

# Fair dealing, libraries and competition in the digital era

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## 1 Introduction

In the *Copyright Amendment (Digital Agenda) Act 2000* (the "DAA"), the Australian legislature extended to digital media the same copyright principles that apply to "traditional" forms of literary and artistic works.<sup>1</sup> Accordingly, as in the *Copyright Act 1968* (the "Copyright Act") itself,<sup>2</sup> the DAA allows certain exceptions to the protections granted to copyright owners. Under the "fair dealing" provisions of the Copyright Act, it is not infringement to reproduce works for the purpose of (1) research or private study; (2) criticism or review; (3) news reporting; or (4) a judicial proceeding.<sup>3</sup> However, given the nature of digital media, which makes it relatively easy to duplicate and disseminate works widely, copyright owners have tended to oppose the wholesale extension of the fair dealing defence to the digital realm.

The focus of this paper is on how these legislative developments affect library access to digital works. Some parties fear that allowing libraries free access to distribute digital works without owner permission will endanger the for-profit digital publishing market.<sup>4</sup> There is a particular concern that library access will hinder the development of "slice and dice" forms of rights, in which copyright owners define new menus of contracting options for users, involving finer subdivisions of rights than could have been economically implemented in a pre-digital world.

The argument presented here is that fair dealing is an essential part of the copyright regime and was appropriately extended to digital media. There are a number of reasons supporting this position. First, fair dealing exceptions are vital for

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<sup>1</sup> *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (the "DAA").

<sup>2</sup> *Copyright Act 1968* (Cth).

<sup>3</sup> *Copyright Act 1968* (Cth), ss. 40-43.

<sup>4</sup> The provision allowing fair dealing in the DAA is not limited to publicly funded libraries, but refers to libraries in general.

maintaining a balance between protection of and access to copyrighted works, which is essential to the efficacy of the copyright system in a market economy such as Australia's. Second, it is important for continued innovation and progress in the commercial world that access for the purposes of study, research, and criticism be unhindered, for innovation is at its base built on imitation. Third, allowing open access to copyrighted works for parties that cannot pay market rates will ultimately result in a more efficient outcome for society as a whole. Finally, the fears of the private sector that granting libraries access to digital works at little or no cost will result in the destruction of the emerging online market for publications are overstated. While the particular nature of digital media should be taken into account when calculating damages when infringement occurs, it should not result in basic copyright treatment different from other forms of media.

This paper is divided into three main parts. Part 2 provides a background to the analysis of fair dealing for digital works, by discussing the underlying rationale of copyright law generally, and of fair dealing provisions for non-digital works in Australia and the United States specifically. Provisions in both the Copyright Act and the United States *Copyright Act 1976* (the "US Copyright Act")<sup>5</sup> are considered here. Part 3 will consider how Australia and the United States have decided to apply fair dealing to digital works, looking at both international legal obligations and their implementation in the two countries. A comparison of these approaches will focus on the adoption of rules- and standards-based regimes, respectively. Finally, Part 4 will consider the DAA in greater depth, concluding that the Act successfully achieves an efficient and equitable outcome for society at large.

## **2 Background: the rationale behind copyright laws and fair dealing provisions**

On 4 March 2001, the DAA became law. To provide a context for discussing the Act's reforms, this paper will first provide an introduction to copyright law generally, including fair dealing as it relates to non-digital works. This consideration of fair dealing focuses on both the Australian and United States copyright statutes. The DAA and its American counterpart, the Digital Millennium Copyright Act (the "DMCA"),<sup>6</sup> were enacted to satisfy the countries' obligations under the World Intellectual Property Copyright Treaty, negotiated in Geneva in 1996 (the "WCT").<sup>7</sup>

The contrast between Australian and American approaches is interesting, not least because of their differing social and economic contexts. While the United States is a net exporter of intellectual property, Australia is well known to be a net importer (in the form of a trade deficit in copyright royalties). In other words, Australia imports much more intellectual property than it exports. This distinction can become

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<sup>5</sup> *Copyright Act*, codified at 17 USCA §§ 101-1332 (1976).

<sup>6</sup> Digital Millennium Copyright Act, codified at 17 USCA § 1201-1205 (1998).

<sup>7</sup> Agreed at WIPO's Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (Geneva, 2-20 Dec. 1996).

important when each nation determines in whose favor the balance between protection of and access to copyrighted works is achieved.<sup>8</sup>

In order to understand approaches taken to digital media and fair dealing, it is necessary to look at copyright law more generally. This section will first provide an introduction to the rationale underlying copyright laws, with a focus on the perspective held in common law countries, and in Australia and the United States in particular. Fair dealing provisions as they relate to works expressed in “traditional” media forms will then be discussed.

## 2.1 Rationale of copyright law

The reason for creating fair dealing exceptions goes directly to the rationale behind copyright laws. The challenge presented by intellectual property laws generally, and copyright specifically, is to provide incentives for both innovation and improvement.<sup>9</sup> Innovation is what occurs when a new work is created; improvement is the process by which subsequent authors build on pre-existing works to create new ones. As Justice Laddie of the United Kingdom has noted, “[t]he whole of human development is derivative” – emphasising that true originality, uninfluenced by any other sources, is unlikely to exist.<sup>10</sup>

In order to create appropriate incentives to serve these societal interests, it is necessary to balance the interests of both copyright owners and users. Fair dealing forms an important part of this balance, as the defence provides access to works that would be costly to purchase for the purposes of research and development, and thus for the ultimate purpose of improvement.<sup>11</sup>

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<sup>8</sup> S Fitzpatrick “Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty” 22 EIPR (2000) 214. From an economic point of view, changes in copyright protection will alter the price of access to copyrighted works and thereby affect the quantity of those works. These decisions have both a marginal impact (on output and use) and infra-marginal effects. For a net importer, the infra-marginal effects broadly correspond to a deterioration in its terms of trade, though this may not occur if the changes are fully reciprocal.

<sup>9</sup> MA Lemley “The Economics of Improvement in Intellectual Property Law” (1997) 75 Texas L. Rev 989, 990.

<sup>10</sup> H Laddie “Copyright: Over-Strength, Over-Regulated, Over-Rated” (1996) 18 EIPR 253, 259.

<sup>11</sup> To be strictly accurate, there are no “new” works as such created; absolutely everything that is created which can be protected under copyright (as distinct from patent) laws is based not only on a shared cultural heritage, but can usually be traced to other works. For example, even Shakespeare, who is regarded as one of the most creative writers in the English language in history, heavily drew upon other sources for his works. One conclusion that arises out of this lack of true originality is that an attempt to separate “original” and “derivative” works from one another is futile, because the “original” is also derivative. This kind of view can have a profound impact on the law of copyright itself, because if one recognizes that all works are in a sense “derivative”, claims for access would be considered more sympathetically, and claims by publishers and authors to carve out exclusive rights might be regarded less sympathetically.

Theoretically, since copyright law protects forms of expression, rather than the ideas and facts contained in a creative work,<sup>12</sup> the privileges extended to copyright holders do not prevent subsequent authors from building on pre-existing works. In addition, fair dealing provisions establish areas in which the needs of the public domain supersede those of copyright owners. While the ultimate purpose of these laws is not to compensate authors, one of their secondary effects is to achieve precisely this, so as to fulfil a broader longer-term goal: encourage contributions of creativity for the general public good.<sup>13</sup>

Economics-based theories of copyright are not the only ones, however, and are in stark contrast to those founded on theories of natural and moral rights. As such rationales have strongly influenced the international intellectual property treaties to which Australia is subject, some consideration of these theories will also be made.

### 2.1.1 Economic rationales for copyright

The central problem in modern copyright law is how to encourage artistic creativity, while at the same time protecting public availability of the resulting works, for the purposes of improvement and other socially laudable uses. As a practical matter, this aim involves creating an equilibrium between incentives and access.<sup>14</sup> The structure of copyright law attempts to do both, but maintaining this balance is difficult, especially because intellectual property laws are often in conflict with notions of free competition.

The basic approach behind copyright laws in common law countries has been to articulate a set of exclusive rights enjoyed by the owners of copyrighted works, and then to carve out situations in which social aims outweigh private rights. These situations thus form the basis of exceptions to copyright protection. The way such exceptions are established in particular countries differs. While the development of intellectual property rights in Australia is primarily a matter for the legislature, in the United States the judiciary and administrative bodies play a larger role. What is clear, however, is that fair dealing/fair use is an essential part of copyright law in both countries.

From a simplified perspective, the instrumentalist view of copyright law is that it should provide incentives to promote the creation and dissemination of knowledge, and is closely linked to utilitarian notions of economic efficiency. The United States Constitution justifies intellectual property rights in this context, by stating that they “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings

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<sup>12</sup> *Feist Publications, Inc v Rural Telephone Service Co, Inc* 499 US 340 (1991) (holding that the information in a published telephone directory did not merit copyright protection).

<sup>13</sup> Information Infrastructure Task Force (Working Group on Intellectual Property Rights), “Intellectual Property and the National Information Infrastructure” (Sept. 1995) (“NII White Paper”), 19-23.

