nature of technology.⁶⁸ There is also no restriction on the number of copies that may be made for this purpose, although it must comply with fair practice. However, there is a specific limitation on the allowable use of protected material: the teaching must take place in a public or private school or tertiary institution, and the exception finds no application in the case of general

⁶³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 786.

⁶⁴ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 786-787.

⁶⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 786.

⁶⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 791.

⁶⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 791.

⁶⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 793.

public teaching.⁶⁹ The permissive language of this exception, when compared to the imperative language of article 10(1), indicates that there is no obligation on member states to enact this exception. The purpose of this distinction is less than clear, as the public interest served by teaching can surely not be treated as inferior to that served by quotations.⁷⁰ Article 10(3) imposes additional fair practice requirements by insisting that the author and source of the work are mentioned, which reinforces the author's moral rights (in this case the right to be acknowledged as the author).⁷¹ It is submitted that the defence of fair dealing can therefore not find application in the case of infringement of moral rights, as this will clearly be beyond the awning of fair practice.

Article 10^{bis} is entitled "Further Possible Free Uses of Works" and provides supplementary instances in which member states can indemnify infringing uses of copyright protected works. This is not an obligatory provision; rather, it is left to the discretion of national legislatures to determine whether and to what extent these exceptions to the rights of the copyright owner will be introduced.⁷²

The first envisioned scenario is the reproduction of media articles relating to topical economic, political or religious events.⁷³ This provision covers not only the subject matter of articles, but extends beyond reproductions to include broadcasts and communications of the same nature by wire to the public.⁷⁴ Although these acts of dissemination could not possibly have foreseen the digital environment, there is nothing in this provision that prevents member states from incorporating this exception in national legislation.⁷⁵ However, the reproduction, broadcasting and communication by wire are contingent on the

⁶⁹ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 114; Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 789-790.

⁷⁰ Kur A & Ruse-Khan HG "Enough is enough – The notion of binding ceilings in international intellectual property protection" *Max Planck Institute for Intellectual Property, Competition and Tax Law Research Paper Series No 09-01* (2008) 1-69 at 18 <available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429> (accessed 27-9-2011). See chapter 5 section 2 3 5 for the discussion of this clause in national legislation.

⁷¹ Moral rights attach inalienably to the author of a work and exist independently of the economic rights; moral rights include the right to be named as author (the right to paternity) and the right to have the integrity of the work protected (right to integrity). See Rose M *Authors and Owners: The Invention of Copyright* (1994) 18; Dean OH *Handbook of South African Copyright* (RS 14 2012) 1-110 – 1-111. Art 6^{bis} of the Berne Convention regulates moral rights.

⁷² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 800.

⁷³ Art 10^{bis}(1).

⁷⁴ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 801.

⁷⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 801.

copyright owner not expressly prohibiting such acts.⁷⁶ The moral rights of the author are again stated in the latter part of the clause, while further actuating national legislatures to promulgate the legal consequences of not acknowledging the source.

Article 10(2) calls for legislators to consider the consequences of incidental exposure of copyright protected works in pursuance of reporting current events. This provision does not constitute a mandate, but rather leaves it to national legislatures to implement.⁷⁷ The provision explicitly accounts for “literary or artistic works seen or heard in the course of [reporting on current events]”.⁷⁸ The form of reporting to the public can be by photography, cinematography, broadcasting or communication to the public by wire. To give meaningful effect to this provision, legislatures of member states should extend the scope to include sound recordings, which are often the medium of expression of said literary works and form an integral part of cinematographic works and broadcasts.⁷⁹

The copyright work must have been seen or heard while reporting on current events, which necessarily implies that there can be no claim to the exception where such material was added after recording the footage for the sake of embellishment.⁸⁰ In essence, the infringement must have occurred while reporting current events. A further requirement is that the use of the protected work must be “justified by the informatory purpose”.⁸¹ This phrase replaced the term “short extracts” that appeared in the Brussels Act, which suggests that the emphasis has shifted from the length or duration of the use *per se*, to the length or duration needed to serve the purpose. The inquiry will be to the nature of the work used and the purpose served by its inclusion in the report.⁸²

Article 10^{bis}(2) exceeds the scope of article 2^{bis}(2), as the former allows for making a cinematographic film to report current events, while the latter does not. Notwithstanding, the former article is aimed exclusively at reporting current events, while the latter is aimed

⁷⁶ Art 10^{bis}(1).

⁷⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 804.

⁷⁸ Art 10^{bis}(2).

⁷⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 804-805.

⁸⁰ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 805.

⁸¹ Art 10^{bis}(2).

⁸² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 805.

at informing the public and is therefore not subject to the temporal restriction.⁸³ Furthermore, an entire work may be used to inform the public in terms of article 2^{bis}(2), while this is not the case with article 10^{bis}(2).⁸⁴

The rights relating to the authorisation of communicating a work to the public are addressed in articles 11 to 11^{ter}. These rights relate to the authorisation of the performance of a work, communication to the public of such performance and broadcasting rights.

The performance of a work can be effected by a person (such as an actor or musician) or by means of a mechanical device (as suggested by the phrase “by any means or process” in article 11(1)(i)).⁸⁵ Performance differs from reproduction precisely because no copy of the original is necessarily made; the work is presented in a non-material form.⁸⁶ The right to authorise the public performance of a dramatic, musical or dramatico-musical work is to vest in the author of the work, while the right to communicate the performance to the public is also to be granted to the author of the work.⁸⁷ Article 11(2) assures that the author is to enjoy the same rights over any translation of the work. These rights are recapitulated for authors of literary works in article 11^{ter}, with performance being replaced by recitation.

Article 11^{bis}, which covers broadcasting and related rights, is applicable to all the subject matter covered in the Berne Convention, although it does not apply to all forms of transmission.⁸⁸ Notably, article 11^{bis} does not fall within the scope of “any communication to the public” as contained in articles 11(1)(ii) and 11^{ter}(1)(ii), instead constituting its own form of communication that qualifies the scope of these articles.⁸⁹ Article 11^{bis}(1)(i)-(iii) regulates broadcasting, rebroadcasting, wired dissemination of broadcasts and public communication of broadcasts by means of loudspeakers or analogous instruments. The right to authorise all of these acts – separately from authorising performance and

⁸³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 808.

⁸⁴ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 808.

⁸⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 705-706, 715.

⁸⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 706.

⁸⁷ Arts 11(1)(i) & (ii) respectively.

⁸⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 717.

⁸⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 730.

communication to the public – is granted to the author of the work.⁹⁰ However, the performance of a work itself attracts protection, which is discussed later in this chapter.⁹¹

Further implicit exceptions to the rights granted in this convention exist that can also be adopted in national legislation.⁹² Chief among them is the minor reservations doctrine, which is based on the *de minimis* principle,⁹³ and is applicable to the performance or communication of a work to the public.⁹⁴ According to this doctrine, exceptions to the rights granted to authors will be allowed when the infringing use is *de minimis*.⁹⁵ The envisioned contexts include the use of a work for charitable performances, public concerts on the occasion of festivals or holidays, and concerts for military bands.⁹⁶ Although this is by no means an exhaustive list, it serves to illustrate the emphasis of the *de minimis* aspect, which is that the use is for a public interest that justifies the diminution of the author's rights and will have no material effect on the commercial exploitation of the work.⁹⁷ This doctrine applies in addition to and has no effect on the application of the fair dealing exceptions.

The Berne Convention is not only the world's oldest treaty on copyright, but also independently the most comprehensive.⁹⁸ The economic rights granted to authors and the limitations on these rights constitute the minimum standards that have become the international baseline. Articles 10 and 10^{bis} are of particular relevance to this analysis as they sketch the contexts in which works can be used without the consent of the copyright owner. These provisions form the basis of the user entitlements that are discussed throughout this thesis.

As will be seen as this chapter progresses, subsequent treaties explicitly use the Berne Convention as the basis for protection by incorporating its provisions and expanding on

⁹⁰ Art 11^{bis}(1).

⁹¹ See section 3 below.

⁹² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 830.

⁹³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 834.

⁹⁴ Arts 11-11^{ter}, 14 of the Berne Convention. See Brennan DJ "The three-step test frenzy: Why the TRIPS Panel Decision might be considered *per incuriam*" (2002) 2 *Intellectual Property Quarterly* 212-225 at 221.

⁹⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 834.

⁹⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 830.

⁹⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 834-835.

⁹⁸ Nimmer D "The impact of *Berne* on United States copyright law" (1989) 8 *Cardozo Arts & Entertainment Law Journal* 27-45 at 27-28.

them accordingly. This should be seen as the development of the Berne Convention rather than autonomous growth of the field of copyright law.⁹⁹ The discussion of the treaties that follow should therefore be understood in this context.

3 2 2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – Copyright

The TRIPS agreement, which is annexure 1C of the Marrakesh Agreement establishing the World Trade Organisation (WTO), is binding on all members of the WTO since January 1, 1995. South Africa – like both other jurisdictions considered in this thesis – is a member of the WTO and must accordingly comply with this agreement. TRIPS forges international trade rules in an attempt to harmonise the global protection and enforcement of intellectual property rights generally and copyright specifically.¹⁰⁰ The subject matter of protection is both copyright and neighbouring rights, with the most substantive treaties at the time of TRIPS's conception being the Berne Convention and the Rome Convention respectively.¹⁰¹ The text of TRIPS in effect combines the texts of these two earlier treaties by means of incorporation by reference and recycling the syntax dually, while updating and extending their reach.

TRIPS is characterised by its protective stance towards intellectual property owners and sets the standards for international trade relations regarding intellectual property rights.¹⁰² Article 2(2) explicitly states that the provisions in the agreement shall not derogate from existing obligations between contracting parties, accordingly building on existing standards and obligations. This clause fortifies the standards of protection and exceptions of the other copyright and related rights agreements discussed in this chapter.¹⁰³

⁹⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 133.

¹⁰⁰ Di Lieto G *The Price of Everything and the Value of Nothing: International Trade Law and Creative Expression in the Digital Information Age* (2010) 4 <available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854763> (accessed 3-10-2011).

¹⁰¹ See sections 2 1 and 3 1 respectively for the discussions of the two treaties.

¹⁰² Correa CM & Yusuf AA *Intellectual Property and International Trade: The TRIPS Agreement* (2nd ed 2008) 6-7.

¹⁰³ Art 2(2) specifically refers to the Berne Convention (section 2 1 of this chapter) and the Rome Convention (section 3 1 of this chapter). See Blakeney M *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement* (1996) 40.

TRIPS increases the international standard of economic protection to include commercial rental rights,¹⁰⁴ as well as recognising computer programs as a type of work worth protecting.¹⁰⁵ TRIPS expressly incorporates the Berne Convention's limitations and exceptions in addition to its standards of protection.¹⁰⁶ Interestingly, the moral rights of authors are specifically excluded by this incorporating provision.¹⁰⁷ Article 3(1), which deals with national treatment, specifically provides that the protection to be granted to foreign nationals is subject to the exceptions provided by the Berne Convention. This entails at least the exception relating to quotations,¹⁰⁸ which is mandatory, and other exceptions that member states have promulgated in terms of the Berne Convention.¹⁰⁹

Article 13 of TRIPS essentially contains the three-step test originally found in article 9(2) of the Berne Convention.¹¹⁰ The works referred to by article 13 of TRIPS must be construed to include all of the types of works that are protected by the Berne Convention, as well as those introduced by TRIPS. This means that all works are affected by the three-step test contained in article 13 of TRIPS, not only the literary and artistic works that the Berne Convention refers to.¹¹¹ The application of the exception is also extended beyond the reproduction right that is the exclusive ambit of article 9(2) of Berne.¹¹² Article 13 applies to all rights granted by the Berne Convention (namely translation,¹¹³ public performance,¹¹⁴ broadcasting and other communication to the public,¹¹⁵ public recitation,¹¹⁶ and

¹⁰⁴ Art 11. See Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 690.

¹⁰⁵ Art 10(1) protects computer programs as literary works under the Berne Convention. See Blakeney M *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (1996) 45. Databases are also protected by art 10(2) of TRIPS for the first time. While article 2(5) of the Berne Convention protects collections of literary and artistic works (specifically listing the examples of encyclopaedias and anthologies), this definition does not extend to databases: see Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 850.

¹⁰⁶ Art 9(1). See Sterling JAL *World Copyright Law* (2008) 558; Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 847-850.

¹⁰⁷ Art 2(2) of TRIPS read with art 6^{bis} of the Berne Convention ensures that member states that are party to the Berne Convention itself will still incur the obligation of providing adequate protection for the moral rights of the authors according to art 6^{bis} of the Berne Convention.

¹⁰⁸ Provided for by art 10(1) of the Berne Convention: see section 2 1 of this chapter.

¹⁰⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 788-789, 847-850.

¹¹⁰ This should be viewed as an independent provision and not a further incorporation of the provisions of the Berne Convention: Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 850.

¹¹¹ Art 9 of the Berne Convention.

¹¹² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 850-851.

¹¹³ Art 8.

¹¹⁴ Art 11.

¹¹⁵ Art 11^{bis}.

¹¹⁶ Art 11^{ter}.

adaptation¹¹⁷), as well as the rental right in TRIPS.¹¹⁸ However, with regard to the standards of protection set by the Berne Convention, the TRIPS agreement is clearly subsidiary¹¹⁹ and the limitations and exceptions cannot detract from the protection provided by Berne.¹²⁰ Regarding the right to rental of computer programs and cinematographic works, article 13 allows exceptions and limitations to be applied without being subject to the incorporation of the substantive provisions of Berne.¹²¹ Accordingly, member states may provide for greater limitations and exceptions to the rental right without the further qualification of complying with the Berne Convention.¹²²

One subtle yet significant difference between the three-step test in article 9(2) of the Berne Convention and the counterpart in article 13 of the TRIPS agreement is the last step of the test. The test in Berne relates to the “legitimate interests of the author”, while the corollary provision in TRIPS refers to the “legitimate interests of the right holder”. These two terms will frequently denote the same party, but there are situations in which this will not be the case.¹²³ Performers are therefore also potentially affected by this provision. Furthermore, the right holder will not always be entitled to moral rights, regardless of the convention used to claim protection, as moral rights attach to the author and are non-transferrable.¹²⁴ The legitimate interests of a right holder in terms of the TRIPS agreement will therefore not include the moral rights, even if the right holder is the author.¹²⁵ It follows that if a member of the WTO is not a signatory of the Berne Convention, moral rights will not accrue to the author and can therefore not be infringed by the application of the three-step test in article 13, regardless of whether a sufficient acknowledgement of the author is made.¹²⁶

By incorporating the substantive provisions of the Berne Convention, TRIPS obliges member states to provide at least the exception allowing quotations as contained in article

¹¹⁷ Art 12.

¹¹⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 852.

¹¹⁹ Art 2(2) of TRIPS and art 20 of the Berne Convention (as incorporated by art 9(1) of TRIPS).

¹²⁰ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 854.

¹²¹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 856.

¹²² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 856.

¹²³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 855.

¹²⁴ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-110 – 1-111.

¹²⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 855.

¹²⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 855.

10(1) of the Berne Convention,¹²⁷ while all other exceptions in the treaty are discretionary.¹²⁸ The general scope of article 13 of TRIPS is compatible with the exceptions contained in article 10 of the Berne Convention, as the proper interpretation of the latter conforms to the standards of the three-step test.¹²⁹ The requirement that the permitted use be compatible with fair practice satisfies the last two legs of the test (that the use does not conflict with the normal exploitation of the work, and that it does not unreasonably prejudice the legitimate interests of the right holder).¹³⁰ As for the first step of the test, the exceptions envisaged by article 10(1) and (2) – the exceptions catering for quotation and teaching – are sufficiently narrowly defined to be regarded as “certain special cases”, as required by article 13 of TRIPS.¹³¹ Moreover, article 10(3) of the Berne Convention further requires that the preceding exempted uses acknowledge the author and source of the work. Although these two conditions are similar to the author’s moral rights, they stand independent of article 6^{bis} of the Berne Convention (which is expressly excluded from incorporation into TRIPS by article 9(1)) and rather constitute elements of fair practice.¹³² For this reason both requirements must be complied with under the TRIPS agreement.

The question of whether the minor reservations doctrine¹³³ should also conform to article 13 should be considered.¹³⁴ Although in many cases national exceptions dealing with *de minimis* exceptions will, per definition, be in conformity with the three-step test, this is irrelevant.¹³⁵ The three-step test is concerned only with those exceptions that are not *de minimis* and for this reason need to comply with the test.¹³⁶ It follows that where an

¹²⁷ For the discussion on the mandatory nature of this exception, see section 2 1.

¹²⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 788-789, 847-850.

¹²⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 858.

¹³⁰ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 858.

¹³¹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 858.

¹³² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 858.

¹³³ Discussed briefly in section 2 1.

¹³⁴ See generally Brennan DJ “The three-step test frenzy: Why the TRIPS Panel Decision might be considered *per incuriam*” (2002) 2 *Intellectual Property Quarterly* 212-225 at 220-224.

¹³⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 860.

¹³⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 860.

exception is *de minimis*, the three-step test contained in article 13 of TRIPS should not be applied.¹³⁷

The TRIPS agreement expands the international protection of copyright while emphasising the importance of international trade rules.¹³⁸ TRIPS has raised the level of protection granted to authors generally while focusing on particular aspects that were in need of attention.¹³⁹ The agreement brought international copyright law up to date as regards the protection of computer programs and databases, and further extended the content of protection over these two categories of works by making provision for the rental right.¹⁴⁰ With regard to exceptions and limitations, TRIPS generalises the three-step test of the Berne Convention, making it applicable to any and all material derogations of rights granted in terms of both the Berne Convention and TRIPS, and protects the rights of copyright owners rather than authors.¹⁴¹

3 2 3 WIPO Copyright Treaty (WCT)

The WCT was drafted and adopted simultaneously with the WPPT¹⁴² (which addresses neighbouring rights to copyright). The sphere of application of the WCT is the rights of authors of literary and artistic works, while the WPPT applies to the rights of performers and producers of phonograms. The WCT was introduced as an answer to the calls of the international intellectual property community that the interpretation of existing treaties was becoming increasingly unclear with the advent of new technological methods of exploiting copyright works.¹⁴³ The treaty is a marked development in respect of regulating technological advances, although it should be considered only the genesis of international law innovation in this regard.¹⁴⁴ The WCT is designed as a special agreement (as contemplated in article 20 of the Berne Convention) and is meant to extend the protection

¹³⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 860-861.

¹³⁸ Di Lieto G *The Price of Everything and the Value of Nothing: International Trade Law and Creative Expression in the Digital Information Age* (2010) 5 <available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854763> (accessed 3-10-2011).

¹³⁹ Barbosa DB *Counting Ten for TRIPs: Author Rights and Access to Information – A Cockroach’s View of Encroachment* (2005) 5 <available at <http://ssrn.com/abstract=842564>> (accessed 3-10-2011).

¹⁴⁰ Barbosa DB *Counting Ten for TRIPs: Author Rights and Access to Information – A Cockroach’s View of Encroachment* (2005) 6 <available at <http://ssrn.com/abstract=842564>> (accessed 3-10-2011).

¹⁴¹ Ginsburg JC *International Copyright: From a ‘Bundle’ of National Copyright Laws to a Supranational Code?* (2000) 8 <available at http://papers.ssrn.com/paper.taf?abstract_id=222508> (accessed 3-10-2011).

¹⁴² The WIPO Performances and Phonograms Treaty, discussed in section 3 3.

¹⁴³ Sterling JAL *World Copyright Law* (2008) 879.

¹⁴⁴ Sterling JAL *World Copyright Law* (2008) 881.

and contain provisions that are in conformity with the Berne Convention.¹⁴⁵ It is further stated that nothing in this treaty shall derogate from the Berne Convention and that it has no relation to any other treaty.¹⁴⁶ Accordingly, the WCT is subject to the Berne Convention and the basis for protection is national treatment as per the latter. Article 1(4) of the WCT requires contracting parties to comply with all of the substantive provisions of the Berne Convention, as well as the appendix, importantly including the moral rights that were neglected in TRIPS.¹⁴⁷ The WCT therefore incorporates by reference all the rights in the Berne Convention and contracting parties are obliged to apply these provisions, irrespective of whether they are signatory to the latter.¹⁴⁸

A notable addition to the subject matter covered by the WCT is the emergence of computer programs, which for the first time enjoy WIPO-sanctioned protection in terms of this convention as well as WTO protection in terms of TRIPS.¹⁴⁹ Article 4 states that computer programs are to be protected as literary works in accordance with the Berne Convention's definition of the term, regardless of the mode or form of expression of the program. This is a conspicuous illustration of one of the objectives of the treaty – to provide protection for developing technology.

The economic rights of authors are severally the right of distribution, rental and communication to the public.¹⁵⁰ The right of reproduction is embodied in an agreed statement concerning article 1(4), stating:

“The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”

The right of reproduction is therefore incorporated by reference and further extended by this convention to apply to the digital environment. Similarly, the three-step test in article 9(2) of the Berne Convention, which is to be applied to all exceptions and limitations to the

¹⁴⁵ Art 1(1) of the WCT read with art 20 of the Berne Convention. See also Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 150.

¹⁴⁶ Art 1(1)-(2).

¹⁴⁷ Art 6^{bis} of the Berne Convention; Sterling JAL *World Copyright Law* (2008) 889.

¹⁴⁸ Sterling JAL *World Copyright Law* (2008) 883.

¹⁴⁹ See section 2.2 above.

¹⁵⁰ Arts 6-8 of the WCT.

reproduction right contained in national legislation, must equally be applied under the WCT.¹⁵¹

The right of distribution – as contained in article 6 – relates only to the distribution and circulation of a work embodied in tangible objects.¹⁵² Although in some countries the right of distribution was considered an indistinguishable tenet of the right of reproduction, this view was not global.¹⁵³ This right was not included in the Berne Convention and therefore represents a great development in the protection of authors' economic rights.¹⁵⁴ The inclusion of this separate provision in the WCT provides the international mandate to attribute the right to authorise distribution to the author.

The right of rental that was introduced by TRIPS¹⁵⁵ is reiterated by article 7 of the WCT. The agreed statement to article 6 explicitly applies to article 7 equally, meaning that the right of rental extends only to those works embodied in tangible objects.¹⁵⁶ Article 7(1) delineates the applicable subject matter for this section, covering computer programs, cinematographic works and the works contained in phonograms. Nonetheless, the subsequent section restricts the extent of this right in the instance of both computer programs and cinematographic works.¹⁵⁷

The exclusive right to authorise the communication of a work to the public is cloaked in the existent protection of the Berne Convention. Article 8 specifically makes this right subject to the operation of the provisions of the Berne Convention dealing with the same entitlements.¹⁵⁸ The article reads:

“Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a

¹⁵¹ See section 2.3 above.

¹⁵² Agreed statement to arts 6 & 7, stating: “As used in these Articles, the expressions ‘copies’ and ‘original and copies,’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”

¹⁵³ Sterling JAL *World Copyright Law* (2008) 889.

¹⁵⁴ Sterling JAL *World Copyright Law* (2008) 889. However, the right of distribution is given to the author in the case of the cinematographic adaptation of their work: see art 14(1) of the Berne Convention.

¹⁵⁵ Art 11.

¹⁵⁶ See n 152 above.

¹⁵⁷ Art 7(2)(i)&(ii).

¹⁵⁸ For the discussion of the counterparts in the Berne Convention, see section 2.1.

way that members of the public may access these works from a place and at a time individually chosen by them.”¹⁵⁹

This provision should be interpreted as “both an extension and clarification of the rights accorded in this area by the Berne Convention”.¹⁶⁰ Article 8 extends on the protection of Berne by making the right available to all authors of literary and artistic works, not merely the authors of literary works as with the Berne Convention corollary (article 11^{ter}). Moreover, it exceeds Berne by stating that the on-demand availability right shall also be accorded to the author.¹⁶¹ This clause provides the author with the right to exploit his product in a more technologically suitable manner.¹⁶²

The permissible limitations and exceptions to the rights of the author are set out in article 10. Article 10(1) is a restatement of the three-step test originally contained in article 9(2) of the Berne Convention. However, it refers to rights granted under “this Treaty” and should accordingly be applied to the extended protection granted in the WCT, as well as all rights that the Berne Convention provides for.¹⁶³ The second part of article 10 is substantially the same as the first part, but relates to the application of the Berne Convention.¹⁶⁴ This nuanced approach effectively favours authors, by extending the three-step test to apply to all rights granted by the Berne Convention and not just to the right of reproduction in article 9(1) as intended by the Berne Convention text itself.¹⁶⁵ Accordingly, any member state of the WCT is obliged to subject all limitations and exceptions to the criteria of the three-step test when any right granted under the Berne Convention or the WCT is in question. The potential application of this clause was considered by some to be crippling to Berne-compliant exceptions already granted by national legislation.¹⁶⁶ For this reason an agreed statement was included as an endnote, which attempts to address these concerns. This agreed statement to article 10 asserts that member states are to extend the application of any exceptions that are suitable under the Berne Convention to the digital environment.

¹⁵⁹ The endnote to this article, which constitutes an agreed statement, reads: “It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2) [which relates to the imposition of conditions in national legislation under which the exclusive broadcasting rights shall apply].”

¹⁶⁰ Sterling JAL *World Copyright Law* (2008) 892.

¹⁶¹ Sterling JAL *World Copyright Law* (2008) 892.

¹⁶² Sterling JAL *World Copyright Law* (2008) 892.

¹⁶³ Sterling JAL *World Copyright Law* (2008) 893.

¹⁶⁴ Art 10(2).

¹⁶⁵ Sterling JAL *World Copyright Law* (2008) 894; Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 868.

¹⁶⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 869.

Furthermore, these states are permitted to formulate new exceptions and limitations on the rights of authors that are “appropriate in the digital network environment”. Nonetheless, the scope of existing exceptions under the Berne Convention remains unaltered by this provision.¹⁶⁷

The interpretation of this provision has proven difficult. Ricketson and Ginsburg note that some existing exceptions that are to be extended to the digital environment could still meet the criteria under the Berne Convention, but could simultaneously fail the three-step test.¹⁶⁸ In such a situation the authors suggest the three-step test is not to be applied.¹⁶⁹ This is based on the last sentence of the agreed statement to article 10, which states:

“It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

This safeguarding clause prevents potential conflict in the process of national implementation of the WCT in regimes based on Berne-standard protection. It would therefore be necessary for the WCT to bear an express provision dealing with a new system of exceptions and limitations, not merely a provision extending the scope of existing derogations of authors’ rights.¹⁷⁰

These provisions form the international standard of copyright protection and exceptions, and are to be reflected in national legislation. Against this understanding of international copyright law, it is now possible to assess the conventions covering neighbouring rights to determine how they pertain to the treaties discussed above.

3 3 Neighbouring Rights

3 3 1 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)

¹⁶⁷ See the latter part of the Agreed Statement to art 10, contained in endnote 9 to the WCT. See further Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 871.

¹⁶⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 871.

¹⁶⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 872-873.

¹⁷⁰ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 872.

The Rome Convention, as the long title suggests, is aimed at solidifying copyright and neighbouring rights surrounding performers and producers, and how their products are relayed to the public. Although South Africa is not party to the treaty, the Rome Convention is heavily relied on by the WPPT¹⁷¹ – especially with regard to exceptions and limitations – as the former provides a sound basis for legislation pertaining to aural works.

The intended recipients of protection under this convention are performers of aural works and producers who first commit such performance to record, as well as broadcasting organisations.¹⁷² The reason for this is that such actors were not protected by the Berne Convention, which consequently led to the implementation of the Rome Convention.¹⁷³ The foundation of the protection awarded to performers is markedly different from that given to producers of phonograms and broadcasters. The performance of a work is the unique presentation of a protected work, while the protection of producers and broadcasters is only for their technological input, not their creativity.¹⁷⁴ While the Berne Convention sets out the categories of works to be protected and the methods of enforcement to be encouraged, the Rome Convention more substantively illustrates the rights to be adopted by national legislation. The Rome Convention differs from the UCC in that the former convention introduced rights that were, at the time of its drafting, not recognised by any international convention.¹⁷⁵ As mentioned earlier, the performers of literary and artistic works are not necessarily also the authors of those works.

Article 1 explicitly assures that the copyright in literary and artistic works is to remain unaffected by the provisions of this convention. The distinction lies between *performing* rights and *performers' rights*: performing rights are usually automatically granted to the author and pertain to her consent to perform her work in public, while performers' rights, which are derivative, relate to neighbouring rights that attach to the performance of a work.¹⁷⁶ The work that is performed need not be under copyright protection, but must

¹⁷¹ See section 3.3.

¹⁷² Art 3. Nonetheless, art 9 broadens the possible application of the convention by providing that member states may extend the envisioned protection to "artists who do not perform literary or artistic works". This clause may be applied to circus and other variety acts captured in a physical medium.

¹⁷³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1210.

¹⁷⁴ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 340-341.

¹⁷⁵ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 345.

¹⁷⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1206.

merely be subject matter that is capable of attracting copyright.¹⁷⁷ Naturally, where the performer is also the author of the work the overlap between the Rome Convention and any other convention or legislation will be supplementary to the rights of the author. If this is not the case, the performance of the work may be an infringement of the rights of the author to authorise performance, while still attracting protection to the performance itself.¹⁷⁸

The Rome Convention utilises the principle of national treatment and sets out minimum substantive rights to be protected by rights of authorisation.¹⁷⁹ The minima performers' rights that are to be protected by national legislation are set out in article 7. The provision does not formulate the rights, but rather leaves the content of the rights to the discretion of each contracting state.¹⁸⁰ The first act envisioned by this article is the broadcast, or other communication to the public, of a performance without the consent of the performer.¹⁸¹ The convention requires national legislation to ensure that this right belongs to the performer, except where the performance already constitutes a broadcast performance or where the broadcast is made from a (presumably legitimate) fixation that presents a limitation on the performer's rights. This leaves the situation where the work consists of a live performance by the author that has not been reduced to a physical medium with the author's consent. Under these circumstances any unauthorised fixation and subsequent broadcast will be an infringement of the rights to be granted to the performer because there is no authorisation for doing so.¹⁸²

The next right to be granted to performers is the exclusive right of first fixation.¹⁸³ This provision is inextricably linked to the prevention of unauthorised broadcasting and other reproductions,¹⁸⁴ both of which are inversely contingent on an existent fixation. The prohibition on broadcasting without consent, as discussed above, contains the proviso that the broadcast was not made from a fixation. This is arguably to allow for the operation of

¹⁷⁷ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 355.

¹⁷⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1206-1207.

¹⁷⁹ Art 2. See Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 343.

¹⁸⁰ As indicated by the wording of art 7(1), which states: "The protection provided for performers by this Convention *shall include the possibility of preventing*" (own emphasis).

¹⁸¹ Art 7(1)(a).

¹⁸² Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 387.

¹⁸³ Art 7(1)(b).

¹⁸⁴ Art 7(1)(a) & (c) respectively.

fair dealing and other exceptions with a performance once it has been fixed to a medium with the consent of the performer. Nonetheless, the prohibition remains absolute until the first fixation of the performance.

Article 7(1)(c) aims to prevent the unauthorised reproduction of a fixation of a performance made contrary to the performer's intentions. The formulation of the provision indicates that the act itself of making the fixation of a performance is not prohibited; rather, the use of the fixation – whether made with or without the consent of the performer – is decisive as to whether the reproduction is prohibited.¹⁸⁵ Reproduction is therefore contingent on a contractual basis. In terms of the first subsection of the prohibition on reproduction, if the initial fixation was made without the consent of the performer, any reproduction of such fixation is prohibited.¹⁸⁶ Notwithstanding, only the reproduction is prohibited, not the original act of making the fixation. If consent is given for the original fixation of a performance, a reproduction of that fixation is to be prohibited only if such reproduction is in conflict with the purpose for which consent was given.¹⁸⁷ This provision is broadly formulated, leaving ample discretionary leeway for legislatures. The need for the consent of the performer may still be obviated if the original fixation was made for purposes of the specific instances of fair dealing contained in article 15 of this convention. However, if a reproduction of a fixation is made that complies with fair dealing but the reproduction itself is for a different purpose, such reproduction is also to be prohibited.¹⁸⁸ The permeating rationale of this provision appears to be to prohibit reproductions of fixations of performances that are contrary to the purpose for which consent was given, or – absent consent – any reproductions at all. Even though article 7 is the most important provision relating to performers' rights in the convention, the level of protection is strikingly lower than those of both phonogram producers and broadcasters as no minimum rights are given to performers, merely the mandate that legislatures provide a method of preventing infringement for performers.¹⁸⁹

¹⁸⁵ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 387.

¹⁸⁶ Art 7(1)(c)(i).

¹⁸⁷ Art 7(1)(c)(ii).

¹⁸⁸ Art 7(1)(c)(iii).

¹⁸⁹ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 384.

The minimum protection to be granted to producers of phonograms in terms of this convention is the reproduction right, as concisely set out in article 10.¹⁹⁰ According to this article, the producer of a phonogram has the exclusive right to authorise direct or indirect reproduction. The former type of reproduction involves making a copy of the original by means of moulding and casting – or, presumably in the current digital age, making a digital copy of the original¹⁹¹ – while indirect reproduction concerns the reproduction of a broadcast of a phonogram over a wireless transmission service such as radio or television.¹⁹² Only the first fixation of an aural work qualifies the maker as a producer of a phonogram and subsequent reproductions are not given the protection of the first producer.¹⁹³ The convention does not, however, grant producers of phonograms the right to control distributions.¹⁹⁴

The rights of broadcasting organisations are substantively similar to those of performers. Such organisations are to be awarded the right to authorise or prohibit rebroadcasts, fixation of the original broadcast and the reproduction of such fixations.¹⁹⁵ The elements of consent for the initial fixation and the purpose of fixations made for fair dealing that are present in the provision prohibiting the reproduction of performances are reiterated here.¹⁹⁶ The purposes warranting exemption are provided in article 15(1) of the Rome Convention. The first occurrence of the fair dealing purpose in the Rome Convention is for private use, denoting use of a non-commercial nature.¹⁹⁷ A private use is regarded as being neither public nor for profit, although the cumulative effect of private use may change the nature to commercial.¹⁹⁸ Moreover, where professional activity coincides with private activity in the

¹⁹⁰ “Phonograms” is used synonymously with the term “sound recordings” in many other jurisdictions, such as the United Kingdom and the United States of America. Although South African legislation uses the term “sound recording”, “phonogram” will be used in this section of this thesis in keeping with the terminology of the Rome Convention.

