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A comparative study of the concepts “fair use” and “fair dealing” in Copyright Law in South Africa, the United States of America and the United Kingdom

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Abstract

The rationale of copyright protection requires a consideration of “private” and “public” interests. To balance these competing interests, exceptions such as “fair use” and “fair dealing” was introduced. These exceptions have been said to be the statutory expression of rights such as Freedom of Expression. Due to the lack of judicial authority on this in South African law, a comparative study of the United States of America and the United Kingdom was conducted. In the United States of America, the system of “fair use” is used which is wide and flexible. Whereas, the United Kingdom and South Africa follow an approach that in order to potentially be viewed as “fair dealing”, the use involved must qualify as a specifically recognised purpose. The South African position is however potentially subject to amendments to introduce an overlapping “fair use” and “fair dealing” exception. However regardless of whether “fair use” or “fair dealing” is applied, a user must overcome a barrier of economic harm. As for international compliance, any exception to copyright must adhere to the “three-step test”. It is clear that the “fair dealing” approach is compliant. However, that of the “fair use” approach is doubtful. In addition there is a potential “pay-per-use” system, in all three jurisdictions, despite the use itself being lawful. The only circumstance in which such a system may be said to be valid is for so called “new distributions of works”. As for whether South Africa should adopt a “fair use” system, such approach has the benefit of flexibility and easier adaptability to advances in society, but is also uncertain and of doubtful compliance with international requirements. Whereas, although “fair dealing” has a level of certainty it can be more rigid due to its threshold requirement. For a developing country, such as South Africa that relies on “digital” formats of work, having a vague and uncertain system is not appropriate. This is so because, such as system has been shown to lead to cautious users which in turn creates a “pay-per-use” system which would violate the very aim of copyright law. Thus reform is plainly needed of a middle-way approach, whereby a threshold requirement is retained and various established factors are incorporated to help determine fairness. However, a more dangerous threat to the survival of both doctrines is the creation of new technology that greatly influences the manner in and extent to which works are protected. This has resulted in protection not only to the content of work but also to the manner of accessing it. Reform is needed in all the jurisdictions under discussion to provide for a specific and more definite “fair use” or “fair dealing” exception to this new protection. If this is not done, then whether use falls under either of these doctrines would be inappropriately dependant on the discretion of the owner of the work.

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CHAPTER 1: INTRODUCTION

Copyright has the purpose of furthering “innovation and creativity”.¹ The protection it grants is acquired immediately, for certain “defined categories of works”, after specified requirements have been met and lasts only for a certain period of time.² Further any protection granted cannot be absolute but rather is limited, so that the “public” is also protected.³ In this manner the right of the “owner” of the copyright to economically exploit the material and the right of the “public” to “advance its “knowledge, entertainment and cultural experiences” is safeguarded.⁴ This is so because, copyright law does not exist to prevent “critical expression or to throttle artistic and other expressive acts” as this would hinder the very purpose of granting statutory protection.⁵ Therefore, these competing interests must be balanced by limiting the “exclusive rights” subsisting in the work.⁶ One such limitation is known as “fair dealing” and another as “fair use”, both of which provide for “copying without consent” for specific situations.⁷ Although having the same basis, these limitations cannot be used interchangeably as “fair dealing” is more limited in its scope whereas “fair use” has a wider application.⁸ These doctrines therefore have the role of advancing the purposes of copyright law by preserving “legitimate and worthy social uses of the work”.⁹

Thus, the purpose of this dissertation is to analyse the effectiveness of both doctrines in balancing these public and private interests in the United States of America (USA), the United Kingdom (UK) and South Africa (SA). A comparative study is necessary due to the lack of decided case law to date. Additionally the USA and UK systems can offer significant guidance, as these jurisdictions have established “fair use” and “fair dealing” doctrines, respectively. Therefore, the dissertation will first discuss the flexible USA position in chapter 2. There follows a consideration, in chapter 3, of the more restricted UK system. Next, chapter 4 will set out the doctrine under SA law, as it currently stands as well as the suggested amendments. Although the interpretation and application of the doctrines at national level is of importance, the overall survival of both doctrines is dependent on compliance with certain international

¹Dean and Dyer *Introduction to Intellectual Property Law* (2014) 3.

²Dean and Dyer (n 1) 3.

³Schonwetter “The ‘Fair Use’ doctrine and the implications of digitising for the doctrine from a South African perspective” 2006 *The Southern African Journal of Information and Communication* 32 32.

⁴Schonwetter (n 3) 32.

⁵*Laugh it Off Promotions CC v SAB International (Finance) BV t/a SABMARK International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC) 154.

⁶Schonwetter (n 3) 33.

⁷Schonwetter (n 3) 33.

⁸Visser “Copyright in works created in the course of employment: the Supreme Court of Appeal gives guidance. *King v South African Weather Service* 2009 *SA MER LJ* 591 595.

⁹Shay “Exclusive Rights in News and the application of Fair Dealing” 2014 *SA MERC LJ* 587 592.

instruments (to which the jurisdictions under discussion are bound). As such, chapter 5 will analyse the compliance of the doctrines with these requirements regarding exceptions and limitations. However even with compliance, there remains a further practical impediment to the doctrines' effectiveness. This impediment is caused by the development or potential development of a "pay-per-use" system, for the use of a copyrighted work under each jurisdiction. Consequently, the inappropriateness of requiring payment for such use will be demonstrated by chapter 6. However the ultimate threat to the survival of the doctrines', is the advancements of a modern technological society which allows for easier access to copyrighted work and the possibility of infringing use. Thus, the resulting extensive protection granted to holders of rights in the work will be considered in chapter 7. The dissertation will conclude, in chapter 8, that reform is needed in order to achieve the required balance, especially regarding the potentially lethal effect on the doctrines by new protection to access of works.



CHAPTER 2: “FAIR USE” IN THE USA

The USA “fair use” doctrine, similar to “fair dealing”, has the foundation that not every use of copyright material should be excluded, so that recognition is given to the “public” interest purpose of copyright.¹⁰ However, “fair use” differs in its application as it is a more wide-ranging doctrine.¹¹ Here follows a brief discussion of the legislative provisions regarding this area of law and then the interpretation of it by the courts.

2.1 *Legislative provisions*

“Fair use” was first created through court decisions, however it has since been enacted into statute and is currently dealt with in Title 17 of the United States Code (the American Act).¹² The relevant section, provides that “fair use of a...work, for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not” infringing use.¹³ It then goes on to provide a list of “factors” to aid in determining if it is “fair use”, namely the: “purpose and character of the use”, “nature of the copyrighted work”, “amount and substantiality of the portion used”, and its “effect...upon the potential market...of the copyrighted work”.¹⁴

The interpretation and application of this section will be further dealt with below. Suffice it to say here that, as section 106 and 106A of the American Act refers to the economic and moral rights attaching to copyrighted material, respectively, and given the wording of the sections it seems clear that “fair use” can be raised against a claim for either type of right.¹⁵ Further, although no exact “definition of fair use” is established, the American Act gives a level a guidance.¹⁶ Firstly, it sets out a “non-exclusive list of purposes” which may indicate what kinds of uses will be seen as fair.¹⁷ Secondly, it also provides a “non-exclusive list of factors” to consider when determining the issue of fairness.¹⁸ These guidelines are subject to interpretation by the courts. Before turning to such interpretation, it must just be mentioned that these “factors” have greatly influenced other jurisdictions.¹⁹ One such jurisdiction is that of Australia, whereby “factors” similar to those set out in section 107 of the American Act were adopted.²⁰

¹⁰Schonwetter (n 3) 33.

¹¹Visser (n 8) 595.

¹²Visser “The Location of the parody defence in copyright law: some comparative perspectives” 2005 *Comparative and International Law Journal of Southern Africa* 321 337.

¹³17 USC s107.

¹⁴17 USC s107.

¹⁵17 USC s106 and s106A.

¹⁶Mitchell “Promoting Progress with Fair Use” 2010-2011 *Duke Law Journal* 1639 1661-1662.

¹⁷Mitchell (n 16) 1661-1662.

¹⁸Mitchell (n 16) 1662.

¹⁹Shay (n 9) 595.

²⁰See s40(2) of Part III Division 3 of the Australian Copyright Act of 1968.