<sup>14</sup> WM Landes and RA Posner “An Economic Analysis of Copyright Law” (1989) 18 J Legal Stud. 325, 326.

and discoveries....”<sup>15</sup> Although compensation to the author is not the primary purpose of copyright protection, the law nonetheless provides potential copyright holders with a set of rights that might encourage them to be creative.<sup>16</sup> The rationale underpinning this view is that if authors had no recourse against parties that copied their works without permission, they might be discouraged from investing their time and resources in creative pursuits.

The other side of this protection regime is that copyright may appear to grant authors an “unfair monopoly”<sup>17</sup> over their creations, but the law is designed to benefit society as a whole, and any advantages to individual authors are incidental to this aim. The general approach is that without some guarantee of protection, authors might be reluctant to publish their works, as they might fear that others would profit from their works without investing time or effort. Society thus benefits from a higher number of creative works than it might otherwise enjoy.

Fair dealing provides the primary limitation on this author-enjoyed monopoly. In Australian jurisprudence, fair dealing is viewed as a means of pursuing aims that have a socially laudable component, and limiting proprietary rights in creative works when they would hinder these aims.<sup>18</sup> The DAA extends this approach to digital works. Similarly, in the United States, the Supreme Court noted in a seminal case on fair use, *Sony Corp. of America v Universal City Studios, Inc.*, that the purpose of copyright laws was not to advantage the copyright owner, but to further the public good:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors...by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.<sup>19</sup>

However, the American position on fair use and digital works is somewhat different from the approach taken in *Sony*, as an analysis of the DMCA will demonstrate.

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<sup>15</sup> United States Constitution, Art. I, § 8; *Feist Publications, Inc v Rural Telephone Service Co, Inc* 499 US 340, 349-350 (1991). This passage from the Constitution refers to other forms of intellectual property in addition to copyright, although only copyright will be discussed here.

<sup>16</sup> *Mazer v Stein* 347 US 201, 219 (1954).

<sup>17</sup> Obviously, copyright rarely grants a monopoly in an economic sense, since it rarely grants market power. There are substitutes available for most copyright works. This situation of course does not mean that the owner of a collection of such works might not hold significant market power, including through the protection copyright grants.

<sup>18</sup> J McKeough and A Stewart *Intellectual Property in Australia* (2nd edn Butterworths Sydney 1997) ¶ 8.24.

<sup>19</sup> *Sony Corp of America v Universal City Studios, Inc* 464 US 417, 429 (1984) (discussing significance of changes in technology and their effect on copyright law).

Although they lack the overt bias towards copyright owners characteristic of moral rights theories of copyright, economics-based approaches do grant copyright owners exclusive privileges over their works for a limited period of time.<sup>20</sup> The tension between intellectual property and competition principles can be high; intellectual property rights both encourage innovation and prevent it, by protecting the author's investment but also preventing competition as a result.<sup>21</sup>

From an economic perspective, the balance struck between access and protection can be stated as follows:

- The intellectual property embodied in a copyrighted work is a non-rivalrous good, *i.e.*, multiple persons can enjoy it simultaneously, without anyone interfering with anyone else's enjoyment. This means that once the work has been produced, no natural scarcity attaches to it, in contrast to a physical good.
- This non-rivalrous nature reduces returns to the author, because the marginal cost of others reusing the intellectual property embodied in an already created work is close to zero.<sup>22</sup> These reduced returns mean that while there is no natural scarcity attaching to intellectual property *ex post* production, there would, in the absence of intellectual property rights, be a scarcity of intellectual property produced in the first place, *i.e.*, an *ex ante* scarcity.
- Copyright remedies this problem by assigning to the author the power, subject to certain qualifications, to dictate the conditions of dissemination of his or her work.<sup>23</sup> Among these qualifications are fair dealing provisions. However, the assignment of exclusive rights creates an artificial scarcity, as the intended effect is to raise the price of the intellectual property above the marginal cost of zero. This treatment can lead to losses in allocative and productive efficiency, because costs are higher than they could have been without copyright protection, and some resources are diverted from other valuable uses.<sup>24</sup>

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<sup>20</sup> In the case of United States copyright, this period of time now runs for a maximum term of life of the author plus ninety-five years--which one could argue is not particularly limited at all.

<sup>21</sup> MA Lemley (1997), 996.

<sup>22</sup> This assumption ignores the costs of physical reproduction since the value added by the intellectual property does not consist of these physical features - rather it is embodied in physical media like books.

<sup>23</sup> Of course, the owner may not be the creator of the work at all, *e.g.*, an author may assign copyright to a publisher or other party. However, this does not affect our analysis because the incentive effects intended by the law still exist in these circumstances. For instance, if copyright laws were only nominally enforced, the author would not be able to demand a very high price for assigning the copyright to the publisher since the copyright would be almost worthless. Thus the author earns fewer returns from his work the lower the level of copyright protection even if he owns no copyright himself.

<sup>24</sup> The losses in allocative efficiency need not occur if price discrimination is perfect. Even then, however, there may be some losses in productive efficiency, unless the discrimination simultaneously prevents any duplication of the fixed costs involved in the wasteful creation of

In other words, the access-protection tradeoff can be recast in more particular economic terms as a tradeoff between the incentive (by raising returns to the creator) and cost-raising effects of the artificial scarcity created by copyright, the latter of which have adverse implications for access. Ideally, the artificial scarcity created by intellectual property protection, with its resulting sacrifices of productive and allocative efficiency, should be no more than is sufficient to induce the 'right' amounts of intellectual property creation.<sup>25</sup>

#### 2.1.1.1 Fair dealing

However, it is important to remember that this imbalance is tempered by certain exceptions to the exclusive rights enjoyed by copyright owners, including fair dealing. The fair dealing exception exists because the aim of intellectual property law is not to favour any particular party over another, but to ensure an outcome that is beneficial to society as a whole.

Explaining the fair dealing provisions of the DAA in terms of economic rationales requires additional consideration of two factors. First, the tradeoffs between incentive effects and cost-raising effects as framed so far have ignored the imperfect real-world implementation costs of a copyright regime. Second, they do not sufficiently highlight the costs of copyright for the production of derivative works. Only a fuller analysis of these two factors can explain why a qualification to copyright protection might take the form of fair dealing provisions rather than alternative means.

With respect to the first point, in the real world there are various frictions involved in the administration of any legal regime. These frictions lead to additional losses of allocative and productive efficiency, which must be taken into account and which, in the case of intellectual property (where there may be greater difficulties with respect to enforcement, especially with digital works), can count in determining the efficient degree and form of protection.

The second point arises from the fact that the majority of intellectual property protected by copyright in fact builds on previously created works. To put this point another way, the tradeoff between "access" and "incentives" is more complex than the dichotomy suggests, because the "incentives" should be tailored towards encouraging the optimal mixture of innovation and improvement.<sup>26</sup> Innovation is what occurs when a new work is created; improvement is the process by which subsequent authors build on pre-existing works to create new ones, *i.e.*, the production of "derivative works".

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similar works. In other words, if the rents accruing to the owner stimulate production of "me too" or imitative works, there may be net losses as a result.

<sup>25</sup> MA Lemley (1997), 996.

<sup>26</sup> MA Lemley (1997), 990.

As Landes and Posner have argued, this has implications for the prospective author's own interests.<sup>27</sup> Most copyrightable works build heavily on earlier works—“innovations” arguably form the minority of copyrightable works. Therefore, the prospective creators of such works may themselves benefit from limiting the scope of copyright protection. While an increase in the scope of protection may enhance the creator's expected revenues, it is also likely to increase the costs of creating works that may attract copyright protection.

The balance between the rights of owners and users of copyrighted works is an important one to achieve, and fair dealing is fundamental to striking this balance.

It is the responsibility of policy makers to take a forward-looking stance on the implications of recent developments for policies formulated sometime in the past. Hence it is worth considering the implications of digital technology in making this cost-benefit calculation. While digital technology provides users with the means of making perfect copies at little or no expense, it also means that copyright owners may benefit from this technology, by controlling access to their works. Overall, this ability may have a negative impact on society, by reducing the number of works held by society as a whole, although it may also enable copyright holders to ensure in practice the protection that copyright laws grant them in theory.<sup>31</sup> The implications of digital technology for the copyright and fair dealing doctrines will be considered in **Part 3**.

### 2.1.2 Non-economic rationales for copyright

This instrumentalist, economics-based view of copyright law is not the only one. At a global level, the rationale for copyright laws is founded on moral rights, as well as incentives-based rationales. While incentives-based systems usually look to economics as a source, natural law theories of copyright are based on notions of fairness and the autonomy of the creator. The major difference between these approaches is that systems based on moral rights clearly privilege the copyright owner above users, while economics-based theories attempt to balance the interests of both parties.

Natural rights theories or “personality” theories of copyright value above all else authorship itself. In countries such France and Germany, moral rights enjoy a status at least equivalent to economic rights in copyright theory. The specific expression of moral rights differs between countries; in France, they are perpetual (causing a conflict with economic rights), while in Germany moral and economic rights have the same duration as one another (and are essentially different aspects of the same

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<sup>27</sup> WM Landes and RA Posner (1989).