¹⁹¹ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 364.

¹⁹² Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1215; Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 393.

¹⁹³ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 359.

¹⁹⁴ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 393-394.

¹⁹⁵ Art 13(a)-(c).

¹⁹⁶ Art 13(c)(i)-(ii).

¹⁹⁷ Art 15(1)(a).

¹⁹⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1217.

same location, commercial and private uses are distinguished to give meaningful effect to fair dealing exceptions.¹⁹⁹

Ricketson and Ginsburg argue that this particular clause is not subject to the Berne Convention's three-step test. They contend that "there is nothing in the text of article 15(1)(a) that qualifies the adjective 'private' as distinct from 'professional' or 'commercial' uses, and ... it is inappropriate to go further and consider the effect on the normal exploitation of the work or the legitimate interests of the right holder (as under the article 9(2) approach)".²⁰⁰ Private use can therefore be seen as the copying of performances, phonograms and broadcasts for exclusive home use by an individual without the intention to distribute or otherwise profit from the work. Private use also includes performance in the family circle, not only the individual private performance.²⁰¹

Article 15(1)(b) permits the use of short excerpts for purposes of reporting current events. This provision is directed at providing a framework for the international dissemination of information regarding current events.²⁰² Notwithstanding, the use of an excerpt of a performance, phonogram or broadcast must be justified by the purpose of news reporting, and cannot be used as a soundtrack or background music. The addition of the adjective "short" differentiates this provision from its counterpart in the Berne Convention,²⁰³ making the latter more comprehensive in relation to literary and artistic works. This indicates that a substantial part, or excerpt, of a performance cannot justifiably be used in a report.

Broadcasting organisations are legitimated in making ephemeral fixations of protected performances and phonograms by means of their own facilities for their own broadcasts.²⁰⁴ The ephemeral requirement is not defined in this treaty, but is generally considered to mean any fixation made by such organisations must be destroyed after a reasonable time, the duration of which is left to national legislatures.²⁰⁵ The purpose of this provision is elucidated by article 11^{bis}(3) of the Berne Convention, which explains "[t]he preservation of

¹⁹⁹ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 410.

²⁰⁰ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1217. See also World Intellectual Property Organisation Standing Committee on Copyright and Related Rights *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (5-4-2003) SCCR/9/7 at 44.

²⁰¹ Sterling JAL *World Copyright Law* (2008) 520-521.

²⁰² Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 410.

²⁰³ Arts 10(1) & 10^{bis}(1).

²⁰⁴ Art 15(1)(c).

²⁰⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1217.

these recordings in official archives [being justified by] their exceptional documentary character”.

Using protected works solely for teaching or scientific research is also to be exempted by national legislation.²⁰⁶ The purpose of this exception is self-evidently the progress of education and knowledge through research. The public interest manifest in education is sufficiently robust to outweigh certain rights granted to performers and producers of phonograms and broadcasts.²⁰⁷ Allowing the reproduction and dissemination of protected materials for teaching – whether in primary, secondary or tertiary institutions – is clearly justified by the didactic purpose.²⁰⁸ However, the phrase “scientific research” is more obscure in the context of this convention.²⁰⁹ Nordemann et al discuss the peculiarity of this phrase, noting that:

“Commercial phonograms and radio and television programs could scarcely offer material for use in scientific research. A greater usefulness may be found in the fields of the cultural and social sciences. Care must therefore be taken that normal use is not encroached upon by the use of the label of ‘science’. For this reason, strict adherence to the concept of science at the internationally recognised level must be the guide for an application of this exception.”²¹⁰

The authors also note that research is generally not a public activity, while the distribution to the public of works covered by this section negates the activity entirely.²¹¹

The term “scientific” may therefore be out of place with regard to normal usage of performances. However, a similar proviso is found in article II of the appendix to the Berne Convention, relating to allowances for developing countries, which permits these states to grant a licence to broadcasting organisations for the translation of a literary or artistic work.²¹²

²⁰⁶ Art 15(1)(d).

²⁰⁷ Sterling JAL *World Copyright Law* (2008) 525-526.

²⁰⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1218.

²⁰⁹ The Rome Convention was the first international instrument to incorporate this term and, accordingly the corollary provision in art 10(2) of the Berne Convention makes no mention of this criterion.

²¹⁰ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 411.

²¹¹ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 411.

²¹² Art II (9)(a)(ii) of the appendix to the Berne Convention.

Notwithstanding the specific cases of fair dealing provided for by article 15(1), the subsequent subsection extends the ambit of the permissible exceptions to those covering copyright in literary and artistic works in domestic legislation.²¹³ This refers to the exceptions provided for in the Berne Convention,²¹⁴ which creates some adhesion between the incongruent relationships between them.²¹⁵ Such exceptions in national law still need to be in conformity with the conventions from which they were adopted, whether the legislating state is party to them or not.²¹⁶ The only proviso in article 15(2) of the Rome Convention is that if the exceptions are incorporated from other categories of works, compulsory licences must nonetheless be compatible with this convention.

The Rome Convention pioneered the standards of protection for performers, producers of phonograms and broadcasting organisations alike. The basic rights to authorise fixation, reproduction and relaying the performance to the public are the primary application of protection. Specific contexts are identified that allow certain uses of performances which can be justified by the public interest, while still protecting the pecuniary interests of rights holders. The specific inclusion of exceptions for private use, reporting on current events, and teaching and scientific research reflects the balance between the interests of rights holders and the general public.

Although to date only 94 states have acceded to the Rome Convention, its substantive contents and exceptions have been adopted in national legislation globally (including both South Africa and the United States of America).²¹⁷ The Rome Convention has therefore served not only as a precursor to the WIPO Performances and Phonograms Treaty, but also as the introduction of neighbouring rights protecting performers and producers of phonograms.

3 3 2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – Neighbouring Rights

²¹³ Art 15(2).

²¹⁴ For example art 10^{bis} of the Berne Convention, which provides for certain free uses; see section 2 1 above.

²¹⁵ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 411.

²¹⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1218.

²¹⁷ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 346.

The economic rights of performers, producers of phonograms and broadcasting organisations contained in TRIPS are modelled on the provisions of the Rome Convention. Although member states are not instructed to apply the Rome Convention unless they are party to it,²¹⁸ the rights in TRIPS itself parallel or exceed those in the Rome Convention.²¹⁹ Article 14(1) of TRIPS is substantively identical to article 7(1) of the Rome Convention, even to the extent of the wording; the provision provides that member states shall award performers “the possibility of preventing” certain acts without their authorisation.²²⁰ The conduct to be prohibited is the fixation of unfixed performances, the reproduction of fixed performances, and broadcasting or communicating the performances to the public, which amounts to the same content as article 7(1) of the Rome Convention.²²¹ A subtle difference is that the TRIPS agreement refers to wireless broadcasts, while the Rome Convention does not specify the method of broadcasting which is to be prohibited. With regard to producers of phonograms, the right of reproduction is transplanted directly from article 10 of the Rome Convention.²²²

The rights of broadcasting organisations are also similar to those contained in the Rome Convention. TRIPS provides that broadcasting organisations are to be granted the rights to prohibit the fixation of their broadcasts, the reproduction of such fixations, the rebroadcast (by wireless means) of their broadcasts, and the communication to the public of televised broadcasts.²²³ These rights are reflected more comprehensively in article 13 of the Rome Convention (save for the wireless aspect). However, TRIPS does contain a deviation: if a member state does not grant these rights to the broadcasting organisations, the copyright owners of the subject matter of the broadcast must have the possibility of preventing all of the above conduct (subject to the Berne Convention).²²⁴ This clause was inserted to achieve a compromise between countries that, at the time of the inception of TRIPS, already provided these rights for broadcasting organisations, and those countries

²¹⁸ Art 3(1).

²¹⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1232.

²²⁰ Art 14(1). See Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1230.

²²¹ See the discussion of this provision in section 3 1 above.

²²² Art 14(2).

²²³ Art 14(3).

²²⁴ Art 14(3).

that had accorded these rights to copyright owners.²²⁵ This issue was ignored by the subsequent WIPO treaties (the WCT and the WPPT).

The novel right of rental that TRIPS introduces is extended, *mutatis mutandis*, to producers of phonograms and “any other right holders in phonograms”.²²⁶ The latter part of this statement suggests that if the performer of a work holds rights in the phonogram, she would share in the rental right.²²⁷

The exceptions and limitations on the neighbouring rights provided in TRIPS are embodied in articles 3(1) and 14(6) respectively. Article 3(1) explicitly refers to the exceptions contained in article 15 of the Rome Convention. The provision places no obligation on member states to enact these exceptions, instead being permissive in character.²²⁸ The exceptions that are allowed in terms of this formulation are exceptions for private use, short excerpts for use in reporting current events, ephemeral fixation by broadcasting organisations, and uses for the purposes of teaching or scientific research.²²⁹ The article also envisages that exceptions to the rights of copyright owners in literary and artistic works may be extended to the field of neighbouring rights.²³⁰

Article 14(6) provides that member states may enact limitations, exceptions, reservations and conditions in relation to the above (excluding the right to rental) to the extent provided for in the Rome Convention. This provision appears to add nothing to the permissible exceptions and limitations provided for in article 3(1) of TRIPS.²³¹ However, this is subject to the application of article 18 of the Berne Convention, which stipulates that the treaty shall not apply with retroactive effect to works where the term of copyright protection has expired.²³² Accordingly, protection of works already in the public domain is excluded.

Although it seems that TRIPS does not expand on the levels of protection or exceptions provided in the Rome Convention, it does extend their application as more countries are

²²⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1230-1231.

²²⁶ Art 14(4).

²²⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1231.

²²⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1216.

²²⁹ Art 15(1)(a)-(d) of the Rome Convention.

²³⁰ Art 15(2) of the Rome Convention. For a more comprehensive discussion of the exceptions and limitations provided for in the Rome Convention, see section 3.1.

²³¹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1232.

²³² Art 14(6) which incorporates by reference art 18 of the Berne Convention.

party to the World Trade Organisation (and therefore party to TRIPS) than are signatories to the Rome Convention. The economic rights in the Rome Convention are therefore relevant to a larger global community than before the adoption of TRIPS, and the commercial rental rights are also granted to producers of phonograms. The specific exceptions of private use, reporting on current events, ephemeral fixation, and teaching and scientific research, although not mandated, are also extended to a broader international community. Furthermore, the exceptions to and limitations on the rights granted to the copyright owners of literary and artistic works may now be expanded to the neighbouring rights covered by TRIPS.

3 3 3 WIPO Performances and Phonograms Treaty (WPPT)

The WPPT is the most comprehensive treaty covering neighbouring rights to copyright.²³³ Although South Africa signed the convention,²³⁴ no effort has been made to incorporate any of the provisions into legislation.²³⁵ The WPPT does not extend the rights and protections of preceding treaties, but instead endeavours to exist as an independent instrument and provide its own substantive content.²³⁶ For this reason it is not required of a contracting state to be a member, or apply the provisions, of the Rome Convention or TRIPS.

The principle of national treatment is once again utilised by this convention in articles 3(1) and 4(1). The definition clause makes it clear that the convention extends beyond the reach of the Rome Convention.²³⁷ The definition of “performers”, for example, has been expanded to include renditions of “expressions of folklore” in addition to those of literary and artistic works.²³⁸ This term can be understood to include “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a

²³³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1233.

²³⁴ South Africa signed the WPPT on December 12, 1997.

²³⁵ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-170.

²³⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1235.

²³⁷ Art 2.

²³⁸ Art 2(a).

community in the country or by individuals reflecting the traditional artistic expectations of such a community”.²³⁹

The objectives of this treaty, stated in the preamble, are to (i) develop and maintain the protection of these neighbouring rights, (ii) introduce new international rules to provide for economic, social and cultural developments, (iii) recognise the impact of information and communication technologies on the production and use of these products, and (iv) maintain a balance between general public interest in education, research and access to information, on the one hand, and the rights of performers and phonogram producers on the other. This last objective clearly strives to strike a balance between the public interest (as embodied in limitations and exceptions to monopoly rights) and the economic incentive used to promote creativity and innovation.²⁴⁰

Performers are given exclusive moral and economic rights concerning their aural performances in chapter II, but this protection is not extended to audio-visual works.²⁴¹ This is significant because it differs from the Rome Convention in these respects, as the latter does not provide for moral rights and in certain instances does apply to audio-visual performances.²⁴² The economic rights of performers over their unfixed performances are provided for in article 6 of the WPPT. This provision explains that performers are to have the exclusive right to authorise both the fixation and broadcast of their performances.²⁴³ In relation to the rights granted by the Rome Convention, this stipulation is more concrete in its formulation; while the Rome Convention provides only that member states must provide “the possibility of prevention”, the WPPT adopts a positive formulation.²⁴⁴

The right to reproduce forms the essence of the performer’s rights under the WPPT and is contained in a single sentence in article 7.²⁴⁵ According to this clause, “[p]erformers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form”. This provision is supplemented by an agreed statement of the WIPO Diplomatic Conference on Certain

²³⁹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1238.

²⁴⁰ See the discussion of this in chapter 2 section 3.

²⁴¹ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1251-1252.

²⁴² See art 19 of the Rome Convention.

²⁴³ Art 6(i)&(ii).

²⁴⁴ Arts 7(1) and 6 of the Rome Convention and the WPPT respectively.

²⁴⁵ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond I* (2nd ed 2006) 13.

Copyright and Neighbouring Rights Questions, which adopted the convention, contained in the endnotes of the WPPT. The addition reads as follows:

“The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”

These provisions form the core protection of a performer’s rights over fixed performances. Implicit in this is that unfixed performances are not subject to the exclusive right of the performer to restrict reproductions.²⁴⁶ The act of recreating a performance (for example by means of an impersonation) is not covered by the WPPT and the performer will not be awarded the same rights as the author, as only the fixation of those particular sounds is covered.²⁴⁷ The terms “direct reproduction” and “indirect reproduction” are not defined in this convention and should therefore be construed similarly to their application in the Rome Convention.²⁴⁸

The insertion of the phrase “in any manner or form” in article 7 indicates that digital copies of a fixation are intended to be included in the exclusive right of reproduction.²⁴⁹ Whether temporary copies of a transient nature are included in the performer’s exclusive rights is unclear; it is submitted that the provision does not extend to such copies as a proposed clause covering this conduct was removed after a proposal by the South African and American delegates, and is therefore not present in the final draft of the convention.²⁵⁰

Article 8 grants performers the exclusive right of distribution, which is inextricably connected to the right of reproduction. The right to authorise commercial rental to the public is governed by article 9 and explicitly extends to after the initial distribution of the original or copies as provided for in the preceding article.²⁵¹ The right of making fixed performances available is further distinguished from the rights of distribution and rental,

²⁴⁶ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1260.

²⁴⁷ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1260.

²⁴⁸ See section 3 1.

²⁴⁹ This interpretation is supported by the agreed statement to the provision.

²⁵⁰ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1261.

²⁵¹ See the agreed statement concerning arts 2(e), 8, 9, 12 & 13: “As used in these Articles, the expressions ‘copies’ and ‘original and copies,’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”

and provides that the performer shall enjoy the exclusive right to authorise making the performance available in such a manner that the public may access the performance at their own spatial and temporal convenience (“on-demand availability right”).²⁵² This provision has a counterpart in the WCT, which was concluded simultaneously, and was clearly intended to cater for developing technological dissemination of performances.²⁵³ While article 8 refers to distribution of performances embodied in tangible objects,²⁵⁴ article 10 by contrast relates to distribution “by wire or wireless means”, denoting intangible digital copies.²⁵⁵

Chapter III deals with the rights of producers of phonograms and therefore makes no mention of moral rights. The economic rights granted to producers of phonograms replicate those granted to performers, although naturally in relation to phonograms. Articles 11 and 12 are phrased identically, *mutatis mutandis*, to articles 7 and 8 (which confer the rights of reproduction and distribution respectively) and are supplemented by the same agreed statements. Article 13 essentially grants identical rights to producers of phonograms over the commercial rental of their phonograms to those of performers, mimicking article 9. Article 14 is also a reiteration of article 10 (the right to make fixed performances available) with the producers of phonograms being the beneficiaries.

The exceptions and limitations to these rights are contained in article 16 of Chapter IV of the treaty. The first section of the article states that legislatures may provide for exceptions to the rights of performers and producers of phonograms to the same extent as they do for copyright in artistic and literary works.²⁵⁶ This provision is substantively similar to article 15(2) of the Rome Convention, without the regulation of compulsory licences. Accordingly, all the exceptions relating to copyright works can be extended to provide exceptions to neighbouring rights, including those relating to reproduction, quotations and illustrations, teaching and research, and news reporting. The second section of the article is a reincarnation of the three-step test created in article 9(2) of the Berne Convention,²⁵⁷ confining any legislative limitations and exceptions to special circumstances that do not conflict with the normal exploitation of the performance or phonogram and do not unreasonably prejudice the rights of the performer or producer of the phonogram.

²⁵² Art 10.

²⁵³ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1264-1265. See section 2 3 of this chapter.

²⁵⁴ As illustrated by the agreed statement to art 8, n 251 above.

²⁵⁵ Compare the wording of art 10 to that of the agreed statement in n 251 above.

²⁵⁶ Art 16(1).

²⁵⁷ Discussed in section 2 1.

Article 16 extends the generally accepted limitations on copyright to neighbouring rights, while reinforcing the existing standards. It does so pragmatically by transplanting the existing domestic model limitations on copyright to the rights of performers and producers of phonograms.²⁵⁸ This can be seen as an indirect incorporation of the provisions of the Berne and Rome conventions and the WIPO Copyright Treaty if the member states are parties to any or all of these conventions.²⁵⁹ However, the use of “may” (instead of “shall”) in the positive formulation of article 16(1) indicates that the WPPT does not oblige contracting states to provide exceptions to the rights of performers and producers, but rather does so by concession. This interpretation is reinforced by the phrasing of article 16(2), which asserts that if the contracting states do indeed provide such limitations, they “shall” be restricted by the framework of the three-step test. However, the first section relates to “limitations or exceptions with regard to the protection of performers and producers of phonograms ... [in] national legislation”.²⁶⁰ This protection may exceed the standards set by the WPPT, while the exceptions to the rights in literary and artistic works may be more restricted, as the two categories are not necessarily unified.²⁶¹ The exceptions that can be applied to the rights provided in the WPPT could therefore fall short of meaningfully accommodating the interests of users and the public interest, as the preamble strives for.

Article 16 is further augmented by an agreed statement in the appendix, which extends the application of the provision to the digital environment.²⁶² Moreover, the agreed statement relating to article 10 of the WIPO Copyright Treaty applies *mutatis mutandis* to article 10.²⁶³ This agreed statement provides that contracting parties are able to extend limitations that comply with the three-step test to the digital environment, as well as further “devise new exceptions and limitations that are appropriate in the digital network

²⁵⁸ Ricketson S & Ginsburg JC *International Copyright and Neighbouring Rights: The Berne Convention and Beyond II* (2nd ed 2006) 1269-1270.

²⁵⁹ World Intellectual Property Standing Committee on Copyright and Related Rights *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (5-4-2003) SCCR/9/7 (2003) 64.

²⁶⁰ Art 16(1).

²⁶¹ World Intellectual Property Standing Committee on Copyright and Related Rights *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (5-4-2003) SCCR/9/7 (2003) 64-65.

²⁶² Agreed statement 6 provides: “The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”

²⁶³ Sterling JAL *World Copyright Law* (2008) 919.

environment”.²⁶⁴ This clause can apply to technological protection measures, which could have an influence on fair dealing.

The economic rights granted by the WPPT coincide largely with those contained in earlier treaties, although the protection is expressly extended to the digital environment. The WPPT is the first convention to provide protection for the moral rights of performers, an aspect which was notably lacking in both the Rome Convention and TRIPS. The rights of producers of phonograms are identical to those granted to performers by this treaty, even to the extent of the right of commercial rental. The rights of both performers and producers of phonograms to authorise distribution in tangible objects are differentiated from the rights relating to the intangible embodiment of performances. This indicates that the WPPT aims to create a basis of protection for the digital form of performances distinct from the traditional tangible objects as a medium of expression. This is evidenced by the stated objective in the preamble to accommodate the “profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms”. In keeping with this, the WPPT makes provision for member states to “devise new exceptions and limitations that are appropriate in the digital network environment”.²⁶⁵ The WPPT and the WCT therefore provide the first appropriate framework for the protection of copyright and neighbouring rights in the digital environment, while leaving enough room for the development of new exceptions and limitations that are necessary for the proper functioning of these rights.

3 4 Conclusion

The international framework for copyright and neighbouring rights was initially created by WIPO in the form of the Berne Convention and the Rome Convention respectively. After extensive revision of the former, both conventions set the international standards in the adjacent fields, which were refurbished by the WTO and WIPO separately in the closing years of the twentieth century. The current international minimum standards of protection are comprehensive in granting copyright owners, performers and producers of phonograms extensive rights over their works and renditions. This is important in the South African context, as foreign nationals of member states to these conventions can

²⁶⁴ See the discussion of the treaty and agreed statement in section 2 3.

²⁶⁵ Agreed statement concerning article 16.

claim protection of their works in South Africa by means of the principle of national treatment.

The most recent treaties on copyright, namely TRIPS and the WIPO Copyright Treaty, reflect a very protective stance towards the rights granted to copyright owners.²⁶⁶ Accordingly, a restrictive approach has developed regarding exceptions and limitations to these rights. The three-step test that first made its appearance in the Berne Convention was originally only applicable to exceptions to the right of reproduction. However, this test has become the norm under the latest treaties, being applied to any and all derogations of rights granted by the Berne Convention and even extending to new rights and exceptions. According to Ricketson, this happened by accident rather than by design merely because it was readily available to be adopted at the time that TRIPS was negotiated.²⁶⁷ He submits that the construction is not entirely suited to the universal application it has found, which could lead to various impediments when considering the ambit of the individual steps of the test. This is further compounded when the extended scope of the test must be reconciled with earlier conventions to which it was not applicable.²⁶⁸ The extension of this approach has therefore led to increasing restrictions regarding fair uses that were allowed by the Berne Convention (contained in the same text that introduced the three-step test), to which the test was not initially relevant. This is especially true of neighbouring rights, where there is an incongruity between the extensive protection granted to performances and phonograms and the limited exceptions incorporated from treaties relating to copyright.²⁶⁹

The three-step test is an effective mechanism for preventing indulgent applications of limitations and exceptions, but it runs the risk of allowing only unreasonably narrow exceptions. This test, which originated in the Berne Convention, has even permeated the conventions on neighbouring rights. The international framework of neighbouring rights that was initially established by the Rome Convention has subsequently been developed by TRIPS and the WPPT, both of which incorporate the three-step test into a realm that it was not intended for. This, combined with the substantive minima to be awarded to the

²⁶⁶ Correa CM & Yusuf AA *Intellectual Property and International Trade: The TRIPS Agreement* (2nd ed 2008) 6-7.

²⁶⁷ World Intellectual Property Standing Committee on Copyright and Related Rights *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (5-4-2003) SCCR/9/7 (2003) 65.

²⁶⁸ World Intellectual Property Standing Committee on Copyright and Related Rights *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (5-4-2003) SCCR/9/7 (2003) 65.

²⁶⁹ See the discussion of this phenomenon occurring in the WPPT in section 3.3.

beneficiaries of protection, has led to an equally protective regime regarding neighbouring rights. The intellectual property rights granted by these various conventions far outweigh the interests of the public reflected in the narrow exceptions allowed.²⁷⁰ The balance between these rights and the larger public interest (as a stated objective of both the WCT and the WPPT) therefore needs to be addressed.

Notwithstanding, the framework allowing member states to devise new exceptions that find application in the digital environment does exist. It was created by the WIPO Copyright Treaty and extended to the WIPO Performances and Phonograms Treaty, and can find operation in many useful scenarios (specifically with regard to the access right). This may be the mechanism required to redress the balance between over-protection and the public domain.

²⁷⁰ Visser C “International intellectual property norm setting” (2007) 32 *South African Yearbook of International Law* 221-232 at 231.

4 Comparative Analyses of Fair Dealing Exceptions in the United Kingdom and Australia

4.1 Introduction

Copyright law is a statutory creation of the United Kingdom, which was subsequently extended to the Commonwealth of Australia. This chapter examines the law regulating the exclusive rights of copyright owners and the fair dealing provisions which limit these rights in the United Kingdom and Australia. In this chapter the exclusive rights (also known as restricted acts) granted to copyright owners in the two jurisdictions are compared. The requirements for copyright protection are not analysed in this thesis, so it will be assumed that copyright subsists in the works considered. Australian copyright law has its foundation in the statutes of the United Kingdom and the autonomous development of Australian copyright law can serve as a valuable comparative guideline for South African copyright law, which is also based on the United Kingdom's legislation. The similarities and differences between the exclusive rights in UK and Australian copyright law are highlighted, enabling the fair dealing provisions of both jurisdictions to be compared on equal footing. The historical origins of fair dealing exceptions are then traced and the developments are illustrated through the various amendments. The current categories of fair dealing in the United Kingdom are reiterated in Australia, with the addition of a parody/satire fair dealing provision in the latter. Case law is discussed to illustrate the construction and functioning of the various fair dealing defences. Although the public interest defence is often raised in conjunction with fair dealing (especially for purposes of news reporting and criticism or review), the scope of this thesis does not extend to this defence.¹ Australian courts frequently rely on British and other commonwealth case law for authority, and vice versa, and the case law should therefore be considered with this in mind.²

4.2 United Kingdom

¹ See section 3 of chapter 2 for a discussion of how fair dealing exceptions reflect the public interest.

² See eg *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch) para 35; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 18, 65; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 65 IPR 513 para 31.

4 2 1 Introduction

The United Kingdom's copyright system is based on the economic and social justification theories discussed in chapter 2.³ Copyright law arose in the United Kingdom as a result of the threat of unauthorised book printing.⁴ The first copyright legislation, the Statute of Anne of 1709, was introduced to protect publishers from this danger and is the foundation of modern copyright law.⁵ Literary works are therefore the oldest category of works protected by copyright, although copyright law has expanded its application to much more than printed editions of literary works.

The United Kingdom has been party to the Berne Convention⁶ since its inception in 1887 and ratified the latest text, the Paris Act,⁷ on July 24 1971. The United Kingdom is also party to the Rome Convention,⁸ the UCC,⁹ TRIPS,¹⁰ the WCT¹¹ and the WPPT.¹² Although a common law copyright in unpublished works was initially recognised, the case of *Donaldson v Beckett*¹³ saw the end of this phenomenon and the only current source of protection is statute.¹⁴ The Copyright, Designs and Patents Act of 1988 (hereafter the CDPA) is the source of protection of copyright owners' economic and moral rights, and performers' rights. One of the controversial aspects of this latest Act is the absence of regulation of private copying (copying sound recordings and audio-visual works for non-commercial, domestic use) and parody, which are recent additions to Australian copyright law.¹⁵ The Act has been amended numerous times, primarily to incorporate the directives of the European Commission.¹⁶

³ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 27.

⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 29.

⁵ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 34.

⁶ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886). See chapter 3 section 2 1.

⁷ 1161 UNTS 3 (1971).

⁸ World Intellectual Property Organisation *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (26-10-1961) 496 UNTS 43 (1961). See chapter 3 section 3 1.

⁹ United Nations *Universal Copyright Convention* (6-9-1952) 216 UNTS 132 (1952). See chapter 3 section 1.

¹⁰ World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994). See chapter 3 sections 2 2 and 3 2.

¹¹ World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996). See chapter 3 section 2 3.

¹² World Intellectual Property Organisation *Performances and Phonograms Treaty* (20-12-1996) 36 ILM 76 (1996). See chapter 3 section 3 3.

¹³ *Donaldson v Beckett* (1774) 4 Burr 2408.

¹⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 41.

¹⁵ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 44.

¹⁶ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 44-45.

4 2 2 Rights Subsisting in Copyright

The CDPA grants a statutory property right in original literary, artistic, musical and dramatic works, sound recordings (referred to as phonograms in chapter 3), films, broadcasts and published editions.¹⁷ This is an exhaustive list of the subject matter that can be endowed with copyright protection. The CDPA deals with literary, dramatic, musical and artistic works separately from sound recordings, films and broadcasts, and treats the typographical arrangement of a published edition separately still.

Copyright grants the author an exclusive right to authorise certain acts in relation to her work.¹⁸ The exclusive acts that have a bearing on the fair dealing provisions are discussed in this section to provide a context in which to examine the fair dealing exception. The essence of copyright protection is the prohibition of unauthorised reproductions of protected works.¹⁹ Copyright owners are also granted a number of other rights in Chapter II of the CDPA in accordance with European Directives and, most recently, the Information Society Directive.²⁰ Copyright is infringed by an unauthorised person doing, or authorising another person to do, any of the acts listed in Chapter II. Infringement of any of the rights granted to copyright owners gives rise to a remedy in the form of an action for infringement, which is the primary method of enforcing copyright.²¹ There must be a primary infringement of a substantial part of a copyright work and guilty knowledge must be attributable to the infringing party for such an action to arise.²² A copyright owner is not required to show damage; she only needs to prove that one of the restricted acts was done without authorisation.²³ The defence of fair dealing can then be raised against a claim for the infringement of any of the economic rights discussed below.

Section 16 of the CDPA defines the restricted acts that are the substance of the exclusive rights granted to the copyright owner. These acts are considered below to give a comprehensive background of fair dealing as a defence to a claim of infringement of one of these acts. As mentioned, the right to authorise reproductions of a work is the essence

¹⁷ S 1(1)(a)-(c) of the CDPA.

¹⁸ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 367.

¹⁹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 28.

²⁰ Directive 2001/29/EC. See also Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 368.

²¹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 367.

²² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 367.

²³ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 369.

of a copyright owner's rights, not coincidentally being the oldest right. The Information Society Directive²⁴ fully defines the scope of the right and specifically provides that "this Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries".²⁵ The content of this right includes 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" of authors' works,²⁶ performers' fixations of their performances,²⁷ and phonogram producers' phonograms.²⁸ This goes beyond the reproduction right envisaged by the Berne Convention, which merely requires the right to prohibit reproduction without going into any more detail.²⁹ The CDPA needed no amendment as it already complied with the Information Society Directive.³⁰

The exclusive right of reproduction as contained in section 17³¹ of the CDPA is compliant with the Information Society Directive, although it employs different terminology. The right granted in terms of the CDPA covers direct and indirect copies,³² as well as permanent and transient copies as envisioned by the Information Society Directive.³³ The term "copy" comprises two elements: (i) a considerable level of similarity, evaluated objectively, between the original and the alleged infringement, and (ii) a causal connection between the original and the alleged copy.³⁴ The question to consider is not whether the alleged infringer used the claimant's work in a derivative way, but whether the work was copied.³⁵ The allegedly infringing copy must therefore represent the original in an objective and substantial way. Making use of a work, for example as inspiration for a derivative work, will therefore not be an infringement of the reproduction right if there is no substantial similarity in the expression of the concept represented.³⁶

²⁴ Directive 2001/29/EC.

²⁵ Directive 2001/29/EC para 21.

²⁶ Art 2(a) of Directive 2001/29/EC.

²⁷ Art 2(b) of Directive 2001/29/EC.

²⁸ Art 2(c) of Directive 2001/29/EC.

²⁹ Art 9 of the Berne Convention.

³⁰ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 370.

³¹ This section is prefaced by section 16(1)(a), which states that the owner of the copyright in a work has the exclusive right to copy the work.

³² S 16(3)(b) of the CDPA states that "[r]eferences ... to the doing of an act restricted by the copyright in a work are to the doing of it ... either directly or indirectly".

³³ S 17(6) of the CDPA.

³⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 370.

³⁵ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 371.

³⁶ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 371.

Less than complete copying can still be an infringement of the reproduction right if the amount copied is not negligible. This is to ensure that the skill, effort and labour of the author are rewarded, while safeguarding against overreaching claims of ownership.

The WIPO Copyright treaty allows exceptions to be devised to accommodate the use of works in the digital environment.³⁷ The Copyright and Related Rights Regulations,³⁸ giving effect to a mandate of the Information Society Directive,³⁹ introduced an exemption clause relating to transient or incidental digital copies in the form of section 28A of the CDPA. This exception is applicable to literary, artistic, dramatic and musical works, published editions, sound recordings and films, but is specifically not applicable to computer programs or databases. According to this provision, a copy that is necessarily made as part of a technological process and which is transient or incidental will not be an infringement if its sole purpose is to enable the transmission of a work over a network,⁴⁰ or to enable a lawful use of the work,⁴¹ if the copy is of no independent economic significance. The reason for this provision is to enable efficient lawful use and proper functioning of digital networks without fear of copyright infringement.⁴² The exception was deemed to comply with the three-step test required by article 9(2) of the Berne Convention, and the test was therefore not added as an additional qualification.⁴³ This is an important exception to the reproduction right; if the exception was absent, the mere act of browsing webpages on the World Wide Web would necessarily infringe all varieties of works, from artistic, literary and musical to sound recordings and films.