2.2 Judicial interpretation and application of the doctrine

The lack of precise definition and application guidelines was a deliberate strategy on behalf of the American executive, in order to allow for “flexibility” and for the changing needs of society.²¹ However this results in “vagueness”, as the interpretation and application of the section is fully dependant on judicial opinion and as such a user of copyrighted material may find it difficult to establish if his/her use is fair, before any action is taken.²²

2.2.1 Authority before *Campbell v Acuff-Rose Music, Inc*²³

Section 107 was previously surrounded by misconceptions as to its effect.²⁴ This was said to be due to the lack of properly reasoned and justified judgments on when use constitutes “fair use”.²⁵ During this period of confusion there were two important judgments handed down by the Supreme Court,²⁶ namely: *Sony Corporation of America, et al v Universal City Studios, Inc, et al*²⁷ and *Harper and Row Publishers, Inc v Nation Enterprises*.²⁸

In the *Sony* case the majority decision made certain important comments regarding “fair use”.²⁹ Firstly, it stated that if the use is for “commercial or profit-making purpose[s]” then it is presumed to be “unfair”.³⁰ The court then turned to the factor regarding “market harm” and commented that “if the intended use is for commercial gain then likelihood [of harm] may be presumed [,] but if it is for a non-commercial purpose the likelihood must be demonstrated”.³¹ Furthermore that, in certain circumstances, the “reproduction” of the whole of the work would not automatically be excluded from “fair use”.³² As for the comments regarding commercial uses, the particular use involved in this case was for a “non-commercial purpose” and so these statements did not affect the decision of the court and as such is not part of the reasons for the decision.³³ Regardless, these statements were used and interpreted as if binding by courts and thus greatly influenced “fair use”.³⁴ Shortly thereafter the Supreme Court in *Harper* found that, if an original is “unpublished” then it “negates fair use”.³⁵ Further, that “fair use” is an

²¹Mazzone “Adminstrating Fair Use” 2009-2010 *William and Mary Law Review* 395 400.

²²Mazzone (n 21) 400-401.

²³510 US 569 (1994).

²⁴Leval “Campbell as fair use blueprint?” 2015 *Washington Law Review* 597 598.

²⁵Leval (n 24) 598.

²⁶Visser (n 12) 324.

²⁷464 US 417 (1984).

²⁸471 US 539 (1985).

²⁹Visser (n 12) 324.

³⁰*Sony* case (n 27) 449.

³¹*Sony* case (n 27) 451.

³²*Sony* case (n 27) 449-450.

³³*Sony* case (n 27) 449.

³⁴Visser (n 12) 324.

³⁵*Harper* case (n 28) 552.

“equitable doctrine” and as such the user had to be in “good faith” to qualify.³⁶ Also, that the enquiry was both a “question of law and of fact”.³⁷ Additionally, it repeated with approval the commercial presumption against “fair use” as set out in *Sony*.³⁸ This presumption was further explained by stating that it is not necessary for the use to be only for profit and that all is required is that there is a potential gain “without paying the customary price”.³⁹ Next, that “fair use” is more readily available for works of “non-fiction”.⁴⁰ However the most influential finding by this court was that the potential for “market harm” is the “single most important element of fair use”, as the doctrine is only effective for use “which does not materially impair the marketability of the work copied”.⁴¹ In reference to the commercial presumption that developed, Visser⁴² submitted that it results in commercial uses generally being automatically viewed as infringement regardless of the particular facts.⁴³ The resulting problems and confusion for this area of the law was, at least in part, addressed in 1994.⁴⁴

2.2.2 *Campbell v Acuff-Rose Music, Inc*

In 1994 the Supreme Court fundamentally affected the interpretation and application of “fair use”.⁴⁵ The court sought to make “fair use” clear, by considering the purposes underlying “copyright”.⁴⁶ The reasoning of the court has remained relevant through the succeeding years and continues to be the most important American decision on this particular issue.⁴⁷ In this regard it was held that in order to comply with the “purposes” of copyright law, it is essential for the doctrine to exist in order to prevent the development of an inflexible regime.⁴⁸ Significantly, the court recognised that creating hard and fast principles for this doctrine is inappropriate as its outcome is fact dependant.⁴⁹ Further that the “purposes” and “factors” contained in section 107 must be applied together, taking into account these “purposes”.⁵⁰ It also held that “parody” could be protected as “fair use” provided there is compliance with the

³⁶*Harper* case (n 28) 552-562.

³⁷*Harper* case (n 28) 560.

³⁸*Harper* case (n 28) 562.

³⁹*Harper* case (n 28) 562.

⁴⁰*Harper* case (n 28) 563.

⁴¹*Harper* case (n 28) 566-567.

⁴²(n 12) 324-325.

⁴³Leval (n 24) 598.

⁴⁴Leval (n 24) 600.

⁴⁵Samuelson “Possible futures for Fair Use” 2015 *Washington Law Review* 815 816.

⁴⁶Leval (n 24) 600.

⁴⁷Leval (n 24) 597 and 614.

⁴⁸*Campbell* case (n 23) 575-577.

⁴⁹*Campbell* case (n 23) 577.

⁵⁰*Campbell* case (n 23) 578.

“factors”.⁵¹ After setting out these general principles, the court turned to an analysis of each factor.

2.2.2.1 “Purpose and character of the use”

For this factor it was held that its interpretation and application can be informed by the accepted “purposes” in section 107, such as “criticism” or “comment”.⁵² However, this is a mere “guideline” as the crux of the enquiry here is if the alleged infringement “merely supersedes the objects of the original creation or instead adds something new with a further purpose or different character, altering the first with a new expression, meaning or message”.⁵³ Basically then, the test is if the alleged infringing work is “transformative”.⁵⁴ Importantly, the court made it clear that “transformative work” is not determinative of “fair use”, but that the core of the doctrine is the protection of such works to advance the purpose of copyright law.⁵⁵ Accordingly, the “more transformative the new work, the less will be the significance of the other factors that may weigh against a finding of “fair use”.⁵⁶ As for the inclusion of “for commercial or non-profit purposes” in this factor, the court concluded that it is merely an aspect to consider.⁵⁷ Thus, the fact that the alleged infringing work is for a “commercial purpose” will not automatically preclude it from being held as “fair use”.⁵⁸

2.2.2.2 “Nature of the copyrighted work”

Due to the circumstances of the case this factor was not overly considered. However, the court did mention that it points to the fact that certain types of “works are closer to the core of intended copyright protection”.⁵⁹ This has the result that, if the original is fundamentally connected to the “purposes” of copyright then a claim of “fair use” of that work will be less likely to succeed.⁶⁰

2.2.2.3 “Amount and substantiality of the portion used”

This factor deals with the reasons for and extent of the copying involved.⁶¹ The permissible amount usable (whether the entire original or a few lines of it) can change, depending on the

⁵¹*Campbell* case (n 23) 579.

⁵²*Campbell* case (n 23) 578.

⁵³*Campbell* case (n 23) 578.

⁵⁴*Campbell* case (n 23) 578-579.

⁵⁵*Campbell* case (n 23) 579.

⁵⁶*Campbell* case (n 23) 579.

⁵⁷*Campbell* case (n 23) 584.

⁵⁸*Campbell* case (n 23) 584.

⁵⁹*Campbell* case (n 23) 586.

⁶⁰*Campbell* case (n 23) 586.

⁶¹*Campbell* case (n 23) 586

“purpose and character of the use”.⁶² The extent of copying is also relevant for factor four.⁶³ Such determination, also involves consideration of both the “quantity and quality” of the portion taken in relation to the original.⁶⁴ Further, the extent of copying versus that of additional or altered material in an alleged infringing work has a bearing on the “transformative value” of the new work.⁶⁵ Additionally it was unequivocally stated that just because a parodist can be said to have copied the essence of the original, does not mean that such copying is automatically unreasonable.⁶⁶ As with the other “factors”, the factual matrix is paramount.⁶⁷

2.2.2.4 “Market” harm

It was held that both the “actual” damage caused and that which has the potential of arising, if there is “widespread and unreasonable” similar actions by others, must be taken into account.⁶⁸ Such damage is not limited to the copyrighted material but also includes that to the “market for derivatives”.⁶⁹ In this regard, evidence was said to be required of any alleged “derivative market”.⁷⁰ The court went on to consider the supposed financial “presumption” developed under the *Sony* case⁷¹ and concluded that, when “transformative use” is involved then no such “presumption” should apply because in such a case “market substitution” is not as likely.⁷² It has been submitted that the effect of this finding is that the “purpose and character” is still deferential to this last element.⁷³ This seems correct, given that the court specifically stated that if “substantial” damage is shown, then this would subsist against the use being fair as the economic protection given to “originals” is essential for the “incentive” to develop works.⁷⁴ Furthermore and of significance, the court made it clear that not all damage will be damage in terms of the Act, by agreeing that “the role of the court is to distinguish between ‘biting criticism that merely suppresses demand and copyright infringement which usurps it’”.⁷⁵ In other words, it must be determined if the use “substitutes” the original or merely decreases “interest” in it.⁷⁶ As for damage to the “market for derivatives” it was held that a “derivative” properly

⁶²*Campbell* case (n 23)586.