<sup>28</sup> NW Netanel “Copyright and a Democratic Civil Society” (1996) 106 Yale LJ 283, 288.

<sup>29</sup> NW Netanel (1996), 285, 288.

<sup>30</sup> WM Landes and RA Posner (1989), 359-360.

<sup>31</sup> L Lessig *Code and Other Laws of Cyberspace* (Basic Books New York 1999), Chapter 15.

body of protection).<sup>32</sup> Article 6bis of the Berne Convention requires Member States to provide to an author, “[i]ndependently of the author’s economic rights, and even after the transfer of the said rights, ... the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”<sup>33</sup>

Historically, countries with civil law systems tend to ascribe to natural rights theories, while countries with common law systems tend to adopt incentives-based theories of intellectual property. However, this distinction is often not clear, and has become less so, in large part due to requirements imposed by the Berne Convention on member nations. Australia recognised limited moral rights of authorship in Part IX of the Copyright Act, but recently adopted a much broader set of moral rights in the *Copyright Amendment (Moral Rights) Act 2000*, including rights to attribution and integrity of authorship.<sup>34</sup> United States intellectual property law, historically founded on incentives-based theories, is increasingly looking to moral rights (*droit moral*) as a source of justification, usually for extending intellectual property laws in favour of their creators.<sup>35</sup> And the United Kingdom has had to cope with the introduction of natural rights theories via the European Union harmonisation process. The *droit moral* perspective adopts the notion that copyright protection exists primarily to preserve an author’s reputation and connection with their creations, rather than being solely or primarily a means to provide economic incentives for creativity.<sup>36</sup>

Despite these changes, and the influence of international treaties such as the Berne Convention on signatory nations, the incentives-based rationale for copyright law remains central to Australian, American, and British intellectual property rights, and it is in this context that more recent legislation functions, including those concerning digital works.

However, just as there are non-economic rationales for copyright, there are also non-economic rationales for **exceptions** to copyright. One notable non-economic

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<sup>32</sup> WR Cornish *Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights* (4th edn Sweet & Maxwell London 1999) ¶ 11-63.

<sup>33</sup> Article 6bis, Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979.

<sup>34</sup> *Copyright Amendment (Moral Rights) Act 2000* (Cth). The Act received royal assent on 21 Dec. 2000. Intellectual Property Branch of the Attorney-General’s Department, Copyright Newsletter, vol. 18 (Dec. 2000), [http://law.gov.au/publications/copyright\\_ews/issue18.html](http://law.gov.au/publications/copyright_ews/issue18.html).

<sup>35</sup> Perhaps natural rights theory makes more sense than economic justifications for extending the maximum copyright term in the United States to 95 years, as was achieved by the 105<sup>th</sup> Congress in the *Copyright Term Extension Act* (which legislation is currently under challenge in the District of Columbia Circuit Court of Appeals).

<sup>36</sup> WR Cornish *Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights* (4th edn Sweet & Maxwell London 1999) ¶ 11-64.

rationale for placing limits on copyright which thus should be balanced against the so-called 'natural rights' of producers is the "support of a democratic culture"<sup>37</sup>:

If copyright is cast too narrowly, authors may have inadequate incentives to produce and disseminate creative works or may be unduly dependent on the support of state or elite patrons. If copyright extends too broadly, copyright owners will be able to exert censorial control over critical uses of existing works or may extract monopoly rents for access, thereby chilling discourse and cultural development.<sup>38</sup>

In other words, the expense of a copyright doctrine which places too much weight on the natural rights of producers and thus construes too restrictively, activities such as review and parody, which serve the important role of social criticism, would be to undermine an essential component of a free and democratic society. Fair dealing, by providing exceptions in this area, supports the valuable goal of striking an appropriate balance.<sup>39</sup>

## 2.2 Fair dealing and traditional forms of media

Both Australian and United States copyright statutes incorporate fair dealing exceptions to the normal operation of copyright provisions, in the form of affirmative defences to claims of copyright infringement. However, neither the terms nor the substance of these exceptions are identical. While the provisions articulated in the Australian Copyright Act are **exhaustive**, the categories set forth in the US Copyright Act are treated as merely **illustrative**.<sup>40</sup> This distinction is of considerable importance when it comes to providing the right set of economic incentives for creators of intellectual property, as will be discussed in **Part 4** of this paper. It more widely reflects an underlying difference in approach between an emphasis on relatively tightly specified "rules" and one set on somewhat looser "standards", as well as different conceptions as to the roles of non-legislative bodies in the development of intellectual property rights.

### 2.2.1 Judicial and legislative roles

The legislative preference for rules or standards is connected to the extent to which the legislature, the judiciary, and other non-legislative bodies take responsibility for law formation and interpretation. The Australian adoption of a specifically drafted, rules-based system of fair use is dependent upon a flexible parliamentary system in which minor legislative change is not overly difficult to achieve. In contrast, the United States legislature has adopted a broader, standards-

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<sup>37</sup> NW Netanel (1996), 288.

<sup>38</sup> NW Netanel (1996), 285, 288.

<sup>39</sup> WM Landes and RA Posner (1989), 359-360.

<sup>40</sup> The "exhaustive" nature of fair dealing in the Copyright Act 1968 is mild compared to parallel provisions in the United Kingdom 1988 Copyright, Designs and Patents Act, which contains forty-nine sections articulating exceptions to copyright infringement. H Laddie (1996), 258.

based approach to fair use, requiring a much higher level of interpretation at the level of the courts, which are required to interpret broad standards for particular situations.

The institutional characteristics of the lawmaking processes in Australia and the United States contribute directly to the roles of rules and standards in their legislation. The American political-legal system depends on the judiciary to interpret legislation to a much greater extent than in England or Australia. Moreover, the nature of legislation in the United States is less formalised (*i.e.*, rule-based) than in countries adopting the English approach to law and governance. These differences are particularly important when considering their approaches to statute, and the relative reliance on rules and standards.

Studies of American and English institutional structures and legislative practices provide a valuable source for this comparison. Although Australia's political structure, which combines federalism with a Westminster style of leadership and decision-making, is a hybrid of American and English approaches, there is still much about statute-creation at the Commonwealth level that resembles "English" law-making practices. While the more extreme Anglo-American contrast will be taken as a starting point, note will be made where English and Australian practices differ.<sup>41</sup>

The most basic contrast between how law is made in the United States and in England is the extent to which the process itself is centralised. In the United States, the combination of federalism and the separation of powers (between executive, judicial, and legislative branches of government) results in a weaker legislature than in England and Australia, where centralised political institutions are the rule. In England, the Parliamentary system is not characterised by any clear separation of powers between legislature and executive, and the most powerful arm of government, the Cabinet, is effectively a combination of the two. Moreover, the Prime Minister himself is a creature both of Parliament and the executive branch. The corollary of this strength, however, is that the judiciary is relatively weak, in contrast to the United States, where the judiciary is often left to interpret unclear statutes.<sup>42</sup>

The process of law making also suggests how these contrasts work in practice. In the Parliamentary system, a tight executive-legislature relationship makes it relatively easy to propose and pass minor legislative amendments. Statutes are proposed by Parliament, but their passage is controlled by the Cabinet, which is in turn controlled by the ruling party, *i.e.*, the party that controls Parliament. As a result, it is rare for legislative proposals approved by the Cabinet not to go through

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<sup>41</sup> This approach is taken for the very practical reason that most literature on this topic focuses on the differences between English and American legal and political systems, rather than between Australian and English or American systems. Using analysis of the English system is not a perfect proxy for the Australian system, as England lacks a federal structure and other defining characteristics of the Australian political and legal structure, but the historical dependence of the Australian system upon the English makes this analysis a good place to start. Much of the following discussion is drawn from PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press Oxford 1987).

<sup>42</sup> PS Atiyah and RS Summers (1987), 299-302.

Parliament successfully. The negative side of this situation is that private Members' bills are rarely passed, particularly if the government opposes them.<sup>43</sup>

This concentration of power in the Cabinet is a function of the strong party system, where support of the party for its candidates is high; and as a result the party demands a high level of loyalty from its Members. Party discipline is considerable, as is trust between parts of government. In part as a result of this party discipline, legislation once adopted tends to be precise, being the result of an agreed approach by the majority party.<sup>44</sup>

In the United States, no single institution controls legislation to the extent of the English-style Cabinet. The clear separation between executive and legislature, and the relative lack of party discipline, means that federal legislation in the United States is usually the result of multiple compromises between numerous interest groups, and contains a greater proportion of open-ended concepts. This is not to say that compromises do not occur in the English-style system, but rather that the leading party tends to communicate a fairly strong "party line".<sup>45</sup> Because the political system is not so strongly party-based, legislative debates tend to be multi-issued, rather than a decision between one approach or another. While legislative compromises are often unnecessary in the Westminster system, which allows the policy of the stronger party (*i.e.*, the Government) fairly smooth passage into law, the less polarised party system in the United States leads to multi-sided issues and legislation that is the result of compromises.<sup>46</sup> Obsolete legislation can be a result of these difficulties, procedural and otherwise.<sup>47</sup>

In keeping with its centralised organisation and policy, the very process of drafting legislation is much more uniform in the United Kingdom than in the United States. Major English legislation is the product of the Office of Parliamentary Counsel, which has a uniform approach to the task. The Australian Commonwealth government takes the same approach, by giving its own Office of Parliamentary Counsel ("OPC") the task of drafting national legislation.<sup>48</sup> The job of the OPC staff is to create an exact expression of the policy to be codified in statute:

The drafters consider the constitutional and legal background against which the legislation is to be framed, analyse the policy and determine the structure of the legislation. Then they draft the legislation in terms intended to give effect, as precisely as possible, to the policy. ...