The transient copy exception is clearly aimed at two different situations: where the copy enables the transmission of a work between third parties via an intermediary, and where the copy is made to facilitate a lawful use. This exception only relates to the reproduction of a work, and therefore cannot be raised as a defence against a claim for infringement of the distribution (or any other) right.⁴⁴ Furthermore, the copy must be temporary of nature, as well as transient and incidental. The use of the term “transient” indicates that not only must the copy be temporary, but more specifically of a fleeting duration. This will be achieved when a copy is made by a computer’s Random Access Memory (RAM) for

³⁷ Agreed statement to art 10 of the WCT.

³⁸ Reg 8(1) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498).

³⁹ Art 5(1) of Directive 2001/29/EC.

⁴⁰ S 28A(a).

⁴¹ S 28A(b).

⁴² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 477-478.

⁴³ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 478.

⁴⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 479.

purposes of accessing and viewing a file, or by a web browser caching data.⁴⁵ “Incidental” implies that the primary purpose pursued is not making the copy, and the reproduction occurs only as a necessary part of the technological process.⁴⁶ Lastly, the copy must be of no independent economic significance, implying that it must serve only as a copy for the purposes of transmitting the work over a digital network, or enabling a lawful use.⁴⁷ This brings the provision squarely in line with the international mandate of article 9(2) of the Berne Convention.

Section 18 of the CDPA gives the copyright holder the exclusive right to control the issue of copies of her work to the public, which is known as the distribution right. This right can concisely be described as the right to authorise the first public release onto the market of the original or copies of a work. Certain European Commission Directives⁴⁸ have required amendment of the CDPA with regard to the distribution right, giving rise to various sets of regulations in the United Kingdom.⁴⁹ Section 18(3) explains that the sale, importation, distribution, hiring or loan (other than to friends and family) of a work amounts to issuing copies to the public.⁵⁰ This right enables copyright owners to prohibit the issue of any (additional) copies, even if the work has previously been made available to the public.⁵¹ In effect, this means that the copyright owner can regulate the number of copies of her work in circulation.⁵²

The distribution right supersedes the right to publish contained in the United Kingdom’s Copyright Act of 1956.⁵³ The difference in terminology has a great effect on the content of

⁴⁵ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 479.

⁴⁶ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 479.

⁴⁷ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 479.

⁴⁸ Council of the European Communities *Directive on the Legal Protection of Computer Programs* (17-5-1991) 91/250/EEC Directive, and the Council of the European Communities *Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright on the Field of Intellectual Property* (19-11-1992) 92/100/EEC.

⁴⁹ The Copyright (Computer Programs) Regulations 1992/3233 and the Copyright and Related Rights Regulations 1996/2967.

⁵⁰ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 427.

⁵¹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 426.

⁵² The territoriality principle has an influence on this right. S 18 of the CDPA expressly indicates the European Economic Community (EEA), to which the UK belongs, as the territory in question. If a copy of a work is put into circulation in the United Kingdom, or anywhere else in the European Economic Area (EEA), for the first time (and has not been put into circulation anywhere else), this is a restricted act and must therefore be authorised by the copyright owner. Distributing a copy in an EEA country effectively exhausts the distribution right. Notwithstanding, if the work was previously put into circulation in a country not part of the EEA, then distributing the work in the United Kingdom is a restricted act. If a copy of a work is put into circulation in a country outside the EEA, it is a matter of national legislation – informed by international conventions and treaties – whether an infringement has occurred. See Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 427.

⁵³ S 2(5)(b) of the Copyright Act, 1956.

the right. The distribution right has a close relationship with the reproduction right, and acquired new meaning with the advent of the digital age and the internet specifically. If a consumer were to make use of peer-to-peer sharing software to download an unauthorised copy of a copyright work, this would constitute an infringement of the reproduction right. Similarly, the person “sharing” the work (making it available for download) would in turn be liable of infringement of the distribution right. This issue has received much consideration in American case law,⁵⁴ with courts grappling with the definition and extent of the distribution right. However, there is a paucity of case law in the United Kingdom in this regard and the way that the courts will handle this issue remains to be seen.

The rental and lending rights of the copyright owner are regulated separately from the distribution rights. As discussed in chapter 3,⁵⁵ rental and lending rights were first recognised by the TRIPS agreement in 1994. Section 18A of the CDPA was consequently added to cater for these categories of rights.⁵⁶ The rationale behind excluding works of architecture in buildings is the wish to prevent the copyright owner from asserting a right to lease the building.⁵⁷ Section 18A(2) distinguishes between the acts of rental and lending on the basis of whether a direct or indirect economic advantage is gained. Economic advantage denotes situations where establishments make a profit from the lending activities.⁵⁸ If such an advantage is gained, the rental right is applicable;⁵⁹ if no such advantage is gained, lending rights are applicable.⁶⁰ Importantly, both definitions make it clear that these restricted acts relate to the public, so by implication lending to friends or family is of no concern to the copyright owner.⁶¹ Nonetheless, lending between establishments that in turn make a work available to the public (such as libraries) is expressly exempted from the scope of the lending right.⁶²

⁵⁴ See *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 454 F Supp 2d 966 (CD Cal 2005); *Universal City Studios Productions LLLP v Bigwood* 441 F Supp 2d 185 (DMe 2006). See to the contrary *Capitol Records Inc v Thomas* [2008] 579 F Supp 2d 1210 (DMinn 2008); *London-Sire Records Inc v Doe 1* [2008] 542 F Supp 2d 153 (D Mass 2008).

⁵⁵ Sections 2 2 and 3 2 of chapter 3..

⁵⁶ S 18A was incorporated into the CDPA by reg 10(2) of the Copyright and Related Rights Regulations 1996 (SI 1996/2967). These rights apply specifically to literary, dramatic and musical works, films and sound recordings, and to artistic works other than works of applied art and works of architecture in buildings: s 18A(1)(a)-(c).

⁵⁷ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 429-430.

⁵⁸ S 18A(5).

⁵⁹ S 18A(2)(a) read with the definition of “rental right” in s 178.

⁶⁰ S 18A(2)(b).

⁶¹ This view is substantiated by the inclusion of the term “establishment”.

⁶² S 18A(4).

The performance right is also provided for in the CDPA. Section 19 states that the public performance of a dramatic, literary or musical work is an act restricted by copyright and therefore the copyright owner has the right to authorise the performance of her work.⁶³ Furthermore, playing or showing a sound recording, film or broadcast in public is also a restricted act that must be authorised.⁶⁴ The producer of the sound recording will hold the copyright in such a work,⁶⁵ although the author of the musical or literary work will also have copyright in the work embodied in the sound recording.

Against this discussion of the economic rights granted by the CDPA, the fair dealing exceptions that limit the owner's property rights can be analysed. As will be seen, fair dealing provisions act as defences against a claim for the infringement of any of these economic rights. It is therefore unnecessary to consider the effect that these exceptions have on the rights individually.

4 2 3 Fair Dealing

4 2 3 1 Introduction

The point of departure in copyright law is that when a person undertakes an act restricted by copyright without authorisation, he infringes the copyright owner's exclusive rights. Unless a statutory defence can be successfully raised, the user will be found liable of infringing one or more of the copyright owner's exclusive rights. The fair dealing provisions constitute some of these statutory defences.

The fair dealing defence was introduced in the United Kingdom by the Copyright Act of 1911.⁶⁶ The fair dealing exceptions contained in the 1911 Act are included and expanded on in the CDPA.⁶⁷ There is an exhaustive list of situations that can be raised as fair dealing defences: using a copyright work for the purposes of research or private study, criticism or review, or reporting current events can qualify as fair dealing and consequently be exempted from liability for infringement in terms of the CDPA. However, there is no open-ended defence of fairness as is the case with fair use. Accordingly, the inquiry of whether the particular use is exempted must start with the question whether the exception applies

⁶³ S 19(1).

⁶⁴ S 19(3).

⁶⁵ As defined in s 178.

⁶⁶ S 2(1)(i).

⁶⁷ Ss 29-30.

to that type of work, and whether the use is for one of the approved purposes.⁶⁸ If both of these questions are answered in the affirmative, the inquiry proceeds to the second stage, where it is established whether there has been a sufficient acknowledgement of the source (if necessary), and whether the use is in fact fair.⁶⁹

The United Kingdom is party to the Berne Convention and the statutory exceptions must therefore be in line with the framework created by this treaty.⁷⁰ The Information Society Directive required various amendments to be made to the CDPA to comply with the mandates regarding fair dealing. Article 5(3) of the Directive stipulates that for fair dealing to apply to research and private study, the act in question must be for a non-commercial purpose.⁷¹ Section 30(1) of the CDPA has been amended to state that fair dealing for purposes of criticism or review will only be allowed if the work has been made lawfully available to the public.⁷²

The fairness inquiry is an objective analysis, measured against the standard of whether “a fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question”.⁷³ The decision of whether the use of a work is fair will ultimately be a matter of impression, but a variety of factors remain important (to varying degrees, depending on the specific purpose of fair dealing and the facts of each case).⁷⁴ One of the most important factors considered is the extent to which the use competes with the exploitation of the work by the copyright owner.⁷⁵ Here the courts take instruction from article 9(2) of the Berne Convention – expanded by article 13 of TRIPS – which allows member states to permit exceptions to the reproduction right in specific cases where the reproduction by a user does not unreasonably prejudice the legitimate interests of the owner or conflict with the normal exploitation of the work.⁷⁶ Furthermore, the court will have regard to how much of the work has been used and the

⁶⁸ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 116.

⁶⁹ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 116.

⁷⁰ See chapter 3 section 2 1 for the discussion of this treaty.

⁷¹ This qualification was implemented by reg 9(a) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498), which amended s 29(1) of the CDPA

⁷² As required by art 5(3)(d) of the Information Society Directive.

⁷³ *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 44; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

⁷⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

⁷⁵ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

⁷⁶ Art 9(2) of the World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886); see chapter 3 section 2 1. As seen in chapter 3 section 2 2, the TRIPS agreement extends this test to all economic rights of copyright holders, whereas the Berne Convention only applies it to the reproduction right of the author.

extent of the use, as well as whether the purpose achieved by using the work could have been achieved without relying on the reproduction, although an affirmative answer will not automatically render the use unfair.⁷⁷

A defence that is closely related to the fair dealing exceptions is the reproduction of a work in the public interest.⁷⁸ Although the defences are often raised in conjunction with one another,⁷⁹ the public interest defence falls beyond the scope of this thesis and will not be analysed separately.

4 2 3 2 **Research and Private Study**

The rationale behind the first of the fair dealing exceptions, allowing non-commercial research and private study, is to afford students and researchers the opportunity to access and use works protected by copyright.⁸⁰ The exception relates to literary, dramatic, musical and artistic works, as well as the typographical arrangement of a work, but requires that a sufficient acknowledgment of the author and source of the work must be made in the case of research, unless this proves to be practically impossible.⁸¹ One aspect that is notably lacking from this exception is the inclusion of cinematographic films and sound recordings, which are becoming an increasingly prevalent means of conveying information.⁸² Making use of a sound recording for the purpose of research would therefore infringe the copyright in the sound recording itself, but not the musical work underlying it.⁸³ As is shown later in this chapter,⁸⁴ the Australian equivalent is to be preferred in this respect because of its broader construction and scope.

⁷⁷ *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 40; *Ashdown v Telegraph Group* [2002] Ch 149 CA paras 76-81; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 499.

⁷⁸ This common law defence is entrenched in s 171(3) of the CDPA.

⁷⁹ See eg *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA; *Beloff v Pressdram* [1973] 1 All ER 241; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143; *Ashdown v Telegraph Group* [2002] Ch 149 CA.

⁸⁰ S 29. See Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 485.

⁸¹ S 29(1)-(2). In terms of s 29(2) no acknowledgment is required in the case of typographical arrangements (published editions).

⁸² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 485.

⁸³ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 116.

⁸⁴ See section 3 3 2.

The Information Society Directive allows member states to provide exceptions for private study and research not only to the reproduction right, but also to the distribution right.⁸⁵ In this respect the CDPA clearly states that fair dealing with a work “does not infringe any copyright in the work”,⁸⁶ which extends the scope of the exception to all the exclusive rights granted to copyright owners. This syntax was formulated on the premise that fair dealing for the purposes of research or study will rarely, if ever, have an impact on any rights other than reproduction and distribution.⁸⁷

The meaning of “non-commercial research” is not exact, as the CDPA implemented the qualification without incorporating a correlative definition.⁸⁸ However, the meaning of the term is informed by recital 42 of the Information Society Directive (which is the cause of its inclusion), which states:

“[T]he non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.”

It is clear from the above extract that the determination of whether the allegedly infringing act does indeed infringe is unique to each specific scenario, and the conduct can be found to be non-commercial regardless of the otherwise-indicating organisational structure. It is suggested that the activity complained of should be viewed on a continuum representing intentions to profit and didactic purposes as the two extremes, with the purpose of the specific research being determinative instead of the larger purpose of the researcher.⁸⁹ Notwithstanding, research carried out for a non-profit organisation with the intention to raise funds for the organisation will likely still be deemed to be of a commercial nature.⁹⁰

The requirement that a sufficient acknowledgment must be made in the case of research is a reflection of the standards of fair practice that are expected of users, although section 29(1B) provides that no acknowledgment needs to be made if it is impossible for practical reasons. This provision will have effect in three scenarios. The first situation envisioned by this clause is where a work was published anonymously. However, while the Information Society Directive requires that the author must be acknowledged if her identity is known

⁸⁵ Art 5(2)(b), (3)(a) & (4).

⁸⁶ S 29(1)&(1C).

⁸⁷ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 489.

⁸⁸ Incorporated by the Copyright and Related Rights Regulations 2003 (SI 2003/2498) following the imperative mandate in recital 42 of the Information Society Directive.

⁸⁹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 486.

⁹⁰ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 486-487.

even where the work was published anonymously,⁹¹ the CDPA does not contain any provision to this effect. The CDPA is therefore not in compliance with the Directive in this regard.⁹² Secondly, where the work is unpublished and it is not possible to establish the author's identity by reasonable enquiry, the user will be excused from making a sufficient acknowledgement.⁹³ Finally, if the work was originally published with the author's name but it has since become impossible to name her for reasons of practicality, no acknowledgement needs to be made.⁹⁴ If, for example, the copy of a work used for research does not bear the author's name, the requirement of sufficient acknowledgment may be dispensed with if it is not possible to ascertain her identity after reasonable enquiry.⁹⁵ If the author is not also the copyright owner, it is important that the author of the work is indicated, not the copyright owner.⁹⁶ The requirement that the author must be acknowledged indicates that the exception applies to the entire research process; from procuring the source material to reproductions of such material in the publication of the research.⁹⁷ This view is fortified by the fact that a distinction is drawn in the CDPA between research and private study.

As regards private study, the Information Society Directive requires that the use of a work for private study is not for commercial ends, either directly or indirectly.⁹⁸ This suggests that courses presented for vocational improvement will not benefit from this fair dealing exception. However, no acknowledgment of the author or source is required in this case because the results of the exercise are not published and attribution is therefore senseless. The meaning of "non-commercial" as discussed in relation to research applies equally to private study.⁹⁹ The fact that a work is used for private study does not necessarily indicate that the use will be protected by the fair dealing exception; a contextual evaluation of the use must be undertaken to determine whether the particular conduct is exempted.¹⁰⁰

⁹¹ Art 5(3)(a).

⁹² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 487.

⁹³ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 487.

⁹⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 487.

⁹⁵ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 487.

⁹⁶ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 488.

⁹⁷ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 118.

⁹⁸ Art 5(2)(b). The CDPA has been amended accordingly by reg 2(1) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498) and this definition of private study is now included in section 178.

⁹⁹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 489.

¹⁰⁰ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 489.

The CDPA extensively regulates acts of copying by persons other than researchers and students.¹⁰¹ In the case of libraries, a librarian cannot rely on the fair dealing provision to make copies because this act is regulated by sections 38 – 40. These sections make it possible for librarians to provide copies of articles from periodicals and sections from published works (subject to certain conditions) without infringing copyright.¹⁰² Such copying must still, however, be for the purpose of non-commercial research or private study, and librarians are therefore exempted from liability if they provide materials for others to use for purposes of fair dealing.¹⁰³ Limited instances of copying are therefore allowed where the person doing the research or private study is not the person doing the copying.

Computer programs are the subject of two provisions that curtail the functioning of the fair dealing exception.¹⁰⁴ Fair dealing does not extend to the act of converting a computer program from a low level language¹⁰⁵ to a high level language¹⁰⁶ or the incidental reproduction of the program while doing so.¹⁰⁷ Furthermore, it is not fair dealing to “observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program”.¹⁰⁸ The fair dealing exception is specifically excluded from these scenarios because they are regulated separately in the act.¹⁰⁹

There has been no case law where the defence of fair dealing for research or private study has been raised in the United Kingdom and authors have therefore looked to other commonwealth jurisdictions for cases where the courts have had the opportunity to consider the application of this exception.¹¹⁰ The Supreme Court of Canada decided such a case in *CCH Canadian v Law Society of Upper Canada*,¹¹¹ where it held that the factors considered in cases of fair dealing for the purposes of criticism, review and news reporting

¹⁰¹ S 29(3).

¹⁰² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 489-490.

¹⁰³ Ss 38(2)(a)(i)-(ii) & 39(2)(a)(i)-(ii) of the CDPA.

¹⁰⁴ S 39(4) & (4A).

¹⁰⁵ A low level language is a “programming language that is close to machine code in form”: Soanes C, Stevenson A & Hawker S *Concise Oxford English Dictionary* (11th ed 2006) s v “low-level”.

¹⁰⁶ A high level language is a “programming language (e.g. BASIC) that has instructions resembling an existing language such as English”: Soanes C, Stevenson A & Hawker S *Concise Oxford English Dictionary* (11th ed 2006) s v “high-level”.

¹⁰⁷ S 39(4).

¹⁰⁸ S 29(4A).

¹⁰⁹ In ss 50B & 50BA respectively.

¹¹⁰ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 489; Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 118-119.

¹¹¹ *CCH Canadian v Law Society of Upper Canada* [2004] SCC 13. See the remarks made about this case in Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 118, 119.

can be helpful in deciding whether specific acts of research and private study are fair.¹¹² Interestingly, the Canadian Copyright Act¹¹³ does not require that the research must be of a non-commercial nature for it to qualify as fair dealing, and the court accordingly held that lawyers can rely on the defence even when their actions are commercial and aimed at making a profit.¹¹⁴

It is clear that the UK exception of fair dealing for the purpose of non-commercial research or private study is of great importance to the public's interest in education and developing academic schools of thought. However, the provision is formulated narrowly in comparison with the Australian equivalent, where a more inclusive approach is adopted.¹¹⁵

4 2 3 3 Criticism and Review

The next fair dealing provision is section 30 of the CDPA. This section makes it possible to use copyright protected works for the purposes of criticism, review and news reporting. For the sake of convenience, fair dealing for the purposes of news reporting will be considered separately from the two former grounds of exemption.¹¹⁶

The review and criticism of a work protected by copyright has arguably been allowed since the Statute of Anne, but has only found statutory embodiment since the Copyright Act of 1911.¹¹⁷ The need for this exception stems from the public interest in freedom of expression, which should not be unnecessarily curtailed by copyright law.¹¹⁸ This exemption is regionally encouraged by the Information Society Directive.¹¹⁹

The CDPA encapsulates the exception as follows:

“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

¹¹² Paras 53, 60. See sections 2 3 3 & 2 3 4 for the discussion of these exceptions.

¹¹³ Copyright Act of 1985.

¹¹⁴ Para 84.

¹¹⁵ See section 3 3 2.

¹¹⁶ See section 2 3 4.

¹¹⁷ S 2(1)(i) of the Copyright Act of 1911. See Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 491.

¹¹⁸ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 42. See also chapter 2 section 3.

¹¹⁹ Art 5(3)(d).

accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.”¹²⁰

The provision does not limit the operation of the exception to certain types of work as in the case of research and private study, which means that any work that has been made available to the public can be used for purposes of criticism and review.¹²¹ Furthermore, the provision states that a fair dealing will not infringe “any copyright in the work”, again indicating that the defence is not limited to the right of reproduction. Any portion or aspect of a work may be used, irrespective of whether it is representative of the work as a whole.¹²² The ideas and concepts underlying the work, or even the manner in which the work was produced, may also be the subject of criticism or review.¹²³ The crux of the exception is that the reproduction of the work should take place as part of or to enable criticism or review of the work, although this need not be the sole purpose.¹²⁴ In the words of Lightman J in *Banier v News Group Newspapers Ltd*, “[s]ection 30 is designed to protect a critic or reviewer who may bona fide wish to use copyright material to illustrate his review or criticism”.¹²⁵ A critic or reviewer has even relied on the fair dealing defence when his commentary on a work was predominantly positive.¹²⁶ As with the other fair dealing exceptions, the court will consider the factual context within which the work was used.¹²⁷

The decision in *Fraser-Woodward Ltd v BBC and Another*¹²⁸ is useful for giving meaning to this fair dealing exception. In this case the defendants used various works protected by copyright in a television programme. The programme was created with the intention of criticising a particular style of journalism and used the media coverage of a high-profile

¹²⁰ S 30(1).

¹²¹ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 44.

¹²² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 492.

¹²³ See for example *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA (where it was considered fair dealing to reproduce and critique passages from various confidential Scientology books and newsletters relating to the philosophy and teachings of this religion); *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA (where excerpts of a television programme were used to criticise the style of journalism); *Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc* [1994] EMLR 1 (where scenes from *A Clockwork Orange* were used to criticise the decision to withdraw the cinematographic film from distribution in the UK, which amounted to fair dealing).

¹²⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 492.

¹²⁵ *Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815.

¹²⁶ *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch paras 56, 60, 61. However, this case was decided on the basis that the works in question were not made available to the public as required by s 30(1A) and the fairness of the dealing was therefore not evaluated. The court commented that if the works had been made lawfully available to the public, the defendant “would have had a reasonable prospect of establishing a fair dealing defence under section 30(1)”: para 177. See also the brief discussion of this case in this section below.

¹²⁷ For the factors considered by the courts, see *Ashdown v Telegraph Group* [2002] Ch 149 CA para 20; *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch) para 55.

¹²⁸ [2005] EWHC 472 (Ch).

celebrity couple, David and Victoria Beckham, as an illustrative example. During the course of the programme, thirteen photographs taken by a Mr Jason Fraser were used without the consent of the plaintiff, who owned the copyright in the photographs. An action for copyright infringement was instituted and the defence of fair dealing for the purpose of criticism or review was raised. All of the photographs in question were allegedly candid shots of one or both of the celebrities and used under licence by various tabloid newspapers. The defendants showed video footage of the photographs appearing on the front page of these newspapers, predominantly accompanied by large text headlines, none of which were shown for longer than four seconds. The defendants argued that the photographs were used for purposes of criticising the photographs themselves and to criticise other works and practices, such as the tabloid coverage of celebrities in general.

The court (per Mann J) confirmed that when considering whether an infringing use of a work can be justified by fair dealing, a liberal interpretation should be employed when defining the terms “criticism” and “review” and “[t]he context is likely to be all-important”.¹²⁹ This approach is consistent with the interpretation given to the provision relating to fair dealing for the purposes of research and private study in Australia, where a contextual analysis is followed.¹³⁰ An equally liberal interpretation was given to the words “another work” contained in section 30(1). The plaintiff argued that the style of journalism does not qualify as “another work” that can be subjected to criticism or review, because a style of journalism cannot be a work for the purposes of copyright law. However, the court rejected this argument and pointed to previous cases where it was decided that the criticism expressed can relate to the idea or philosophy underlying the work, or even its social and moral implications.¹³¹ Furthermore, no specific reference to the work being criticised is required, which strengthens this affirmation.¹³²

The plaintiffs also averred that the fair dealing provision could not exempt the defendants’ use of the photographs, as there was no sufficient acknowledgement of seven of the photographs shown. The court found that this was not the case, as each shot of the photographs included the text “Pictures: JASON FRASER”, or where this was not

¹²⁹ Paras 36-37. The court referred to *Ashdown v Telegraph Group Ltd* [2002] Ch 149 CA where this approach was followed. See para 55 for the factors that the court considered to be important in this context regarding whether the use qualified as fair dealing. See also Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 484.

¹³⁰ See section 2 3 2.

¹³¹ Paras 39-42, where the court considers the judgments in *Hubbard v Vosper* [1971] 1 All ER 1023 CA; *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA.

¹³² Para 53.

displayed reference was made to the author of the photographs by the narrator.¹³³ The court stated that the acknowledgement of the author does not have to be explicit in every instance; the requirement of sufficient acknowledgement can be satisfied by an implied reference when “anyone paying a moderate amount of attention would be able to identify the photographs as from the same series (and therefore the same photographer)”.¹³⁴

Although there is no general defence of fairness in the CDPA (such as the fair use defence in American copyright law), the use of a work must still be evaluated according to this criterion in each case. The court acknowledged that how the programme was made and the attitude of the defendant in dealing with intellectual property rights throughout this process are relevant considerations to the fairness of the dealing.¹³⁵ Some of the other guidelines that the court laid down for determining the fairness of the use include the motives of the user, the general impression of whether there was fair dealing, the quantity of the work used, the actual purpose of the use and whether the averred attempt at fair dealing is merely a simulation, and whether the reproduction of the work unreasonably prejudices the legitimate interests of the work or conflicts with the author’s normal exploitation of the work (in accordance with article 9(2) of the Berne Convention).¹³⁶ The court recognised that with the use of a photograph, a much greater portion (if not the entire photograph) would likely have to be used, compared to a literary or musical work, for the criticism or review to make sense.¹³⁷ Furthermore, the argument that fair dealing could not be relied on in this case because the use of the photographs was of a commercial nature was rejected.¹³⁸ In the court’s opinion, the balance of the interests of the copyright owner, on the one hand, and those of the critic on the other, weighed in favour of the critic.¹³⁹ The fair dealing defence was therefore upheld.

The CDPA includes the performance of a work in the provision relating to criticism and review, which permits making quotations from theatrical performances where the script

¹³³ Para 18.

¹³⁴ Para 73.

¹³⁵ Para 5.

¹³⁶ Para 55. The court adopted these considerations from the factors employed by other courts, specifically in *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620; *Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815; *Hyde Park Residence v Yelland* [2001] Ch 143 para 40; *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1 at 14; *Johnstone v Bernard Jones Publications Ltd* [1938] 2 Ch 599 at 603-604.

¹³⁷ Para 55.

¹³⁸ Para 59.

¹³⁹ Para 64.

has not been made available to the public.¹⁴⁰ However, no express allowance is made for parody or caricature of a work, even though this is encouraged by the Information Society Directive.¹⁴¹ While the criticism/review provision could feasibly be construed to cover these actions, it will not always be clear *ex ante* whether the parody of the work will fall into one of the categories of the *numerus clausus* of exceptions.¹⁴² One consideration that gravitates against the inclusion of parody and caricature in the scope of the exception for criticism and review is that a sufficient acknowledgment of the source is required by section 30(1), which is not provided as a general practice of parodies.¹⁴³ However, a national review of the United Kingdom's copyright law in 2006 found the benefits of including an exception for parody and satire outweigh the costs, and accordingly advised the promulgation of such an exception.¹⁴⁴ Another review was concluded in 2011, which yielded the same results.¹⁴⁵ The government has indicated that it will take steps to promulgate such an exception by the end of 2012.¹⁴⁶ However, in the absence of a specific fair dealing clause for parody and satire,¹⁴⁷ it would appear that this act is generally not exempted and a defence in line with freedom of expression will have to be employed.¹⁴⁸

A work can be the subject of criticism or review only once it has been made available to the public. This qualification has its inception in article 5(3)(d) of the Information Society

¹⁴⁰ Ss 30(1) & 30(1A)(d). This was not the case under the Copyright Act of 1956, which made no mention of a performance.

¹⁴¹ Art 5(3)(k).

¹⁴² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 492-493.

¹⁴³ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 492-493. As the authors note there, "it runs counter to ordinary publishing practice and imposes a rather artificial obligation on the parodist, as one of the benchmarks against which a parody can be judged is its success in making a connection with the work being parodied without any form of express reference". However, as Visser contends, it is possible that where the work that is being parodied is well known and is recognisable in the parody, this could be enough for the requirement of a sufficient acknowledgement to be satisfied: Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative and International Law Journal of Southern Africa* 321-343 at 337.

¹⁴⁴ Gowers A *Gowers Review of Intellectual Property* (2006) 68 <available at http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf> (accessed on 23-01-2012).

¹⁴⁵ Hargreaves I *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) 49-50 <available at <http://www.ipso.gov.uk/ipreview-finalreport.pdf>> (accessed 23-06-2012).

¹⁴⁶ HM Government *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011) 16 <available at <http://www.ipso.gov.uk/ipresponse-full.pdf>> (accessed 27-06-2012).

¹⁴⁷ Such as the one contained in the Australian Copyright Act: see section 33.5.

¹⁴⁸ A parody or caricature of a work can also be viewed as a derogatory treatment of the work, which the author has a moral right to object to in terms of s 80 of the CDPA. See Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative and International Law Journal of Southern Africa* 321-343 at 337; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 493.

Directive, which caused the CDPA to be amended to comply with this condition.¹⁴⁹ The qualification is informed by section 30(1A), which states:

“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.”

This qualification to the exception is clearly not aimed at excluding works that have not been published, but rather at works that have not been made available to the public by any means. This view is supported by subsections (d) and (e), which deem a work to have been made available to the public even if no copy of the work has been issued.

In the case of *Hubbard v Vosper*,¹⁵⁰ the court upheld the defence of fair dealing for the purpose of criticism where the literary work in question was distributed only within a small sect of a religious community and not intended for wider public dissemination. However, this case was decided before the amendment of the CDPA in 2003 that requires the work to be made available to the public; the amendment could mean that the case would be decided differently today.¹⁵¹

In *HRH The Prince of Wales v Associated Newspapers Ltd*¹⁵² the defendant (a newspaper) published certain extracts from the personal diary of the plaintiff that it had acquired from a former employee of the latter. Copies of the diary had been legitimately distributed among a group of individuals chosen by the Prince himself on the understanding that they were not to be viewed by any other person. The employees of the

¹⁴⁹ The necessary changes to s 30(1) were brought about by reg 10(1)(a) of the Copyright and Related Rights Regulations (SI 2003/2498), while s 30(1A) was inserted by reg 10(1)(b) of the same regulations.

¹⁵⁰ *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA.

¹⁵¹ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 47; Robertson G & Nicol A *Robertson and Nicol on Media Law* (5th ed 2007) 372-373.

¹⁵² [2006] EWHC 522 Ch.

plaintiff who had access to the diary had all signed confidentiality agreements in terms of which they undertook not to distribute copies to any unauthorised persons or divulge the contents of the diary. The court unequivocally stated that the “[c]irculation of copies of the journal to a number of carefully selected recipients ... does not amount to making it available to the public”.¹⁵³ Although the defendant might have been able to rely on fair dealing for purposes of criticism or review, this prospect was negated by the fact that the literary work was not made available to the public as required by section 30(1).¹⁵⁴ These cases demonstrate the change in the legal position relating to fair dealing for purposes of criticism or review brought about by the Copyright and Related Rights Regulations.¹⁵⁵

The condition that the work must previously have been made available to the public places a justifiable limit on the scope and application of the fair dealing provision. However, there is no reason why a work should not be open to criticism and review once it has been lawfully disclosed. The provision as it stands strikes a sensible balance between the interests of authors and the public.

4 2 3 4 Reporting Current Events

As with the fair dealing exception relating to criticism and review, the exception for purposes of news reporting first appeared in the Copyright Act of 1911, although it was phrased as an exception for “newspaper summary”.¹⁵⁶ It is trite law that copyright does not grant a monopoly right over information, facts or opinions; merely over how they are expressed. The exception of fair dealing for the purpose of news reporting aims to legitimise the use of these expressions by journalists reporting to the public.¹⁵⁷ The exception is clearly based on the public interest in the free dissemination of current and relevant information.¹⁵⁸ By making use of original quotations, journalists are able to better inform the public without tainting the information with an opinion of their own.¹⁵⁹ Using the original text, sound recording or film footage enables the public to receive information in its original form.

¹⁵³ Para 176.

¹⁵⁴ Para 177.

¹⁵⁵ (SI 2003/2498).

¹⁵⁶ S 2(1)(i).

¹⁵⁷ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 494.

¹⁵⁸ See *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 41, 76-77.

¹⁵⁹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 494.

The Information Society Directive embodies this exception in article 5(3)(c), where it states:

“[R]eproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character ... as long as the source, including the author’s 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 [is permitted.]”

The correlative fair dealing provision in section 30(2) of the CDPA is couched in the following terms:

“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.”

As with the other fair dealing exceptions in the CDPA, this exception should be interpreted liberally.¹⁶⁰ The term “current events” is not confined to events that occur within a recent temporal context, but rather events that still occupy the public’s mind.¹⁶¹ Again, the text does not restrict itself to the reproduction of the work, instead using the familiar phrase “any copyright in the work”. Furthermore, the work itself does not have to be a work that has been recently produced.¹⁶² However, the subject matter cannot merely be of historical interest; it must be relevant to contemporary events, whether local, national or international.¹⁶³ Courts have found that even sporting events can qualify as “events” in terms of this provision.¹⁶⁴ The prevailing view is that “reporting” does not cover editorial or opinion pieces, and the reproduction of the work must be aimed at informing the public or a section of the public.¹⁶⁵ The term “current events” does not extend as far as the term

¹⁶⁰ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 40, 75; *Ashdown v Telegraph Group* [2002] Ch 149 CA para 64; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 486, 495; Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 54.

¹⁶¹ *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 paras 28-32; *Ashdown v Telegraph Group* [2002] Ch 149 CA para 64. See also Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 495; Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 55.

¹⁶² Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 55.

¹⁶³ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 495; Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 54.