⁶³*Campbell* case (n 23) 587.

⁶⁴*Campbell* case (n 23) 587.

⁶⁵*Campbell* case (n 23) 587-588.

⁶⁶*Campbell* case (n 23) 588.

⁶⁷*Campbell* case (n 23) 589.

⁶⁸*Campbell* case (n 23) 590.

⁶⁹*Campbell* case (n 23) 590.

⁷⁰*Campbell* case (n 23) 590.

⁷¹*Campbell* case (n 23) 591.

⁷²*Campbell* case (n 23) 591.

⁷³Leval (n 24) 605.

⁷⁴*Campbell* case (n 23) 593.

⁷⁵*Campbell* case (n 23) 592.

⁷⁶Visser (n 12) 330.

construed, consists only of those works which the “creator of the original” would normally “develop or license others to develop”.⁷⁷ If the new work merely consists of “criticism” then there is no damage to a “derivative market” as such work will not be a “derivative”.⁷⁸

2.2.2.5 Good faith as a factor?

Unfortunately, the court did not make a conclusive finding regarding whether the use must be in “good faith”.⁷⁹ This issue was merely referred to superficially in a footnote to the judgment.⁸⁰ In this regard, the court showed there is a lack of consensus as to whether it is a requirement and then went on to state that “even if good faith were central to fair use” the applicant was not shown to be in bad faith.⁸¹ The mere fact that “permission for use” was not granted is thus irrelevant in a “fair use” enquiry.⁸² However, Leval has said that the wording chosen by the court implies that it does not deem “good faith” relevant to determine “fair use”.⁸³

2.2.3 After Campbell

The three cases dealt with above have greatly influenced later decisions.⁸⁴ Notably the significance placed on whether the new work is “transformative”, the interconnected relation between the “factors”, and the need to engage in a balancing process with the “factors” as well as the “purposes” of copyright is clear.⁸⁵ For example, in the *Cariou v Prince*⁸⁶ case the Court of Appeal (second circuit) had to consider the legitimacy of a so called “appropriation artist”.⁸⁷ After repeating with approval some of the general principles set out in the *Campbell* case, the court initially stated that the “ultimate test” regarding this issue is determining whether permitting the “use” or blocking the “use” is most likely to advance the “purposes” of copyright.⁸⁸ Significantly it has recently been held that as the overall objective of copyright is to increase “public knowledge”, the persons that copyright seeks to benefit is chiefly “the

⁷⁷*Campbell* case (n 23) 592.

⁷⁸*Campbell* case (n 23) 592.

⁷⁹Samuelson (n 45) 820.

⁸⁰*Campbell* case (n 23) 584 n18.

⁸¹*Campbell* case (n 23) 584 n18.

⁸²*Campbell* case (n 23) 584 n18.

⁸³Leval (n 24) 614.

⁸⁴Penrod “Restoring the Balance test: A better approach to fair use in copying” 2014 *Chicago-Kent Journal of Intellectual Property* 106 115.

⁸⁵See *Elvis Presley Enterprises, Inc v Passport Video* 349 F.3d 622 (2003); *Cariou v Prince* 714 F.3d 694 (2013); *Sofa Entertainment, Inc v Dodger productions, Inc* 709 F.3d 1273 (2013); *Authors Guild, Inc v Hathitrust* 755 F.3d 87 (2014); and *Cambridge University Press v Patton, et al* 769 F.3d 1232 (2014);

⁸⁶714 F.3d 694 (2013).

⁸⁷*Prince* case (n 86) 699.

⁸⁸*Prince* case (n 86) 705.

public” and thus the reason behind creating economic inducements, is for authors to develop new “works for public consumption”.⁸⁹

Importantly, the court in *Prince* went on to agree that the crux of determining “fair use” is a “transformative” nature.⁹⁰ Further that, for the use to be “transformative” it is not necessary that it “comments on the original or [the] author” and that a court should be cautious as not all use that changes the protected work is necessarily “transformative”.⁹¹ Further, a manner of differentiating between “fair use” transformation and the transformation rights of the holder is whether the particular “transformative” use is linked to a “suggested [‘fair use’] purpose”.⁹² Overall, if the use is “transformative” then any profit motive of the user becomes irrelevant.⁹³ Connected to this is the point that the use must be justified beyond the “original” being a good medium for the new work.⁹⁴ However, “how the work appears to the reasonable observer” is relevant and not the users intended purpose in creating the work and therefore meaning that “good faith” is not a requirement.⁹⁵ Turning then to the “nature of the copyright”, this involves a two pronged test: firstly, is the work “expressive or creative” and secondly is it “published or unpublished”.⁹⁶ However the outcome of this test is of less weight, if the use has “transformative value” and is thus of seldom importance.⁹⁷ Next that as the permissible “amount” of copying is determined by considering the “purpose and character” of the use, the effect is that taking the whole of the original work is not automatically a bar to “fair use” and that a user is not limited to copying only that which is necessary for his/her purpose.⁹⁸ In terms of taking the whole work, it is permissible if it is “reasonably” necessary for the users’ “transformative purpose” and if it does not compete with the copyrighted work.⁹⁹ Generally however, the bigger or more significant the “amount” taken the more it becomes likely that the use is a “substitute” for the work.¹⁰⁰ Further in terms of “market harm”, it was concluded that the “market for the original and potential derivatives.... is usurped if the infringer’s target audience and nature of the infringing content is the same as the original.”¹⁰¹ Nevertheless, it

⁸⁹*Authors Guild v Google, Inc* 2015 WL 6079426 (C.A.2 (N.Y.)) 5.

⁹⁰*Prince case* (n 86) 705-708.

⁹¹*Prince case* (n 86) 706-708.

⁹²*Google case* (n 89) 8.

⁹³*Google case* (n 89) 9.

⁹⁴*Google case* (n 89) 8.

⁹⁵*Prince case* (n 86) 707.

⁹⁶*Prince case* (n 86) 709-710.

⁹⁷*Prince case* (n 86) 710 and *Google case* (n 145) 11.

⁹⁸*Prince case* (n 86) 710 and *Google case* (n 145) 12.

⁹⁹*Google case* (n 89) 12.

¹⁰⁰*Google case* (n 89) 12.

¹⁰¹*Prince case* (n 86) 709.

was repeated that the “more transformative the...use, the less likelihood that the...use substitutes for the original” and as such less likely to “usurp” the market although it may suppress or “destroy” it.¹⁰² Nonetheless, the consequence of the copying must also be considered.¹⁰³ For this, damage can be caused through the “manner” of completing a “transformative purpose” if it has the outcome of “widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute”.¹⁰⁴ In order to weigh against a finding of “fair use”, any damage caused or potentially caused must be substantial and not trifling in nature.¹⁰⁵

Despite this emphasis of transformation and balancing “factors”, there is still evidence of judicial opinion harking back to the findings of the two earlier Supreme Court cases, by emphasising “market harm”.¹⁰⁶ Such evidence includes statements that: to overcome a claim based on “fair use” an owner of copyrighted material “must point to market harm that results because the secondary use serves as a substitute for the original”¹⁰⁷; the “market harm” is the “single most important element of fair use”¹⁰⁸; and the “transformative” nature of a new work cannot by itself be determinative of “fair use”¹⁰⁹.

Therefore there appears to be logical inconsistencies¹¹⁰ in the application of section 107 by the American courts, due to both the “transformative” nature and “market harm” being said to be central.¹¹¹ It is submitted that there is no such inconsistency. This is so because, to use an analogy, transformation and economic damage has been treated as the opposite ends of a connected seesaw- the higher the one side goes the lower the other and at all times with each requiring the other to maintain a balance. In other words, once a high degree of “transformative value” is established the less likely is the possibility of economic harm (but such harm can still be established).¹¹² Additionally, this seesaw effect can be better understood if the “purposes” of copyright law is appreciated. The judiciary has continually repeated the “purpose” of copyright protection as the promotion of the “Progress of Science and Useful Arts”.¹¹³ Thus,

¹⁰²*Prince* case (n 86) 709.

¹⁰³*Google* case (n 89) 15.

¹⁰⁴*Google* case (n 89) 15.

¹⁰⁵*Google* case (n 89) 15.