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<sup>43</sup> PS Atiyah and RS Summers (1987), 300-302.

<sup>44</sup> Atiyah and Summers (1987), 305.

<sup>45</sup> Atiyah and Summers (1987), 314

<sup>46</sup> Atiyah and Summers (1987), 310-314.

<sup>47</sup> Atiyah and Summers (1987), 315.

<sup>48</sup> Subordinate legislation (such as regulations) are prepared by the Office of Legislative Drafting.

The function of OPC is the continued delivery of quality legislation – legislation that embodies good legislative practice, that accurately reflects the client’s instructions and that is presented in a form and structure that promotes ease of use and understanding.<sup>49</sup>

The result of this approach is that legislation is drafted by staff devoted to and trained for the task, and thus tends to have a regular and predictable format and style. United States legislation does not have such uniformity of style and language. In part it may originate from any individual member of the House of Representatives or Senate, may be drafted by any such member or their personal staff, and may undergo substantial drafting changes during the process of consideration.<sup>50</sup> Unlike Members of the Australian Parliament, all of whom may call upon the support offered by the Office, Members of the United States House of Representatives must rely on their own resources.

The reason for describing these processes is that the form of legislation in each country has a direct impact on the role of courts in the process of making law. English-style statutes tend to be interpreted in a uniform fashion by the judiciary, simply because of the uniform style of drafting. In the United States, legislation is neither so uniform nor is the judiciary’s interpretation of it so predictable.

As a result of many factors, including party-polarised policies and precise legislative drafting, it is possible to create English (and Australian) statutes that are in essence a set of rules. The highly uniform method of drafting (and an accordingly consistent judicial practice of interpretation) makes it possible to formulate such a set of rules that are largely unambiguous in expression and interpretation. In the United States, there is a strong tradition of drafting by stating broad principles (as in the Constitution), rather than as detailed rules. The Constitutional power of the courts in the United States mean that difficult legislative decisions are sometimes left to judicial discretion, whether by intent or not.<sup>51</sup>

Accordingly, there is a high level of confidence and comfort with judicial discretion in the United States. However, sometimes inconsistent rulings can result. According to Landes and Posner, it is conventionally believed that “no general theory can explain the cases that invoke the doctrine” of fair use in the United States.<sup>52</sup> This conclusion is particularly true of the United States form of the doctrine, given the open-ended nature of the criteria noted in § 107 of the US Copyright Act, which simply identifies purpose, nature, amount, and effect as the guiding principles for finding a case of fair use.<sup>53</sup> The relative importance of these factors is left to the courts to decide. By contrast, in Australia and England, the precision of most statutes does not require radical judicial interpretation.

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<sup>49</sup> Office of Parliamentary Counsel website, <http://www.opc.gov.au/about/index.htm>.

<sup>50</sup> Atiyah and Summers (1987), 315-323.

<sup>51</sup> Atiyah and Summers (1987), 323.

<sup>52</sup> WM Landes and RA Posner (1989), 357.

<sup>53</sup> 17 USCA § 107.

### 2.2.2 Rules versus standards

The foregoing discussion demonstrates that the general preference for rules or standards in Australia and the United States is in great part a product of fundamental structural and historical differences. Rules and standards also impose different costs on government and society.

The Australian approach to fair dealing is characterised by the adoption of a set of fairly specific rules, rather than the broader standards in the US Copyright Act. While from an American perspective the rules format may seem lacking, in its prescribed definition of situations in which fair dealing may be asserted, in practice a rules-based approach can impose a lower cost on society and the judiciary. Standards may be more easily adaptable to changing situations, but rules avoid the need for the judiciary to engage in time-consuming analysis every time a potential case of fair dealing arises. Moreover, reliance on legislatively defined rules can avoid some of the market failure problems that undermine the development of efficient approaches through piecemeal litigation.<sup>54</sup>

On the other hand, rules are more costly to formulate in the first instance, given the upfront costs to policymakers of collecting the necessary information and submissions. In Australia, the OPC has the very real cost of supporting a staff of approximately 45 people, who receive detailed instructions from the relevant government agency before drafting legislative material.<sup>55</sup> (In the United States, no such entity exists, although individual Representatives' offices bear the burden of legislative drafting.) In addition, making all the relevant considerations to draft specific rules, and thus avoid errors that may have long-term consequences, may be more time-consuming and costly than implementing more general standards. Nonetheless, on balance, the Australian approach to fair dealing may be preferable, given its higher degree of precision and uniformity.

To make this conclusion in favour of rule-based laws clearer, further description of the differences between rules and standards is appropriate here. The basic difference between laws that are rules and laws that are standards lies in the extent to which they are designed *ex ante* to provide a tangible set of guidelines, or *ex post* to provide general guidance on issues, leaving the specific application of general principles to the courts (or to some other authorised decision-maker). While standards may in some ways be more flexible and easily applied to a multitude of situations, rules provide a degree of certainty and clarity before an issue is adjudicated.<sup>56</sup> And while rules may be more costly to create than are standards, requiring as they do a more in-depth understanding of the specific situations involved, standards typically require repeated expenditure (and more generally social cost<sup>57</sup>) at the adjudication stage.

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<sup>54</sup> See sections 2.2.1 and 2.2.4.

<sup>55</sup> Office of Parliamentary Counsel website, <http://www.opc.gov.au/about/index.htm>.

<sup>56</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 215-216 (McHugh J).

<sup>57</sup> Including the social cost of the uncertainty associated with litigation, which includes the risk of litigation being wrongly decided. A system based on resolving issues through litigation may

Another way of expressing the difference is that rules lead to more predictable outcomes, which are closer in line with legislative intent. The description of the statute-creation process in England and Australia is certainly consistent with this characterisation. Standards, which depend upon a greater degree of analysis and time on the part of the judiciary each time they are applied, are more likely to diverge from legislative intent.<sup>58</sup> However, as Louis Kaplow has noted, while standards might be said to have a cost at the point of judicial decision-making, rules bear a similar cost at the point of legislative decision-making:

While rules are more costly to promulgate than standards because rules involve advance determinations of the law's content, standards are more costly for legal advisors to predict or enforcement authorities to apply, because they require later determinations of the law's content.<sup>59</sup>

As a result, rules tend to lead to more predictable outcomes that are less of a drain on the resources of the judiciary. The outcome of applying rules are more likely to be consistent with the intent of the legislature than are standards, which depend upon a greater degree of analysis and time on the part of the courts.<sup>60</sup>

### 2.2.3 Fair use in Australia

The Australian *Copyright Act* defines fair dealing exceptions that operate only in specific circumstances, adhering closely to a rule-like law. Under the Act, it is not copyright infringement to reproduce protected works if the purpose falls into one of four categories: (1) research or private study; (2) criticism or review; (3) news reporting; or (4) a judicial proceeding. The DAA extends these defences to the digital realm.<sup>61</sup> This approach is in direct contrast to that adopted by the United States legislature, which has chosen not to extend the same fair use provisions allowed "traditional" media into the digital realm, but to provide a *sui generis* set of provisions.

For libraries, the most important of the Australian limitations on the rights of copyright owners is the first, which allows special access for the purposes of research and private study. If the use of copyrighted material falls within the fair dealing

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fail to reach efficient outcomes if the litigation decision involves externalities. For example, a decision that confirms an exclusive right confers benefits that accrue entirely or at least very largely to the owner of those rights; while one that narrows those rights will typically yield benefits partly captured by consumers. As a result, any individual third party that might pursue such a claim cannot expect to obtain the full social benefit of its action. It follows that from a societal point of view, there will generally be too little legal challenge to exclusive rights.

<sup>58</sup> L Kaplow "General Characteristics of Rules" (1996), John M. Olin Center for Law, Economics, and Business, Harvard Law School (Discussion Paper No. 191).

<sup>59</sup> L Kaplow "Rules Versus Standards: An Economic Analysis" (1992) 42 Duke LJ 557, 562-563; L Kaplow (1992), 562-563.

<sup>60</sup> L Kaplow (1996).