¹⁶⁴ *BBC v BSB* [1992] Ch 141. See also Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 54; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 495.

¹⁶⁵ See Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 496; Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 56. However, it is conceivable that an opinion piece could qualify for exemption under the exception for criticism or review.

“news” (as used in the Australian provision), according to case law.¹⁶⁶ It is unclear why the exception is entitled “News Reporting” although it does not use the phrase in the text of the provision itself, or why the court reneged from the liberal interpretation of the provision. It is submitted that this differentiation amounts to a distinction without a difference, and that the liberal interpretation of fair dealing exceptions prevalent in case law requires these terms to be viewed as synonyms.

No distinction is drawn between works that have been made available to the public and those that have not. The provision contains no prohibition against using works that have not been made available to the public, in contrast with the exception for criticism and review. However, courts are likely to consider this in the analysis of whether the use of the work is fair.¹⁶⁷ A work that has not been made available to the public can still be used (if the public interest justifies it), although it will be more difficult to show that the use was fair.¹⁶⁸ Although it is primarily an objective analysis, certain subjective considerations, such as the motives and intentions of the user, are relevant to the fairness of the use.¹⁶⁹ The method used to acquire the work is also helpful; if, for example, the work was obtained in breach of confidence, this will weigh against a finding that the subsequent use was fair.¹⁷⁰ All of these factors will contribute to deciding whether the use was fair, which nonetheless remains a matter of impression. Whether it is reasonably necessary to reproduce the work to report the events will also be an indication of whether the use is fair.¹⁷¹ Accordingly, if the copyright work is used appropriately to relay information to the public, it will indicate a fair dealing with the work (subject to the other considerations discussed here).

The wording of section 30(2) makes it clear that the exception applies to all categories of copyright works except photographs. The reason for excluding photographs from the scope of this exception is the notion that using a photograph without licence for the

¹⁶⁶ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 41-43. See section 334.

¹⁶⁷ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 47-48. See *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; *Ashdown v Telegraph Group* [2002] Ch 149 CA para 75.

¹⁶⁸ See generally *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA; *Time Warner v Channel 4* [1994] EMLR 1; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143; *Ashdown v Telegraph Group* [2002] Ch 149 CA; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 499.

¹⁶⁹ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 40; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

¹⁷⁰ *Ashdown v Telegraph Group* [2002] Ch 149 CA paras 75. See generally also *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143; *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch.

¹⁷¹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 496.

purpose of news reporting can never be fair.¹⁷² The obvious scenario illustrating this rationale is a newspaper using a photograph that a rival newspaper has paid dearly for and simply relying on this fair dealing exception to justify it. Notwithstanding, such a photograph may still be reproduced and distributed for the purpose of criticism or review, but the courts will be wary of a simulated intention and legitimate criticism or review will have to be passed on the photograph.¹⁷³

The requirement that a sufficient acknowledgement of the source be made is unproblematic, as it should *prima facie* be evident whether such an acknowledgement has been made. The considerations discussed in relation to the fair dealing exception for purposes of criticism or review,¹⁷⁴ especially those taken into account by the court in *Fraser-Woodward Ltd v BBC*,¹⁷⁵ should apply *mutatis mutandis* to the exception of fair dealing for the purpose of reporting current events. Subsection (3) alleviates the mandate somewhat by providing that when current events are reported by means of a sound recording, film or broadcast, no acknowledgement is required where this would be practically or otherwise impossible.¹⁷⁶

This exception is clearly necessary for the proper functioning of an independent media. The media can rely on this exception to use works protected by copyright without fear of infringement, which will often be required to effectively inform the public of important current happenings. The intrinsic requirement of fairness prevents undue harm to the copyright owner's legitimate interests, and prevents the exception being relied on to justify improper uses.

¹⁷² Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 496.

¹⁷³ See eg *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 14. Although this case does not involve the reproduction of a photograph, the court drew attention to the caveat that defendants may "attempt to dress up the infringement of another's copyright in the guise of criticism [or review]". See also *Time Warner v Channel 4* [1994] EMLR 1 at 14; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 41.

¹⁷⁴ See section 2 3 3.

¹⁷⁵ *Fraser-Woodward Ltd v BBC and Another* [2005] EWHC 472 (Ch).

¹⁷⁶ See the discussion of the similar concession relating to fair dealing for the purpose of non-commercial research in section 2 3 2.

4 3 Australia

4 3 1 Introduction

The first federal Australian Copyright Act was passed into law in 1905.¹⁷⁷ This Act is sanctioned by the Constitution of the Commonwealth of Australia, which specifically provides the legislature with the power to regulate copyright law.¹⁷⁸ The 1905 Act did not incorporate the principles or provisions of the Berne Convention (or any other international agreements) and sought to free Australia from the UK copyright law as it stood at the time.¹⁷⁹ The 1905 Act introduced fair dealing to Australian copyright law, with a provision that contained the majority of the substance of the contemporary fair dealing exceptions.¹⁸⁰ However, this only lasted until 1912, when the Copyright Act of 1912 was promulgated, repealing the 1905 Copyright Act¹⁸¹ and adopting the United Kingdom's Copyright Act of 1911 in its entirety (with additional provisions to aid its application in Australia).¹⁸² The 1911 Act statutorily abolished common law copyright and statute is now the only source of protection.¹⁸³ In the United Kingdom the Copyright Act of 1956 repealed the Act of 1911, but this Act continued to remain in force in Australia.¹⁸⁴ Following the repeal of the Act in the United Kingdom, the Australian Attorney-General appointed a committee to examine the implications of the United Kingdom's repeal in Australia and the accession by Australia to the Berne Convention and the Universal Copyright Convention.¹⁸⁵ This body, known as the Spicer Committee, published a report in 1959 which provided the impetus for legislative reform and consequently formed the foundation of the 1968 Act.¹⁸⁶

The Australian Copyright Act 63 of 1968 (hereafter the "Copyright Act") came into operation on May 1, 1969, and regulates the current law of copyright in Australia. Australia

¹⁷⁷ The statute was known as the Copyright Act, 1905; see Atkinson B *The True History of Copyright: The Australian Experience 1905-2005* (2007) 13.

¹⁷⁸ S 51(xviii) of the Commonwealth of Australia Constitution Act 1900.

¹⁷⁹ Australia was not a signatory to the Berne Convention, although it enjoyed the benefits and obligations of the Berne Convention under the United Kingdom's International Copyright Act of 1886, which extended these to Australia; see Atkinson B *The True History of Copyright: The Australian Experience 1905-2005* (2007) 13.

¹⁸⁰ S 28 read: "Copyright in a book shall not be infringed by a person making an abridgment or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information."

¹⁸¹ S 4.

¹⁸² S 8.

¹⁸³ Lahore J *Copyright and Designs: Commentary I* (RS 87 2010) 4041.

¹⁸⁴ Lahore J *Copyright and Designs: Commentary I* (RS 87 2010) 2043.

¹⁸⁵ Lahore J *Copyright and Designs: Commentary I* (RS 87 2010) 2043.

¹⁸⁶ Lahore J *Copyright and Designs: Commentary I* (RS 87 2010) 2043.

is party to the latest text of the Berne Convention (the Paris Act)¹⁸⁷ as of March 1, 1978. Australia is also party to the Rome Convention,¹⁸⁸ the UCC,¹⁸⁹ TRIPS,¹⁹⁰ the WCT¹⁹¹ and the WPPT,¹⁹² which are discussed in chapter 3. Part VIII of the Copyright Act makes provision for the Act to be applied to qualified works of foreign countries in accordance with the principle of national treatment.¹⁹³

4 3 2 Rights Subsisting in Copyright

The Copyright Act has a fragmented structure when compared to the CDPA, although the substantive provisions are largely similar. The Copyright Act recognises artistic, literary, dramatic, and musical works as works eligible for copyright protection.¹⁹⁴ Moreover, it treats sound recordings, cinematographic films, broadcasts and published editions as “subject-matter other than works” also eligible for copyright protection.¹⁹⁵ Computer programs are protected independently from literary works by the Copyright Act, while the CDPA does not treat computer programs as distinct from literary works. Apart from this, the categories of subject-matter eligible for protection are identical to those recognised in the CDPA, although the CDPA gives separate protection to databases while the Copyright Act treats them as a subset of literary works.

The Copyright Act grants a property right to the author of a work in the form of the exclusive right to do or authorise certain acts in relation to that work.¹⁹⁶ Accordingly, guilty knowledge is irrelevant when establishing infringement.¹⁹⁷ These acts correspond with the restricted acts granted by the CDPA;¹⁹⁸ they entail the reproduction right, the publication right, the performance right, the right of communication to the public, the adaptation right, and the right to do any of these restricted acts in relation to an adaptation (depending on

¹⁸⁷ 1161 UNTS 3 (1971).

¹⁸⁸ World Intellectual Property Organisation *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (26-10-1961) 496 UNTS 43 (1961).

¹⁸⁹ United Nations *Universal Copyright Convention* (6-9-1952) 216 UNTS 132 (1952).

¹⁹⁰ World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994).

¹⁹¹ World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996).

¹⁹² World Intellectual Property Organisation *Performances and Phonograms Treaty* (20-12-1996) 36 ILM 76 (1996).

¹⁹³ Ss 184-185.

¹⁹⁴ Part III of the Act.

¹⁹⁵ Part IV of the Act.

¹⁹⁶ Lahore J *Copyright and Designs: Commentary I* (RS 92 2011) 2095.

¹⁹⁷ Lahore J *Copyright and Designs: Commentary I* (RS 94 2011) 34185.

¹⁹⁸ See section 2 2.

the type of work in question).¹⁹⁹ To comply with TRIPS, the right to authorise the commercial rental of a literary, musical or dramatic work, or a computer program or sound recording was introduced by the Copyright (World Trade Organization Amendments) Act.²⁰⁰ As these rights have already been discussed in relation to the CDPA,²⁰¹ it is unnecessary for present purposes to do so again, given that the rights contained in the Copyright Act are substantially the same, save for a few divergences which warrant a brief analysis.

While the CDPA provides for a distribution right, the Copyright Act grants only a publication right.²⁰² The right to publish a work has been interpreted by the courts to mean the right to make a work public which has not been available to the public previously in the copyright territory.²⁰³ The publication right does not allow the copyright owner to prohibit issuing additional copies to the public (although this could infringe the reproduction right). This differs greatly from the distribution right, especially in the digital environment where distribution is coupled with reproduction over the internet and both the distributing and reproducing parties can be held liable.²⁰⁴ Accordingly, the publication right is not as extensive in its scope as the distribution right.

The rights of public performance and communication to the public contained in the Copyright Act of 1968 are very similar to those contained in the CDPA.²⁰⁵ As with the UK equivalent, the communication right includes making a work available or transmitting it electronically, although it does not include tangible copies (which are addressed by the publication right).²⁰⁶ The Copyright Act also includes a broadcast as a communication to the public.²⁰⁷

The rental right – which was introduced internationally by TRIPS as a new addition to the exclusive rights²⁰⁸ and introduced into Australian law one year after the commencement of

¹⁹⁹ Ss 31, 85-88. See generally Lahore J *Copyright and Designs: Commentary I* (RS 88 2010) 34041-34043.

²⁰⁰ Ss 3 & 4 of the Copyright (World Trade Organization Amendments) Act, 149 of 1994, inserted s 31(1)(c) - (d) and s 85(d) respectively into the Copyright Act.

²⁰¹ See section 2 2.

²⁰² Ss 29 & 31(1)(a)(ii).

²⁰³ *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 18 IPR 443.

²⁰⁴ See the discussion of the distribution right in section 2 2.

²⁰⁵ Ss 27 & 22(5)-(6A) of the Copyright Act 63 of 1968, respectively.

²⁰⁶ According to the definition of “communicate” in s 10(1) of the Copyright Act. See also Lahore J *Copyright and Designs: Commentary I* (RS 67 2005) 34066.

²⁰⁷ See the definition of “broadcast” in s 10(1) of the Copyright Act. Broadcasting is also included in the right to communicate a work to the public in the CDPA: see s 20.

²⁰⁸ See sections 2 2 & 3 2 of chapter 3.

TRIPS²⁰⁹ – applies to different subject-matter than it does in terms of the CDPA. Article 11 of TRIPS requires member states to provide the rental right to authors of “at least” computer programs and cinematographic films if the rental of these works has led to widespread copying. While the CDPA protects the rights of the producers of films on this occasion, it ignores the owners of computer programs in this context. The Australian position, inversely, protects the rights in computer programs, but neglects the rental rights of producers of films.²¹⁰ It must therefore be assumed that the rental of the different types of works has different effects in the eyes of the two legislators.

Sensibly, the rights in respect of computer programs are limited to exclude situations where the computer program is not capable of being copied in the ordinary use of the machine or device in which it is embodied, and where the computer program is not the essential object of the rental.²¹¹ The distinction drawn between rental and lending in the CDPA is upheld in the Copyright Act, albeit with different terminology. Whereas the CDPA refers to “rental”, the Copyright Act employs the term “commercial rental” to illustrate its intended distinction from “lending”. The Copyright Act specifically states that it “is not the intention of Parliament that a lending arrangement should be regarded as a commercial rental arrangement”.²¹²

The exclusive rights as set out in the Copyright Act therefore do not differ greatly from those in the CDPA. With the exceptions of the different subject-matter covered by the rental right and the distinction between the publication and distribution rights, the content of the protection granted to copyright owners is largely the same. Given this context the fair dealing provisions can now be compared in the same light.

4 3 3 Fair Dealing

4 3 3 1 Introduction

The fair dealing provisions in the Australian Copyright Act are arranged according to the subject-matter each one covers. The fair dealing provisions relating to literary, artistic,

²⁰⁹ Ss 2, 3 of the Copyright (World Trade Organization Amendments) Act 149 of 1994.

²¹⁰ The Copyright Act provides for computer programs (s 31(1)(d)), sound recordings (s 85(1)(d), and literary, musical and dramatic works embodied in sound recordings (s 31(1)(c)).

²¹¹ S 31(3), (5) respectively.

²¹² S 30(A)(3). See also Lahore J *Copyright and Designs: Commentary I* (RS 66 2005) 34090.

dramatic and musical works are contained in Division 3 of Part III,²¹³ while those relating to sound recordings, cinematographic films, broadcasts and published editions are contained in Division 6 of Part IV.²¹⁴ The most notable substantive difference in this regard between the Copyright Act and the CDPA is that the former contains an additional fair dealing exception for parody or satire.²¹⁵

When the Copyright Act was promulgated in 1968, it soon proved to not strike an effective balance between the interests of the copyright owner and the public interest.²¹⁶ Consequently, the first reform committee, known as the Franki Committee, was appointed in 1974 to re-examine the reprographic needs and trends in Australia, and the Copyright Amendment Act 154 of 1980 was drafted to implement the recommendations made by the committee.²¹⁷ The Amendment Act introduced three subsections to the fair dealing provision relating to research and study, which aim to inform users of what will be considered fair.²¹⁸ This amendment introduced the four factors traditionally associated with fair use that courts adopted in the United States in the case of *Folsom v Marsh*,²¹⁹ as well as an additional factor.²²⁰ These factors are considered when assessing the use of the copyright work to determine the fairness of the conduct. The Act also amended the exception by removing the word “private” from private study, thereby making the category broader than the UK equivalent.²²¹ Another Copyright Amendment Act²²² was promulgated shortly afterwards, which extended the application of the fair dealing provisions relating to criticism, review and news reporting to audio-visual works.²²³

Although various other amendments to copyright law were made around the same time, the next amendment to fair dealing came with the Copyright Amendment (Digital Agenda) Act²²⁴ in 2000. As the short title suggests, the Act was aimed at bringing the legislation relating to copyright in line with the technological developments of the past decades.²²⁵ For

²¹³ Ss 40-42.

²¹⁴ Ss 103A-103C.

²¹⁵ Ss 41A, 103AA.

²¹⁶ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40041-40042.

²¹⁷ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40042.

²¹⁸ S 40(2)-(4), discussed in section 3 3 2.

²¹⁹ 9 F Cas 342 (1841). These factors are now statutorily embodied in s 107 of the American Copyright Act of 1976.

²²⁰ S 7 of the Copyright Amendment Act, 154 of 1980. See the discussion of the factors in section 3 3 2.

²²¹ S 7 of the Copyright Amendment Act, 154 of 1980.

²²² 78 of 1986.

²²³ S 11, which introduced ss 103A and 103B. Audio-visual works are defined in section 110A to include sound recordings, cinematographic films, and sound and television broadcasts.

²²⁴ 110 of 2000.

²²⁵ According to the objectives of the Act.

this reason, the term “copy” was replaced by “reproduce” to make it applicable to digital technologies (while using the term “facsimile copy” in reference to an analogue copy), both in the sections that provide for this exclusive right and the fair dealing provisions relating to it.²²⁶ The Act also extended the fair dealing provisions to apply to the exclusive right of communication to the public and introduced definitions for a “reasonable portion” that may be used for fair dealing.²²⁷ Although it was suggested that this Act should replace the specific fair dealing provisions with a general fair use provision (which would retain the specific purposes as indicative of what should be considered fair),²²⁸ this suggestion was not enacted.

Pursuant to the Australia-United States Free Trade Agreement (AUSFTA), numerous amendments to Australian copyright law were made by the US Free Trade Agreement Implementation Act.²²⁹ However, this Act only contained some minor alterations to the definitions relating to fair dealing.²³⁰ Subsequent to the promulgation of the Implementation Act, the Parliamentary Committee launched an inquiry into the desirability of incorporating a fair use exception as found in American copyright law.²³¹ Similarly, the Senate Select Committee suggested that adopting a fair use defence could provide an adequate redress to the balance of interests between copyright owners and users.²³² However, instead of replicating the American fair use exception, the existing fair dealing provisions were retained and a new fair dealing exception providing for parody and satire was added, while exceptions were also adopted for time-shifting and format-shifting.²³³ This Act also clarified the meaning and scope of a “reasonable portion” by use of a systematic table inserted into the fair dealing for research and study provision.²³⁴ Accordingly, no general defence exists

²²⁶ See eg ss 23, 25, 42A-42D, 134-150 of the Copyright Amendment (Digital Agenda) Act 110 of 2000.

²²⁷ In s 10(2A)-(2C) of the Copyright Act. See Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40043-40044.

²²⁸ Copyright Law Review Committee *Simplification of the Copyright Act 1968 – Part 1 – Exceptions to the Exclusive Rights of Copyright Owners* (1998) para 6.10 <available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/clrc/4.html?stem=0&synonyms=0&query=Simplification%20AND%20Copyright%20Act&nocontext=1>> (accessed 16-07-2012).

²²⁹ 120 of 2004.

²³⁰ S 248A of the Copyright Act was amended to make minor changes to the definition of “exempt recording” in Part XIA, which relates to performers’ protection.

²³¹ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40044.

²³² Senate Select Committee on the Free Trade Agreement between Australia and the United States of America *Final Report* (5-8-2004) 75-76 <available at http://www.aph.gov.au/senate_freetrade/report/final/report.pdf> (accessed 4-1-2012).

²³³ These additions were promulgated by the Copyright Amendment Act 158 of 2006 in 2007. See Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40045.

²³⁴ S 40(5), inserted by s 11 of the Copyright Amendment Act 158 of 2006.

and users have to rely on one of the *numerus clausus* of fair dealing defences, also known as “specific purpose” defences.²³⁵

These developments have shaped the copyright law of Australia generally and the fair dealings provisions specifically. With this historical context it is possible to analyse the amended statute, the Copyright Act, as regards the individual fair dealing provisions.

4 3 3 2 Research and Study

The first notable difference between the Copyright Act and the CDPA is the omission of the prefixes “non-commercial” and “private” before research and study. While the CDPA was amended to include the “non-commercial” qualification, the Copyright Act has had no such amendment and remains without this criterion.²³⁶ By contrast, the Copyright Act was amended by the Copyright Amendment Act 154 of 1980 to have the prefix “private” removed from “study”.²³⁷ The Franki Committee, which suggested the amendment, considered the qualification both artificial and impractical.²³⁸ The core fair dealing for the purpose of research or study provision, section 40(1), states:

“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.”

Section 103C(1), which relates to audio-visual works, is substantively identical and the commentary on the above section therefore applies, *mutatis mutandis*, to this section as well.²³⁹ In contrast to the UK counterpart, this provision does not require a sufficient acknowledgement of the author and source to be made in the case of research, although this could arguably be relevant to the determination of fairness. The next subsection, section 40(1A), reiterates this exception for persons enrolled as external students at an

²³⁵ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40046.

²³⁶ See the discussion of the limitations that the term has on the exception in UK law in section 2 3 2.

²³⁷ S 7. See the discussion of this amendment in section 3 3 2.

²³⁸ Copyright Law Committee on Reprographic Reproduction *Report: Part 2* (1976) para 2.64 <available at <http://www.ag.gov.au/Documents/CLRC%20-%20Copyright%20Law%20Committee%20on%20Reprographic%20Reproduction%20-%20Part%202.pdf>> (accessed 16-07-2012).

²³⁹ S 103(C)(1) states: “A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of research or study.”

educational institution, but it specifically excludes lecture notes from its definition of literary works.²⁴⁰

The Federal Court of Australia has applied the terms “research” and “study” according to their dictionary meanings.²⁴¹ “Research”, in terms of the Macquarie Dictionary (as relied on by the court), is the “diligent and systematic inquiry or investigation into a subject in order to discover facts or principles”,²⁴² while study is defined as the “[a]pplication of the mind to the acquisition of knowledge, as by reading, investigation, or reflection”.²⁴³

When deciding on whether a particular use qualifies as fair dealing for the purpose of research or study, courts are directed by statutory guidelines.²⁴⁴ Courts are instructed to consider five factors, namely the purpose and character of the dealing, the nature of the work that was used, the possibility of obtaining the work within a reasonable time at an ordinary commercial price, the effect of the dealing on the potential market for or the value of the work, and the amount and substantiality of the part of the work reproduced if the entire work is not used.²⁴⁵ All of these statutory guidelines (except the possibility of obtaining the work by legitimate means) correspond with the factors contained in the fair use analysis in the American Copyright Act of 1976.²⁴⁶ The fourth consideration – the effect of the dealing on the potential market for the work, or the work’s value – is clearly aimed at catering for the Berne three-step test.²⁴⁷ These factors aid the courts in establishing whether a particular use is fair, which is to be determined on each set of facts individually.²⁴⁸ Section 103C, which covers fair dealing in relation to audio-visual works, also contains these statutory guidelines, although that is where the provision ends; the following commentary therefore relates only to section 40.

²⁴⁰ The section reads: “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.” The meaning of “lecture notes” is provided by the following provision, s 40(1B).

²⁴¹ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292.

²⁴² *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 298.

²⁴³ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 298.

²⁴⁴ The language employed suggests that the factors are to be applied by courts when determining the fairness of any alleged fair dealing, not only fair dealing for the purpose of research or study.

²⁴⁵ S 40(2)(a)-(e). Where a “work” is referred to in any of these subsections, it is immediately followed by the inclusion of an adaptation of that work.

²⁴⁶ S 107(1)-(4), which is reflected in s 40(2)(a), (b), (d) & (e) of the Australian Copyright Act.

²⁴⁷ As found in art 9(2) of the Berne Convention. See chapter 3 section 2 1 for the discussion of this test.

²⁴⁸ *Haines v Copyright Agency Ltd* (1982) 42 ALR 549 at 556.

Subsections (3) and (4) further regulate the application of this fair dealing exception.²⁴⁹ In terms of these provisions, an article that appears in a periodical may be reproduced in part or in its entirety for the purpose of research or study, unless another article from the same publication is also reproduced (provided the latter reproduction is for the purpose of different research or another course of study).²⁵⁰ This serves as a quantitative guideline regarding what may be reproduced. An article from a periodical publication may therefore be reproduced regardless of other statutory guidelines or the size of the article; the reproduction will be deemed fair dealing.²⁵¹ However, the Explanatory Memorandum to the Copyright Amendment Bill of 2006 makes it clear that more than one article from the same periodical may be reproduced if it is for the same research or course of study in terms of section 40(4).²⁵² With the amendment of the section, the emphasis has shifted from the subject-matter of the articles copied to the nature of the research or study.²⁵³ Reproducing more than one article from a periodical can now qualify as a deemed fair dealing if it is for the same research or study.

Another quantitative guideline is the reasonable portion test contained in section 40(5) of the Copyright Act. This section provides a great deal of clarity to the fair dealing exception by providing thresholds for specific portions of works that qualify as “reasonable portions”. In terms of this section, if a literary, dramatic or musical work is contained in a published edition of at least ten pages, 10% of the total number of pages of the published edition may be reproduced, or, alternatively, one chapter if the work is divided into chapters.²⁵⁴ Furthermore, a reproduction of a literary or dramatic work published in electronic form may not exceed 10% of the total number of words or a single chapter if the work is divided into chapters.²⁵⁵ If a work is available both in publication and electronic form, the use will qualify as a deemed fair dealing if it satisfies either the pagination or word count threshold

²⁴⁹ These subsections were introduced by s 7 of the Copyright Amendment Act 154 of 1980 and amended by s 11 of the Copyright Amendment Act 158 of 2006.

²⁵⁰ S 40(3), (4).

²⁵¹ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40066.

²⁵² Explanatory Memorandum on the Copyright Amendment Bill 2006 (2006) 113 <available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html> (accessed 4-1-2012).

²⁵³ The Explanatory Memorandum states that the provision now “effectively allows more than one article from the same periodical publication to be reproduced (that is, it provides that this will constitute a fair dealing) where those articles are required for the same piece of research or the same course of study, but prohibits the reproduction of large portions of unrelated articles from a periodical publication”: Explanatory Memorandum on the Copyright Amendment Bill 2006 (2006) 113 <available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html> (accessed 4-1-2012). See also Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40066-40067.

²⁵⁴ S 40(5)(1)(a), (b).

²⁵⁵ S 40(5)(2)(a), (b). These guidelines specifically do not apply to computer programs or electronic compilations of data in the case of electronic publications: s 40(5)(1), (2).

of a reasonable portion.²⁵⁶ However, once a reproduction qualifies as a deemed fair dealing in terms of subsection (5), any further use of the same work will not be eligible for the same exemption.²⁵⁷ Further use may still qualify as a fair dealing, but the usual judicial evaluation will have to be consulted to ascertain this. Furthermore, the definition of a “reasonable portion” contained in section 10 of the Act²⁵⁸ will not be applicable to the inquiry of whether the use qualifies for the protection of subsection (5), as the use will be deemed to be a reasonable portion only if it fulfills the criteria of the latter.²⁵⁹

The five statutory guidelines contained in section 40(2) will still be applicable to the evaluation of whether the dealing with a work is a fair dealing if it does not fall within the ambit of a reasonable portion in terms of subsection (5). If, for example, an amount of more than 10% of the words in an electronic publication is used, the defendant can still raise a defence of fair dealing for the purpose of research or study in terms of section 40(1) and the court will then consider the statutory guidelines contained in section 40(2). The deemed fair dealing provisions (section 40(3)-(5)) therefore act as an extra-judicial mechanism to determine whether the use qualifies as a fair dealing, failing which the courts will have to be consulted.

The Australian defence of fair dealing for the purpose of research and study has a wider range of application than the UK counterpart as it is not confined to non-commercial research or private study. The statutory guidelines provide a greater degree of certainty than the comparatively uninformed provision in the CDPA, as the Australian courts are instructed to take these guidelines into account when assessing the fairness of the dealing. Extra-judicial guidelines are also provided to inform users of thresholds that will automatically deem conduct to constitute fair dealing. The Australian provision incorporates the three-step Berne test, which is absent from the CDPA in the context of fair dealing. Accordingly, the Australian provision is better structured and much more comprehensive.

4 3 3 3 Criticism and Review

²⁵⁶ S 40(6). See also Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40067.

²⁵⁷ S 40(7).

²⁵⁸ S 10(2)-(2C).

²⁵⁹ S 40(8).

Section 41 of the Copyright Act contains the fair dealing exception for purposes of criticism or review. This provision is similar to the exception in section 30 of the CDPA,²⁶⁰ except that it does not require the work used to have been previously made available to the public. Section 103A, which relates to audio-visual subject-matter, is phrased identically, *mutatis mutandis*, to section 41, which states:

“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 of another work, and a sufficient acknowledgement of the work is made.”

A “sufficient acknowledgement” is defined in section 10(1) as an acknowledgement indicating the title or other description of the work and the name of the author, unless the author has indicated that she wishes to remain anonymous in respect of that work. The fact that the Act does not prohibit the use of an unpublished work does not mean that such works may be freely used; if a work is not available to the public this will be considered when evaluating the fairness of the work.²⁶¹ The criticism or review may also relate to the doctrines, ideas and philosophies underlying the work, as in the United Kingdom.²⁶² The terms “review” and “criticism” have also been interpreted by the court according to their dictionary definitions.²⁶³ “Criticism” was held to mean to critical use of the mental faculties, while “review” was understood as the process leading to this result.²⁶⁴

The comprehensive analysis of the fair dealing exception for the purpose of criticism or review in CDPA can be applied to the Australian provision, given the similarity of the phraseology, the reliance on case law from the United Kingdom,²⁶⁵ and the absence of the statutory requirement that the work must have been made available to the public in the Australia (which means that earlier UK case law can also be applied as is).²⁶⁶ To guard against needless repetition this exception will not be discussed any further in the Australian context.

4 3 3 4 News Reporting

²⁶⁰ S 30(1)-(1A), discussed in section 2 3 3.

²⁶¹ See generally *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485; Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40090.

²⁶² Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40090.

²⁶³ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292.

²⁶⁴ For the full definition adopted by the court see *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 299.

²⁶⁵ See eg *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] 118 FCR 417 at 438-439.

²⁶⁶ See section 2 3 3.

The fair dealing exception for the purpose of reporting news is more detailed in its construction than its UK counterpart. Although the exception is for the purpose of reporting news, this includes reporting on information and events that are relevant to the public interest.²⁶⁷ The term “news” has been interpreted by courts in the UK to be wider than the term “current events” as used in the CDPA and covers information relating to past events that was not previously known.²⁶⁸ Although the provision in the CDPA is entitled “News Reporting”, the term is not used in the exception itself and the court has specifically interpreted the clause to cover only current events and not news in general, which is at odds with the liberal interpretation which the court committed itself to.²⁶⁹

This fair dealing exception is applicable to literary, dramatic, musical and artistic works and audio-visual items.²⁷⁰ According to the definition in section 10(1), an artistic work includes a photograph and the fair dealing exception therefore covers the use of a photograph as well. This is not the position in the CDPA, as the use of another person’s photograph for the purpose of reporting current events is never seen as fair.²⁷¹

For the use of a work to qualify for protection under this exception, it must be for the purpose of reporting news in a magazine, newspaper or similar periodical, and it must be accompanied by a sufficient acknowledgement.²⁷² The exception also extends to news reporting by means of a communication or in a cinematographic film.²⁷³ Although there is no requirement that a sufficient acknowledgement must be made in the latter case, this will presumably be an important factor when evaluating the fairness of the use.²⁷⁴ While the scope of the Australian exception is greater (as regards both the use of photographs and what may be reported), it is otherwise very similar to the exception found in the CDPA in its construction and application.

The Copyright Act makes it clear that “playing 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

²⁶⁷ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40095.

²⁶⁸ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 41; Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40095.

²⁶⁹ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 41-43.

²⁷⁰ S 42(1), s 103B respectively.

²⁷¹ See section 2 3 4.

²⁷² S 42(1)(a), s 103B(1)(a).

²⁷³ S 42(1)(b), s 103B(1)(b).

²⁷⁴ Especially considering the mandate in art 10^{bis}(1) of the Berne Convention that “the source must always be clearly indicated”.

news being reported".²⁷⁵ Although this clause does not appear in the fair dealing exception relating to audio-visual items,²⁷⁶ it must be assumed that a musical work in this context refers to a musical work embodied in a sound recording for the provision to have any meaning. This is in accordance with article 10^{bis} of the Berne Convention, which requires that member states must determine the conditions under which the reproduction of such works may be permitted.²⁷⁷ It is clear that the use of a musical work must be integral to the news being reported, and cannot be used for the embellishment of the report.

The Australian fair dealing exception relating to news reporting, like the exception relating to research and study, is much broader than the UK exception. This makes it possible to disseminate historical and contemporary information more freely by reproducing copyright works to give the public the benefit of the original prose without opining as to its interpretation or meaning.

4 3 3 5 Parody and Satire

The fair dealing exception for parody and satire was introduced by the Copyright Amendment Act 158 of 2006 as a result of the Australia-US Free Trade Agreement (AUSFTA). The AUSFTA led to increasingly strong protection for copyright owners' interests in Australia, which caused a significant imbalance concerning the protection of the public interest.²⁷⁸ This resulted from American standards of protection being incorporated into Australian copyright law without necessarily incorporating an extension of the existing exceptions governing users' entitlements. The Australian Copyright Law Review Committee considered that the open-ended fair use exception contained in American law provided a greater degree of protection for users' entitlements and the public interest than was present in Australian copyright law at the time.²⁷⁹ Furthermore, the exceptions allowed by the Information Society Directive²⁸⁰ also granted broader protection than the specific fair dealing defences permitted by the Copyright Act. It was therefore necessary to expand the defences available to users of copyright works, and the exception

²⁷⁵ S 42(2).

²⁷⁶ S 103B.

²⁷⁷ Art 10^{bis} (2). See section 2 1 of chapter 3 of this thesis for the discussion of this article.

²⁷⁸ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091.

²⁷⁹ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091.