¹⁰⁶*Authors Guild* case (n 85); *Kienitz v Sconnie Nation LLC* 766 F.3d 756 (2014); and *Oracle America, Inc v Google, Inc* 750 F.3d 1339 (2014).

¹⁰⁷*Authors Guild* case (n 85) 96-97.

¹⁰⁸*Authors Guild* case (n 85) 96-97.

¹⁰⁹*Kienitz* case (n 106) 759.

¹¹⁰*Penrod* (n 84) 115.

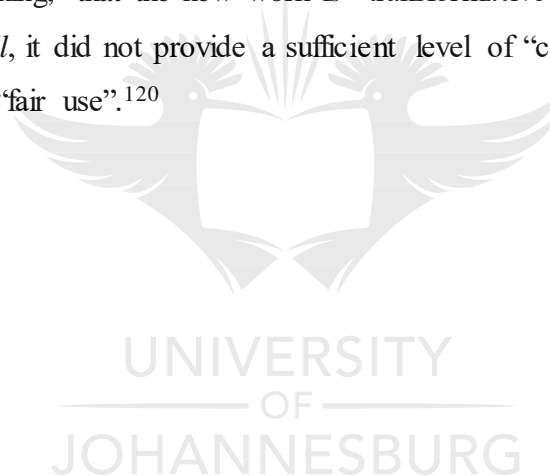
¹¹¹Compare *Prince* case (n 86) 705-706 and *Authors Guild* case (n 85) 96.

¹¹²*Google* case (n 89) 9 and 11.

¹¹³*Prince* case (n 86) 705.

the objective of copyright is to enhance and incentivize “creativity” and “innovation”.¹¹⁴ Such enhancement requires a balance between the “private interests” (economic and moral rights) and the “public interests” (access to information and knowledge growth).¹¹⁵ Therefore, factor four protects the “private interest” and factor 1 (specifically the question of transformation) protects the “public interest” of copyright. While at all times balancing these “factors” to allow for a situation that best serves the “public”.¹¹⁶

This emphasis on “market harm” is understandable given that copyright is viewed as a “commercial right” to enable “authors” to economically exploit their work.¹¹⁷ Further, that “transformative” works advance the overall goal of “public” benefit and are also unlikely to compete with the copyrighted work and as such also has a position of pre-eminence.¹¹⁸ Thus, *Campbell* seems to have renounced the “presumption” that “commercial uses” are not considered “fair” only when it can be said, in the true sense of the term and taking into account the full scope of its meaning, that the new work is “transformative” in nature.¹¹⁹ Despite the significance of *Campbell*, it did not provide a sufficient level of “certainty” for a user to pre-determine if the use is a “fair use”.¹²⁰



¹¹⁴*Campbell* case (n 23) 577.

¹¹⁵Schonwetter (n 3) 33.

¹¹⁶*Prince* case (n 86) 705 and *Google* case (n 89) 5.

¹¹⁷*Google* case (n 89) 6 and 14.

¹¹⁸*Google* case (n 89) 7.

¹¹⁹Samuelson (n 45) 819-820 and *Google* case (n 89) 9 and 11.

¹²⁰Visser (n 12) 330.

CHAPTER 3: THE UK “FAIR DEALING”

The “fair dealing” doctrine in the UK is applicable only for particular “purposes”.¹²¹ This may have the advantage of “certainty” but greatly limits “judicial discretion” as to what is “fair”.¹²² Here follows a look at the relevant legislative provisions and then a discussion of applicable case law.

3.1 *Legislative provisions*

Copyright law in general is regulated by the Copyright, Designs and Patents Act 1988 Chapter 48 (CDPA). As for the rights attaching to copyrighted works, these rights include economic and “moral rights”.¹²³ Briefly for “moral rights”, such rights include, amongst others, the ability to claim identification as the “author” and to prevent “work [being] subjected to derogatory treatment”.¹²⁴ However, the impact of the “fair dealing” doctrine on “moral rights” is limited. Accordingly, “fair dealing” is only applicable against a claim regarding the identification as “author” if the relevant “work” is used for the “reporting of current events”.¹²⁵ The doctrine is spread over a variety of sections for a variety of “purposes” that do not constitute an “infringement” of copyright.¹²⁶

In this regard, the CDPA has recently been subject to important amendments, including what use can potentially be a “fair dealing”.¹²⁷ Accordingly, a use can potentially qualify as a “fair dealing” if it is for: “research and private study”;¹²⁸ “criticism, review, quotation and news reporting”;¹²⁹ “caricature, parody or pastiche”;¹³⁰ or the “sole purpose” of “illustration for instruction”.¹³¹ Certain of these recognized uses have additional requirements before it can be “fair use”. For instance, the use by way of “research” or for “illustration for instruction” has been specifically limited to “non-commercial purpose[s]”.¹³² Therefore, if a particular use does not qualify for one of the specific categories or comply with that category’s specific

¹²¹Thompson “Copy or Paste? UK Copyright Law in light of Modern Education” 2014 *North East Law Review* 25 25.

¹²²Thompson (n 121) 25.

¹²³§ 16 and ch IV of the CDPA.

¹²⁴§ 77 and s80(1) of the CDPA.

¹²⁵§ 79(4) of the CDPA.

¹²⁶O’Donnell “Fair Use in the UK, Fair use in the USA...No Future, No Future” 2007 *Hiberian Law Journal* 57 61-62.

¹²⁷Lee “United Kingdom copyright decisions and legislative developments 2014” 2015 *IIC-International Review of Intellectual Property and Competition Law* 226 231.

¹²⁸§ 29 of the CDPA.

¹²⁹§ 30 of the CDPA.

¹³⁰§ 30A of the CDPA.

¹³¹§ 32 of the CDPA.

¹³²§ 29(1) and s32(1)(a) of the CDPA.

requirements, there is no possibility of it being a “fair dealing” of the work.¹³³ However the concept of “fairness” is not defined in the statute, leaving this part of the inquiry to be determined by the courts.¹³⁴

3.2 Judicial interpretation and application of the doctrine

The first stage of the doctrine requires that the use is for a specific purpose.¹³⁵ In this regard the *Pro Sieben* case is important.¹³⁶ The court held that the words “for the purpose of” should be widely interpreted according to everyday parlance.¹³⁷ Therefore, phrases such as “in the context of” or “as part of an exercise in” could easily be used instead of the ones contained in the statute.¹³⁸ When speaking of the specific issues of “criticism or review” and “reporting current events”, the court further found that such terms are extensive and without concrete limits so the only appropriate approach would be to “interpret them liberally”.¹³⁹ This call for a liberal interpretation, should also apply to the other “purposes”.¹⁴⁰ Finally, the court also made it clear that for this stage, the subjective aim of the alleged infringer in making use of the protected work is not important. Rather an objective test is preferred, so that a mere “sincere belief” that such use is recognized is not sufficient.¹⁴¹ Once this objective threshold is overcome, the courts will turn to “fairness”.¹⁴²

The *locus classicus* for whether a use is “fair” is *Hubbard v Vosper*.¹⁴³ It was said that “fair dealing” is not capable of a precise definition, but rather is a “question of degree” and “matter of impression” which in turn is dependent on the specific factual matrix.¹⁴⁴ However, the court did provide certain “factors” to consider.¹⁴⁵ These “factors” are: the amount of the copying, what the copying was used for (if it was to express identical material as the original and in competition with it, then it is likely to be “unfair”), if such copying and additional material included by the copier is proportional in the circumstances, and further “factors” relevant in the given situation.¹⁴⁶ Subsequent to this finding, the court of appeal set the test of “fairness” as

¹³³Visser (n 12) 336.

¹³⁴O'Donnell (n 126) 62.

¹³⁵Visser (n 12) 336.

¹³⁶*Pro Sieben Media AG v Carlton U.K. Television Limited and another* 1999 E.M.L.R. 109.

¹³⁷*Pro Sieben* case (n 136) 121.

¹³⁸*Pro Sieben* case (n 136) 121.

¹³⁹*Pro Sieben* case (n 136) 122.

¹⁴⁰O'Donnell (n 126) 62.

¹⁴¹*Pro Sieben* case (n 136) 121.

¹⁴²O'Donnell (n 126) 62.

¹⁴³1972 2 Q.B. 84.

¹⁴⁴*Vosper* case (n 143) 94.

¹⁴⁵*Vosper* case (n 143) 94.