<sup>61</sup> *Copyright Act 1968* (Cth), ss. 40-44.

exception, the user will not be required to obtain explicit permission from the copyright owner in order to reproduce the work. However, it is not enough simply to claim that the use of copyrighted material is exempt because the use is educational. Instead, section 40(2) articulates a set of factors that is taken into account when determining whether the fair dealing defence applies, regardless of the context of the use asserted:

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

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is copied – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.<sup>62</sup>

It is interesting that although the Australian approach to fair dealing is more specifically articulated than in section 107 of the US Copyright Act, the text of section 40(2) of the Copyright Act is very similar to guidelines developed for American “fair use” provisions.<sup>63</sup>

#### **2.2.4 Fair use in the United States**

As noted earlier, the fair use provisions set forth in the US Copyright Act are illustrative, in contrast to Australia’s more specific criteria. In this way, the United States laws more closely resemble standards rather than rules. They are so broad as to require a great deal of judicial guidance.

Section 107 of the US Copyright Act establishes a test for determining whether a fair use exception applies, involving four factors that are both defined by statute and developed in case law. Although not discussed in any detail in section 107, case law has established that generally all four factors are considered, and failure on any count may preclude a finding of fair use. These elements are:

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<sup>62</sup> *Copyright Act 1968 (Cth) s. 40(2).*

<sup>63</sup> *Universal City Studios, Inc v Sony Corporation of America* 480 FSupp 429 (CD Cal 1979).

- The “purpose and character” of the use, focusing on whether or not the use is either for profit, or for “non-profit educational purposes”. Non-commercial uses enjoy the presumption of fair use.
- The nature of the copyrighted work. This factor has not been discussed much in fair use jurisprudence, but seems to ask whether the nature of the work is such that distributing it would serve the public interest.
- The “amount and substantiability” of the part of the copyrighted work used. The use of small proportions of a copyrighted work, as opposed to large sections, supports a finding of fair use. Thus, book reviews are an example where the exclusive right of reproduction is relaxed in the favour of the public.
- Finally, courts consider whether the use has an effect on the “potential market for or value of the copyrighted work”. Uses that do not limit the ability of the copyright owner to reap benefits in markets not already exploited tend to support a finding of fair use, although some controversy exists as to which markets should be reserved to the copyright owner.<sup>64</sup>

The application of these principles is not always straightforward. Indeed, it is difficult to discern any “universal” definition of fair use from these provisions.<sup>65</sup> This lack of precision is double-edged: it gives courts the flexibility to prevent copyright from being abused by owners, but it can also be a disadvantage, in that the actual scope of the exceptions may depend on the individual judge.<sup>66</sup>

In addition, it is not clear from the text of the US Copyright Act which of these factors command greater weight, or how exactly the analysis should be conducted. In response to this fundamental lack of clarity, Wendy Gordon has argued that fair use should be applied consistently with the economic principles underlying copyright. This approach results in the finding that fair use should come into play when copyright laws cause market failure. According to this perspective, fair use should be awarded to the user when market failure is present, transfer of the use away from the copyright owner is socially desirable, and an award of fair use would not cause substantial injury to the incentives of the copyright owner.<sup>67</sup> While this perspective is a valuable one, it demonstrates how little guidance is given by the text of the statute itself.

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<sup>64</sup> *Universal City Studios, Inc v Sony Corporation of America*, 480 FSupp 429 (CD Cal 1979).

<sup>65</sup> *KD Crews Copyright, Fair use, and the Challenge for Universities: Promoting the Progress of Higher Education* (University of Chicago Press Chicago 1993) 24.

<sup>66</sup> H Laddie “Copyright: Over-Strength, Over-Regulated, Over-Rated” (1996) 18 EIPR 258.

<sup>67</sup> WJ Gordon “Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors” (1982) 82 Colum L Rev 1600, 1603-1605.

### 2.2.5 Comparing Australian and American approaches

Overall, the American fair use criteria are similar to those in the Australian *Copyright Act* 1968. However, it is important to note that in enumerating the four criteria, Congress explicitly commented that the list was non-exhaustive, and encouraged the courts to develop the doctrine further. By contrast, each situation in which a defence of fair dealing might arise is specifically noted in the *Copyright Act* 1968, from news reporting (ss. 41, 103B) to research and study (ss. 40, 103A).

This is not to say that the Australian system is unable to deal with new situations--but that in Australia it is usually the legislature that attempts to do what is more commonly left to the judiciary in the United States. For example, while the breadth of the United States provisions allows copying for the purpose of ensuring interoperability between computer programs, the Australian approach was to adopt specific legislation achieving the same end.<sup>68</sup> Although it could be argued that the American approach provides less certainty for both owners and users of copyright, it is also fair to note that the very predictability of the Australian statute can be to the potential disadvantage of the public domain, and accordingly to society and the economy as a whole.

Thus, in 1998, the Copyright Law Review Committee (the "CLRC") advocated a number of revisions to the fair dealing exceptions to the Copyright Act.<sup>69</sup> In addition to suggesting that numerous fair dealing provisions should be consolidated, the CLRC also argued that they should be expanded to include situations not specifically noted in the Copyright Act. It is the belief of the authors of this paper that, in addition to the specific fair use defences allowed in the Act, a more general provision allowing for unforeseen circumstances could be valuable. While copyright laws exist to protect the owners of creative works, the intent behind the laws is not to protect them absolutely. Indeed, it can be argued that more permissive fair dealing provisions encourage people to create more intellectual property, rather than the other way around. Promoting innovation -- the improvement of existing works, and the subsequent creation of further works -- is the primary reason in common law-based legal systems for intellectual property laws. If encouraging Australia to create intellectual property-based products is a sensible policy goal, both protection and access are necessary prerequisites.

## 3 Fair dealing for digital works

National copyright laws are increasingly subject to the terms of international treaties. Both copyright protection itself and fair dealing must be consistent with

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<sup>68</sup> In Australia, the legislature built into the *Copyright Act* 1968 a specific exception to allow for reverse engineering of software for the purposes of ensuring interoperability. The *Copyright Amendment (Computer Programs) Act* 1999 (Cth) added s. 47D to achieve this end. It is interesting that although the terms of § 107 of the US Copyright Act permit the same exception, that the DMCA added a provision to United States copyright law that achieves the same end. 17 USCA § 1201(f).

<sup>69</sup> The Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part I – Exceptions to the Exclusive Rights of Copyright Owners* (September 1998), Chapter 6.

these provisions. As a result, there are some similarities between the copyright laws of signatory nations to these treaties, particularly in terms of the general rights recognised. But even countries with similar legal systems, such as Australia and the United States, also have some significant differences when it comes to extending fair dealing and fair use provisions to digital media, not least because of the differences between their copyright laws generally, as discussed above. Nevertheless, considering the obligations imposed by these treaties is an important step towards understanding the nature of the domestic laws themselves.

### **3.1 A note on the challenges of digital media**

Even if it is accepted that fair dealing exceptions should apply equally to digital and non-digital works, it is true that digital works have some characteristics that differentiate them from creations in “traditional” media.

The distinguishing features of digital media are fairly easy to identify. First, digital works are typically easy to reproduce at very low or no cost. A good example of this characteristic is very simple: given the necessary equipment, it is much faster and easier to reproduce a book or article in digital format than it is to photocopy it. Given the right software, making a digital copy might only involve a few simple steps; photocopying a bound book will always mean a lengthy process that yields an imperfect copy. Second, once digital copies are made, they are often indistinguishable from the original. With the creation of digital watermarking and other techniques, this difficulty may be reduced; but just as quickly as programmers create new means of encryption, others will create ways of working around the new locks. Third, digital files are easy to disseminate, quickly and to a wide audience.

Digital technology provides a real challenge for existing copyright laws. Technology itself provides the means of both copying without detection, and of protecting works from such unauthorised copying. Thus, while digital technology poses a threat to copyright owners, it also provides them with a means of greater control.<sup>70</sup> More specifically, the development of trusted systems such as encryption opens up possibilities for private regulation of data transmitted over the Internet. At the same time, however, these technologies may result in fair use exceptions effectively being bypassed, and the rights of users being unjustifiably curtailed as a consequence.

For these reasons, it is understandable why copyright owners who are embarking into the world of digital publishing have some concern about applying the same fair use principles to digital as to fixed media. But these worries can be unfounded, given the controls in place over the ability of libraries to disseminate digital works.

### **3.2 International obligations: the WIPO Copyright Treaty**

To analyse the extension of fair use defences to digital works under the DAA, it is necessary to understand the context in which this amendment to the Copyright Act

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<sup>70</sup> NW Netanel (1996), 285.

was made. As both the DAA and the DMCA fulfil the respective countries' obligations under the Berne Convention and the WCT, this section will both provide background on these international convention, and describe how the DAA and the DMCA implement these obligations, with a focus on fair use provisions and potential problems for the public domain.

Both the DAA and the DMCA were enacted to implement the WCT. Given the shared motivations behind these statutes, it may be useful to examine the underlying international obligations themselves.