²⁸⁰ Discussed in section 2 3 1.

for parody and satire was the most pertinent exception to Australia's cultural traditions and the desire for Australian copyright law to be transformative rather than suppressive.²⁸¹

The Copyright Amendment Bill Explanatory Memorandum makes it clear that the parody/satire exception is not meant to be purely for non-commercial uses, but can be employed by the commercial media or in "[an]other commercial setting".²⁸² The distinction between parody and satire is not clear and neither term is defined in the Copyright Act, although the two concepts share many characteristics, such as criticism, ridicule and comment in a humorous manner.²⁸³ American courts have held that satire uses an identifiable style to deliver broad commentary on an aspect of society, while parody focuses on a specific work or works.²⁸⁴ However, as the Copyright Act clearly caters for both parody and satire, it is trivial to fervently draw or uphold a distinction between the two terms.²⁸⁵

The exception relating to parody and satire is contained in section 41A, which states:

"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 parody or satire."²⁸⁶

This provision concisely encapsulates the public's interest in transformative critical uses of copyright works. The exception exempts a fair dealing from all the restricted acts granted to the copyright owner, not only the right of reproduction. Although no case law regarding this exception has been reported, the seminal American case of *Campbell v Acuff Rose Music Inc*²⁸⁷ provides some insight as to the nature of the defence (which was raised under the fair use defence, as there is no specific exception for parody/satire in American copyright law). The court made it clear that a parodic or satirical character must be

²⁸¹ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091-40092.

²⁸² Explanatory Memorandum on the Copyright Amendment Bill 2006 (2006) 111 <available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html> (accessed 4-1-2012).

²⁸³ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40093.

²⁸⁴ *Dr Seuss Enterprises v Penguin Books USA Inc* [1997] 109 F 3d 1394 (9th Cir 1997). See also Mee B "Laughing matters: Parody and satire in Australian copyright law" (2010) 20 *Journal of Law Information and Science* 61-96 at 81-82.

²⁸⁵ Mee B "Laughing matters: Parody and satire in Australian copyright law" (2010) 20 *Journal of Law Information and Science* 61-96 at 81-82; Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40093. In this regard see also the decisions of the Federal Court and High Court respectively in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (No 2) [2005] FCAFC 53, and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14.

²⁸⁶ The correlative provision relating to audio-visual items is s 103AA, which is phrased identically but for the substitution of terms.

²⁸⁷ [1993] 510 US 569.

reasonably perceivable from the use of the work.²⁸⁸ When evaluating the parodying use, the court is to refrain from evaluating its quality or humour, or whether it was in good or bad taste.²⁸⁹

The United States Supreme Court held that whether the purpose and character of the use is transformative is an important factor that must be considered.²⁹⁰ The court acknowledged that a substantial part of a work may have to be used in order for the parody to be recognised as relating to that particular work, although the extent of original contribution that the parody makes is very important.²⁹¹ Accordingly, the degree to which the parody or satire changes or adds to the original work will be a paramount consideration in the assessment of fairness.²⁹² However, the nature of the copyright work being parodied is unlikely to be of much assistance regarding the fairness evaluation (although only parodies of literary, artistic, dramatic and musical works are eligible for protection).²⁹³ The effect that the parody or satire has on the market for the original work is also unlikely to be great as a parody usually does not act as a substitute for the parodied work, although it is conceivable that a parody can usurp the potential market for the original.²⁹⁴ Nonetheless, an unfavourable review of a literary or musical work is also likely to influence the demand for the product, and a parody or satire should be seen in a similar light.²⁹⁵

It is submitted that in accordance with the liberal interpretation courts give to all the other fair dealing defences, the same approach should be adopted in this case. Moreover, the inquiry into the fairness of the dealing should be distinct from whether the particular use qualifies as a fair dealing for the purpose of parody or satire. The subjective nature of humour should therefore play no role in determining whether the use falls into this category of exception, which is traditionally an objective analysis.²⁹⁶ When assessing the fairness of the dealing courts are likely to take the fair use factors into account, all of which are listed in section 40(2) under the exception of fair dealing for the purpose of research or study.²⁹⁷

²⁸⁸ *Campbell v Acuff Rose Music Inc* [1993] 510 US 569 at 583.

²⁸⁹ *Campbell v Acuff Rose Music Inc* [1993] 510 US 569 at 583.

²⁹⁰ *Campbell v Acuff Rose Music Inc* [1993] 510 US 569 at 579-580.

²⁹¹ *Campbell v Acuff Rose Music Inc* [1993] 510 US 569 at 588.

²⁹² Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094.

²⁹³ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094.

²⁹⁴ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094.

²⁹⁵ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094.

²⁹⁶ See section 2 3 3 in this regard.

²⁹⁷ See section 3 3 2. See also Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40093. See chapter 2 section 3 in this regard.

This exception reflects Australia's accommodation of users' entitlements and progressive copyright regime in general. Although no case law has yet been reported involving this defence in Australia, the statutory exception has only existed since 2006 and will likely require judicial application in years to come.

4 4 Conclusion

Australian copyright law has its genesis in the law of the United Kingdom, but since the promulgation of the Copyright Act 63 of 1968 it has started to surpass the Copyright, Designs and Patents Act of 1988 in respect of the fair dealing exceptions. The Copyright Act provides for the same exclusive rights for copyright owners as the CDPA, with the exception of the publication right substituting the distribution right. However, the rental and lending rights (which are deemed to make a work available to the public by the CDPA for purposes of fair dealing for criticism or review)²⁹⁸ apply to different subject-matter in the two statutes. The exclusive rights in the United Kingdom apply to literary, dramatic, musical and certain artistic works, as well as sound recordings and films,²⁹⁹ while the Australian provision covers literary, musical and dramatic works reproduced in sound recordings, as well as computer programs.³⁰⁰ The Australian Copyright Act does not extend the commercial rental right to films, and the CDPA does not extend this protection to computer programs, which are the only two categories of works mentioned in TRIPS.³⁰¹ Notwithstanding these differences, the content of the exclusive rights granted by the two pieces of legislation are largely similar.

The fair dealing provisions regarding criticism and review are practically identical in the CDPA and the Copyright Act, except that in the Copyright Act there is no requirement that the work must have been made available to the public. The Australian provision is therefore more flexible, as the courts will not consider the fact that a work has not been made available to the public as an absolute bar against employing the defence, but rather as a factor when determining whether the use was fair. The research and study exception finds a more comprehensive embodiment in the Copyright Act than it does in the CDPA. Apart from the statutory guidelines found in section 40(2) of the Copyright Act, the Act

²⁹⁸ S 30(1A).

²⁹⁹ S 18A.

³⁰⁰ S 31(1)(c)-(d).

³⁰¹ Art 11 of the World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994).

delineates situations where the reproduction of a copyright work will be deemed fair dealing. This approach is clearly to be preferred, as it provides clarity for users and avoids unnecessary judicial recourse. The exception for news reporting is again more lenient in the Australian statute, as it extends to the use of photographs. While the inclusion of photographs is questionable,³⁰² the extension of the ambit of the provision to historical news as opposed to what is strictly relevant at the time seems sensible, as it allows for greater dissemination of information.

Australia's additional fair dealing exception for the purposes of parody and satire stems indirectly from American rather than the law of the United Kingdom.³⁰³ Parodying use can be seen as copying most of the main elements, but with significant original creative effort. This exception makes it permissible to use a copyright work in a substantial but transformative way to deliver comment on or ridicule the original work in a humorous way. Although the subjective humour involved in the parody or satire is not relevant, other subjective factors (such as the motive of the user) may be considered by courts in assessing the fairness of the use, as in cases where any of the other fair dealing defences are raised. The court will first ascertain whether the use falls within one of the statutory categories of fair dealing, and, if it finds in the affirmative, whether the use was fair. The fairness inquiry is primarily an objective one, with the definitive question being whether "a fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question".³⁰⁴ The final evaluation therefore remains whether the overall impression is that the use made of the work was fair.

This comparative analysis of the fair dealing provisions contained in the CDPA and Australian Copyright Act makes it possible to transpose the commentary to the South African provisions, where applicable. The next chapter uses this analysis as a comparative basis, using prominent judicial and academic insights to inform the correlative provisions in the Copyright Act 98 of 1978.

³⁰² See the discussion of the rationale for excluding photographs in section 2 3 4.

³⁰³ Although America does not have such an exception in their Copyright Act, the exception came as a result of the Australia-US Free Trade Agreement.

³⁰⁴ *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 44.

5 Fair Dealing in Terms of South African Copyright Law

5.1 Introduction

This chapter is set against the background of the preceding discussions of the theoretical justifications for the delimitation of copyright owners' rights,¹ the international framework of copyright law and limitations on copyright,² and the legislative position and judicial development of copyright law in the United Kingdom and Australia.³ The origin and historical progression of the statutes governing copyright law has been sketched to draw attention to the common roots of all three jurisdictions examined in this thesis. This chapter contributes to this exposition by explaining how South African copyright law shares the statutory ancestry of the United Kingdom and Australia. The current source of protection in South Africa is analysed in this chapter – in the comparative setting provided in the previous chapters – to indicate which aspects are comparable and to what extent. The chapter then turns to the fair dealing exceptions in South African law and provides an exposition of the scope and content of the exceptions, relying on the comparative findings in chapter 4. The implicit notion of fairness is explained with reference to the factors discussed in that chapter.

The Australian fair dealing exception for parody and satire provides a basis for considering the impact that such an exception would have in South African law, where the conspicuous absence of this exception leaves an imbalance between the interests of copyright owners and the public. This chapter advocates the promulgation of an exception for parody, showing how such a hypothetical exception would function in the South African copyright environment. This is done by consulting foreign legislation and case law, specifically from Australia and the United States of America. The Constitutional Court decision in *Laugh It Off Promotions CC v SAB International*⁴ is relied on to define the boundaries of the proposed exception in the South African setting. The chapter employs the methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue*

¹ Chapter 2.

² Chapter 3.

³ Chapter 4.

⁴ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC).

*Service*⁵ to illustrate the impact of such an exception on the constitutional property rights of copyright owners. It concludes that the exception would amount to a deprivation of property, but one that is both justifiable in terms of the constitutional property clause and desirable in the South African copyright paradigm.

5 2 South African Copyright Law

5 2 1 Historical Background

The first legislation to grant a form of copyright in South Africa was the British Literary Copyright Act of 1842,⁶ the successor of the Statute of Anne.⁷ In terms of this Act, works first published in the United Kingdom enjoyed protection in South Africa. This Act was given further application in South Africa by the British International Copyright Act of 1886, which extended the protection of British copyright legislation to works first published in British colonies.⁸ Modern South African copyright law has its origin in the United Kingdom's Copyright Act of 1911.⁹ After the United Kingdom's Copyright Act of 1956 repealed the 1911 Act, South Africa's Copyright Act 63 of 1965 similarly repealed the 1916 Act insofar as it related to copyright.¹⁰ This Act did not directly incorporate the United Kingdom's Copyright Act of 1956, although large parts of the United Kingdom's Act were adopted.¹¹ The 1965 Act remained in force until the promulgation of the Copyright Act 98 of 1978 (hereafter the Copyright Act), which currently serves as the source of copyright law in South Africa.¹² Although a form of common law copyright existed until the early 20th

⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

⁶ Dean OH *The Application of the Copyright Act, 1978, to Works Made Prior to 1979* (LLD thesis Stellenbosch University 1988) 7.

⁷ The Statute of Anne is briefly discussed in section 2 1 of chapter 4.

⁸ Dean OH *The Application of the Copyright Act, 1978, to Works Made Prior to 1979* (LLD thesis Stellenbosch University 1988) 7.

⁹ This Act was adopted by s 143 of the Patents, Trademarks, Designs and Copyright Act 9 of 1916, which is discussed in chapter 4 section 2 1.

¹⁰ S 48(2) of the Copyright Act 63 of 1965.

¹¹ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-4; Dean OH *The Application of the Copyright Act, 1978, to Works Made Prior to 1979* (LLD thesis Stellenbosch University 1988) 10.

¹² The Copyright Act has been amended numerous times, namely by the Copyright Amendment Act 56 of 1980, Copyright Amendment Act 66 of 1983, Copyright Amendment Act 52 of 1984, Copyright Amendment Act 39 of 1986, Copyright Amendment Act 13 of 1988, Copyright Amendment Act 61 of 1989, Copyright Amendment Act 125 of 1992, Intellectual Property Laws Amendment Act 38 of 1997, and the Copyright Amendment Act 9 of 2002.

century, the Copyright Act makes it clear that statute is now the exclusive source of copyright.¹³

The Copyright Act ventured away from the United Kingdom's Copyright Act of 1956 in numerous respects,¹⁴ but is still based on the economic and social justification theories discussed in chapter 2.¹⁵ The current statutes are comparable because South Africa shares its legislative roots of copyright law with Australia and the United Kingdom. All three jurisdictions are members of the World Intellectual Property Organisation, the United Nations, and the World Trade Organisation, which means that their international obligations in respect of copyright are also largely the same.¹⁶ This chapter shows where South Africa has digressed from the standards of protection of, and exceptions to, copyright owners' rights, how the different formulations of similar provisions affect their application, and the manner in which courts are likely to interpret these provisions in light of foreign case law and the Constitution of the Republic of South Africa, 1996.

5 2 2 Rights Subsisting in Copyright

The South African Constitution compels courts to take international law into account when interpreting the Bill of Rights.¹⁷ When interpreting legislation, every court must adopt any reasonable interpretation of the legislation that brings it in line with international law.¹⁸ This indicates that when interpreting the fair dealing provisions of the Copyright Act, the court must read them according to the international framework provided by the instruments to which South Africa is party. South Africa has been a signatory of the Berne Convention¹⁹ since October 3, 1928, and has ratified the Brussels text²⁰ concerning substantive provisions and the Paris text²¹ in relation to administrative provisions. The Copyright Act

¹³ S 41(4) of the Copyright Act 98 of 1978. See Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-3 – 1-4. Common law copyright has been completely abolished since ss 142-143 of the Patents, Trademarks, Designs and Copyright Act 9 of 1916 took effect.

¹⁴ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-4.

¹⁵ See section 3 of chapter 2.

¹⁶ South Africa is party to 8 WIPO treaties, while the United Kingdom and Australia are party to 17 and 16 respectively.

¹⁷ S 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

¹⁸ S 233 of the Constitution of the Republic of South Africa, 1996. Because the section specifically refers to "international law" this will include the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, which South Africa has signed but not yet ratified.

¹⁹ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886).

²⁰ 331 UNTS 217 (1948).

²¹ 1161 UNTS 3 (1971).

was drafted to allow South Africa to accede to the Paris text in respect of the substantive provisions, but no attempt has yet been made to formally accede.²² That being said, article 9 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS),²³ to which South Africa is party, requires all members to comply with the substantive provisions (articles 1-21) of the Paris Act. The legislative framework is in place in the form of the Copyright Act, which complies with the substantive provisions of the Paris Act,²⁴ as South Africa incurs obligations under this text because of the incorporation by TRIPS. The two WIPO treaties of 1996 – the Copyright Treaty²⁵ and the Performances and Phonograms Treaty²⁶ – are not strictly binding on South Africa, as the treaties have been signed but not yet ratified by South Africa.²⁷ South Africa is not party to either the Universal Copyright Convention²⁸ or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention),²⁹ both of which are discussed in chapter 3.³⁰

Literary, musical and artistic works, cinematograph films, sound recordings, published editions, broadcasts, programme-carrying signals and computer programs are recognised as protected categories of works by the Copyright Act.³¹ These categories cover the same subject-matter as the CDPA and the Australian Copyright Act, albeit with a different approach.³² The exclusive rights, or restricted acts as they are more commonly known, of copyright owners contained in the Copyright Act also correspond largely with those

²² Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-166.

²³ World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C 1869 UNTS 299 (1994). This is also required by art 1(4) of the World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996), which South Africa has signed but not ratified. See the discussion of these instruments in sections 2 and 2 3 of chapter 3 respectively.

²⁴ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-166.

²⁵ World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996).

²⁶ World Intellectual Property Organisation *Performances and Phonograms Treaty* (20-12-1996) 36 ILM 76 (1996).

²⁷ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-170. See the discussions in sections 2 3 and 3 3 of chapter 3. Even though the provisions of these treaties have not yet been incorporated into South African legislation, courts are required to interpret legislation in accordance with these treaties in terms of s 233 of the Constitution.

²⁸ United Nations *Universal Copyright Convention* (6-9-1952) 216 UNTS 132 (1952).

²⁹ World Intellectual Property Organisation *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (26-10-1961) 496 UNTS 43 (1961).

³⁰ At sections 1 and 3 1 respectively.

³¹ S 2(1).

³² Dramatic works are included in the definition of literary works in the Copyright Act, while they are protected separately in both the CDPA and the Australian Copyright Act. Furthermore, no distinction is drawn between broadcasts and programme-carrying signals in either the CDPA or the Australian Copyright Act. Databases are also given separate protection by the CDPA, while the South African and Australian Copyright Acts both protect databases as a subset of literary works. Computer programs are protected as literary works by the CDPA, while the South African and Australian Copyright Acts treat computer programs as distinct from literary works and afford separate protection to these works.

granted by the Australian Copyright Act³³ and, to a lesser degree, those granted by the CDPA.³⁴ In general the right to do or authorise any of the following acts constitute the exclusive rights of the copyright owner: reproduce the work, publish the work, perform the work in public, broadcast or cause the work to be transmitted in a diffusion service, letting a work by way of trade, make an adaptation of the work, or do any of the above acts in relation to an adaptation of a work. These acts are variously applicable to the separate categories of a work, each set of restricted acts specifically provided for in sections 6-11B,³⁵ which regulate the nature of copyright that vests in each type of work. Since the fair dealing provision explicitly states that “[c]opyright shall not be infringed”,³⁶ it is unnecessary to delve into the content of each restricted act. The content of the exclusive rights in the Australian Copyright Act and the CDPA (discussed in chapter 4 of this thesis) can be applied to the South African equivalents to the extent that fair dealing is concerned, as the emphasis is on the infringing act (which was by implication not authorised) and not on the functioning of the restricted acts. Nevertheless, it is necessary to note some of the differences between the restricted acts in order to facilitate a complete illustration of how the respective fair dealing provisions considered in this thesis compare to one another.

The commercial rental right introduced by article 11 of TRIPS³⁷ is granted to cinematograph films,³⁸ sound recordings³⁹ and computer programs⁴⁰ by the South African Copyright Act. In all three instances the relevant provision is phrased as the exclusive right to do or authorise the “letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy [or reproduction] of the [work]”.⁴¹ The commercial rental right in the Copyright Act therefore surpasses the conditional mandate contained in article 11 of TRIPS by granting protection over both cinematograph films and computer programs and even provides protection to the owners of the copyright in sound recordings. In this regard the Copyright Act exceeds the standard of protection provided in both the CDPA and Australian Copyright Act.

³³ Discussed in section 3 2 of chapter 4.

³⁴ Discussed in section 2 2 of chapter 4.

³⁵ S 6 regulates literary and musical works, s 7 artistic works, s 8 cinematograph films, s 9 sound recordings, s 10 broadcasts, s 11 programme-carrying signals, s 11A published editions, and s 11B computer programs.

³⁶ S 12(1).

³⁷ See section 2 2 of chapter 3.

³⁸ S 8(1)(g), which was inserted by s 6 of the Copyright Amendment Act 52 of 1984, and substituted by s 8(b) of the Copyright Amendment Act 125 of 1992.

³⁹ S 9(b), amended by s 7 of the Copyright Amendment Act 52 of 1984 and s 2 of the Copyright Amendment Act 61 of 1989, and substituted by s 2 of the Copyright Amendment Act 9 of 2002.

⁴⁰ S 11B(h), which was inserted by s 10 of the Copyright Amendment Act 125 of 1992 and substituted by s 53 of the Intellectual Property Laws Amendment Act 38 of 1997.

⁴¹ Ss 8(1)(g), 9(b), 11B(h).

Unlike the CDPA and Australian Copyright Act,⁴² the South African counterpart does not provide for the exemption of reproductions that are transient in nature and incidental to the legitimate use of a copyright work.⁴³ Instead, the Act provides the exclusive right to reproduce “in any manner or form”,⁴⁴ which covers reproductions in non-material form.⁴⁵ However, section 13 of the Copyright Act allows exceptions to the reproduction right additional to those contained in the Act, which are to be prescribed by regulation, provided that these exceptions do not conflict with the normal exploitation of the work and that they do not unreasonably prejudice the legitimate interests of the copyright owner.⁴⁶ The Minister of Economic Affairs published such regulations shortly after the promulgation of the Copyright Act.⁴⁷ These regulations provide guidelines for reproductions in general and distribution of copies by libraries, archive depots, teachers and local authorities (relating to building plans).⁴⁸ The regulations are supplementary to the fair dealing exceptions⁴⁹ and will therefore only be relied on when an allegedly infringing act cannot be categorised as one of the acts allowed as fair dealing. Regulation 2 allows reproductions to be made (generally/by any person) and presumably for any purpose, provided that only one copy of a reasonable portion of the work is made, “having regard to the totality and meaning of the work”.⁵⁰ This exception is further confined to instances where the cumulative effect of the reproductions made does not conflict with the normal exploitation of the work and “does not unreasonably prejudice the legitimate legal interest and residuary rights of the author”.⁵¹ The construction of the regulation suggests that a court should consider similar factors to those relevant to the fair dealing provisions.⁵² It is submitted that a context-sensitive analysis of the facts of each case must be employed, including whether the essence of the work was reproduced, the use of the work (including whether the use was commercial),⁵³ and whether an acknowledgement of the author was made (this is evident from the consideration of the author’s residual rights). This provision serves as the basis

⁴² Discussed in sections 2 2 and 3 2 of chapter 4.

⁴³ However, see n 106 below.

⁴⁴ Ss 6(a), 7(a), 8(1)(a), 10(a), 11B(a).

⁴⁵ See Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-68. The broad definition of “material form” in s 2(2) extends to digital data or signals, which indicates that this is intended to constitute an infringement.

⁴⁶ As required by art 13 of TRIPS.

⁴⁷ The Copyright Regulations of 1978, GN R2530 in GG 6252 of 1978-12-22.

⁴⁸ Regs 2-9A.

⁴⁹ S 13 of the Copyright Act states that any exceptions permitted by regulation are “[i]n addition to reproductions permitted in terms of this Act”.

⁵⁰ Reg 2(a).

⁵¹ Reg 2(b).

⁵² See section 2 3 6.

⁵³ This factor is a condition for the reliance on the exception for reproduction by a library or archive depot in terms of reg 3(a).

for some of the further exceptions created by the regulations⁵⁴ and clearly operates in conjunction with the fair dealing exceptions. Regulations 7-9 (which provide guidelines for teachers' use of reproductions for the purposes of their own research as well as the distribution of reproductions to students) serve as an illustration of this.

5 2 3 Fair Dealing

5 2 3 1 Introduction

The fair dealing exceptions were introduced into South African law by the adoption of the United Kingdom's Copyright Act of 1911.⁵⁵ Section 2(1)(i) provided for exemption from infringement if a work was used for the purpose of research or private study, criticism or review, or newspaper summary.⁵⁶ The 1911 Act conferred rights over original literary, musical, dramatic and artistic works⁵⁷ and the fair dealing provision applied to all four categories of works.⁵⁸ The South African Copyright Act 63 of 1965 similarly granted protection for these types of works,⁵⁹ but the fair dealing exception did not extend to artistic works.⁶⁰ This Act additionally allowed fair dealing for the purposes of personal or private use of a work.⁶¹

The term "fair dealing" was initially absent from the Copyright Act 98 of 1978, but the legislator resurrected it by means of the Copyright Amendment Act 125 of 1992.⁶² The fair dealing exceptions in the Copyright Act apply to literary (which includes dramatic) and musical works,⁶³ artistic works,⁶⁴ cinematographic films,⁶⁵ sound recordings,⁶⁶ broadcasts,⁶⁷ programme-carrying signals,⁶⁸ published editions⁶⁹ and computer

⁵⁴ Reg 2 is expressly referred to by regs 3, 7, 8, 9A.

⁵⁵ This Act was adopted by s 143 of the Patents, Trademarks, Designs and Copyright Act 9 of 1916.

⁵⁶ These categories of fair dealing are reiterated in the CDPA, although the last category – for purposes of newspaper summary – has been broadened to reporting current events: see section 2 3 4 of chapter 4.

⁵⁷ S 1(1).

⁵⁸ S 2(1)(i) states that a fair dealing with "any work" shall not infringe copyright.

⁵⁹ S 3.

⁶⁰ S 7(1).

⁶¹ S 7(1)(a).

⁶² S 11.

⁶³ S 12(1).

⁶⁴ S 15(4).

⁶⁵ S 16(1).

⁶⁶ S 17.

⁶⁷ S 18.

⁶⁸ S 19(1). This section does not incorporate the s 12(1) fair dealing provision as the other sections do, but it makes provision for the exception for purposes of reporting current events which is substantively similar to s 12(1)(c)(ii). See the discussion in section 2 3 4.

programs.⁷⁰ The conduct permitted by the fair dealing provisions in the current Act include research and private study, personal or private use, criticism and review, and reporting current events. The Act does not define the concept of fair dealing, which is in keeping with the CDPA and the Australian Copyright Act. Because the concept of “fairness” is by no means clearly defined it allows courts to consider everything relevant to the copyright owner’s rights and the public interest, in the specific context of the facts of each case, before reaching a decision as to whether an infringement occurred. As was seen in the discussion of case law in chapter 4, the fair dealing standard is set as whether a “fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question”.⁷¹

In 2000, the Department of Trade and Industry published a Draft Amendment Bill⁷² for comment which would have influenced the fair dealing provisions vastly. The Bill purported to substitute the concept of fair dealing with “fair practice”, as well as making the provisions applicable solely to natural persons.⁷³ More importantly for present purposes, the Bill provided guidelines for the courts to consider if a defendant invoked any of the fair dealing (or fair practice, as the Bill would have it) defences.⁷⁴ These guidelines were precisely the same as those relating to fair dealing for purposes of research and study present in the Australian Copyright Act.⁷⁵ Although this would have been most welcome, the publication for comment was the last that was seen of this Bill and it appears as if it has been abandoned.

No provision is made in the Copyright Act for the use of a copyright work for the purposes of parody or satire; nevertheless, the hypothetical operation of a parody exception will be considered in the South African context in light of *Laugh It Off Promotions CC v SAB International*,⁷⁶ where the defence of parody (as a form of freedom of expression) was raised against a claim of trademark infringement.⁷⁷ The Australian formulation of this

⁶⁹ S 19A.

⁷⁰ S 19B(1).

⁷¹ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 44; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498. See section 2 or chapter 4.

⁷² GN 1805 in GG 21156 of 2000-05-10.

⁷³ In terms of the proposed amendment of s 12.

⁷⁴ In terms of the proposed subs 14.

⁷⁵ S 40(2)(a)-(e). These guidelines are discussed in section 3 3 2 of chapter 4 and section 2 3 2 of this chapter.

⁷⁶ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC), hereafter *Laugh It Off*.

⁷⁷ This case involved alleged trademark infringement by the appellant in the form of facetious T-shirts portraying a caricature of the respondent’s well-known trademark.

exception, discussed in chapter 4, provides a useful comparative basis for this analysis. South African courts have shown a proclivity for considering the legislation and judicial decisions of Australia⁷⁸ and the United Kingdom⁷⁹ when resolving copyright disputes. For this reason it is apposite to take account of the similar legislative provisions and judicial factors that are considered in these jurisdictions. Unlike in South Africa, the Australian and United Kingdom courts have had occasion to apply the fair dealing exceptions, and particularly useful for South Africa is the fact that these cases were heard before the substantial amendments of the fair dealing provisions in the CDPA and Australian Copyright Act, when they were similar to the current South African counterparts.⁸⁰ It is submitted that South African courts should look to these foreign judgments for guidance when confronted with a fair dealing defence.⁸¹

5 2 3 2 Research or Private Study, or Personal or Private Use

The South African exception of fair dealing for the purposes of research or private study can be compared to the exception in both the CDPA and the Australian Copyright Act, but on different aspects. The exception relating to literary and musical works is contained in section 12(1)(a), and is extended to artistic works,⁸² broadcasts⁸³ and published editions,⁸⁴

⁷⁸ See eg *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) 472; *Helm Textile Mills (Pty) Ltd v Isa Fabrics CC and Others* 2005 BIP 349 (T) 357; *Biotech Laboratories (Pty) Ltd v Beecham Group Plc and Another* 2002 (4) SA 249 (SCA) 264; *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd* 1998 (2) SA 965 (SCA) 990; *Frank & Hirsch (Pty) Ltd v A Roopanand Bros (Pty) Ltd* 1993 (4) SA 279 (AD) 317; *Apple Computer v Rosy t/a SA Commodity Brokers (Pty) Ltd and Another* (1984) 134 JOC (D) 136.

⁷⁹ See eg *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) 472, 474; *Accesso CC v Allforms (pty) Ltd and Another* 1998 BIP 296 (T) 307-308; *Golden China TV Game Centre v Nintendo Co Ltd* 1997 (1) SA 405 (A) 410-411; *Payen Components SA Ltd v Bovic Gaskets CC and Others* 1994 (2) SA 464 (W) 472.

⁸⁰ *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977; *Hyde Park Residence v Yelland* [2001] Ch 143; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620, *Banier v News Group Newspapers Ltd* [1997] FSR 812; *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292; *Haines v Copyright Agency Ltd* (1982) 42 ALR 549; *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485; *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA.

⁸¹ See the discussion of these cases in chapter 4 generally.

⁸² S 15(4).

⁸³ S 18.

⁸⁴ S 19A.

mutatis mutandis. The correlative provision in the CDPA does not apply to broadcasts or published editions and therefore has a more limited application. The Australian Copyright Act applies the exception to artistic, dramatic, musical and literary works and published editions⁸⁵ as well as audio-visual items,⁸⁶ which include sound recordings, cinematographic films and sound and television broadcasts.⁸⁷ South Africa's correlative fair dealing exception finds its scope between the exceptions of the other two jurisdictions.

The fair dealing provision in section 12(1)(a) of the Copyright Act is couched in the following terms:

“Copyright shall not be infringed by any fair dealing with a literary or musical work ... for the purposes of research or private study by, or the personal or private use of, the person using the work.”⁸⁸

The terminology used is an amalgamation of the CDPA and the Australian Copyright Act. Although there is no requirement that the research must be non-commercial such as in the CDPA, the study must still be of a private nature. In this sense the analysis of the meaning of “private” in chapter 4 (as it exists in the CDPA) can be readily applied to the South African provision.⁸⁹ The meaning given to this qualification equates to that of “non-commercial” and the work may not be distributed; however, a contextual evaluation of the use for private study must be undertaken to determine whether the particular use can be exempted.⁹⁰ It appears that research undertaken in terms of this provision can be of an entirely commercial nature without constituting an infringement.⁹¹ The Canadian case of *CCH Canadian v Law Society of Upper Canada* even indicates that this provision can exempt lawyers' actions when their research is commercial and aimed at making a profit.⁹²

⁸⁵ S 40.

⁸⁶ S 103C.

⁸⁷ S 110A.

⁸⁸ The term “fair dealing” was introduced by s 11 of the Copyright Amendment Act 125 of 1992; before this amendment there was no recognition of fair dealing in the 1978 Act and the provision read: “Copyright shall not be infringed if a literary or musical work is used solely, and then only to the extent reasonably necessary [for the purposes of...].” The fair dealing exception as it stands enjoys “a large measure of international recognition and its reintroduction [after its last appearance in the Copyright Act 63 of 1965] brings our law more into line with the international laws”: Dean OH *Handbook of South African Copyright Law* (RS 11 2003) 4-138 n 32B.

⁸⁹ At section 2 3 2 of chapter 4.

⁹⁰ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 489. See further chapter 4 section 2 3 2.

⁹¹ Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 724.

⁹² *CCH Canadian v Law Society of Upper Canada* [2004] SCC 13 para 84.

Section 12 does not require a user to make any form of acknowledgement of the source or author of the work that has been used. This is the position in Australian law as well.⁹³ Nonetheless, it is likely that courts will consider whether a sufficient acknowledgement has been made as part of the fairness inquiry. Whether it is reasonably necessary to acknowledge the author and source of the work will depend largely on the specific use of the work. If the research conducted is subsequently published – whether commercially or non-commercially – it is likely more necessary that an acknowledgement be made than if the work was used exclusively for the purposes of private study.

The fair dealing exception relating to research and study in the Australian Copyright Act provides users and courts with guidelines as to what will be considered fair.⁹⁴ If a South African court is presented with an alleged infringement being justifiable as a fair dealing, it is advisable that the court takes the factors laid out in the Australian fair dealing provisions into consideration. The relevant considerations will differ according to the similarity of the provisions compared, but in the case of research and private study a number of factors should be taken into account. Australian courts are instructed to consider at least five factors when determining whether an alleged infringement constitutes a fair dealing. The five mandatory considerations in section 40(2)(a)-(e) correlate to the fair use factors contained in American law, with one additional factor.⁹⁵ When faced with a claim of fair dealing for the purpose of research or study, Australian courts must consider the purpose and character of the dealing,⁹⁶ the nature of the work,⁹⁷ the possibility of obtaining the work within a reasonable time at an ordinary commercial price,⁹⁸ the effect of the dealing on the potential market of the work,⁹⁹ and the amount and substantiality of the portion that has been used.¹⁰⁰ These considerations frame the general evaluation of whether a user's conduct amounts to fair dealing. It is submitted that South African courts should not stray too far from this evaluation, subject to one proviso: while in Australian law the dealing can be of a commercial nature, the South African Act explicitly states that the study undertaken must be of a private nature.¹⁰¹ For this reason the first factor considered under Australian

⁹³ S 40 of the Australian Copyright Act. See the discussion in section 3 3 2 of chapter 4.

⁹⁴ S 40.

⁹⁵ See the discussion of the factors and fair dealing for the purpose of research or study generally in 3 3 2 of chapter 4.

⁹⁶ S 40(2)(a).

⁹⁷ S 40(2)(b).