¹⁴⁶*Vosper* case (n 143) 94.

objectively determined by considering if “a fair minded and honest person would have dealt with the copyrighted work, in the [same] manner” as the particular user.¹⁴⁷ Further, in *Ashdown*¹⁴⁸ it was agreed that the key “factors” are, in order of importance, if: the new work is “commercially competing” with the original, the original is published or not, and finally the “amount and importance of the work” copied. As for “commercially competing” with the original, the court acknowledged that “fair dealing” is a statutory protection of the right to Freedom of Expression (FOE) but continued to find that such protection does not have the effect of allowing someone to gain financially from the efforts of another.¹⁴⁹ The importance of the “commercial” impact and potential harm caused by the use, is also notable from the decision in *The Newspaper Licensing Agency Ltd v Meltwater Holding BV*.¹⁵⁰ Here, the court agreed that it is not permissible to make use of a work for financial gain to the “commercial” detriment of the holder of the rights attaching to the copyrighted material.¹⁵¹ The exception being if there is a significant “public interest” feature that supersedes the financial interests of the holder.¹⁵² Finally, the “motive” of the user in taking the original or portions thereof has been emphasized as important.¹⁵³ Overall, although the courts have developed “factors” to be considered together when determining the fairness of a particular use, depending on the circumstances, the most determinative question is the potential economic damage caused.¹⁵⁴



¹⁴⁷*Hyde Park Residence Ltd v Yelland* 2000 R.P.C 604 616.

¹⁴⁸*Ashdown v Telegraph Group Ltd* 2001 EWCA Civ 1142.

¹⁴⁹*Ashdown* case (n 148) par 32 and 82.

¹⁵⁰2011 R.P.C 7.

¹⁵¹*Meltwater* case (n 150) 239 and *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* 2012 R.P.C 1.

¹⁵²*Meltwater* case (n 150) 239-240.

¹⁵³*Pro Sieben* case (n 136) 121 and *Fraser-Woodward Limited v British Broadcasting Corporation, Brighter Pictures Limited* 2005 EWHC 472 (Ch) par 55.

¹⁵⁴D’Agostino “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K Fair Dealing and U.S Fair Use” 2008 *McGill Law Journal* 209 344.

CHAPTER 4: THE SA POSITION

4.1 Rights granted by copyright protection

4.1.1 Economic Rights

Depending on the particular work involved, the “owner” of it is given the ability to perform certain actions with it, such as: reproduction, public performances, and “making an adaptation of the work”.¹⁵⁵ Regardless of the type of work and rights involved, the function of this protection is to give the “owner” of the work certain “exclusive statutory rights”, and as such entitles him/her/it to prevent others from making use of the work in certain ways.¹⁵⁶ Thus if a person who is not the “owner of the copyright” or who does not have the “owner’s” permission, performs or causes someone else to perform the “exclusive rights” of the owner as set out in the Copyright Act¹⁵⁷ (the Act), then such person has infringed these rights and can be prevented for doing so or continuing to do so.¹⁵⁸ As a result of this, the “owner” of the copyright is provided with a type of statutory “monopoly”, however it is not absolute.¹⁵⁹

4.1.2 “Moral Rights”

The “author” of the copyright is also entitled to enforce what is known as “moral rights”.¹⁶⁰ For this, the Act provides additional protection to the “author” of “literary, musical, artistic works, a cinematograph film or a computer program”.¹⁶¹ In terms of this protection the “author” is entitled to claim “authorship” and can oppose “distortions, mutilation or other modification of the work...if it is or would be prejudicial to the honour or reputation of the author”.¹⁶² Finally, impinging a moral right has the effect of infringing copyright per chapter 2 of the Act.¹⁶³ Since the “fair dealing” exception to protection is not found in that chapter it does not apply to “moral rights” and therefore, cannot prevent a finding of such infringement, but a general claim in terms of “freedom of expression” remains.¹⁶⁴ An additional problem potentially faced by an “author”, is the submission that “moral rights” can only be raised once the “economic rights” have been disposed of as then no financial damage can be shown.¹⁶⁵

¹⁵⁵Dean and Dyer (n 1) 23.

¹⁵⁶Dean and Dyer (n 1) 3.

¹⁵⁷98 of 1978.

¹⁵⁸§23(1) of the Act.

¹⁵⁹Schonwetter (n 3)32.

¹⁶⁰Dean “Protection of the Author’s Moral Rights in South Africa” 1995 *SA MER LJ* 73 73.

¹⁶¹§20 of the Act.

¹⁶²§20(1) of the Act and Dean (n 15) 74.

¹⁶³§20(2) of the Act.

¹⁶⁴Visser (n 12) 337.

¹⁶⁵Visser (n 12) 338.

4.2 Current legislative provisions

“Fair dealing” is currently set out in section 12 of the Act, and its application is further extended by subsequent provisions. So, it is not an infringement of “copyright” if a “fair dealing” is made of a work “for purposes of”: “research or private study”, “personal or private use”, “criticism or review” or “reporting current events”.¹⁶⁶ For “criticism”, “review” and “reporting current events” it is necessary to acknowledge the “source” and “author” of the original.¹⁶⁷ Due to the application of the doctrine to various types of protectable works, the only work to which it does not currently apply is a “programme-carrying signal”.¹⁶⁸ A party claiming “fair dealing” in opposition to a claim of infringement, would first have to show that the use in question is for one of the “purposes” set out in this “closed list”.¹⁶⁹ The rationale of this is to attempt to provide precision regarding what will be considered as non-infringing use.¹⁷⁰ Only once this initial requirement is fulfilled will it be considered whether the particular use is fair.¹⁷¹ Thus, it is of the utmost importance for a court to be cautious with this doctrine, in that it should actually be for a legitimate “public purpose” and not mere economic advantage.¹⁷² However, the exact extent of it is ambiguous, especially given the lack of guidelines in the Act as to when fairness can be found, meaning that much is left to the judgment of the court.¹⁷³

4.3. Laughing it Off and the impact of the Bill of Rights (BOR)

In the current constitutional dispensation, the BOR¹⁷⁴ effects the interpretation and application of all law in South Africa.¹⁷⁵ For copyright, depending on the circumstances, a user of another’s work may be able to raise a defence based on FOE rights as contained in section 16 of the Constitution.¹⁷⁶ Hence, there is a powerful connection between FOE rights and “fair dealing”, in that it acts to override certain entitlements of the copyright owner to give effect to the rights of the user.¹⁷⁷ Thus, “fair dealing” can be viewed as the statutorily enacted guardian of FOE.¹⁷⁸ Therefore it is necessary to contemplate the impact of such rights.

¹⁶⁶s 12(1) of the Act.

¹⁶⁷s 12(1) of the Act.

¹⁶⁸See s 15(4), s 16(1), s 17, s 18, s 19A and s 19B(1) of the Act.

¹⁶⁹Shay (n 9) 593.

¹⁷⁰Shay (n 9) 593.

¹⁷¹Shay (n 9) 593.

¹⁷²Shay (n 9) 594.

¹⁷³Schonwetter (n 3) 34.

¹⁷⁴ch 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

¹⁷⁵*National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* 2014 2 All SA 461 (GJ) 463-489.

¹⁷⁶*Gidani* case (n 175) 488-492.

¹⁷⁷Shay (n 9) 603-604.

¹⁷⁸Schonwetter (n 3) 33.

In this regard, a constitutional court decision is significant.¹⁷⁹ This case dealt with an allegation of infringement in terms of section 34(1)(c) of the Trade Marks Act¹⁸⁰ (anti-dilution) which protects against use of a mark which “takes unfair advantage of or is detrimental to the distinctive character or repute of the registered mark”.¹⁸¹ The user, however, claimed that the use constituted a “parody” and as such was not infringement.¹⁸² The court began by stating that the purpose of the section is to protect the “advertising prowess or selling power” of the mark.¹⁸³ It went further to find that the question of “unfair advantage or detriment” depends on if the particular “expressive” act involved, falls under the protection of the Constitution.¹⁸⁴ Although it was said that FOE is not an absolute right, its importance in a democratic society should not be underestimated, as it enhances other rights and values.¹⁸⁵ Thus, as the anti-dilution provision potentially prevents “expressive conduct”, it must be interpreted in a manner that is “least destructive of the rights”.¹⁸⁶ Also, how these interests will be balanced to establish fairness is fact dependant.¹⁸⁷ The crux of the decision come to the finding that in order to avoid FOE rights, a “likelihood of substantial economic detriment” must be shown.¹⁸⁸ The point was made that conduct having, amongst others, a commercial aim will not necessarily be excluded from constitutional protection.¹⁸⁹ As for “parody” it was found that it is “relevant”, but not definitive, in a consideration of “fair use”.¹⁹⁰ However, the court went onto state that if no financial damage is demonstrated, then whether the “parody” is fair will not be considered.¹⁹¹ It was further made clear that merely referring to conduct as “parody” is not determinative of the issue, because if the conduct is “constitutionally” protected then it can only be limited in a manner that is “constitutionally” recognised.¹⁹² In a significant minority judgement, Judge Sachs stated that whether a defence of “parody” would succeed is fact dependant and all “relevant factors” must be considered with the “purpose” of the particular “law” as well as the FOE principles in mind.¹⁹³ In finding a balance between these interests it is necessary to determine if “an

¹⁷⁹*Laugh it Off* case (n 5).