The different bases for copyright protection in common and civil law jurisdictions are reflected in the conflicts that have played out at the international level, particularly in negotiations over various Berne Convention revisions. This conflict is particularly acute with respect to the recognition of moral and natural rights of authors in copyright over their works. When in the United Kingdom and United States common law, copyright laws were replaced by statute, natural law concepts were superseded by an exclusive right for the author to prohibit others from copying their works without authorization. Under this system, if an author sold the rights to their work, all rights (economic or otherwise) passed to the new owner. By contrast, in the European natural rights system, authors retained their moral or personal rights in a work, even if they contracted their economic rights away. Personal rights in a creative work were considered to be inalienable.<sup>71</sup>

Thus, while in the Anglo-American world copyright has historically been considered to be an economic benefit for the copyright owner (who is not necessarily the author), in jurisdictions that subscribe to a natural rights, or "droit d'auteur" approach, copyright attaches to the author as an individual.<sup>72</sup> In the international context, the second approach is easier to adopt, as national borders do not interfere with the operation of a concept that attaches to the author permanently.<sup>73</sup> These different views on copyright played out in the negotiation of the Berne Convention, in which countries that strongly subscribed to the natural rights of authors (such as France) wanted a true codified law of copyright (a universal code), while Anglo-American countries preferred to leave most matters to national legislatures. In the end, it was a middle group of countries, preferring some common legislation along with some areas reserved for national law, which dominated the negotiations for the Berne Convention prior to 1886.<sup>74</sup>

The oldest and most fundamental of the international treaties covering authors' rights in copyright is the Berne Convention for the Protection of Literary and Artistic Works (1886). The Berne Convention has been revised and amended a number of times, including in Paris (1896, 1971, 1979), Berlin (1908), Berne (1914), Rome (1928), Brussels (1948), and Stockholm (1967). The Berne Convention is designed to protect

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<sup>71</sup> P Berger "The Berne Convention: Its History and Its Key Role in the Future" (1988) 3 JL & Tech 1, 6-7.

<sup>72</sup> P Berger (1988), 58-59.

<sup>73</sup> P Berger (1988), 7.

<sup>74</sup> P Berger (1988), 15.

the rights of authors in their “literary and artistic works,” a term which is defined very broadly, encompassing creations in scientific fields, as well as the result of artist and literary activity, “whatever may be the mode or form of expression,” although it does not specifically refer to digital works.<sup>75</sup> This treaty goes further than any other intellectual property regime to impose minimum standards on the members of the Convention.<sup>76</sup>

The core principle of the Berne Convention is that authors who are nationals of other Berne countries are granted the same treatment as is given to that country’s own nationals. The level of protection is independent of that in the work’s country of origin, and is solely determined by the protection regime in place in each particular member state. Even when the author is not a national of the country of origin, his or her work will be protected at the same level as is enjoyed by nationals.<sup>77</sup>

Although the Berne Convention grants authors certain other protections, its focus is on preserving the economic and moral rights of authors in their works. Ten exclusive rights are guaranteed to authors under the Berne Convention: reproduction; translation; recording; cinematographic; moral; broadcasting; public performance; public recitation; adaptation, arrangement, and alteration; and *droit de suite*. The most important of these rights with respect to digital works is that of reproduction, as intermediate storage of files on computers is often necessary to the ordinary use and access to such media. Article 9 of the Berne Convention, which outlines the exclusive reproduction right, states that:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

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

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.<sup>78</sup>

With respect to the development of new technologies, Berne confronts two challenges: (1) responding to the threats caused by new (and increasingly more “perfect”) reproduction techniques, such as digital recording; and (2) finding a way to protect new varieties of works, such as computer programs and files. The first challenge is really a question of over what forms of media an author will enjoy the exclusive rights set forth in the Berne Convention. The exclusive right of

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<sup>75</sup> Berne Convention, Art. 2(1).

<sup>76</sup> WR Cornish (1999) ¶ 9-26.

<sup>77</sup> Berne Convention, Art. 5.

<sup>78</sup> Berne Convention, Art. 9.

reproduction itself is determined by the definition of “literary and artistic works” set forth in Article 2(1) of the Berne Convention:

The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.<sup>79</sup>

This laundry list of works that qualify for protection has lengthened over the history of the Convention, and the adoption of various amendments and Protocols since its original adoption in 1886. However, as late as September 1979, when the Berne Convention was last amended, there was no explicit mention of digital or computer-generated works. Article 9(1) does give authors an exclusive right to authorize the reproduction of their works “in any manner or form”, which may be interpreted to encompass digital technologies. This clause is seen by some as evidence of the Convention’s ability to confront new technologies.<sup>80</sup>

Above all, the Berne Convention works to protect rights of authors in their own creations. Moral rights are explicitly guaranteed in the Berne Convention, reflecting the natural rights bias of many of its signatories. Article *6bis* of the Convention guarantees the right of the author “to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation”, separately from economic rights in the work. While economic rights may be transferred under the Convention, moral rights cannot be contracted away, by definition. Moral rights last after death until the expiration of economic rights, as determined by national legislation. In the United Kingdom, this period lasts for the life of the author plus 50 years; in the United States, the maximum term for copyright protection was recently extended to 95 years.<sup>81</sup> This Article relies on domestic enforcement and remedy provisions to safeguard this right.<sup>82</sup>

Although the Berne Convention does not cover a number of areas, including, most significantly for this context, the transmission of digital work, the WCT, which constitutes a Special Agreement under the Berne Convention,<sup>83</sup> partially clarifies the

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<sup>79</sup> Berne Convention., Art. 2(1).

<sup>80</sup> P Berger (1988), 61.

<sup>81</sup> Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, 112 Stat. 2827 (1998).

<sup>82</sup> Berne Convention, Art. *6bis*.

<sup>83</sup> Berne Convention, Art. 20. The WIPO Copyright Treaty was agreed in December 1996.

Berne Convention with respect to on-line digital services. The WIPO Copyright Treaty was negotiated at the December 1996 Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva.<sup>84</sup> For works falling within the jurisdiction of the Berne Convention, the WCT requires a right of communication to the public (Article 8), so that members of the public may access such works from a place and at a time chosen by them individually. It was not clear in prior copyright laws whether the public had a right to access in such an individual manner.<sup>85</sup> Although attempts were made to establish a right of electronic reproduction for rights holders, a consensus was not reached over how to treat technical mechanics, and the Article was deleted. Had a right of reproduction been secured, then distributors of services and information on the Internet would be able to be held liable as distributors. Given that the transmission of data over the Internet requires making copies of the data at various stages, some more or less transient (as in RAM), others more or less permanent, adapting the law to this new technology was not straightforward.<sup>86</sup>

One aspect of the WCT is that it establishes a minimum standards set of rules for copyright protection, as does the Berne Convention. Instead of attempting a harmonisation or mutual recognition of standards role, these and other intellectual property treaties represent the lowest common denominator of protection among many countries, each with their different levels of protection. One reason proposed for this approach with respect to the WCT, which is not that used for many non-intellectual property international treaties, is that there is no international consensus regarding the treatment of material transmitted over the Internet and in other digital forms. In addition, the treaties lack effective enforcement or dispute resolution provisions.<sup>87</sup> The success of these treaties therefore relies in great part on the form of implementation adopted by national legislatures.

The DAA and the DMCA are two approaches to the implementation of WCT obligations set forth in Articles 11 and 12. These provisions state that the member states are obliged to provide legal protection and remedies “against the circumvention of effective technological measures” and the protection of rights management information.

### **3.3 National implementation of international obligations: the DAA and the DMCA**

How Australia and the United States have fulfilled their obligations under the WCT is particularly relevant for understanding the impact on access to works by the

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<sup>84</sup> SA Mort “The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights” (1997) 8 *Fordham Intell Prop Media & Ent LJ* 173, 196.

<sup>85</sup> WR Cornish (1999) ¶ 9-36.

<sup>86</sup> WR Cornish (1999) ¶ 9-36. Reports on the WIPO Diplomatic Conference that resulted in the WIPO Copyright Treaty (2-20 Dec. 1996) noted that the proposed reproduction right was the most heavily discussed (<http://educate.lib.chalmers.se/IATUL/2-97.html>).

<sup>87</sup> SA Mort (1997), 214-215.

public domain, including libraries. Accordingly, exactly how these domestic statutes alter or maintain existing fair dealing and fair use provisions is the focus of this section. The argument presented here is that although fair dealing provisions should treat digital media equally with more traditional forms, Australia's fair dealing laws might be productively revised to adopt a less exhaustive collection of categories.

### 3.3.1 Australia and the DAA

As has been mentioned already, the DAA has extended the fair dealing provisions that already existed in the *Copyright Act 1968* to digital works.