⁹⁸ S 40(2)(c).

⁹⁹ S 40(2)(d).

¹⁰⁰ S 40(2)(e).

¹⁰¹ S 12(1)(a).

law – the purpose and character of the dealing – will have a more limited scope in the South African context, as the dealing will either be for a commercial purpose or it will not. This is not to be the end of this inquiry, however, as courts must take any other factors into account regarding the nature and purpose of the dealing, although the most important one is likely to be whether it is for a commercial purpose. In the case of research, this qualification is absent and the evaluation should correspond to a larger extent with the Australian approach.

The Australian Copyright Act further regulates individual academic uses by providing firm guidelines to afford a greater degree of certainty to individuals wishing to use copyright works in a manner compatible with fair practice. The Act makes it clear that reproducing a work (in its entirety) contained in a periodical publication is exempted from infringement.¹⁰² This should be seen as an indication of the sort of activity that the fair dealing provision is intended to protect.

The best illustration of extra-judicial certainty is section 40(5) of the Australian Copyright Act, which gives concrete criteria to be observed when employing the fair dealing for the purpose of research or study exception. According to this provision, if the portion of a work that is reproduced amounts to less than 10% of the total number of pages (or words, depending on whether the work is contained in a published edition or digital format) or a single chapter if the work is divided into chapters, it qualifies as a “reasonable portion” and is accordingly exempted. If the reproduction constitutes more than this reasonable portion, the traditional evaluation in terms of the remainder of the section must be undertaken by the judiciary. Although this provision will not automatically exempt a user under South African law, courts should be cognisant of this threshold when evaluating a fair dealing of this nature.

The South African provision contains an interesting addition to the research or private study exception; the section provides that a personal or private use of a work can also constitute a fair dealing.¹⁰³ This appears to be aimed at situations similar to those covered by the first part of the clause (research and private study), but for purposes unconnected with education or academia. Authors have pointed to the distinction between personal and private uses that the legislator presumably intended to draw with the use of the word “or”

¹⁰² S 40(3).

¹⁰³ S 12(1)(a).

between the two adjectives, but the difference between the terms remains unclear.¹⁰⁴ The fact that the source does not have to be mentioned is easily justified, as a reasonable interpretation of the provision will exclude any commercial uses of a work (including any publication of personal or private use), thereby negating the need for and utility of an acknowledgement. The exception is confined to instances where a reproduction of a reasonable portion of a work is made for the purposes of using it solely by the reproducer, and not where such reproductions are distributed to other persons (although these other persons would presumably be able to make a reproduction themselves).¹⁰⁵

If the use is of a personal or private nature, the purpose of the use is irrelevant to determining whether the conduct is permissible. The judicial analysis will therefore differ: the first step will determine whether the use is of a personal or private nature, instead of whether the use falls into one of the permitted categories, and the second step will determine the fairness of the conduct in the usual way. The purpose of the use could still be relevant to the second step of the judicial analysis where the fairness of the act is evaluated, but not the first step. Accordingly, it is submitted that the exception for personal or private use should be viewed as an open extension of the permitted uses, but is still subject to the same considerations that a court would consider for non-commercial research or private study.¹⁰⁶ This is in line with the three-step test contained in the Berne Convention, which requires exceptions to be confined to special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the rights of the copyright owner.¹⁰⁷ The South African provision therefore allows a broad variety of private uses. The Australian and United Kingdom's correlative exceptions cover only the activities of research and study, while South African courts are not confined to allowing only uses of an academic nature.

¹⁰⁴ Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 724.

¹⁰⁵ Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 724; Copeling AJC *Copyright and the Act of 1978* (1978) 42.

¹⁰⁶ One important application of this exception is that it could feasibly be relied upon when reproductions are made by a computer's RAM when accessing works in digital format and on the internet: see Ital EG *Copyright Law and the Internet in Modern South African Law* (LLM thesis Stellenbosch University 2000) 84-85. This could be an indirect way of relying on a similar exception to the transient and incidental reproductions exception contained in s 28A of the CDPA and ss 38A-38B of the Australian Copyright Act, although if the reproduction is made while engaging in commercial activities it will still fall outside the sphere of application of this exception.

¹⁰⁷ The Information Society Directive also makes provision for private uses, although the provisions are aimed at "private-copying", which is a separate exception and therefore falls outside the ambit of fair dealing: see paras 38-39 of Directive 2001/29/EC.

5 2 3 3 Criticism or Review

The fair dealing exception for the purposes of criticism or review is succinctly encapsulated in section 12(1)(b) as follows:

“Copyright shall not be infringed by any fair dealing ... for the purposes of criticism or review of that work or of another work.”

The exception applies to a broader category of works than the exception relating to research or private study, or personal or private use. In addition to the types of works covered by that exception, cinematograph films,¹⁰⁸ sound recordings¹⁰⁹ and computer programs can be used for purposes of criticism or review.¹¹⁰ An important condition attached to the exemption of the conduct is that the use is accompanied by a reference to the source and, if applicable, the name of the author.¹¹¹ This requirement does not present difficulty in interpretation, as it plainly states what is required for compliance and is even less troublesome than the “sufficient acknowledgement” requirement in the CDPA and Australian Copyright Act.¹¹²

The exception corresponds with the Australian counterpart in all formal aspects, as well as the types of work to which it applies.¹¹³ The CDPA limits this exception to works that have been made available to the public,¹¹⁴ while neither the South African nor the Australian exception has this requirement. Accordingly, the South African provision should be interpreted in the same way as it has been interpreted by Australian courts¹¹⁵ and by courts of the United Kingdom before the amendment that introduced the contingency.¹¹⁶ Notwithstanding, courts should consider whether the work was made available to the public when assessing the fairness of the dealing.¹¹⁷ The fact that it

¹⁰⁸ S 16(1).

¹⁰⁹ S 17.

¹¹⁰ S 19B.

¹¹¹ S 12(1).

¹¹² Discussed in sections 2 3 3 and 3 3 3 of chapter 4 respectively.

¹¹³ Ss 41, 103A of the Australian Copyright Act make the exception applicable to literary, dramatic, musical and artistic works, and audio-visual items.

¹¹⁴ S 30(1) read with s 30(1A).

¹¹⁵ See eg *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292.

¹¹⁶ The amendment was brought about on the 31st of October 2003 by s 30(1) of the Copyright and Related Rights Regulations (SI 2003/2498). See the construction of the provision adopted by the courts prior to the amendment in *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA; *Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc* [1994] EMLR 1; *Banier v News Group Newspapers Ltd* [1997] FSR 812; *Ashdown v Telegraph Group* [2002] Ch 149 CA. See generally section 2 3 3 of chapter 4.

¹¹⁷ See *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485. See also section 3 3 3 of chapter 4 generally.

was not previously made available will, however, not be an absolute prohibition against a finding of fair dealing, although it will arguably be easier to justify such a case in terms of the exception for reporting current events.¹¹⁸

The wording of the provision refers to criticism or review of “that or another work”, which phrasing is also present in the Australian Copyright Act and the CDPA. This indicates that not only can a different work be criticised or reviewed in conjunction with the copyright work in question, but the ideas and philosophies underlying a work can also be analysed and critiqued.¹¹⁹ In this sense the South African provision is identical to the Australian and UK counterparts. It is submitted that the terms “criticism” and “review” should be given a liberal interpretation, as has been the approach by courts in the United Kingdom.¹²⁰

There is no exception for the parody or satire of a work, and users may therefore want to rely on the fair dealing for purposes of criticism or review exception if faced with legal action. Although parody does not fall squarely within the boundaries of this exception, it is conceivable that various forms of parody may be accommodated under this exception, although this will not always be clear *ex ante*. As stated in chapter 4, one consideration that indicates that a parody will not be exempted under this exception is the fact that generally the author and source of the original work are not mentioned when a work is parodied.¹²¹ However, courts will be guarded against a simulated intention and the user will have to attempt genuine criticism or review of the work and not merely try to don this exception as an afterthought.¹²²

5 2 3 4 Reporting Current Events

¹¹⁸ See eg *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA, where the work was not put into general circulation prior to the defendant’s use of it. See also Robertson G & Nicol A *Media Law* (5th ed 2007) 373.

¹¹⁹ See Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40090 for the discussion of this phrase in the Australian legislation. In respect of the CDPA, see *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA, where portions of a television programme were reproduced to criticise the style of journalism employed. See also *Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc* [1994] EMLR 1, where parts of a cinematograph film were reproduced to criticise the decision to withdraw the film *A Clockwork Orange* from the cinema circuit in the UK. See also the discussion of *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch) in section 2 3 3 of chapter 4.

¹²⁰ See eg *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch) paras 36-37; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620.

¹²¹ Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 336-337.

¹²² See the discussion of a parody defence in the South African context in section 3 below.

The fair dealing exception for purposes of reporting current events applies to the same categories of works as the exception for criticism or review.¹²³ The exception allows the use of a copyright work if it is for the purpose of reporting current events in two situations: where the work is used in a newspaper, magazine or similar periodical,¹²⁴ and where the work is used in a broadcast or cinematographic film.¹²⁵ An acknowledgement of the author and source required only in the first instance. In this regard the South African exception is again more similar to the Australian equivalent than the United Kingdom's. The Australian Copyright Act makes it clear that the use of a copyright work in a newspaper, magazine or similar periodical must be accompanied by a sufficient acknowledgment, while this is not the case if the work is used in a "communication or ... cinematograph film".¹²⁶ The CDPA does not limit the way in which news can be reported, only requiring that a sufficient acknowledgement be made whenever a work is used for this purpose.¹²⁷ However, if the work is used in a sound recording, broadcast or film, an acknowledgement need not be made if it would be "impossible for reasons of practicality or otherwise".¹²⁸ The fine distinction of practicality mandates journalists to disclose the source of the material used in the United Kingdom, while in South Africa and Australia they will be exempted if the use is otherwise fair. Furthermore, in the United Kingdom a photograph is excluded from the ambit of fair dealing,¹²⁹ while in South Africa and Australia users are permitted to make use of photographs.

The provision in the Copyright Act relates to "current events", which is the same terminology used in the CDPA; the Australian Copyright Act employs the term "news". Although the terms appear to be synonymous, a distinction has been drawn by the Civil Division of the Court of Appeal in the United Kingdom.¹³⁰ According to the court, the term "current events" does not extend as far as "news" as used in the Australian statute and only relates to matters that occupy the public's current interest.¹³¹ This means that copyright works which were relevant any number of years ago but no longer qualify as

¹²³ Namely literary, musical and artistic works, broadcasts, published editions, sound recordings, cinematograph films and computer programs.

¹²⁴ S 12(1)(c)(i).

¹²⁵ S 12(1)(c)(ii).

¹²⁶ S 42(1)(a)-(b).

¹²⁷ S 30(2).

¹²⁸ S 30(3).

¹²⁹ S 30(2).

¹³⁰ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977.

¹³¹ See *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 41-43 where the court endorsed the distinction drawn by the court *a quo*, reported as *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [1999] RPC 539 at 546. See also *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 paras 28-32; Robertson G & Nicol *A Media Law* (5th ed 2007) 372-374.

“current events” will be excluded from the protection of this fair dealing provision. It is submitted that this construction is incompatible with the liberal interpretation that the courts have committed themselves to in numerous cases, and in effect amounts to a distinction without a difference.¹³² A liberal interpretation of “current events” could feasibly render the term synonymous with “news”, making the distinction arbitrary. South African courts will therefore not go amiss by relying on Australian jurisprudence in this regard.

No distinction is drawn between works that have been made available to the public and those that have not. It appears that works that have not been disclosed may be reproduced for the purpose of reporting current events, although the fact that they have not been disclosed, as well as the motives of the user, will likely be considered during the fairness enquiry.¹³³ This is a sensible approach, as the role of the media often requires disclosing information that is not publicly known. If the work was used appropriately to convey information to the public, the use will qualify as fair. The South African exception is therefore neither as confined as the United Kingdom’s exception, nor as extensive as Australia’s in this regard.

A provision relating to this fair dealing exception is the exception made for programme-carrying signals.¹³⁴ Excerpts of a programme-carrying signal that consist of a report of current events (which in turn presumably complies with the fair dealing exception) may be distributed without the consent of the copyright owner to the extent that the distribution is compatible with fair practice and is justified by the informative purpose of the report itself.¹³⁵ The clause is subject to the proviso that no sporting events may be distributed in this manner.¹³⁶ This provision will not influence whether the use of a work is fair or otherwise; it merely allows portions of a report of current events to be distributed on the basis of its informative purpose.

5 2 3 5 Quotation and Illustration

¹³² *Ashdown v Telegraph Group* [2002] Ch 149 CA para 64; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 40, 75; *Pro Sieben AG v Carlton Television Ltd* [1999] EMLR 109 CA at 614G.

¹³³ See *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 75; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 40. See also generally *Ashdown v Telegraph Group* [2002] Ch 149 CA.

¹³⁴ S 19.

¹³⁵ S 19(1).

¹³⁶ S 19(2).

The Copyright Act contains an analogous exception to fair dealing allowing the quotation of works for various purposes. This exception applies to literary and musical works,¹³⁷ cinematograph films,¹³⁸ sound recordings,¹³⁹ broadcasts,¹⁴⁰ and computer programs.¹⁴¹ This provision is not generally considered a fair dealing exception, but it has a similar construction and effect in the South African Copyright Act. A copyright work that has been lawfully made available to the public can be quoted as extensively as the purpose allows, provided that a sufficient acknowledgement is made and the quotation is compatible with fair practice.¹⁴² The purpose of the quotation is clearly of paramount importance, as the justification of using the work will depend on the purpose of the use. Unlike the other fair dealing provisions, no specific purpose is prescribed and the exception can exempt a wider range of activities than the comparatively narrow preceding provisions. The construction of this provision is flexible enough to conceivably accommodate commercial uses and quotations for purposes traditionally unaffiliated with fair dealing, if the ends justify the means. It follows that the first step of the fair dealing evaluation will differ. The socially beneficial purpose for which a work is used will serve as the justifying basis, allowing copyright owners to object to uses of their works that do not merit exemption.¹⁴³ The court will not be confined to ascertaining whether the purpose of the use is formally permitted; instead, the court should determine whether the purpose of the use is justifiable, and if so whether it is justified by the extent of the use. This flexible construction will enable legitimate uses for a wide array of purposes without being detrimental to copyright owners' interests.

A similar exception exists allowing the use of copyright works by way of illustration for teaching purposes.¹⁴⁴ This provision contains the same conditions as the preceding one, requiring that the use is justified by the purpose, complies with fair practice, and makes a sufficient acknowledgment of the author and source of the work. The work may be used in

¹³⁷ S 12(3). The term "copyright ... shall not be infringed" indicates that a legitimate use will be exempted from infringing any of the copyright owner's exclusive rights.

¹³⁸ S 16(1).

¹³⁹ S 17.

¹⁴⁰ S 18.

¹⁴¹ S 19B(1).

¹⁴² S 12(3).

¹⁴³ An attorney could arguably rely on this exception to use protected works draft an opinion for a client, even though a commercial element is evident. The purpose of using the work is itself not commercial and only aids in properly performing the legitimate task of providing legal services.

¹⁴⁴ S 12(4). This exception is applicable to literary and musical works, artistic works (s 15(4)), cinematograph films (s 16(1)), sound recordings (s 17), broadcasts (s 18), published editions (s 19A) and computer programs (s 19B(1)).

a publication, broadcast, or sound or visual record for teaching purposes.¹⁴⁵ The purpose of the use will again be consulted to determine whether the manner in which the work was used is consistent with fair practice. The term “by way of illustration” should be construed as meaning “by way of example, for the purpose of clarification”.¹⁴⁶ This construction means that a work cannot be used as the primary method of teaching, only as an illustrative example to aid in the process of teaching.¹⁴⁷ Accordingly, this exception cannot be relied on to reproduce or distribute entire works, as this would not constitute fair practice. Works can be used for illustrative purposes, but not as the primary medium of instruction.

The CDPA provides a similar exception for users of literary, musical, dramatic and artistic works that have been made available to the public, provided the users are either giving or receiving instruction, a sufficient acknowledgement is made, a reprographic process is not employed and the use amounts to a fair dealing.¹⁴⁸ This provision is clearly aimed at extending the fair dealing provisions of the Act, and enables both teachers and students to use copyright works for educational purposes without fear of infringement. This section is supplemented by section 32(1) of the CDPA, which replaces the requirement that the use amounts to fair dealing with the requirement that the use is non-commercial, while not explicitly requiring that the work was made available to the public. The Australian Copyright Act contains a similar exempting provision, without the requirement of a sufficient acknowledgement or fair practice.¹⁴⁹

These two provisions directly incorporate all of the constitutive elements of article 10(1)-(3) of the Berne Convention, which endorses this exception.¹⁵⁰ Whether a sufficient acknowledgment has been made will in most cases be easily verifiable, while this is not the case with the condition that the conduct complies with fair practice.¹⁵¹ Dean contends

¹⁴⁵ The term “publication” is problematic, as the definition provided in s 1 is unhelpful in this context: Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 726-727. It is submitted that the term is used to connote writing or drawing on a suitable medium that can be reproduced and distributed for the purposes of teaching.

¹⁴⁶ Copeling AJC *Copyright and the Act of 1978* (1978) 43; Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 726.

¹⁴⁷ Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 726.

¹⁴⁸ S 32(2A) of the CDPA.

¹⁴⁹ S 200(1)(a).

¹⁵⁰ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886). See the discussion of this provision in chapter 3 section 2 1.

¹⁵¹ S 32(3A) of the CDPA provides that an acknowledgement can be dispensed with when it would be impractical to make such an acknowledgement. The South African Copyright Act does not make this allowance.

that “fair practice” is synonymous with “fair dealing” and that the same considerations are relevant to determining whether the conduct is lawful.¹⁵² This view is sensible and can only be correct, and the discussion of the fairness inquiry involved in the determination of whether specific conduct qualifies as fair dealing can be equally useful to this provision.

5 2 3 6 The Fairness Inquiry

South African courts have not had the opportunity to consider the interpretation or application of any of the above fair dealing exceptions and have not considered the question of the fairness of a user’s conduct. For this reason the judicial analysis of the elements of the provisions in the CDPA and Australian Copyright Act should be consulted when such a case presents itself. Likewise, it is submitted that South African courts should take heed of the manner in which the concept of fairness is applied in these foreign jurisdictions, given the similarity of the respective statutes. The factors comprising fairness as determined by the courts in Australia and the United Kingdom therefore bear reiterating.¹⁵³

The fair dealing test is divided into two steps: does the conduct fall into one of the exempted categories and was the use of the work fair? The first question is easily dealt with by determining whether the allegedly infringing conduct can properly be classified as one of the statutorily exempted activities (which activities comprise an exhaustive list).¹⁵⁴ If the actions of the defendant fall into one of these categories, the courts look at the fairness of the dealing.

The general fairness inquiry is based on the objective standard of whether a “fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question”.¹⁵⁵ A number of factors have been employed by courts to assist with this evaluation. An important, but by no means dispositive, factor is the extent to which the use of the copyright work competes with the copyright owner’s exploitation of the work.¹⁵⁶ This amounts to a practical application of the third step of the

¹⁵² Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-95.

¹⁵³ For the full discussion of these factors see chapter 4 generally.

¹⁵⁴ There is no general defence of fairness as found in, for example, the American defence of fair use.

¹⁵⁵ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 44; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

¹⁵⁶ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

article 9(2) test of the Berne Convention.¹⁵⁷ Another important factor that has surfaced is the amount of the work that has been used, and the extent of the use.¹⁵⁸ In cases where the work was not previously made available to the public, courts have considered whether the work was obtained by the user in breach of confidence.¹⁵⁹ Other relevant factors include the motives of the user (including the actual purpose of the use and whether the averred attempt at fair dealing is merely a simulation) and whether the reproduction of the work unreasonably prejudices the legitimate interests of the copyright owner (which is also in accordance with article 9(2) of the Berne Convention).¹⁶⁰ The factors will be of varying importance, depending on which instance of fair dealing is relevant and the facts of the particular case.

5 3 Parody

5 3 1 Fair Dealing for the Purposes of Parody

As discussed in chapter 4, the Australian Copyright Act provides for fair dealing for the purposes of parody or satire.¹⁶¹ The South African Copyright Act, like the CDPA, does not contain a fair dealing (or any other type of) exception allowing the use of a copyright work for the purposes of parody or satire. If a parodist wants to rely on an exception in the Copyright Act, he will have to bring his defence in line with one of the statutorily recognised grounds of fair dealing, the most likely choice being fair dealing for the purposes of criticism or review.¹⁶² Parody will not easily slot into the structure of this provision, but it is conceivable that a parody that delivers genuine commentary in an appropriate manner will be protected.¹⁶³ This section examines the need for and

¹⁵⁷ Art 9(2) of the World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886); see section 2 2 of chapter 3.

¹⁵⁸ *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 40; *Ashdown v Telegraph Group* [2002] Ch 149 CA paras 76-81. It must be noted that if a photograph is used for the purpose of criticism or review, the entire photograph will likely have to be reproduced for the criticism or review to make sense, while the use of an entire literary work will likely not be condoned: see *Fraser-Woodward Ltd v BBC and Another* [2005] EWHC 472 (Ch) para 55.

¹⁵⁹ *Ashdown v Telegraph Group* [2002] Ch 149 CA; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143.

¹⁶⁰ *Fraser-Woodward Ltd v BBC and Another* [2005] EWHC 472 (Ch) para 55; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620; *Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815; *Hyde Park Residence v Yelland* [2001] Ch 143 para 40; *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1 at 14; *Johnstone v Bernard Jones Publications Ltd* [1938] 2 Ch 599 at 603-604.

¹⁶¹ S 41A. See section 3 3 5 of chapter 4.

¹⁶² Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 336.

¹⁶³ Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-148 – 42-149. As a matter of practice a parodist does not make an acknowledgement of the author of the work, as a parody relies on the work being

hypothetical functioning of an exception for parody in South African copyright law; related notions such as “satire” and “pastiche” will not be considered, although it is advisable that at least one of these terms is included if legislative intervention of this nature is undertaken. Although the general defence of freedom of expression is beyond the scope of this thesis, it will be considered specifically in the context of parody and assessed as a justification for the promulgation of such an exception.¹⁶⁴

It is trite that the exception of fair dealing for the purposes of parody or satire (as contained in the Australian Copyright Act) is founded on the right to freedom of expression. The parody exception will therefore not be out of place in South African law, as the fair dealing exception for criticism or review is likewise based on this consideration.¹⁶⁵ It is accepted that the public interest (manifest in freedom of expression) can curtail the application of copyright law and intellectual property rights generally.¹⁶⁶ Accordingly, it is argued that the right to freedom of expression, entrenched in section 16 of the Constitution, should allow a greater use of copyright works for the purposes of parody, satire or pastiche than of trademarks for the same purposes.

Copyright entails the protection of the expression of ideas and opinions, while parody is likewise the expression of an idea or opinion, even if it uses a copyright work as a basis for its expression. It is submitted that the fair dealing provisions relating to criticism or review, and parody or satire, have a greater vested interest in the right to freedom of expression and the dissemination of ideas and opinions than is the case with a parody of a corporate logo. This is because copyright law is aimed at promoting (rather than suppressing) the creative expression of ideas and opinions.¹⁶⁷ The same underlying considerations should therefore apply to a parody as to the protection of copyright, while the justifications

identifiable for its effectiveness, which will disqualify it from the criticism/review provision. See Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 336. However, as Visser contends here, it is arguable that if the work is very well known and easily recognisable to the general public, this fact could satisfy the requirement of a sufficient acknowledgement, as the purpose of the requirement has been met.

¹⁶⁴ The discussion of parody and satire is confined to the author’s economic rights and does not consider the effect on moral rights, as explained in the introductory chapter.

¹⁶⁵ Milo D, Penfold G & Stein A “Freedom of expression” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-145 – 42-149. Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091-40092.

¹⁶⁶ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 44; *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) 465-466; Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-120; Milo D, Penfold G & Stein A “Freedom of expression” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-145 – 42-149; Ramsden P *A Guide to Intellectual Property* (2011) 192-194. See the discussion in chapter 2 sections 2 and 3.

¹⁶⁷ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-1 – 1-2; Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091-40092.

underlying the allowance of criticism and review equally and additionally apply to a parodying use of a work. The uninhibited criticism or parody of publicly expressed views and ideas arguably has a greater social justification than the parody of a mark used to distinguish products from one another. Although the latter undeniably serves an indispensable function in an open and democratic society, it is contended that the former type of free speech should exceed the sphere of application and scope of permissibility allowed in relation to a trademark.

A user who employs parody as a means to express himself will have no defence according to the Copyright Act and, in terms of the principle of subsidiarity, will be precluded from relying on the general defence of freedom of expression in terms of section 16(1)(b)-(c).¹⁶⁸ This indicates a need for legislative intervention to give proper expression to section 16 of the Constitution in South African copyright law.¹⁶⁹ If an exception for parody is statutorily introduced with comprehensive guidelines, a user's right to freely express himself will find legislative embodiment and would not invariably be a constitutional matter. Section 16 could then be used in a more limited but equally effective way by informing the interpretation of the statutory provision. An explicit statutory exception for parody would therefore facilitate a greater circulation of ideas and prevent unnecessary self-censorship for fear of "being engaged in a ruinous lawsuit",¹⁷⁰ which is implicit in legal uncertainty.

The Australian exception for parody and satire was introduced as a result of the increased standards of protection brought about by the Free Trade Agreement concluded with the United States (AUSFTA).¹⁷¹ This agreement compelled Australia to increase the standards of protection granted to copyright owners, which left concerns regarding the imbalance of the interests of copyright owners and users.¹⁷² Accordingly, the additional protection was accompanied by the additional exception. However, it is submitted that the South African position indicates that the legislature would be justified in adopting a similar exception. South Africa has a stronger basis for the right to freedom of expression than Australia

¹⁶⁸ However, see *Rapid Phase Entertainment CC and Others v SABC* [1997] JOL 393 (W) where the court considered parody as a defence to copyright infringement.

¹⁶⁹ See generally Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 343; Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-145 – 42-149.

¹⁷⁰ *Laugh It Off Promotions CC v South African Breweries International* 2006 (1) SA 144 (CC) para 106.

¹⁷¹ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091.

¹⁷² See the discussion in section 3 3 5 of chapter 4. See also Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40091.

does.¹⁷³ Australia's Constitution¹⁷⁴ does not explicitly make provision for this right, while the South African Constitution does. Section 16 of the Constitution expressly grants the right to freely receive or impart information and ideas, as well as the right to freedom of artistic creativity, both of which have obvious bearing on the parodying use of a work. If the exception is drafted properly (see, for example, the Australian provision¹⁷⁵ or the framework in the Information Society Directive¹⁷⁶) it will conform to the standards of article 13 of TRIPS.¹⁷⁷

Apart from bringing South African law in line with international standards, an exception for parody could stimulate a culture of creativity and user-generated content. The obstacles of obtaining permission (which in itself could present an insurmountable hurdle in the case of parody) and high transaction costs will be eliminated, which will encourage users to become creators of copyright content. In the current digital age, consumers are able to produce works on inexpensive computers and distribute them across the globe instantly, whereas a few decades ago this was only possible with considerable investment and specialised facilities. However, the chilling effect of legal threats often stifles creativity and aggravates market failure.¹⁷⁸ Moreover, there is no evidence that a parody will cause detriment to the economic value of the work that is being parodied.¹⁷⁹ While it is possible that this may occur with certain works, it is also possible that a parody will be beneficial to the original work by increasing publicity and awareness of the original.¹⁸⁰ This effect is evident where a parody of a song revives interest in the original and stimulates sales.¹⁸¹

¹⁷³ See generally the discussion of the relation of South Africa's position to those of America and the United Kingdom in Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-145 – 42-149.

¹⁷⁴ Commonwealth of Australia Constitution Act 1900.

¹⁷⁵ S 42A reads: "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 parody or satire."

¹⁷⁶ "Member States may provide for exceptions or limitations to the rights [of reproduction and public communication...] for the purpose of caricature, parody or pastiche": art 5(3)(k) of Directive 2001/29/EC.

¹⁷⁷ See section 2 2 of chapter 3.

¹⁷⁸ Anonymous "Parody, pastiche & caricature: Enabling social and commercial innovation in UK copyright law" (2011) *Consumer Focus* 1-4 at 4 <available at <http://www.consumerfocus.org.uk/files/2011/07/Consumer-Focus-Parody-briefing.pdf>> (accessed 10-07-2012).

¹⁷⁹ Rogers M, Tomalin J & Corrigan R "The Economic Impact of Consumer Copyright Exceptions: A Literature Review" (2010) 11 *Consumer Focus* 1-40 at 7, 32; *Consumer Focus Consumer Focus Response to the Consultation on Proposals to Change the UK's Copyright System* (2012) 18 <available at <http://www.consumerfocus.org.uk/files/2010/10/Consumer-Focus-response-to-the-consultation-on-proposals-to-change-the-UK-copyright-system.pdf>> (accessed 15-07-2012).

¹⁸⁰ Rogers M, Tomalin J & Corrigan R "The Economic Impact of Consumer Copyright Exceptions: A Literature Review" (2010) 11 *Consumer Focus* 1-40 at 17.

¹⁸¹ This happened when a 2002 parody of the 1971 song *Is This The Way To Amarillo?* led to the original song being reissued due to public demand, which subsequently became the highest selling single of 2005 in

Furthermore, the most recent review of the United Kingdom's copyright law conservatively estimates that introducing an exception for parody will result in an annual cost saving of £1 million in the United Kingdom, and a possible additional economic growth of between £130-650 million per annum.¹⁸² This same review concludes that an exception for parody "should not have an effect on the incentive to produce new works".¹⁸³ The United Kingdom has indicated that it will publish proposals for the inclusion of an exception for parody by the end of 2012.¹⁸⁴ The benefits of promulgating an exception for parody in the South African context therefore require prompt legislative intervention to foster a culture of social and commercial innovation.

The Australian Copyright Act allows the parody and satire of artistic, literary, musical and dramatic works, or an adaptation of such a work.¹⁸⁵ The Act also provides for the parody of audio-visual items in section 103AA. It seems sensible to extend the subject-matter to these items so that the exception is not unduly confined to, for example, musical works while not finding application to the sound recording of the musical work.

An exception for parody should be construed both narrowly and liberally: narrowly in the sense that its field of application should not overlap with the exception for criticism or review,¹⁸⁶ and liberally in terms of the forms of parody that it should exempt.¹⁸⁷ Once the scope of the exception has been distinguished from that of criticism or review, courts should be willing to accommodate various forms of parodic expression under the exception. Statutory exceptions often include variations and extensions of the term "parody", such as "satire",¹⁸⁸ "caricature" and "pastiche".¹⁸⁹ The more accommodating a definition is of forms of expression related to parody, the more embodiment the right to

the UK: Rogers M, Tomalin J & Corrigan R "The Economic Impact of Consumer Copyright Exceptions: A Literature Review" (2010) 11 *Consumer Focus* 1-40 at 17.

¹⁸² Hargreaves I *Supporting Document EE: Economic Impact of Recommendations* (2011) 29 <available at <http://www.ipo.gov.uk/ipreview-doc-ee.pdf>> (accessed 23-06-2012).

¹⁸³ Hargreaves I *Supporting Document EE: Economic Impact of Recommendations* (2011) 29 <available at <http://www.ipo.gov.uk/ipreview-doc-ee.pdf>> (accessed 23-06-2012).

¹⁸⁴ HM Government *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011) 16 <available at <http://www.ipo.gov.uk/ipresponse-full.pdf>> (accessed 27-06-2012).

¹⁸⁵ S 41A.

¹⁸⁶ Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 343.

¹⁸⁷ This is consistent with the liberal interpretation of the terms "criticism" and "review" adopted by courts in the United Kingdom: see *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch) paras 36-37; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620.

¹⁸⁸ For example in Australian law: see s 41A of the Australian Copyright Act.

¹⁸⁹ "Caricature" and "pastiche" are given equal footing to "parody" in, among others, France: see s 122-5.4 no 4^o of the *Code de la Propriété Intellectuelle* Loi n° 92-597 du 1 juillet 1992. Official WIPO English translation <available at http://www.wipo.int/wipolex/en/text.jsp?file_id=180336> (accessed 28-7-2012). See also art 5(3)(k) of the Information Society Directive 2001/29/EC.

freedom of expression is afforded, and artistic and social value consequently promoted.¹⁹⁰ It is submitted that the semantics of an exception should not prevent courts from giving proper expression to the section 16 right.¹⁹¹ This is in line with the dictum of the Constitutional Court in the *Laugh It Off* case, where the categorisation of the use was deemed irrelevant once the expression was found to be constitutionally protected.¹⁹² To restrict the use of a work because it does not fall within the precise linguistic parameters of the term employed would cheapen the guarantee of freedom of expression granted by the Constitution.

A parody will necessarily constitute an adaptation of a work. The definition of an adaptation varies according to the type of work in question, but the essential feature is the reproduction of a substantial and recognisable part of the original work while demonstrating a transformative character.¹⁹³ Parody is similarly defined as the “transformative use of a well-known work for purposes of satirising, ridiculing, critiquing or commenting on the original work”.¹⁹⁴ It follows that for an exception for the purpose of parody to have any meaning, it should exempt the parodying use from infringing the restricted act of making an adaptation.¹⁹⁵ This problem will be avoided by the phrase “copyright shall not be infringed”, as used in section 12(1) for the existing fair dealing exceptions.

Another problem arises where an adaptation of a work intends to deliver commentary on the work, but in a way that is not necessarily humorous. Although courts have consistently held that the subjective nature of humour precludes it from being a determinative factor,¹⁹⁶ it is accepted that to rely on parody as a defence an attempt must be made to render the adaptation humorous.¹⁹⁷

¹⁹⁰ Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 326.