¹⁸⁰194 of 1993.

¹⁸¹*Laugh it Off* case (n 5) 163.

¹⁸²*Laugh it Off* case (n 5) 154 and 172.

¹⁸³*Laugh it Off* case (n 5) 163.

¹⁸⁴*Laugh it Off* case (n 5) 165.

¹⁸⁵*Laugh it Off* case (n 5) 166.

¹⁸⁶*Laugh it Off* case (n 5) 167.

¹⁸⁷*Laugh it Off* case (n 5) 167.

¹⁸⁸*Laugh it Off* case (n 5) 168.

¹⁸⁹*Laugh it Off* case (n 5) 171.

¹⁹⁰*Laugh it Off* case (n 5) 172.

¹⁹¹*Laugh it Off* case (n 5) 172-173.

¹⁹²*Laugh it Off* case (n 5) 173.

¹⁹³*Laugh it Off* case (n 5) 178.

independent observer”, “sensitive to” FOE and the creator’s rights, views the damaged caused as greater.¹⁹⁴ Judge Sachs also listed “non-exhaustive” elements as important in determining this issue, namely: the amount taken, if it is “primarily commercial”, whether the information could have been disseminated in another manner, the “medium...and context” involved, and that quality of the humour is irrelevant.¹⁹⁵

Although *Laugh it Off* does not deal directly with copyright and “fair dealing” it has been recently held, by the High Court, to apply “equally” to copyright law.¹⁹⁶ In this regard, when dealing with “parody” as a defence to copyright infringement, it was stated that the interests of the owner has to be weighed against the “public” interests regarding FOE to determine the type and extent of use comprising infringement.¹⁹⁷ Therefore, as in *Laugh it Off*, the purpose of copyright protection must be considered.¹⁹⁸ After quoting with approval the relevant sections of the *Laugh it Off* case that set out “substantial economic harm” as a requirement to oust FOE,¹⁹⁹ it was held that the particular use was not constitutionally safeguarded as it was not really for the “public” benefit but rather only to make a profit- meaning the question of “parody” did not fall for consideration.²⁰⁰ Thus, the court did not have to specifically rule on the issue of “substantial economic harm”. However, it is submitted that the application of this is, unfortunately, implied throughout the judgment. This is so because, firstly, the court clearly acknowledges and approves of the requirement- indeed went on to note that the use had caused economic damage.²⁰¹ Secondly, and most striking is the connection in reasoning of the two decisions. As stated, the Constitutional Court based its finding on the economic purpose behind the anti-dilution provision.²⁰² Similarly, the court in *Gidani* also made clear that the purpose of copyright must be considered.²⁰³ In this regard, the owner is granted certain entitlements in order to ensure “commercial exploitation” by him/her of the work and must be assessed against the relevant “public” interests.²⁰⁴ Therefore, although FOE can be “limited” if “expressive” conduct is in conflict with protection granted by copyright,²⁰⁵ if *Laugh It Off* applies then any

¹⁹⁴*Laugh it Off* case (n 5) 178.

¹⁹⁵*Laugh it Off* case (n 5) 176, 179, and 180.

¹⁹⁶*Gidani* case (n 175) 488.

¹⁹⁷*Gidani* case (n 175) 489-490.

¹⁹⁸*Gidani* case (n 175) 489.

¹⁹⁹*Gidani* case (n 175) 490.

²⁰⁰*Gidani* case (n 175) 490-491.

²⁰¹*Gidani* case (n 175) 490-491.

²⁰²*Laugh it Off* case (n 5) 163-168.

²⁰³*Gidani* case (n 175) 489.

²⁰⁴van der Walt AJ and Shay RM “Constitutional Analysis of Intellectual Property” 2014 *Potchefstroom Electronic Law Journal* 51 65.

²⁰⁵Pistorius “Trade-Mark tarnishment: Should we ‘Laugh it Off’ all the way to ‘Telkomsucks’ and Hellcom?” 2004 *SA MERC LJ* 727 737.

claim to uphold economic rights against FOE would have to be accompanied by a “likelihood of substantial economic harm”.

4.4 Copyright Amendment Bill

The proposed Copyright Amendment Bill (the Bill) was recently released for public comment.²⁰⁶ The long title of the Bill specifically states one of its “purposes” as making provision for the “fair use of copyright”.²⁰⁷ Firstly, it seeks the introduction of section 12A into the Act to deal specifically with “fair use”.²⁰⁸ It establishes that “fair use” of copyright for purposes of “criticism, comment and news reporting, judicial proceedings, professional advice, teaching..., scholarship or research is not infringement”.²⁰⁹ These provisions are specifically limited to activity not for “commercial gain”.²¹⁰ Further, it includes a specific defence regarding “cartoon, parody and pastiche” in terms of certain types of work for “non-commercial use”, provided that the “use is limited and reasonable”.²¹¹ Finally, it introduces “factors” to consider when determining the fairness of the use, namely: “the purpose and character of the use”, “the nature of the copyright work”, “the amount and substantially” of the work used, the “proportionality of the work used (“few lines” versus the “whole work”)), and the effect on the derivative market.²¹² Therefore the proposed amendment would result in a “fair dealing” and “fair use” doctrine in SA, whereby there is an overlap between the two, with guidance for the application of “fair use” only.



²⁰⁶GN 39028 in GG 601 (27-07-2015) 4.

²⁰⁷GN 39028 in GG 601 (27-07-2015).

²⁰⁸s 14 of the Bill.

²⁰⁹s 14 of the Bill.

²¹⁰s 14 of the Bill.

²¹¹s 14 of the Bill.

²¹²s 14 of the Bill.

CHAPTER 5: COMPLIANCE WITH INTERNATIONAL REQUIREMENTS REGARDING LIMITATION OF RIGHTS

The purpose of this chapter will be to examine the compliance of the “fair use” and “fair dealing” doctrines with the Berne Convention for the Protection of Literary and Artistic works²¹³ (Berne Convention) and the Agreement on Trade-related Aspects of Intellectual Property Law²¹⁴ (TRIPS).

As a point of departure, the Berne Convention is viewed as the primary source of “international” law regulating “copyright” protection.²¹⁵ It was created and later amended with the aim of providing wider protection to the “reproduction” right attaching to “works” and to have “harmonization” of protection amongst the member states.²¹⁶ As such the Berne Convention makes provision for “exceptions” to “reproduction”, in that it provides for prerequisites that national law must comply with.²¹⁷ A “three-step test” has been established, whereby domestic “exceptions” are required to: (1) be limited to “certain special cases”, (2) “not conflict with a normal exploitation of the work”, and (3) “not unreasonably prejudice the legitimate interests of the author”.²¹⁸ This “three-step test” was later adopted and used in the TRIPS agreement,²¹⁹ an agreement in terms of which all members of the World Trade Organization are bound.²²⁰ It has been said that TRIPS has changed and expanded the “three-step test”.²²¹ This is so because, it now applies to “exceptions” to all exclusive rights subsisting in the “work”.²²² As the jurisdictions that are the subject of this dissertation are member countries to the Berne Convention²²³ and TRIPS agreement,²²⁴ it is essential for the doctrines in the respective jurisdictions to comply with the “three-step test”.

Notwithstanding its significance, the interpretation of the test and thus what is required of national legislation to conform to it, is subject to uncertainty.²²⁵ However when considering the

²¹³September 9 1886.

²¹⁴Annexure 1C to the Agreement Establishing the World Trade Organisation adopted on 15 April 1994 in Marrakesh.

²¹⁵Samuelson (n 45) 850.

²¹⁶Samuelson (n 45) 850.

²¹⁷Shay *Users’ Entitlements under the Fair Dealing Exceptions to Copyright* (2012 dissertation US) 31-32.

²¹⁸Article 9(2) of the Berne Convention and Shay (n 217) 32.

²¹⁹Samuelson (n 45) 851 and article 9(1) and 13 of TRIPS.

²²⁰Shay (n 217) 39.

²²¹Samuelson (n 45) 851.