The DAA has also provided some additional provisions in the digital context. The Act extends the exception granting libraries, archives, galleries, and museums (together, "cultural institutions") the right to digitise material held in their collections for the purposes of internal management and preservation, without obtaining the permission of the copyright holder. Although this provision is subject to safeguards of the owners' rights, concerns have been expressed regarding this provision. Specifically, it has been argued that the cultural institutions provision would have a substantial effect on competition in markets for digital and online works, such that libraries and other organisations would be able to compete directly with copyright owners in the sale and licensing of copyrighted material, but at a significantly lower cost.<sup>88</sup>

Restrictions apply to the ability of libraries to reproduce copyrighted digital works, such that the feared reduction of competition is unlikely to materialise. The commercial availability test requires that before a library can supply a reasonable portion of a work in digital form, it must determine that the portion is not available within a reasonable amount of time and at a reasonable price. This test also applies to the supply of an article in electronic form. In addition, cultural institutions are subject to other restrictions, including the requirement that they destroy any digital copies of works made for the purpose of supplying a user or another library or archive, and to obtain explicit permission from copyright owners to digitise hard copy material or to make electronic copies available to users not on the premises of the library or archive.

The most significant change that the DAA has made to fair dealing provisions is to apply Australian copyright law's deeming provision to digital works.<sup>89</sup> United States copyright legislation does not contain a parallel provision. Before the DAA, section 10(2) of the Australian *Copyright Act 1968* specified that when fair dealing provisions allow the copying of no more than a "reasonable portion" of the work for certain purposes, this portion can be no more than 10% of the work as a whole.<sup>90</sup>

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<sup>88</sup> Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement* (Commonwealth of Australia, September 2000), 85-87.

<sup>89</sup> F Macmillan "The digital copyright deadlock" (May 2000), <http://www.alia.org.au/incite/2000/05/macmillan.html>.

<sup>90</sup> *Copyright Act 1968* (Cth), ss. 10(2), 40.

Early drafts of the DAA did not provide guidance as to how 10% of a digital work was to be determined – which, given the arrangement of digital works into multiple sections (e.g., a website or database), can be difficult to determine with accuracy. The DAA as adopted simply extends the existing arrangement to digital works, by specifying that a reproduction is a “reasonable portion” of a work if the number of words copied is not more than 10% of the total number of words in the work; or, if the work is divided into chapters, and the number of words copied exceeds 10% of the number of words in the work, the reproduction contains only a single chapter or part thereof.<sup>91</sup>

The effect of extending the deeming provision could be seen as being that of limiting the extent to which libraries can share digital copies of works, either with each other or their patrons. To borrow a physical copy of a book, no copying would be involved. However, to borrow a digital copy of a book, it would be more efficient for a library to be able to generate a copy of that book, so that the work could be loaned to multiple patrons at one time. The most sensible way of doing so could be for the library to create multiple copies on compact disks or other recordable media, and to control the loaning of those copies. Although users could (absent effective technological controls) create a copy of that compact disk, it would be no different from a borrower photocopying an entire book – although digital copying would obviously be much easier. This ease of copying digital works is not an argument *per se* for eliminating fair dealing exceptions. Instead, it could be argued that the fact that it is relatively easy to reproduce entire works should more properly be taken into account when dealing with cases of infringement at the remedies stage.<sup>92</sup>

Although fair dealing provisions as they exist currently protect most uses of copyrighted works in libraries, they remain circumscribed by the definitions provided by the *Copyright Act 1968*. Such an action would be for the greater benefit of users of copyrighted works, rather than their owners. Given the trend to more closely protect creative output, preserving these exceptions may be important for the future of Australian innovation.

### 3.3.2 The United States and the DMCA

The DMCA does not change the fair use provisions in the US Copyright Act. In fact, the DMCA explicitly states with respect to copyright protection and management systems that such provisions shall not “affect rights, remedies, limitations, or defences to copyright infringement, including fair use,” under the US Copyright Act.<sup>93</sup> Instead, the DMCA focuses on implementing Articles 11 and 12 of the WCT. In addition, it achieves a laundry list of other provisions, establishing safe harbours for online service providers, permitting the creation of temporary copies of

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<sup>91</sup> *Copyright Act 1968* (Cth), s. 10(2A)(c)-(d).

<sup>92</sup> There is here too an element of social cost benefit analysis that needs to be done. If the increased copying is relatively marginal, as it can be given adequate controls (including penalties for infringement), the social cost of that copying is likely to be low relative to the social cost of removing or materially narrowing exceptions for fair use.

<sup>93</sup> 17 USC § 1201(c).

programs for the performance of computer maintenance, and making miscellaneous amendments to the US Copyright Act, including the facilitation of Internet broadcasting, as well as granting *sui generis* protection for boat hull designs. Nevertheless, the DMCA contains some provisions of interest to the topic considered here.

With respect to libraries, the DMCA contains a number of exceptions. Non-profit libraries and educational institutions are not considered to be violators of the prohibition against circumventing copy control technology when they access an illegally copied work, as long as they do so solely to review the work and determine whether to purchase a copy for permitted uses.<sup>94</sup> In essence, this provision extends the fair use defence to libraries in the digital context, albeit for a set of highly specific (and at moment rather poorly defined) situations.

More importantly, by creating a strong bias in favour of copyright owners who use technology to regulate access to their works, the DMCA may seem to represent a success for owners over users. However, its effect is somewhat more complicated than first appears. By favouring owners that make use of encryption and other technologies, United States copyright law has endorsed the use of “self-help” measures to protect digitised works. The potential impact of allowing a certain measure of self-regulation is both positive and negative; owners will exert greater control over their works than mere legal prohibitions might allow, but such increased control may also limit access to deserving users, where otherwise fair use would come into play.

As discussed above, the US Copyright Act is by no means perfect. However, the fair use defences in the Act work in a broad context, not limited to named situations. This generality has in fact lead to some confusion, as it is not always clear when fair use defences will apply. In such situations, adopting an approach such as Wendy Gordon’s, which looks to the underlying intent of the copyright laws, may be the best way forward.<sup>95</sup>

## 4 Protection versus access and digital media

The reasons for supporting the extension of fair dealing exceptions to digital works do not derive from pure sympathy for copyright users. Ultimately, preserving open access to copyrighted works for valid public domain uses can have a material impact on Australia’s society and its economy. As noted above, copyright law does not exist to protect the profits of copyright owners, and the fact that it may do so is a corollary of the primary objective, which is to maximise returns to society as a whole. Copyright law functions to protect both creative works and access to them.

Society may experience a net gain from individual’s creativity if certain resources are accessible to a wider audience-- including those who may not be able to pay for access. In addition, since innovation depends on imitation, access to

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<sup>94</sup> 17 USC § 1201(d).

<sup>95</sup> WJ Gordon (1982) , 1603-1605.

copyrighted (as well as patented) works is fundamental to economic progress itself. A situation in which information and prior forms of innovation are closely guarded may result in higher profits for individual firms, but creates the danger of retarding innovation in society generally. The rationale in law for these aims has already been discussed above in **Section 2**.

The crucial question here is whether or not the fair dealing provisions carried over from the *Copyright Act* to the DAA constitute a better means of dealing with these problems than does the economic analysis of copyright considered in **Section 2**. The list of exempted activities in the fair dealing provisions is primarily aimed at and has the important effect of increasing the ease of access for non-commercial activities which are unlikely to lead to the production of works which would reduce the commercial value of the copyrightable work. In some cases where the exempted activities lead to the production of commercially marketed derivative works, the derivative works thus facilitated may increase the value of the primary work (e.g., book reviews which, together, create publicity for the work, even when some are unfavourable).

First, looking back at the transaction costs problem, assume that the people whose conduct would have been protected by fair dealing provisions intend to produce a derivative work, and wish to use only a relatively small proportion of each copyrighted primary work for this purpose. The transaction costs involved in contracting and bargaining with all the individual copyright holders incurred by these prospective creators of derivative works may be relatively high, compared with any diminution of incentives suffered by the primary works' owners if the latter did not have unqualified rights to withhold clearance without payment. Thus, in the absence of fair dealing provisions, either transaction costs will be incurred with little corresponding benefit in those cases where production of the derivative work nonetheless goes ahead; or some derivative works are not produced at all because the transaction costs dissuade prospective creators. In the latter case, the social value of this dissuaded activity, regardless of whether or not it yields a commercially valuable derivative work, is foregone.<sup>98</sup>

Second, in the absence of fair dealing provisions, the actual copyright payments which eventuate out of the bargains between the prospective creators of derivative works and the owners of the "original" works may still be high enough to dissuade some socially valuable activity. Alternatively, it would constitute an additional cost that is not justified by any substantive additional incentivisation of the owner.

These arguments demonstrate how fair dealing provisions can be relatively well targeted at offsetting or reducing social costs that would otherwise be created by desirable copyright protection. There could be other means of qualifying copyright protection so as to alleviate the costs described e.g. winding back the scope of protection but though there may be other arguments for these measures, they are

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<sup>96</sup> MA Lemley (1997), 990.

<sup>97</sup> WM Landes and RA Posner (1989).

<sup>98</sup> For example, scholarly commentary from which the creator does not intend to make any profit.

likely to be particularly blunt ways of achieving what fair dealing provisions do better.

The presumption is that differential formulation of fair use provisions depending on the copying medium is unjustified. Thus the question of whether or not the DAA maintains an acceptable balance between protection and access or incentives and access can essentially be reduced to the following: is there anything about the digital realm which justifies a different formulation of fair dealing provisions from those available in the non-digital realm?