¹⁹¹ Once the right has found statutory embodiment in the Copyright Act, s 16 should be consulted to inform the interpretation of the provision in line with the values entrenched in the Constitution.

¹⁹² *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 66.

¹⁹³ See s 1 of the Copyright Act for the full definition.

¹⁹⁴ Garner BA *Black’s Law Dictionary* (8th ed 2004) s v “parody”.

¹⁹⁵ See Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 323 where he discusses this approach as adopted in Spanish law.

¹⁹⁶ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 55; *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994) 582.

¹⁹⁷ *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994) 582, where the court stated that a parodic character must be perceivable.

The liberal interpretation afforded to fair dealing exceptions in the United Kingdom and Australia should apply equally to a fair dealing exception for parody; accordingly, a parody of the ideas and philosophies underlying the original work should be allowed.¹⁹⁸ However, it is submitted that a parody of an unpublished work should not be permitted.¹⁹⁹ A parody relies greatly on the work being identifiable for it to be effective.²⁰⁰ It follows that a parody of a work that has not been made available to the public can be neither effective nor fair. However, once a work has been published in any form, the author should reconcile herself with the possibility of a user parodying the work in the same sense as she would with criticism or review.

The fairness element of any fair dealing defence inherently involves a measure of uncertainty, as its determination is contingent on the factors that the court considers relevant. Alas, no case law concerning the use of a copyright work for the purposes of parody has yet been reported in Australia, as the fair dealing exception was only introduced in 2006.²⁰¹ For this reason it is prudent to analyse the factors consulted by the Constitutional Court in *Laugh It Off* (bearing in mind that the claim was one of trademark infringement), as well as the prominent American cases involving fair use that the court referred to.²⁰²

In a judgment concurring with Moseneke J (who wrote for the majority), Sachs J pointed out that “[i]f a parody does not prickle it does not work”,²⁰³ referring to the inherently paradoxical nature of a parody. A parody will necessarily have a simultaneously original and derivative character, making substantial use of a known work while transforming it in a

¹⁹⁸ See Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40090; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA; *Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc* [1994] EMLR 1; *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch). See also section 2 3 3 of chapter 4.

¹⁹⁹ This has been held to be an important factor in the fairness analysis in the United Kingdom: *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch; *Ashdown v Telegraph Group* [2002] Ch 149 CA; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143; *Hubbard v Vosper* [1971] 1 All ER 1023 CA.

²⁰⁰ Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 337.

²⁰¹ The exception was introduced by the Copyright Amendment Act 158 of 2006. The possibility of a parody falling within the scope of the fair dealing exception for criticism or review was acknowledged in the UK cases *Williamson Music Ltd and Others v Pearson Partnership Ltd and Another* [1987] FSR 97 and *Joy Music Ltd v Sunday Pictorial Ltd* [1960] 1 All ER 703 (QB), although the exception finds no statutory embodiment. Cf *Schweppes Ltd and Others v Wellingtons Ltd* [1984] FSR 210.

²⁰² Although the case involved alleged trademark infringement, the *ratio decidendi* can still be helpful in the context of copyright as an indication of where the boundaries of freedom of expression in the form of parody lie with regard to intellectual property rights. Courts in the UK have also referred to American case law when dealing with parody: *Williamson Music Ltd and Others v Pearson Partnership Ltd and Another* [1987] FSR 97 at 103-104.

²⁰³ Para 75.

humorous way.²⁰⁴ The larger the original contribution, the more of the original work the parody is allowed to use. The nature of the protected work will also be relevant for this purpose.²⁰⁵ Depending on the nature of the original work, using a larger or smaller amount may be judged as fair; using a larger portion of an artistic work will be necessary for it to be recognisable and the parody therefore effective, than, for example, with a literary work.²⁰⁶ In respect of the nature of the use, the court paid particular attention to whether the parody was primarily communicative or primarily commercial.²⁰⁷ The purpose and character of the use is of great importance in the sense that a parodist cannot simply use a work without contributing something original and thereby transforming the original into an adaptation, as opposed to a mere reproduction.²⁰⁸ Sachs J was quick to point out in the *Laugh It Off* case that the fact that a parody has some commercial element does not render it outside the boundaries of protection and is by no means determinative.²⁰⁹ Although a commercial aspect of a parody will not preclude it from exemption, it is clear that the primary aim of the parody must be communicative.²¹⁰ Furthermore, courts should be wary that the alleged parody is “not a commercial activity masquerading as a free speech one”.²¹¹ The Australian Copyright Amendment Explanatory Memorandum explicitly states that the exception for parody is not intended to exempt only non-commercial uses.²¹² The exception is aimed at allowing parody and satire by the commercial media as well, which relegates this factor to an inferior rank of importance.²¹³

²⁰⁴ Para 76.

²⁰⁵ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 37. See also Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 328 and the discussion of this fair use factor.

²⁰⁶ See *Hustler Magazine Inc v Moral Majority Inc* 796 F 2d 1148 (9th Cir 1986) 1154; Kelderman RS “You cannot hide behind religion in copyright law: The Ninth Circuit correctly rejected a religious extension to the fair use defense in *Worldwide Church of God v Philadelphia Church of God Inc*” (2002) 35 *Creighton Law Review* 1107-1150 at 1126, 1136.

²⁰⁷ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) paras 62, 85.

²⁰⁸ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) paras 14, 25, 77. This factor was borrowed from the fair use analysis in American law, specifically from the case *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994). See also Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 326-327; Pistorius T “Trade-mark tarnishment: Should we ‘Laugh It Off’ all the way to ‘Telkomsucks’ and ‘Hellcom’?” (2004) 16 *South African Mercantile Law Journal* 727-740 at 739.

²⁰⁹ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 84. Sachs J illustrated this with a quote from Samuel Johnson, saying that “[n]o man but a blockhead ever wrote, except for money”. See also *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C), where the court held that commercial speech is no less worthy of constitutional protection than other forms of speech.

²¹⁰ The communication must therefore be more significant than the trade: *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 102.

²¹¹ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 102.

²¹² Explanatory Memorandum on the Copyright Amendment Bill 2006 (2006) 111 <available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html> (accessed 4-1-2012).

²¹³ See section 3 3 5 of chapter 4.

Apart from whether the parody itself is properly classified as a commercial activity, the potential effect that it has on the market for the original work will also be considered.²¹⁴ The party alleging infringement must adduce evidence to show that the parody has or is likely to materially detriment the marketing magnetism of the trademark, or the correlative exploitation of economic rights in copyright.²¹⁵ The court warned that in our constitutional democracy, expressive acts such as parody should not be “lightly trampled upon by marginal detriment or harm unrelated to the commercial value that vests in the mark itself”.²¹⁶ This dictum can be extended to the context of copyright: marginal detriment, or the allegation of such detriment, should not unduly cripple the operation of free speech.²¹⁷ Akin to this is whether the parody is likely to confuse the average person as to the distinction between the original and the parody.²¹⁸ It is likely that the greater the original contribution made by the parodist, the smaller the likelihood of confusion will be. This is consistent with considering whether the parody is critical transformative use and contributes something original, or is merely parasitic. It is submitted that a parody of a work cannot meaningfully be said to detract from the original in any way if the original is recognisable (which is required for the parody to be effective and communicative to anyone who perceives it) and there is no confusion as to the distinction between the parody and the original.²¹⁹

The *Laugh It Off* case illustrates that the subjective nature of the humour is completely irrelevant, which is consistent with American case law.²²⁰ Whether the humour resonates

²¹⁴ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) paras 56-59, 98. This is expressed as “[taking] unfair advantage of, or be[ing] detrimental to, the distinctive character or the repute of the registered trade mark” in s 34(1)(c) of the Trade Marks Act 194 of 1993.

²¹⁵ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) paras 51-59.

²¹⁶ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 56.

²¹⁷ It is submitted that this approach, where the commercial effect of the parody is but one of the relevant factors and not the most important or dispositive consideration, is correct. American courts held the contrary position, formulated in *Sony Corporation of America et al v Universal City Studios Inc et al* 464 US 417 (1984) and *Harper & Row Publishers Inc v Nation Enterprises* 471 US 539 (1985), where the commercial aspect was hailed as the most important factor and rendered the use presumptively unfair if it had a commercial aspect. This emphasis was displaced in *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994) 577, where the Supreme Court warned against undue adherence to concrete rules or presumptions, and held that each case must be judged in its unique context. See Visser’s discussion of the development of the American courts’ methodology: Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 324-326.

²¹⁸ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 96.

²¹⁹ The impact that an effective parody may have on the market for the original work can be equated to an unfavourable review, which is protected by s 12(1)(b). See Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094. See also section 3 of chapter 2.

²²⁰ See *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994) 582 respectively. Cf Illsley T “How to tell a take-off from a rip-off: Trade mark parody and freedom of expression in South Africa” (2006) 22 *South African Journal of Human Rights* 119-125 at 124.

with the court should play no role in the determination of whether the expression qualifies for protection. Once the expression has been found worthy of protection, whether the humour is in good taste is an irrelevant consideration.²²¹ This approach finds support in American case law applying the fair use exception.²²² Interestingly, the Constitutional Court found that the subjective intention of the defendant is as irrelevant as whether the parody may cause offence.²²³ The Constitutional Court faulted the Supreme Court of Appeal in this regard, explaining that anteriorly considering whether there is an infringement prevents the court from properly determining whether the expression musters constitutional protection.²²⁴ The medium of expressing the parody is likewise irrelevant.²²⁵

These factors are not, nor are they meant to be, exhaustive.²²⁶ The crux of all fair dealing exceptions is whether an honest and fair-minded person would have used the work in the way the defendant did, given the specific context.²²⁷ This should remain the benchmark for fair dealing exceptions, including the hypothetical exception of fair dealing for the purposes of parody.

5 3 2 Constitutional Analysis in Terms of the Property Clause

This section examines the constitutional implications of promulgating a new fair dealing exception for parody. To date the Constitutional Court has not formulated a general principle to indicate whether or not *all* intangibles should be recognised as property for the purposes of section 25 of the Constitution (the property clause).²²⁸ However, it is generally accepted that intellectual property rights qualify as property for the purpose of section 25.²²⁹ For this reason it is necessary to consider the constitutional implications of adopting an additional fair dealing exception for parody.

²²¹ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) paras 55, 75, 88.

²²² See eg *Campbell aka Skyywalker et al v Acuff-Rose Music Inc* 510 US 569 (1994) at 582.

²²³ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 95.

²²⁴ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 44.

²²⁵ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 86. See the SCA's differing opinion in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) paras 30-32.

²²⁶ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 89.

²²⁷ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 44; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

²²⁸ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 113.

²²⁹ The Constitutional Court refused to award intellectual property independent constitutional recognition or protection, concluding that it is not a universal norm to afford intellectual property separate protection: *Ex*

A distinction must to be drawn between exceptions to copyright before the advent of the Constitution of the Republic of South Africa 1996, and those that were incorporated (even hypothetically) after the Constitution took effect. In the first situation, exceptions to copyright could not infringe the copyright owner's constitutional property rights for the simple reason that none existed.²³⁰ This links up with the internal modifier argument in chapter 2, whereby the copyright owner did not have the rights in the first place as the original source of the rights delimits them.²³¹ The copyright owner's rights therefore do not extend to instances of fair dealing. However, the theoretical analysis differs if the rights existed at the dawn of the constitutional era, subsequent to which additional delimitations were placed on the copyright owner's rights by means of amendments to the source of the rights (the Copyright Act). In this case, the additional delimitation will have to be analysed to determine whether it could reasonably be perceived as a deprivation of the copyright owner's property rights in terms of section 25(1) of the Constitution.²³² As neither the Intellectual Property Laws Amendment Act 38 of 1997 nor the Copyright Amendment Act 9 of 2002 made any substantive amendments to the fair dealing exceptions in the Copyright Act,²³³ the investigation focuses on the post-1996 promulgation of a hypothetical fair dealing exception for parody as proposed above. This analysis should be undertaken in terms of the methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (hereafter *FNB*).²³⁴

Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) para 75. Intellectual property is therefore considered one form of property protected by s 25: Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 143-145. See also Kellerman M *The Constitutional Property Clause and Immaterial Property Interests* (LLD thesis Stellenbosch University 2010) for a full justification of affording intellectual property rights constitutional protection. See to the contrary Dean OH "The case for the recognition of intellectual property in the Bill of Rights" (1997) *Tydskrif vir Hedendaags Romeins-Hollandse Reg* 195-119, who argued for the separate recognition of intellectual property rights; the author subsequently accepted the Constitutional Court's implicit acknowledgement of the equal status of trademarks and freedom of expression in the *Laugh It Off* case as a basis from which to proceed with intellectual property discourse: Dean OH "Trade mark dilution laughed off" (2005) Oct *De Rebus* 18-22; Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-3 n 3. See also *Oilwell (Pty) Ltd v Protec International Ltd and Others* 2011 (4) SA 394 (SCA), where the court equated the nature of intellectual property to that of immovable property, which – it is submitted – is clearly incorrect.

²³⁰ The constitutionality of the Copyright Act generally is beyond the ambit of this thesis; only the constitutionality of post-Constitution amendments that introduce exceptions to the Copyright Act will be considered.

²³¹ See chapter 2 section 4.

²³² S 25(1) states that "[n]o one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property".

²³³ S 54 of the Intellectual Property Laws Amendment Act 38 of 1997 amended the terminology in s 12(5) of the Copyright Act, but this does not influence the delimitation of rights as explained in chapter 2 section 5.

²³⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). As will become apparent,

The point of departure for any constitutional property dispute is always section 25(1).²³⁵ The first question is whether the interest amounts to property for the purpose of section 25.²³⁶ It can be accepted that a copyright owner's rights in a work constitute property rights for that purpose.²³⁷ The next stage in the *FNB* methodology is to establish whether there has been a deprivation of such property.²³⁸ The term "deprivation" denotes a regulatory interference with the use of property.²³⁹ The property interest in question is the copyright owner's exclusive right to authorise any of the restricted acts.²⁴⁰ A fair dealing exception that allows the public to use a copyright work without authorisation clearly interferes with the copyright owner's pre-existing rights to her work. However, the wide meaning attached to the term "deprivation" by the Constitutional Court in *FNB* has been subjected to alteration in subsequent cases. The Constitutional Court held that whether there has been a deprivation is contingent on the extent that the regulation interferes with the use, enjoyment and exploitation of the property.²⁴¹ However, for the purposes of this thesis the hypothetical exception is regarded as a deprivation of property rights.²⁴²

The next question is whether the deprivation is consistent with the provisions of section 25(1).²⁴³ This clause requires the determination of whether the deprivation is in terms of law of general application and, if so, whether it constitutes an arbitrary deprivation of

it is unnecessary to attempt to justify a limitation of a constitutional property right in terms of section 36(1), as this analysis is (in practically every case) subsumed by the third stage of the *FNB* methodology: Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 78-79.

²³⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60.

²³⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

²³⁷ Kellerman M *The Constitutional Property Clause and Immaterial Property Interests* (LLD thesis Stellenbosch University 2010) 35, 329-331; Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 145.

²³⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

²³⁹ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 192, 196-197. The Constitutional Court affords a wide interpretation to deprivation, saying that it encompasses "any interference with the use, enjoyment or exploitation of private property": *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

²⁴⁰ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-52.

²⁴¹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32.

²⁴² Viewing the exception as not imposing a severe enough limitation on the use, enjoyment and exploitation of a copyright owner's exclusive rights to constitute a deprivation would serve no purpose in this thesis, as that would mean the end of the constitutional analysis and the exception would be constitutional. Accordingly, it is accepted without deciding that the hypothetical exception may constitute a deprivation to guard against this possibility.

²⁴³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

property. It is clear that if a fair dealing exception for parody is promulgated – either by means of an amendment to the Copyright Act or by regulation as envisaged by section 13²⁴⁴ – it will qualify as a deprivation authorised by law of general application.²⁴⁵ A law is arbitrary if it “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”.²⁴⁶ If a deprivation is effected by legislation, the section 25(1) procedural analysis will likely follow the principles that have developed to determine this question in administrative law.²⁴⁷ These principles should not present difficulty, as the proposed exception will go through the normal legislative process and be open to public participation, which is sufficient to satisfy the requirement that all relevant interests and points of view are placed before the administrator (or in this case the legislator).²⁴⁸ The second principle proscribes bias, which will be achieved by the express requirement that the law is of general application.²⁴⁹ The exception would neither impose any sort of procedures on copyright owners, nor detract from a copyright owner’s normal judicial recourse. For these reasons the rights of the copyright owners will not be affected in a procedural manner.

Section 25(1) implicitly requires that the alleged deprivation must be for a public purpose or in the public interest.²⁵⁰ Accordingly, the promulgation of a new exception that arguably constitutes a deprivation of existing property rights must be justifiable in terms of this reading of the property clause. In this regard the public interest manifest in freedom of expression, embodied in section 16 of the Constitution, should be consulted. The right to freedom of expression is fundamental to the proper functioning of a democratic society, but is not of paramount value in the larger scheme of the Bill of Rights.²⁵¹ This position

²⁴⁴ It is submitted that the incorporation of a parody exception by means of regulation is unsuitable, as s 13 only allows exceptions to the reproduction right. A parody will necessarily also infringe the right to make or authorise an adaptation of a work, and will therefore not be exempted in terms of s 13.

²⁴⁵ The Constitutional Court made it clear that (properly enacted) legislation amounts to law of general application: *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61. See also van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 232-237.

²⁴⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

²⁴⁷ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 at 91, 93; Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 266, 269. Administrative law will not be directly applicable in this case, as there is no administrative action involved.

²⁴⁸ Klaaren J & Penfold G “Just administrative action” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa IV* (2nd ed OS 2008) 63-81.

²⁴⁹ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 at 93.

²⁵⁰ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 225, 227-232.

²⁵¹ Milo D, Penfold G & Stein A “Freedom of expression” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-9, referring to O’Regan J’s dictum in *Khumalo and*

also applies to property rights for determining whether a specific deprivation is substantively arbitrary. The rationales that underpin the right to freedom of expression as a fundamental right (as relevant to this analysis) include the proper functioning of democracy,²⁵² individual self-fulfilment and audience autonomy,²⁵³ the promotion of tolerance through the co-existence of diverging opinions,²⁵⁴ and the search for truth.²⁵⁵ These justifications form the broad basis for entrenching the right to freedom of expression in its various incarnations, and apply specifically to the freedom to express an opinion by parodying a copyright work in order to illustrate the parodist's opinion. In addition to these principles, the desire for copyright law to be transformative rather than suppressive provides a powerful justification for the small infringement that a parody constitutes.²⁵⁶ Considering these factors, it is highly unlikely that a court would even think about describing the effects of the provision as arbitrary, even against the proportionality standard, save for the most extraordinary cases.

The question of whether there is sufficient reason for the deprivation requires an enquiry into the relationship between the reasons for the provision and the effects it has, the stringency of which lies on a continuum between rationality- and proportionality-type evaluation.²⁵⁷ The applicable standard is to be determined according to the severity of the deprivation: the more extensive the effects, the closer to the proportionality end of the spectrum the test will be. The Constitutional Court set out certain factors in *FNB* for

Others v Holomisa 2002 (5) SA 401 (CC) para 25. See also *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 47.

²⁵² This is achieved by allowing criticism of government and key role-players in society, and should not be unnecessarily stifled by copyright (or any other) law: see Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-21 – 42-25.

²⁵³ This rationale recognises the intrinsic value of allowing free communication between people in pursuit of self-fulfilment, and the ideal of independent evaluation and free criticism of others' views in order for every member of the public audience to reach their own conclusion: see Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-25 – 42-27.

²⁵⁴ A society that protects freedom of expression is more likely to encourage tolerance of a diverse array of ideas, opinions and ways of life by restraining the impulse to censor contrarian views: see Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-28 – 42-30.

²⁵⁵ This justification relies on the premise that many opinions that would otherwise be suppressed may contain elements of truth, and by promoting freedom of expression the likelihood of establishing truth is increased: see Milo D, Penfold G & Stein A "Freedom of expression" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa III* (2nd ed OS 2008) 42-16 – 42-21.

²⁵⁶ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40092.

²⁵⁷ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 243. The "thickness" of the test may vary according to the context, and a rationality-type enquiry can suffice: Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 245-246. However, the more stringent standard of proportionality will be used in this analysis.

assessing whether sufficient reason exists to justify a deprivation.²⁵⁸ These include the relation between the deprivation in question and the purpose it seeks to achieve, the purpose for the deprivation and the person whose property is affected, the nature of the property and the extent of the deprivation, and whether the deprivation affects all incidents of ownership.²⁵⁹ The court explicitly stated that if the deprivation only impacts on some incidents of ownership and only partially, or if the property in question is not of a corporeal nature, less compelling reasons will be required for purposes of justifying the particular interference.²⁶⁰ In this regard it is worth emphasising that only the rights of reproduction and adaptation will be impinged upon, and not ownership in its entirety.²⁶¹ Furthermore, a parody of a copyright work is unlikely to usurp the market for the original work, and therefore does not interfere with the copyright owner's commercial exploitation of the work.²⁶² The appropriate test in this instance will therefore gravitate towards the rationality end of the continuum, considering the factors propounded by the Constitutional Court in *FNB*. Accordingly, there must be a rational link between the provision and a legitimate purpose that it strives to achieve.²⁶³ The deprivation in question easily meets this standard, and in most cases will even meet the higher standard of proportionality, which requires that the deprivation must be justifiable considering the reason for its occurrence and the effect it has on the property owner's rights.

It follows that the deprivation that would be caused by the incorporation of a fair dealing exception allowing a parodying use will not be arbitrary. Rather, it will contribute to an equitable balance (served by the proportionality principle) between the property rights of copyright owners and the public use of copyright works. The promulgation of the proposed exception is therefore in line with the third stage of the *FNB* methodology.

The fact that the third stage is answered in the affirmative negates the application of the fourth step, which requires a court to test the deprivation against section 36(1) of the

²⁵⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

²⁵⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

²⁶⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

²⁶¹ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 245. Visser asserts that the public communication right will also be infringed: Visser C "The location of the parody defence in copyright law: Some comparative perspectives" (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 342. While I submit to this view, it is contended that a work that has not been communicated to the public should be excluded from the ambit of the proposed exception: see section 3 1 of this chapter.

²⁶² Rogers M, Tomalin J & Corrigan R "The economic impact of consumer copyright exceptions: A literature review" (2010) *Consumer Focus* 1-40 at 32. See also the discussion in section 2 3 6 of this chapter.

²⁶³ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 237.

Constitution if the said deprivation is inconsistent with the requirements of section 25(1). Yet, it remains to be ascertained whether the interference could amount to an uncompensated expropriation contrary to section 25(2) of the Constitution.²⁶⁴ In this context it is clear that the suggested exception will not constitute an expropriation of property, as the owner does not lose her rights to normal commercial exploitation. This view is fortified by the fact that expropriation involves the acquisition of property rights by a “public authority”, which will evidently not be the case here.²⁶⁵ Furthermore, judicial expropriation can only be exercised if there is explicit legislative authorisation, which the suggested exception does not provide.²⁶⁶ The fact that South African courts have no common law power to order expropriation strengthens such a conclusion.²⁶⁷ Accordingly, the exception passes constitutional scrutiny.

It is argued above that the promulgation of a fair dealing exception for parody will serve the public interest while not arbitrarily depriving copyright owners of their property rights. The need for legislative intervention in this area is apparent.²⁶⁸ Once an exception for parody exists, the balance between property rights and freedom of expression (which were given equal status by the Constitutional Court in the *Laugh It Off* case)²⁶⁹ will reflect the transformative ideal of copyright law by protecting vested commercial interests in creative works, while allowing an adequate degree of parodic expression. The proposed exception will further enable commentary on existing works and the creation of new works by allowing the public to use copyright works in a transformative way. Once the right to freedom of expression is statutorily embodied in this way, users will be able to align their conduct with the legislative guidelines *ex ante* and pursue a wider array of creative expressions.

5 4 Conclusion

²⁶⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

²⁶⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 32.

²⁶⁶ See in this regard van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 433; Gildenhuys A *Onteieningsreg* (2nd ed 2001) 14.

²⁶⁷ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 453-454; Gildenhuys A *Onteieningsreg* (2nd ed 2001) 10, 93.

²⁶⁸ Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 341.

²⁶⁹ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-3 n 3.

South African and Australian copyright law find their inception in the law of the United Kingdom. Over the course of the twentieth century both South Africa and Australia emancipated themselves from the original statutory sources and proceeded to develop in parallel with the United Kingdom. The same types of works currently qualify for protection in all three jurisdictions, albeit under different categories.

The fair dealing provisions contained in the Copyright Act largely correspond with those in both the CDPA and the Australian Copyright Act. The terminology in section 12(1) of the Copyright Act makes the analyses undertaken in chapter 4 variously applicable. In the case of research and private study, the terminology falls between that used in the CDPA and the Australian Copyright Act: any research undertaken is not required to be of a non-commercial nature, although studying is qualified by this condition. In the United Kingdom both of these activities must be non-commercial in nature, while in Australia both can be undertaken for a commercial purpose. Depending on which part of the clause is invoked, courts should look to one of these jurisdictions for interpretive standards. The Australian Copyright Act provides imperative guidelines that the courts should take into account when assessing a fair dealing for the purpose of research or study, especially the quantitative threshold embodied in section 40(5). Although the normative factors in Australian law were proposed as an addition to the South African Copyright Act, the Department of Trade and Industry appears to have lost interest and the proposal lapsed into disuse.

South African law contains an interesting addition to the research/private study exception that allows users to utilise copyright works for personal or private use. This exception does not appear in either the CDPA or the Australian Copyright Act. It is suggested that the phrase is intended to extend the scope of the exception beyond uses for educational or academic purposes. Accordingly, the clause should be seen as extending the types of use allowed to accommodate any use of a copyright work that is for a personal or private (read: non-commercial) purpose and complies with fair practice. South African courts should consult the factors employed by courts in the foreign jurisdictions considered to determine whether the use complies with the fairness component inherent in the exceptions.

The fair dealing exception for criticism or review poses no difficulties regarding its interpretation. In this respect the liberal interpretations that courts have afforded this provision can be applied *mutatis mutandis* in a context-sensitive manner. The liberal interpretation includes the criticism or review of the copyright work or another work, as well

as the ideas and philosophies underlying the work. It is imperative that the user acknowledges the source and author of the work, if available. A fair dealing for the purposes of reporting current events should be accommodated under a similarly liberal interpretation to include news events as envisioned in the Australian Copyright Act. Photographs are included in the definition of artistic work in South Africa and may therefore be used in terms of this exception, while in the United Kingdom the use of a photograph will not be allowed in this context. No distinction is made between works that have been made available to the public and those that have not. The use of unpublished works can therefore qualify for protection, although the fact that it was not made available to the public will likely be considered as relevant to determining the fairness of the dealing. If the work was used in an appropriate manner to convey information to the public, it is probable that the use will be exempted.

Australian law contains an exception for parody and satire, while the law of South Africa and the United Kingdom do not. This exception is founded primarily on the right to freedom of expression, which has been known to limit intellectual property rights. It is clear that the South African Constitutional Court places immense value on this right, no less so when it manifests itself in the form of parody. This chapter has shown how an exception for parody will function in South African law, which factors should take precedence in the contextual analysis that will be required, and how it is desirable that the legislator takes action in this regard. Furthermore, the exception is justified in the constitutional sense, as was shown by subjecting it to the *FNB* methodology to ascertain whether it would amount to an unjustifiable arbitrary deprivation of constitutional property rights. Accordingly, it is submitted that the proposed exception has a vested interest in South African constitutional law and a sound basis for its incorporation into copyright law. Legislative intervention would therefore be welcome.

The fair dealing exceptions are certainly not characterised by their clear cut boundaries of exemption, but they contribute immeasurably to the transformative and social value of copyright works. The exceptions provide users with the entitlements to engage in and promote academic development, freedom of information, and the dissemination of ideas. As evidenced in this thesis, the need for the exceptions is universally endorsed and indispensable to the adequate balance of the protection of intellectual property rights and the public interest.

6 Conclusion

6.1 Introduction

Two reviews of the United Kingdom's copyright regime have been undertaken in recent years.¹ These reviews found the law to be largely satisfactory, but concluded that the exceptions to copyright in particular were lagging behind the international community. An exception for parody was specifically recommended by both reviews,² and the government has indicated that it will publish proposals for the introduction of an exception for parody towards the end of 2012.³ South African copyright law finds itself in a similar situation, as it originates from the legislation of the United Kingdom and has not been subjected to any substantial review in the past few decades. Copyright exceptions have gradually developed to their current state, with the fair dealing exception for parody being the most recent international addition.

Current South African copyright legislation and jurisprudence leave a conspicuous lacuna regarding the scope and application of the fair dealing exceptions. This area of legal uncertainty affords courts the opportunity to delineate and develop the exceptions in the interest of allowing legitimate uncompensated uses and stimulating creativity. However, South African courts have not had the chance to engage with this aspect of copyright law and the defence therefore remains as vague as it was at the time of its promulgation.

This thesis set out to critically and comparatively evaluate the state of the fair dealing exceptions in the Copyright Act 98 of 1978 in relation to their counterparts in the United Kingdom and Australia. The study aimed to clarify the application of the fair dealing exceptions so that courts may be more willing to consider foreign and international law, as mandated by section 39(1) of the Constitution of the Republic of South Africa, 1996. This is achieved by analysing the provisions relating to limitations on copyright in international treaties and foreign legislation. Parallels can be drawn between fair dealing exceptions in

¹ Gowers A *Gowers Review of Intellectual Property* (2006) <available at http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf> (accessed on 23-01-2012); Hargreaves I *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) <available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>> (accessed 23-06-2012).

² Gowers A *Gowers Review of Intellectual Property* (2006) 68 <available at http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf> (accessed on 23-01-2012); Hargreaves I *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) 49-50 <available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>> (accessed 23-06-2012).

³ HM Government *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011) 16 <available at <http://www.ipo.gov.uk/ipresponse-full.pdf>> (accessed 27-06-2012).

South Africa, the United Kingdom and Australia regarding the application and impact of these provisions. Judicial guidelines for each of the exceptions are set out where possible and specific areas of divergence are pointed out.⁴ Nebulous elements of these provisions are identified and clarified by comparative evaluation, allowing foreign judicial experience to be applied to similar cases that may arise. The impact of the constitutional property clause (section 25) on the validity of exceptions to copyright is considered to ascertain whether these exceptions are constitutionally permissible.⁵

6 2 The Purpose of Copyright Exceptions

Chapter 2 analyses the economic and social justifications that warrant the promotion and protection of works, which form the basis of modern copyright law. The limitations on copyright are then considered in light of these social objectives. These objectives constitute a concrete basis for awarding real rights over intellectual property, and for limiting these rights in certain instances.

The primary rationale for granting exclusive rights over intellectual creations is the utilitarian aim of encouraging socially beneficial activities by providing economic incentives for authors.⁶ The beneficiaries of these rights are economic rational actors who exploit the exclusive rights awarded to them to their maximum advantage. This results in works being extensively protected against uncompensated use, which limits the use and distribution of intellectual property. Granting economic rights can thus frustrate the policy objectives that led to their existence. The paradox created by this approach is self-evident; the socially beneficial uses that copyright law purports to promote are being partially prevented by the conferral of exclusive rights. This means that one person's freedoms are enhanced at the expense of everyone else's.⁷ When individual property rights hinder more highly valued social objectives, the rights must be limited to allow the pursuit of these social objectives.⁸

To ease this intrinsic tension, copyright owners' rights are limited in certain instances. Exceptions allow free uses either when such uses have an insignificant detrimental effect

⁴ See chapter 4 sections 2 3 and 3 3, and chapter 5 section 2 3.

⁵ See chapter 5 section 3 2.

⁶ Drahos P *A Philosophy of Intellectual Property* (1996) 25; Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 107-108. See chapter 2 section 3.

⁷ Hettinger EC "Justifying intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 97-113 at 100.

⁸ Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252-307 at 297.

on the owner's economic rights, or when these rights start encroaching on other basic liberties. Fair dealing exceptions embody the public interest in education, free dissemination of information, and freedom of expression. Every exception is intended to provide a greater social benefit than the loss it causes to the individual copyright owner.⁹ These provisions serve as a mechanism for the public to use protected works without consent or compensation.

In addition to mediating the relationship between owners' property rights and other fundamental constitutional rights, this thesis shows how fair dealing exceptions address a number of significant economic and social policy issues that arise from the creation of real rights over incorporeal objects.¹⁰ Copyright owners are able to levy excessive fees in cases where there are no substitutes for a work.¹¹ The transaction costs involved in obtaining the required licences to use copyright works can also be fatal to many legitimate uses that require a work to be reproduced.¹² Copyright owners could also simply withhold their consent for certain uses, like the criticism of their works. In these cases copyright works will be underused, resulting in economic inefficiency. Fair dealing allows limited uses of works in these situations to enable users to pursue legitimate public objectives. This means that users do not need to spend valuable time and resources locating the copyright owners and negotiating for licences. Users can rely on fair dealing exceptions to pursue objectives like research and study, news reporting, to criticise or review another person's work, or even to parody a work.

Parodies of protected copyright works demonstrate the role that fair dealing exceptions can play in enabling transformative, creative uses of existing copyright works to produce new works. Authors often rely on existing culture to create new products, using prominent elements of a particular work in this process. A parody copies the main elements of a work to ensure that it is still recognisable, but with considerable original creative effort. The fair dealing exception for parody and satire acknowledges and legitimates this process, if the work is properly used and the resulting product genuinely passes satirical comment on it. Courts guard against users invoking the exception as a defence when there was no clear

⁹ Aufderheide P & Jaszi P *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2011) 24.

¹⁰ See chapter 2 section 3.