²²²Samuelson (n 45) 851.

²²³WIPO-Administered Treaties, contracting parties> Berne Convention
http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (01-10-2015).

²²⁴Understanding the WTO: The Organisation> Members and Observers
https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm(01-10-2015).

²²⁵Schonwetter (n 3) 35.

validity of an alleged over-reaching “exception to public performance” rights under the USA copyright provisions, a “panel” of the World Trade Organization’s “Dispute Settlement Body”²²⁶ gave substantial assistance.²²⁷ At the outset it must be noted that although this report is significant, it is not binding on any “members” other than the litigants involved in the dispute.²²⁸ This curtails its usefulness.²²⁹ For the sake of convenience, the interpretation given to each of the three steps will briefly be set out separately. There follows a consideration of the compliance with the steps by the doctrines.

5.1 General comments

The “panel” stated that the steps of the test are “cumulative” and therefore each must be adhered to.²³⁰ It went on to hold that, the test is clearly meant to allow only for “narrow and limited” circumstances.²³¹ This general demand for acknowledging the restrictive nature of the test, is further notable from the interpretation of the steps.²³²

5.2 Step 1: “certain special cases”

It was decided that the “ordinary meaning” of the words used in the step must be ascertained, taking into account “their content, object and purpose”.²³³ This “ordinary meaning” requires that the “limitation or exception... should be clearly defined and narrow in scope and reach”.²³⁴ The “panel”, however, made it clear that it is not necessary that “each...possible” circumstance potentially leading to an application of the provision be expressly “identified”. All that is necessary, is that the reach of the provision is specified and determinable.²³⁵ As for this reach, although not determinative, the “public policy” that lead to a particular provision being enacted is helpful.²³⁶

5.3 Step 2: “not in conflict with a normal exploitation of the work”

Here it was concluded that “exploitation” means the manner by which the “owner” of the copyrighted material uses the rights attaching thereto, in order to obtain “economic” benefit.²³⁷

²²⁶United States--Section 110(5) of the US Copyright Act, Report of the Panel WT/DS160/R (15 June 2000) [https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf\(05-10-2015\)](https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf(05-10-2015)).

²²⁷Schonwetter (n 3) 35.

²²⁸Schonwetter (n 3) 35-36.

²²⁹Schonwetter (n 3) 35-36.

²³⁰WT/DS160/R (n 226) par 6.97.

²³¹WT/DS160/R (n 226) par 6.97.

²³²WT/DS160/R (n 226) par 6.97.

²³³WT/DS160/R (n 226) par 6.107.

²³⁴WT/DS160/R (n 226) par 6.112.

²³⁵WT/DS160/R (n 226) par 6.108.

²³⁶WT/DS160/R (n 226) par 6.112.

²³⁷WT/DS160/R (n 226) par 6.165.

Further that “normal exploitation” entails considering if the use is “regular, usual, typical or ordinary” (“empirical”) and if it “[conforms] to a type or standard” (“normative”).²³⁸ Additionally, such consideration requires an analysis of each right subsiding in the material.²³⁹ For “empirical normalcy” it was concluded that of importance is the “areas in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exception”.²⁴⁰ As for the “normative” aspect, it was concluded that the current manners of exploiting for gain, as well as those which have a likely potential of being a source of gain for the “owner” is important.²⁴¹ It has been submitted that this is dependent on the existing “commercial and technological conditions” and as such what is “normal” can change.²⁴² Therefore, this step is met if the provision does not cater for or allow a third party to economically compete with the “owner’s” protected rights.²⁴³

5.4 Step 3: “unreasonably prejudice the legitimate interests of the author”

The “panel” had to consider the meaning of “interests”, “prejudice” and what extent thereof would be “unreasonable”.²⁴⁴ After analyzing the meanings of these terms, it was found that overall it involves the question of whether the provision “causes or has the potential to cause an unreasonable loss of income to the copyright owner”.²⁴⁵

5.5 Compliance of doctrines

The “fair dealing” doctrines in SA and the UK follow an approach of recognising specific uses that qualify as an exception.²⁴⁶ Therefore, these doctrines are limited in “scope”.²⁴⁷ It is submitted, that is also notable from the objective of precluding protection on the basis of “fair dealing”. Such objective is to advance “the public interest in education, free dissemination of information and freedom of expression”.²⁴⁸ Thus, the potential wide interpretation of the specific types of uses qualifying as “fair dealing”²⁴⁹ can be resolved by adhering to this underlying objective; thereby following the “panel’s” suggestion on this point. Furthermore, the doctrines also complies with the last two steps of the “three-step test”.²⁵⁰ This is so due to

²³⁸WT/DS160/R (n 226) par 6.166.

²³⁹WT/DS160/R (n 226) par 6.173.

²⁴⁰WT/DS160/R (n 226) par 6.177.

²⁴¹WT/DS160/R (n 226) par 6.180.

²⁴²Visser (n 12) 342.

²⁴³WT/DS160/R (n 226) par 6.181.

²⁴⁴WT/DS160/R (n 226) par 6.222.

²⁴⁵WT/DS160/R (n 226) par 6.229.

²⁴⁶Shay (n 9) 593.

²⁴⁷See generally Shay (n 217) 150-161.

²⁴⁸Shay (n 217) 144-145.

²⁴⁹*Pro Sieben* case (n 136) 122.

²⁵⁰See generally Shay (n 217) 150-161.

the emphasis placed on the legally relevant “commercial” impact on the original by the English courts in interpreting and applying the doctrine.²⁵¹ Therefore, should a work “economically compete” with the original it will, in all probability, not qualify as a “fair dealing”.²⁵² Given the above, the “fair dealing” doctrine as interpreted and applied by the UK courts (which interpretation is of value for the SA position)²⁵³ complies with the “three-step test”.²⁵⁴

Whereas the “fair dealing” compliance is subject to a level of certainty, the compliance of the “fair use” doctrine is controversial.²⁵⁵ In this regard, the main contention lies with whether the USA doctrine provides an “exception” only for “certain special cases”.²⁵⁶ A comprehensive analysis of this issue is beyond the scope of this dissertation, however it is tentatively submitted that the arguments in favour of compliance with this step are convincing. Firstly, the test as interpreted by the “panel” does not demand the boundaries of an “exception” to be specifically detailed but only that its reach be determinable.²⁵⁷ In this regard it has been stated, that the USA doctrine has a “reasonably predictable pattern”.²⁵⁸ Again the underlying objective of the doctrine, to advance creativity and innovation,²⁵⁹ is of use. Thus despite the limits of the doctrine not being statutorily defined, the courts seems to have limited it to uses that fulfil the function of protecting relevant and important “public interests” in the work.²⁶⁰ As for steps two and three, there is clear compliance given the emphasis placed on and the detrimental impact on a claim of “fair use” by economic damage to the original.²⁶¹ The broader “fair use” doctrine being compatible with the “three-step test” would also be in line with the objects of the test to provide “sufficient breathing space to satisfy economic, social and cultural needs” to members.²⁶² Despite the foregoing, until such time as a ruling is made on its compliance, the “fair use” doctrine is potentially not a “proper expression” of international obligations and as such its survival is open to doubt.²⁶³

²⁵¹Ashdown case (n 148) par 70.

²⁵²D’Agostino (n 154) 344.

²⁵³Shay (n 9) 592 and Visser (n 12) 337.

²⁵⁴See generally Shay (n 217) 150-161.

²⁵⁵Schonwetter (n 3) 48, Samuelson (n 45) 852 and Okediji “Towards an International Fair Use doctrine 2000-2001 *Columbia Journal of Transnational Law* 75 173.

²⁵⁶Schonwetter (n 3) 48, Samuelson (n 45) 852 and Okediji (n 255) 173.

²⁵⁷Schonwetter (n 3) 48.

²⁵⁸Samuelson (n 45) 582.

²⁵⁹Campbell case (n 23) 579.

²⁶⁰See Schonwetter (n 3) 33; *Authors Guild* case (n 85) 9; *Prince* case (n 86) 705 and *Latimer v Roaring Toyz, Inc* 601 F.3d 1224 (2010) 1238.

²⁶¹Samuelson (n 45) 852.

²⁶²Samuelson (n 45) 853.

²⁶³Schonwetter (n 3) 48.