One common response to this question is that digital technology when aligned with the Internet provides a real challenge for existing copyright laws. These technologies provide the means of creating copies indistinguishable from the original, and then widely disseminating the results of this copying.

In particular, it is argued that fair dealing provisions may hinder the growth of a digital, online market for publications; and in this way libraries, with fair dealing access to works, would be competitive with online publishers. The argument is that it is so much easier for individuals to infringe the copyright of digital works and therefore, the availability of fair dealing provisions increases the scope for such copyright infringements. This situation is likely to discourage authors from making their works available in a digital form and thus restrict the ability of digital markets to grow. However, this argument is weakened by a number of considerations.

First, individuals with strong motives to infringe digital works are likely to be able to digitise works without the consent of the authors anyway. In contrast to this, authors who fail to digitise their works because of fears of easier copyright infringement are likely to suffer diminished marketing opportunities for their work, which have the potential to affect its commercial value. In other words, theoretically there may be strong incentives for authors to digitise their works anyway and in practice there is little evidence that authors would be reluctant to make their works digitally available, as evidenced by the phenomenal growth of the World Wide Web.

Second and more importantly, while technology makes copying easier, it also makes it easier to protect works from unauthorized copying in digital form as evidenced by the development of copyright management technologies, digital watermarks and encryption. In fact, these technologies may result in fair use exceptions effectively being bypassed, and the rights of users being unjustifiably curtailed as a consequence. This may in fact necessitate stronger fair dealing provisions for intellectual property in the digital realm.

Thus it is not a foregone conclusion that on balance, technology makes the infringement possibilities in the digital realm easier than infringement possibilities elsewhere. Even if these infringement fears are justified, the first consideration allied with the second can reinforce the perception among authors that on balance they are better off participating in digital markets than not.

Third, as was alluded to previously, to the extent that copyright infringement has disproportionately harmful effects in the digital realm, this can also be dealt with by taking into account when calculating damages the special circumstances of the digital realm. For instance if detection of infringement is more difficult in the digital

realm, thus reducing the ultimate deterrence value of the same penalty arising from copyright infringement in the digital realm, then the penalty should be correspondingly raised to such a degree as to equalize the deterrence value, once the lower probability of being caught in the digital realm is factored in. If desired, a higher deterrent value can be introduced to infringements in the digital realm by accordingly adjusting the penalty upwards from current penalties.<sup>99</sup>

Recalling the costs of repealing fair dealing discussed earlier, the case for weakening or repealing fair dealing provisions in the digital world on the basis that they may hinder the growth of digital markets for publication seems to offer a remedy with costs which are considerably disproportionate to the problem. This conclusion presumes that the costs of repealing fair dealing are of the same magnitude and nature as before. However, this presumption too has come under challenge from proponents of the view that fair dealing provisions should be loosened or repealed simply because of the availability of digital and online technologies.

The argument made in this case is that these digital technologies can substantially reduce the transaction costs of authors and users getting together and making bargains about use of copyrighted works. An extreme version of this argument is made by Merges, who argues that:

...because the contemporary fair use doctrine is predicated on a market failure rationale, and because an electronic exchange potentially eliminates this market failure for digital content, fair use law will significantly shrink.<sup>100</sup>

However, Merges' arguments conflates the 'market failure' which is created by copyright law (*i.e.*, the foregone social value of derivative works not produced) with only one of the causes of that market failure, namely the possibly disproportionate transaction costs of enforcing intellectual property laws without fair dealing. Referring back to the taxonomy established above, the second cause relates to the pricing effects of copyright fees resulting from the bargaining between copyright holders and prospective producers of derivative works. As discussed, these pricing effects add to the cost of derivative works, which need not even be in the rational self-interest of prospective creators (because it increases their direct cost of production), and/or which can discourage the production of less derivative works than might be socially optimal.

In addition to this result, there is an additional consideration based on the anti-commons literature, which leads to a reconsideration of the cost-benefit calculus prospective creators face in deciding on the kind of copyright protection that is in

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<sup>99</sup> Note however that there are social costs to increasing penalties, especially in the face of risk aversion and of some chance of adjudicative error.

<sup>100</sup> RP Merges "The End of Friction? Property Rights and the Contract in the "Newtonian" World of On-line Commerce" (1997) 12 Berk Tech L . 115.

their rational self-interest.<sup>101</sup> It was argued previously that the “derivative works” argument for fair dealing provisions arose from a rational tradeoff between the creator’s expected revenues and the increased costs of creating works that enjoy copyright protection as the scope of protection increased. However, there may not be a straightforward positive correlation between revenues to the rights holder and the scope of copyright protection. The reason for this is also closely related to the reason why socially sub-optimal levels of production of derivative works may result from the absence or dilution of fair dealing provisions.

The argument, as set out by Depoorter and Parisi,<sup>102</sup> is that in the absence of fair use, even if contracting costs and search costs are zero, the results of bargaining between the prospective creator and the primary works’ rights holder may be inefficient. This inefficiency results from the fact that the rights holders of the primary works set copyright clearance prices independently of each other, and may therefore ignore any complementarities in demand as between their respective works. For instance, if one person owned all the copyrights, she would see that setting easy terms of access to work X may lead to the production of derivative works, which are also likely to employ works Y and Z. A similar relationship may hold as between Y on the one hand and X and Z on the other and Z on the one hand and X and Y on the other. She may thus price all these works lower because she gets to capture the full benefits of these complementarities. However, where X, Y and Z are owned by separate rights holders, they fail to capture the benefits of these complementarities and may set prices which lead to a higher total cost of clearing copyright and therefore to an under-utilisation of their respective primary works.

Thus, not only does their price setting behaviour, as has already been discussed, discourage the production of derivative works. It also leads to prices, which, ignoring these externalities, reduces the economic value of other rights holders’ portfolio. This argument can be extended to show that an increase in the number of copyright holders, exercising independent control on the price of their respective licenses, exacerbates the degree of underutilization. The important point to note is that this argument depends solely on the pricing behaviour of the rights holders. The reduction in transaction costs created by digital technologies and the Internet has no bearing on the rationale for fair dealing provisions suggested by these effects.

Taken together, the arguments presented in this section demonstrate a continued validity of fair use/fair dealing provisions in a digital age. However, it is only reasonable to note that there are some complex balancing issues involved, and that the precise outcomes of these depend on a range of factors – such as the extent to which the growth of online transactions does reduce the costs of securing improved bargains between owners and users. These are clearly difficult to predict, and hence an incremental, “adjust as you go”, approach to policy formulation may have clear merit.

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<sup>101</sup> B Depoorter and F Parisi “Fair use and Copyright Protection: A Price Theory Explanation” (2001) Working Paper No. 01-03, Law and Economics Working Papers Series, George Mason University School of Law, [http://papers.ssrn.com/paper.taf?abstract\\_id=259298](http://papers.ssrn.com/paper.taf?abstract_id=259298).

<sup>102</sup> B Depoorter and F Parisi (2001).

## 5 Conclusion

In contrast to the confusion created by the DMCA, in which digital works appear to be more highly restricted than non-digital works, the DAA has created a predictable system in line with the overall aims of copyright law. The rules-based system adopted in the *Copyright Act 1968* should serve the purpose for which it was defined – to ensure that the exclusive rights enjoyed by owners of copyrighted works are tempered by the ability of certain users to escape copyright liability for socially commendable aims. From an economic perspective too, there are clear arguments for the Australian approach. However, it should be noted that Australian copyright law might benefit from a more general, American-style fair dealing provision, such that courts would be permitted to increase the number of situations in which the fair dealing defence applies, as appropriate. So as to minimise the costs of uncertainty, such a more open-ended provision ought to be additional to clearly specified “safe harbours”, rather than a replacement for them.

In addition, despite the fears of copyright owners that allowing libraries and other cultural institutions to make electronic copies of portions of digital works for distribution will destroy the market for online publications, it is likely that these fears are overstated. In cases of actual copyright infringement, the nature of digital works, which are easily reproduced and disseminated, can be taken into account when determining damages.

Although the DAA extends the same fair dealing concepts to digital as to non-digital works, the challenge of dealing with digital media still exists. It is not necessary to create a new set of laws applicable only to digital media, equivalent to the new set of laws that Johnson and Post have advocated for activities in “cyberspace”.<sup>103</sup> But the fact remains that copies of digital works can be difficult to distinguish from the originals, and dissemination is much easier than with physical copies.

However, the potential for copyright owners to “lock up” digital works by means of encryption and other forms of rights management is significant and should not be ignored. These technological measures can certainly be desirable, in so far as they reduce the costs of preventing piracy and allow investors in creative effort to obtain some part of the benefit society derives from their investment. Yet it remains important to maintain the balance this article has emphasised between incentives and access. Strong encryption coupled with insufficient fair dealing exceptions would be a dreary future indeed

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<sup>103</sup> DR Johnson and D Post “Law and Borders--The Rise of Law in Cyberspace” (1996) 48 *Stan L Rev* 1367.