¹¹ Boyer M "The economics of copyright and fair dealing" (2007) *CIRANO Scientific Publications* 1-48 at 30-36 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

¹² This is demonstrated by the tragedy of the anticommons: see Heller M "The tragedy of the anticommons: Property in the transition from Marx to markets" (1998) 111 *Harvard Law Review* 621-688.

intention of parodying a work, but merely of copying it.¹³ However, without this exception creators are discouraged by the intellectual property regime that grants exclusionary rights to the owners of existing works. This obstructs the creation of new works, contrary to the primary objective of copyright law.

Reasonable limitations on rights can even benefit copyright owners, one pertinent example being the fair dealing exception for criticism and review. If reviewers were required to obtain consent to criticise or review a work, the consequent review would lack credibility because copyright owners would be able to influence what is said about their works.¹⁴ Even negative reviews have been shown to hold benefit for authors if the alternative is no review at all.¹⁵ Moreover, any detriment that a review causes to the potential market for a work would be because the reviewer draws attention to specific ideas or flaws in the work. This is not the kind of harm that copyright law seeks to prevent, and it will have no impact on the incentive to create valuable intellectual products.¹⁶ This shows that some limitations on rights can hold benefits for copyright owners, resulting in negative marginal costs.¹⁷

The law both awards and limits property rights in the interests of dissemination of ideas and information. The fair dealing exceptions are an essential part to the balance of private property rights and public interest, and are calculated to either cause minimal economic harm to copyright owners' interests or place a restraint on their rights when they pose a threat to other important interests.

6 3 Nature and Construction of Exceptions

The nature and construction of copyright exceptions determine their scope and application. Two approaches (or a combination of the two) are usually followed in the construction of exempting provisions.¹⁸ The first approach employs a rule or set of criteria that will

¹³ *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620, *Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815, *Hyde Park Residence v Yelland* [2001] Ch 143 para 40, *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1 at 14, *Johnstone v Bernard Jones Publications Ltd* [1938] 2 Ch 599 at 603-604.

¹⁴ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

¹⁵ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

¹⁶ Posner RA *Economic Analysis of Law* (8th ed 2011) 54.

¹⁷ Posner RA "The law and economics of intellectual property" in Vaver D (ed) *Intellectual Property Rights: Critical Concepts in Law I* (2006) 157-165 at 159; Boyer M "The economics of copyright and fair dealing" (2007) *CIRANO Scientific Publications* 1-48 at 1 <available at <http://ssrn.com/abstract=1133595>> (accessed 20-5-2012).

¹⁸ Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141.

legitimate conduct,¹⁹ while the second approach adopts specific purposes that will be rendered lawful.²⁰ It is possible to combine the two by stipulating general criteria that will exempt conduct, complemented by specific purposes which will deem conduct fair. This hybrid system allows ample flexibility to determine whether a particular use is justified, with a degree of legal certainty embodied in the specific socially beneficial purposes.²¹

The fair dealing exceptions can be raised as affirmative defences to claims of infringement, which means that they render certain conduct lawful instead of merely excusing it. The legislation that grants the real rights delimits them short of certain instances of application. This internal modification approach demarcates the limits of rights and creates a range of privileges. Copyright owners can enforce their rights in the normal way, but these rights do not apply in the circumstances envisioned by the fair dealing exceptions. In terms of South African constitutional property law analysis, this approach means that there is no right and thus no deprivation that needs to be justified. The language used in the South African, Australian and the United Kingdom's legislation indicates that the rights are delimited from the outset, intentionally creating user entitlements in the form of privileges. Privileges allow the beneficiaries to act in a certain way without liability; the copyright owners' rights do not apply and they are left with no-rights. However, privileges are not necessarily accompanied by correlative duties on others to respect these privileges. In the absence of such a duty, the holder of a privilege can raise the entitlement as a defence, but cannot enforce it positively because copyright owners are not obliged to allow these uses.²² The law therefore legitimates users' conduct, but does not provide protection for them.

6 4 International Law

South Africa is obliged to implement the substantive provisions of the Paris Act²³ of the Berne Convention,²⁴ even though it has not signed this version of the treaty. This is

¹⁹ Referred to as the unitary system: Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141.

²⁰ This approach is known as the particle system: Rahmatian A *Copyright and Creativity: The Making of Property Rights in Creative Works* (2011) 141-142.

²¹ An example of the hybrid system is the fair use doctrine found in American law.

²² Hohfeld WN "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale Law Journal* 16-59 at 30-32; Singer JW *Entitlements: The Paradoxes of Property* (2000) 132.

²³ 1161 UNTS 3 (1971).

²⁴ World Intellectual Property Organisation *Berne Convention for the Protection of Literary and Artistic Works* (9-9-1886) 1161 UNTS 3 (1886).

because of the effect of article 9 of TRIPS²⁵ and article 1(4) of the WIPO Copyright Treaty (WCT),²⁶ both of which incorporate the substantive provisions of the Paris Act. Accordingly, the rights and limitations contained in the latest text of the Berne Convention, as well as those added by TRIPS and the WIPO treaties, are directly relevant to South African copyright law.

The most prominent exempting clause in the Berne Convention is the three-step test in article 9(2). This provision states that any exceptions to the reproduction right of literary and artistic works are to be confined to certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. This provision has been extended by TRIPS and the WCT to all rights granted in terms of these treaties, including the rights incorporated from the Berne Convention.²⁷ TRIPS also extends the last leg of the test to apply to rights holders, not only authors as is the case with the Berne Convention.

The Rome Convention permits member states to extend any exceptions they have promulgated in relation to literary and artistic works to neighbouring rights.²⁸ This is in addition to the exceptions for private use, reporting current events, ephemeral fixations and teaching or scientific research that the Rome Convention expressly allows.²⁹ It is clear that none of these envisioned exceptions could feasibly pose a threat to the economic exploitation of the rights granted by this treaty. These exceptions illustrate the balance between rights holders and the public that this area of law tries to achieve. These provisions are expressly endorsed by TRIPS,³⁰ while the WIPO Performances and Phonograms Treaty (WPPT) adopts the three-step test and extends the exceptions applicable to literary and artistic works to neighbouring rights.³¹

The WCT contains an agreed statement in the appendix, which is equally applicable to the WPPT, to the effect that member states can extend limitations that comply with the three-step test to the digital environment, and may further “devise new exceptions and limitations

²⁵ World Trade Organisation *Trade-Related Aspects of Intellectual Property Law* (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994).

²⁶ World Intellectual Property Organisation *Copyright Treaty* (20-12-1996) 36 ILM 65 (1996).

²⁷ Art 9 read with art 13 of TRIPS and art 1(4) read with art 10 of the WCT.

²⁸ Art 15(2).

²⁹ Art 15(1).

³⁰ Art 14(6).

³¹ Art 16 of the World Intellectual Property Organisation *Performances and Phonograms Treaty* (20-12-1996) 36 ILM 76 (1996).

that are appropriate in the digital network environment”.³² The South African legislature should follow this suggestion when reviewing the Copyright Act 98 of 1978. One example of this exception is section 28 of the Copyright, Designs and Patents Act 1988, which exempts transient and incidental copies that are necessarily made as part of a technological process.³³ This exception is compliant with the three-step test as it stands and the independent tenets of the test are not required as additional qualifications.³⁴

6 5 Fairness Inquiry

The study of case law shows that courts distinguish between the classification of an allegedly infringing act and the fairness of the act.³⁵ Before drawing conclusions from specific provisions, the judicial approach to resolving fair dealing disputes should be understood. Courts first examine the actions of the defendant objectively to determine whether the conduct can properly be categorised as one of the acts of fair dealing. If it is established that the act does indeed fall within the scope of one of the fair dealing provisions, the fairness of the use is evaluated. The statutory exceptions considered here state that fair dealing “does not infringe any copyright in the work”, so any one particular restricted act will not present an obstacle to the proper functioning of the exceptions.³⁶ This is justified by the extension of the three-test step to all exclusive rights that TRIPS effects.³⁷

The Australian Copyright Act adopted five factors that courts must consider when establishing whether a particular use qualifies as fair.³⁸ These factors were included in the South African Draft Amendment Bill³⁹ that was published for comment in 2000, but the Bill has since been abandoned. The construction of the Australian provision suggests that these factors should apply to all evaluations of fair dealing, not only those regarding research and study. These factors correspond with the four factors traditionally associated with fair use which courts have frequently consulted in fair dealing cases. This statutory mandate ensures that courts follow the same methodology, although the importance of

³² Agreed statement to art 10 of the WCT.

³³ Ss 43A, 43B of the Australian Copyright Act also contain this exception.

³⁴ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 478-479.

³⁵ See specifically chapters 4 sections 2 3 3-2 3 4 and 3 3 3-3 3 4.

³⁶ See eg s 29(1) of the CDPA.

³⁷ Art 13.

³⁸ S 40(2), restated in s 103C.

³⁹ GN 1805 in GG 21156 of 2000-05-10.

each factor will vary to accommodate each specific set of facts. These judicial guidelines take the elements of the three-step test into account, explicitly instructing courts to consider the effect that the use has on the potential market for the work and the possibility of obtaining the work within a reasonable time at an ordinary commercial price.⁴⁰ If the use competes with the copyright owner's normal commercial exploitation of her work, this will indicate that the use is not fair.⁴¹ Courts consider various other factors which are of varying importance depending on the particular facts of each case.⁴²

The amount and substantiality of the use is considered to determine the quantity and quality of the portion reproduced.⁴³ No single factor is determinative and using a work in its entirety can qualify as a fair dealing if all of the factors combined point to this conclusion. If the work was unpublished, the court will consider whether the work was obtained in breach of confidence.⁴⁴ The subjective intentions of the user can be relevant, both with regard to the particular use and the attitude that the user had toward intellectual property rights throughout the process of use.⁴⁵ However, the fairness is to be determined against the objective standard of whether a "fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question".⁴⁶ Individual factors have been advanced by courts in the context of a specific type of fair dealing, which should be taken into consideration for those purposes. With this discussion in mind, the fair dealing provisions are analysed individually.

6 6 Research and Private Study

Fair dealing allows the use of works for research and private study to enable students and researchers to use works for didactic purposes without fear of copyright infringement. The

⁴⁰ The first requirement of the test – that the exceptions must be confined to certain special cases – is satisfied by the specific purpose envisioned by each exception.

⁴¹ Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

⁴² See section 2 3 6 of chapter 5 for an exposition of the factors that courts frequently consider.

⁴³ *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 40; *Ashdown v Telegraph Group* [2002] Ch 149 CA paras 76-81.

⁴⁴ *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch paras 176-177; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 75; *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA para 38.

⁴⁵ *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch).

⁴⁶ *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 para 44; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 38; Garnett K, Davies G & Harbottle G *Copinger and Skone James on Copyright I* (15th ed 2005) 498.

CDPA requires that both of these activities must be for non-commercial purposes,⁴⁷ while the Australian exception makes no such demand. The South African Copyright Act falls neatly between these provisions, requiring that any study undertaken in terms of this provision is “private”, but does not impose this condition on researchers.⁴⁸ Nonetheless, whether the research was carried out for direct economic advantage will likely be considered relevant to the fairness of the research. The Information Society Directive, to which the United Kingdom is party, contains a useful explanation regarding the nature of research, which instructs courts that the activity in question should be characterised by the activity as such and not only by the organisational structure or the means by which the institution involved (if any) is funded.⁴⁹

None of the international conventions on copyright explicitly permits the limitation of rights for these purposes, although the preamble of the WCT expressly recognises the need to maintain a balance between the rights of authors and the public interest inherent in education and research. The Rome Convention contains an exempting clause in favour of teaching and research. Art 15(1)(d) allows exceptions to neighbouring rights “solely for the purposes of teaching or scientific research”. However, the proper application of this provision is unclear, as scientific research is usually not embodied in a performance or phonogram. It has been suggested that this exception could operate more effectively in the cultural and social sciences than other fields of research.⁵⁰

South African courts should take heed of Australian case law⁵¹ regarding the interpretation and application of this provision, bearing in mind that the Australian provision does not impose the requirement that any study undertaken in terms of this clause must also be of a non-commercial nature. The Federal Court of Australia adopted the dictionary definitions of “research” and “study”,⁵² which proved unproblematic. The South African exception (like the Australian equivalent) does not require an acknowledgement of the author or source of the work that was used, which the CDPA does.⁵³ Notwithstanding, whether a sufficient

⁴⁷ The CDPA was amended to bring it in line with art 5(3)(a) of the Information Society Directive 2001/29/EC, which requires that for research to be exempted it must be of a non-commercial nature.

⁴⁸ S 12(1) of the South African Copyright Act 98 of 1978.

⁴⁹ Recital 42 of the Information Society Directive 2001/29/EC.

⁵⁰ Nordemann W, Vinck K, Hertin PW & Meyer G *International Copyright and Neighbouring Rights Law: Commentary* (1990) 411.

⁵¹ Eg *Haines v Copyright Agency Ltd* (1982) 42 ALR 549; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292.

⁵² *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 298.

⁵³ S 29(1). This requirement can be dispensed with in terms of s 29(1B) where it would be impossible to make an acknowledgement for reasons of practicality or otherwise.

acknowledgement has been made will form part of the fairness inquiry during the judicial analysis, depending on whether acknowledging the source would serve any purpose in the specific case.

Section 40(3)-(5) of the Australian Copyright Act provides user guidelines that will automatically exempt qualifying conduct. This provision sets quantitative thresholds which aid users in aligning their conduct with what the law permits. Any use of a work that falls within the scope of these subsections will be deemed fair dealing with that work. This section creates a degree of clarity and extra-judicial certainty to an exception that has been notoriously vague, and the South African Copyright Act will undoubtedly benefit from the promulgation of a similar provision. If conduct does not qualify for exemption under section 40(3)-(5), the use can still be exempted by the normal judicial evaluation. These standards therefore do not detract from users' entitlements, but provide a valuable extra-judicial mechanism to determine the legitimacy of users' conduct *ex ante* and prevent unnecessary litigation. For these reasons, South African courts should consult the Australian provision rather than the United Kingdom's when applying section 12(1) of the South African Copyright Act.

The South African provision extends the exception to allow personal and private uses of works.⁵⁴ This addition permits uses of works similar to research and private study, but for purposes unrelated to education or academia. This clause extends the range of permitted uses beyond specific purposes; if the use can properly be classified as personal or private, a work can feasibly be used for any purpose.

The purpose of the use is not relevant to determining whether the conduct qualifies for exemption. This means that the first step of the judicial analysis will differ: instead of the purpose of the use determining whether the act can be exempted, the nature of the use will be determinative. The purpose of the use is relegated to the second stage of the judicial analysis, where the court considers a multitude of factors to establish the fairness of the use. This exception can therefore exempt a potentially open-ended array of uses, provided they are personal or private.⁵⁵ The construction of the exception is clearly compatible with the Berne three-step test, as it is sufficiently narrowly defined, cannot interfere with the normal exploitation of the work and is unlikely to be prejudicial to the

⁵⁴ S 12(1)(a).

⁵⁵ An important application of this exception is the exemption of reproductions that are necessarily made by a computer's Random Access Memory when browsing the internet: Ital EG *Copyright Law and the Internet in Modern South African Law* (LLM thesis Stellenbosch University 2000) 84-85.

owner's rights. This clause therefore allows the reproduction of a reasonable portion of a work if the reproduction is used solely by the reproducer – the distribution of the work will not be exempted.⁵⁶

6 7 Criticism and Review

The fair dealing exception for criticism and review is justified by the public interest in freedom of expression that it embodies.⁵⁷ The aim of this exception is “to protect a critic or reviewer who may bona fide wish to use copyright material to illustrate his review or criticism”.⁵⁸ The Australian Federal Court accepted the standard dictionary definition of these terms, as with research and study.⁵⁹ The exception is substantively identical in all three statutes, except that the CDPA only allows the use of a work that has been made lawfully available to the public.⁶⁰ This is in line with article 5(3)(d) of the Information Society Directive, which permits only the use of quotations from works that have been made lawfully available to the public. This is not required in South Africa or Australia, although this will be an important factor regarding the fairness of the use and it will be difficult to prove that a use was fair if the work was obtained in breach of confidence.⁶¹ For this reason Australian case law is more applicable to South African law, although earlier cases from the United Kingdom are equally useful.⁶² The exception extends to the criticism of the work that was used or criticism of “another work”.⁶³ Courts have given this exception a liberal construction, as with the other fair dealing exceptions, and have held that “another work” includes the ideas and philosophies underlying a work, or even the process of

⁵⁶ This exception applies to all rights in a work, but the act of distribution will likely invalidate the use because it is improbable that a distribution will be personal or private, unless confined to the users' family circle. See Gibson JTR, Visser C, Pretorius JT, Sharrock R & van Jaarsveld M *South African Mercantile and Company Law* (8th ed 2003) 724; Copeling AJC *Copyright and the Act of 1978* (1978) 42.

⁵⁷ Burrell R & Coleman A *Copyright Exceptions: The Digital Impact* (2005) 42.

⁵⁸ *Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815.

⁵⁹ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 299.

⁶⁰ S 30(1).

⁶¹ *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch paras 176-177; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143 para 75; *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA para 38. See also generally *Ashdown v Telegraph Group* [2002] Ch 149 CA.

⁶² Cases heard before the amendment of the CDPA include *Hubbard and Another v Vosper and Another* [1971] 1 All ER 1023 CA; *Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc* [1994] EMLR 1; *Banier v News Group Newspapers Ltd* [1997] FSR 812; *Ashdown v Telegraph Group* [2002] Ch 149 CA. Cases heard subsequent to the amendment will end at the first step of the fair dealing test and will therefore not be helpful.

⁶³ S 12(1)(b) of the Copyright Act 98 of 1978; s 41 of the Australian Copyright Act 63 of 1968; s 30(1) of the Copyright, Designs and Patents Act 1988.

producing the work including the style of journalism.⁶⁴ This approach gives appropriate recognition to the freedom of expression that underlies the exception.

It will generally be fairly evident whether a work has been used for the purposes of criticism or review, although courts are guarded against simulated uses where defendants invoke the defence after the fact.⁶⁵ This is specifically relevant to South Africa and the United Kingdom where there is no defence for parody or satire, and defendants might want to rely on the criticism/review exception to exempt their actions. Although it is possible for parodies to qualify for exemption in terms of this exception, the requirement that a sufficient acknowledgement of the author and source is made will often preclude the success of this line of defence. A parody does not usually acknowledge the author or source of the work that it parodies, as an effective parody relies on the original work being sufficiently well-known for it to be recognisable as the subject of the parody. However, if a parody does provide a sufficient acknowledgement and genuinely criticises or reviews the work, it is conceivable that it may be exempted by this fair dealing exception.⁶⁶

6 8 Reporting Current Events

The fair dealing exception allowing the use of works for news reporting enables journalists and other users to reproduce and distribute portions of a work, verbatim, to provide the public with untainted information regarding important current events. Both the Berne Convention and the Information Society Directive expressly allow these exceptions.⁶⁷ Although case law from the United Kingdom suggests the term “news” is more encompassing than the term “current events”, this distinction appears to be arbitrary and the terms should be seen as synonyms, especially considering the liberal interpretation of

⁶⁴ *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch); *Ashdown v Telegraph Group Ltd* [2002] Ch 149 CA; *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA; *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1; *Hubbard v Vosper* [1971] 1 All ER 1023 CA.

⁶⁵ *Pro Sieben Media AG v Carlton UK Television* [1999] EMLR 109 CA 620, *Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815; *Time Warner Entertainments LP v Channel Four Television Corporation Plc* [1994] EMLR 1 at 14.

⁶⁶ Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative and International Law Journal of Southern Africa* 321-343 at 336-337. Conversely, as Visser argues here, it is possible that if the work is very well known and is clearly recognisable as the subject of the parody, this could be enough to satisfy the requirement of a sufficient acknowledgement.

⁶⁷ Art 10 of the Berne Convention and art 5(3)(c) of the Information Society Directive.

fair dealing exceptions that courts follow.⁶⁸ The exceptions for reporting current events do not require that the work must previously have been made available to the public. The absence of this requirement is understandable, as the proper functioning of an independent media is founded on the liberty to be able to report previously unavailable information.⁶⁹

The CDPA specifically excludes the use of photographs from the scope of exemption.⁷⁰ The rationale behind this is that one newspaper would be able to rely on this exception to reproduce a photograph that a competing newspaper has paid for dearly. Accordingly, the exception will not allow the use of photographs for reporting news in any situation, although photographs can still be used as the subject of the criticism or review. This qualification is absent from the South African and Australian provisions, and the appropriate use of photographs for reporting current events can still be exempted.⁷¹ The South African and Australian exceptions are therefore broader than the United Kingdom's equivalent in this respect. Conversely, the CDPA does not limit the ways in which news can be reported, while the South African and Australian legislation prescribe the ways in which news should be communicated to the public.⁷² This prescription seems archaic in the current age.

6 9 Quotations and Illustrations

The Berne Convention allows quotations to be made from lawfully available works, provided that the quotation is compatible with fair practice and the extent of the quotation is justified by its purpose.⁷³ A similar exception allows the promulgation of exceptions for illustrative use of literary and artistic works for teaching purposes.⁷⁴ This provision is also

⁶⁸ This contention is supported by the fact that s 30 of the CDPA is entitled "Criticism, review and news reporting", while the term "current events" is used in the provision itself.

⁶⁹ As with the exception for criticism or review, the fact that the work has not been made available to the public will be considered during the fairness inquiry: see *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 Ch; *Ashdown v Telegraph Group* [2002] Ch 149 CA; *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143.

⁷⁰ S 30(2).

⁷¹ Photographs are included in the definition of artistic works in both statutes, and the exception specifically applies to artistic works in terms of s 12(1)(c) of the Copyright Act and s 42(1) of the Australian Copyright Act.

⁷² S 12(1)(c) of the Copyright Act and s 42(1) of the Australian Copyright Act only allow the use of a work for this purpose when news is reported in a newspaper, magazine or similar periodical, or by means of a communication or cinematograph film.

⁷³ Art 10(1).

⁷⁴ Art 10(2).

informed by the requirement of fair practice. Both of these exceptions are further qualified by the requirement that the use is accompanied by an acknowledgement of the source and the name of the author if it appears on the work.⁷⁵

The provisions in the Berne Convention were directly adopted in section 12(3)-(4) of the South African Copyright Act, which are consequently compliant with the international mandate. No specific purpose of the quotation is prescribed, leaving a broad spectrum of potentially justifiable uses. Furthermore, there is no requirement that the purpose of the use must be non-commercial, meaning that purposes traditionally not associated with fair dealing can be exempted if the ends justify the means.⁷⁶ The judiciary's nuanced approach will differ in the same way that it does with the exception allowing personal or private uses.

The exception allowing illustrations for teaching purposes more closely resembles fair dealing, as the specific purpose of the use is identified. The CDPA and Australian Copyright Act both contain similar provisions, although additional constraints are imposed.⁷⁷ The CDPA requires that the use must be a fair dealing, while the South African Copyright Act requires that the conduct complies with fair practice. These two concepts effectively amount to the same standard and the same factors will determine whether the use is exempted.⁷⁸ The justifying purpose can therefore exempt a use in terms of section 12(3) or (4) if it is compatible with fair practice and acknowledges the source and author of the work.

6 10 Parody and Satire

The Information Society Directive provides the framework for legislators from member states wishing to promulgate an exception for the purposes of caricature, parody or pastiche.⁷⁹ Two reviews⁸⁰ of the United Kingdom's copyright law have recommended that this provision should be utilised by promulgating an exception for parody, but to date no

⁷⁵ Art 10(3).

⁷⁶ Eg, an attorney would arguably be able to rely on this exception to quote from various sources when drafting an opinion for a client.

⁷⁷ S 32(2A) of the CDPA and s 200(1)(a) of the Australian Copyright Act prohibit the use of reprographic appliances in making the reproductions.

⁷⁸ Dean OH *Handbook of South African Copyright Law* (RS 14 2012) 1-95.

⁷⁹ Art 5(3)(k).

⁸⁰ Gowers A *Gowers Review of Intellectual Property* (2006) 68 <available at http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf> (accessed on 23-01-2012); Hargreaves I *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) 49-50 <available at <http://www.ipso.gov.uk/ipreview-finalreport.pdf>> (accessed 23-06-2012).

action has been taken in this regard.⁸¹ Australia adopted an exception for parody in 2006 following the Australia-United States Free Trade Agreement, but this provision has not yet been relied on in court. The fair dealing exception for parody and satire is in line with the three-step test and is encouraged by the European Parliament and the Council of the European Union.⁸²

The need for the exception in South African law is evident.⁸³ This exception will allow copyright law to foster a culture of creative discourse. The right to freedom of expression is given strong protection by section 16 of the Constitution, and an exception for parody will promote the freedom to impart and receive information and ideas, and the freedom of artistic creativity as contained in section 16(1)(b)-(c). Parodies are becoming increasingly valuable in the cultural and economic sense, given the exponential growth of traditional and social media forms. The obstacle of obtaining permission to use a work in this way will be fatal to most transformative uses, which demonstrates the need for an exception in this regard. It has even been suggested that the absence of an exception for parody amounts to implicitly allowing censorship by private parties.⁸⁴ Moreover, legitimate parodies will hardly, if ever, derogate from the commercial exploitation rights of the original work, and has actually been shown to hold benefits for the copyright owner.⁸⁵ The most recent review of the United Kingdom's copyright law concluded that an exception for parody "should not have an effect on the incentive to produce new works".⁸⁶

The same considerations underlying the protection of copyright works apply to allowing parodies of these works, with freedom of expression additionally supporting the exemption of such uses.⁸⁷ The exception, which is an embodiment of freedom of expression, allows transformative critical uses of copyright works. This reflects the ideal that copyright should promote the creative expression of ideas and opinions, rather than suppress them.

⁸¹ The government has indicated that it will take steps towards the promulgation of an exception for parody during 2012: HM Government *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011) 16 <available at <http://www.ipo.gov.uk/ipresponse-full.pdf>> (accessed 27-06-2012).

⁸² Art 5(3)(k) of the Information Society Directive.

⁸³ See chapter 5 section 3 1.

⁸⁴ Harper S "Westminster's state of mind – Open to protection of parody?" (04-05-2012) *Intellectual Property Magazine* 1-4 at 2-3 <available at http://www.ipworld.com/ipwo/doc/view.htm?id=283805&searchCode=S&searchPage=basic_search&queryString=Westminster> (accessed 27-06-2012).

⁸⁵ Rogers M, Tomalin J & Corrigan R "The Economic Impact of Consumer Copyright Exceptions: A Literature Review" (2010) 11 *Consumer Focus* 1-40 at 17.

⁸⁶ Hargreaves I *Supporting Document EE: Economic Impact of Recommendations* (2011) 29 <available at <http://www.ipo.gov.uk/ipreview-doc-ee.pdf>> (accessed 23-06-2012).

⁸⁷ Section 3 1 of chapter 5.

An exception for parody should be construed narrowly to prevent an overlap with the exception for criticism and review, but liberally enough to accommodate any legitimate uses.⁸⁸ The amount of original creative contribution evident in a parody will be an important factor in the determination of whether the conduct amounts to fair dealing.⁸⁹ American case law makes it clear that a parodic or satirical character must be reasonably perceivable from the use of the work for it to be exempted.⁹⁰ However, in keeping with the liberal interpretation that courts have adopted with regard to fair dealing provisions in general, this should not be a high threshold. It is clear that the subjective nature of humour should play no role in whether the use can properly be classified as a parody, or in the fairness evaluation.⁹¹ Once a use has been classified as parody during the first step of the judicial analysis, the subjective nature of humour should not detract from the protection of freedom of speech that the exception grants.⁹²

The extent of original contribution that the parodying use makes is an important, but flexible, factor. A parody will simultaneously have an original and derivative character, as it reproduces the main features of a well-known work while contributing certain features to transform the work appropriately.⁹³ The original contribution that the parodist makes is therefore not the pivotal consideration, but is important in determining whether the use of a work is transformative or a mere reproduction.

The effect that a parody has on the market for the original work is unlikely to be significant and expressive acts such as parody should not be “lightly trampled upon by marginal detriment or harm unrelated to the commercial value that vests in the [work] itself”.⁹⁴ Even if a particular use does have a considerable impact on the market, this should be seen in the same light as an unfavourable review in terms of the fair dealing exception allowing criticism or review.⁹⁵ The Australian Copyright Amendment Bill Explanatory Memorandum

⁸⁸ Visser C “The location of the parody defence in copyright law: Some comparative perspectives” (2005) 38 *Comparative International Law Journal of Southern Africa* 321-343 at 343.

⁸⁹ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094.

⁹⁰ *Campbell v Acuff Rose Music Inc* [1993] 510 US 569 at 588.

⁹¹ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) paras 55, 75, 88; *Campbell v Acuff Rose Music Inc* [1993] 510 US 569 at 583.

⁹² See chapter 5 section 3 1.

⁹³ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 76.

⁹⁴ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 56.

⁹⁵ Lahore J *Copyright and Designs: Commentary I* (RS 77 2008) 40094. See chapter 2 section 3 for a discussion of the importance of this exception.

expressly indicates that parodies of a commercial nature are permissible,⁹⁶ and South African case law clearly supports this view.⁹⁷

A parody of an unpublished work will be ineffective and should not be permitted.⁹⁸ An effective parody relies on the work being well-known and recognisable, especially if no acknowledgement of the author or source is made. If the work is not known by the public who perceives the parody, the context to understand and appreciate the parody will be absent. Accordingly, only parodies of published works should be permitted.

6 11 The Constitutionality of an Exception for Parody

In the interest of encouraging the promulgation of a fair dealing exception for parody in South African law, it is necessary to establish the constitutionality of this exception to ascertain whether the exception would be permissible in terms of the property clause, as applied in the methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (hereafter *FNB*).⁹⁹

Section 25(1) is the point of departure for determining whether an infringement or restriction of property rights amounts to a constitutional property dispute. The first question is whether the disputed interests constitute property rights for the purpose of section 25(1). Having shown that a copyright owner's rights in her work do indeed constitute property rights for the purposes of section 25(1),¹⁰⁰ it is necessary to determine whether there has been a deprivation of such property. As has been argued before, some exceptions are framed so as to define the right short of the permitted use, in which case there is no right and no deprivation. However, it is accepted that certain applications of an exception for parody can amount to a regulatory interference with the use of property, and it would therefore constitute a deprivation.¹⁰¹ This deprivation would be consistent with the

⁹⁶ Explanatory Memorandum on the Copyright Amendment Bill 2006 (2006) 111 <available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html> (accessed 4-1-2012).

⁹⁷ *Laugh It Off Promotions CC v SAB International* 2006 (1) SA 144 (CC) para 84.

⁹⁸ See section 3 1 of chapter 5 where this argument is made.

⁹⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). See chapter 5 section 3 2 for the full, comprehensive application of this methodology.

¹⁰⁰ Kellerman M *The Constitutional Property Clause and Immaterial Property Interests* (LLD thesis Stellenbosch University 2010) 35, 329-331; Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 145.

¹⁰¹ The broad definition of deprivation as employed in *FNB* is relied on; if the exception does not amount to a regulatory interference, the exception will be constitutionally valid and this will be the end of the inquiry.

elements of section 25(1): the deprivation would be promulgated by means of legislation, which is law of general application.¹⁰² Administrative law principles considered in conjunction with the requirements of section 25(1) indicate that the proposed exception will not be procedurally arbitrary if it is properly enacted.¹⁰³

The implicit requirement in the property clause that the deprivation must be for a public purpose or in the public interest is satisfied by the public interest in promoting or upholding freedom of expression. The interests served by freedom of expression, coupled with the desire for copyright law to be transformative rather than suppressive, form a legitimate basis for allowing the deprivation in question. The *FNB* methodology then proceeds to consider whether the proposed deprivation is substantively arbitrary according to the requisite justification on the rationality-proportionality continuum. The factors propounded by the Constitutional Court in *FNB* show that in most cases of parody a rationality-type evaluation will suffice, but the parody exception will be justifiable even on the “thicker” standard of proportionality, save for extraordinary cases.¹⁰⁴ Accordingly, the exception would be in the public interest and the deprivation that it would cause would not be arbitrary, either substantively or procedurally.

The fourth stage in the *FNB* methodology becomes unnecessary if the deprivation is justifiable in terms of section 25(1). Furthermore, it is clear that a fair dealing exception will not amount to an expropriation of the copyright owners’ rights, as the owner does not lose her rights to normal commercial exploitation. The fair dealing exception for parody would therefore be constitutionally viable and would contribute to the equitable balance between the property rights of copyright owners and the public use of copyright works. It follows that legislative intervention in this regard would be constitutionally valid.

6 12 Concluding Remarks

This thesis started by considering the nature and function of fair dealing exceptions in light of their construction and origin. The statutory entitlements granted to users embody a number of highly regarded facets of the public interest, and allow valuable uncompensated

¹⁰² Properly enacted legislation will always be law of general application: *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61. See also van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 232-237. See the application of the methodology in section 3 2 of chapter 5.

¹⁰³ See section 3 2 of chapter 5 for the full analysis of the administrative law principles.

¹⁰⁴ Para 100; Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 245-246.

uses of copyright works. The current Australian exceptions are more inclusive than that of South Africa or the United Kingdom. All of the fair dealing exceptions in the South African Copyright Act are compliant with the three-step test standard set in article 9(2) of the Berne Convention, which was subsequently extended by article 13 of TRIPS, and the proposed exception for parody complies with section 25 of the Constitution.

The United Kingdom is currently taking steps to promulgate a fair dealing exception for parody, and until the South African legislature does the same the Copyright Act will lag behind international standards. The need for this exception has been demonstrated and the potential sphere of application has been clarified by analysing the factors that should inform the judicial analysis. The constitutionality of the exception has been proven to vanquish any doubt in this regard. The absence of this provision is the primary pitfall of the current South African exceptions to copyright, and its inclusion will move the South African copyright regime forward considerably.

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