CHAPTER 6: THE APPROPRIATENESS OF REQUIRING PAYMENT FOR USE

In this chapter the validity of a “pay-per-use” system will be considered generally and thereafter more specifically in terms of the proposed amendment under SA law. In order to achieve the policy objectives of copyright, the various Copyright Acts under discussion specifically provide that when a use can be classified as “fair use” or “fair dealing”²⁶⁴, it is not a violation of copyright protection as it will not be infringing use.²⁶⁵ Therefore when a use can be so classified, the rights of the copyright owner are not effected and are not relevant as he/she does not have any rights in the particular situation.²⁶⁶

Once the effect of the doctrines is understood, it seems that it is not appropriate to require payment from the user to use work that is legally recognised as permitted and thus “free use”.²⁶⁷ If payment should be required then these doctrines would failure to achieve their policy aim.²⁶⁸ However, there is an interesting trend of requiring payment for certain types of non-infringing uses.²⁶⁹ In an analysis of various jurisdictions, Ginsburg has argued that in order to comprehend paying for something that is legally allowed, understanding the kind of use involved is essential.²⁷⁰ According to her, uses should be separated into “new distributions” and “new works”.²⁷¹ This means that should the use complained of merely introduce the exact same content but in a different form or medium then, although it can be classified as “fair use”, a “pay-per-use” system can be introduced in order to ensure a proper balancing of rights.²⁷² Whereas if the use constitute a “new work”, no payment should be required as “authors” are specifically entitled to refer to the work of others when developing and creating their own.²⁷³ Therefore, should the use qualify as a creative use then not only is there no infringement of the work but a “pay-per-use” system is also inappropriate.²⁷⁴ This logic will be applied to the suggested Bill.

²⁶⁴For the purposes of this chapter “fair use”, unless the context indicates otherwise, will be used to indicate both doctrines.

²⁶⁵See s 12(1) of the Act, s 107 of the American Act and s 29(1), s 29(1C), s 30(1), s 30(1ZA), s 30A(1) and s 32(1) of the CPDA.

²⁶⁶*Google* case (n 89) 15 and Thompson (n 121) 29.

²⁶⁷Mazzone (n 21) 398.

²⁶⁸Mazzone (n 21) 404.

²⁶⁹Ginsburg JC “Fair use for free or permitted-but-paid?” 2014 *Berkeley Technology Law Journal* 1383 1386.

²⁷⁰Ginsburg (n 269) 1386.

²⁷¹Ginsburg (n 269) 1386.

²⁷²Ginsburg (n 269) 1385-1386 and 1389.

²⁷³Ginsburg (n 269) 1389.

²⁷⁴Ginsburg (n 269) 1389.

The Bill seeks to introduce a limited “pay-per-use” system.²⁷⁵ It provides for situations in which a “license” must be applied for.²⁷⁶ However, of specific interest is the inclusion of a “license” requirement for certain uses related to “cartoon, parody and pastiche”.²⁷⁷ To assist in the determination of what is “fair”, the Bill incorporates various “factors” to be taken into account.²⁷⁸ One such factor is that the “use...is fair and proportionate”, which in turn requires that if the “whole copyrighted work” is used for “cartoon, parody or pastiche for commercial use” then a “license” is needed.²⁷⁹ These three particular uses, are not specifically defined in the Bill but their dictionary definitions indicates that they cover similar situations.²⁸⁰ Therefore, the rest of this chapter will focus on the authority surrounding “parody”.

From a copyright perspective, although a “parody” refers to the original work it does constitute a “new work”.²⁸¹ This is due to the dual character of “parody” whereby to function, it must refer to the copyrighted work to a sufficient degree to enable it to be identified as the work under scrutiny (“derivative” character).²⁸² However, merely referencing the work will not qualify for protection, and the “new work” must rather contain additional features of comment or change (“original” character).²⁸³ After looking at the legal interpretation of “parody” it becomes clear that the proposed “pay-per-use” system is inappropriate and furthermore illogical on at least three grounds. Firstly even if Ginsburg’s call for payment in certain circumstances is accepted, it is submitted that parodic use is not one of those circumstances. This is so because, in order to qualify as a “parody” the use cannot merely provide the same content in a different form. What is required is sufficient additions, alterations or comments to the copyrighted work²⁸⁴ so that the use has an “original” character.²⁸⁵ As such the user would be applying his or her “creativity” to develop a “new work”.²⁸⁶ Secondly, the relevant amendment would only require a “license” if the entire original is used.²⁸⁷ This is strange as there is already an accepted weariness of an entire copy qualifying as “fair use”, meaning that requiring permission to use

²⁷⁵s 14 of the Bill.

²⁷⁶See for example Schedule A-Translation Licenses and B-Reproduction Licenses in GN 39028 in GG 601 (27-07-2015).

²⁷⁷s 14 of the Bill.

²⁷⁸s 14 of the Bill.

²⁷⁹s 14 of the Bill.

²⁸⁰See for example Visser (n 12) 323 when discussing “parody, pastiche and caricature” and van der Walt and Shay “Parody as a means to advance the objectives of copyright law 2013 *SAMERC LJ 1*.

²⁸¹Visser (n 12) 322.

²⁸²van der Walt and Shay (n 280) 3.

²⁸³van der Walt and Shay (n 280) 3.

²⁸⁴*Campbell Case* (n 23) 588 and *Laugh it Off case* (n 5) par 77.

²⁸⁵van der Walt and Shay (n 280) 3.

²⁸⁶Ginsburg (n 269) 1385-1386 and 1389.

²⁸⁷s 14 of the Bill.

and then paying for such privilege is already likely.²⁸⁸ However it is also recognised that, in certain circumstances, copying the entire work could potentially be “fair use”.²⁸⁹ Therefore as this is such a case dependant question, it is arbitrary to set the requirement in terms of the amount taken. Lastly, a work constituting a “parody” in the true legal sense of the word has been held to undoubtedly be “transformative”.²⁹⁰ Given this, such use is not likely to be “competing” with the original.²⁹¹ Therefore unless a “derivate market” is effected, it is unlikely for the use to negatively impact on the financial rights of the owner that are legitimately protected by copyright.²⁹² Thus payment should not be required for a type of use that represents the aim of allowing such an exception,²⁹³ especially if it cannot or at least is highly unlikely to interfere with the legitimate rights of the owner.



²⁸⁸*Sony* case (n 27) 450 and *Vosper* case (n 143) 94.

²⁸⁹*Campbell* case (n 23) 586-588, *Sony* case (n 27) 450 and *Google* case (n 89) 12.

²⁹⁰*Campbell* case (n 23) 579.

²⁹¹van der Walt and Shay (n 280) 7.

²⁹²*Campbell* case (n 23) 592 and van der Walt and Shay (n 280) 7.

²⁹³*Campbell* case (n 23) 579.

CHAPTER 7: THE IMPACT OF TECHNOLOGICAL ADVANCES OF A MODERN SOCIETY

The discussion so far has centred on “technologically neutral” applications of the doctrines, however the rapid advancements in technology affects these doctrines.²⁹⁴ Technological advancements have a notable impact on copyright in general, both from the perspective of the holder of the rights subsiding in the work as well as that of the users of such work.²⁹⁵ Previously, the level of “technology” enabled relatively expensive and “time” consuming use in “limited quantities” and of substandard “quality”.²⁹⁶ Whereas since the advent and development of the “Internet” and other modern technology, a user is enabled to make fast, cheap and “unlimited copies” of superb “quality”.²⁹⁷ The “Internet” also means that the copy can be sent throughout the globe practically immediately, as opposed to the use being restricted to one area.²⁹⁸ Thus the impact on the holder’s interests as well as those of the “user”, are both positive and negative.²⁹⁹

As for the holder, the positive is that the “market” for the copyrighted material has the potential to expand indefinitely.³⁰⁰ The negative being that with this extended publicity and availability of the work comes an increased risk and level of infringement.³⁰¹ Whereas, the “user” has the positive impact of increased “access” to copyrighted material and the negative of additional “legal and technical” systems that give the “owner” of the copyrighted material extensive control over “access” to the material.³⁰² It has been said that, due to the relatively fixed nature of “fair dealing” as compared to the open nature of “fair use”, the “fair use” doctrine is more readily adaptable to technological advancements.³⁰³ Regardless, the focus of this chapter will be the effect of giving the “owner” control over the “access” of the material. This will be done by first setting out the international requirements on this issue. There follows a consideration of the national implantation of these requirements for “fair use” and “fair dealing”, respectively. Finally, it will conclude that reform is necessary in order to better protect the application and scope of these doctrines.

²⁹⁴Schonwetter (n 3) 42.

²⁹⁵Pistorius “Developing countries and copyright in the information age: the functional equivalent Implementation of the WTC” 2006 *Potchefstroom Electronic Law Journal* 1/27 1/27.

²⁹⁶Pistorius (n 295) 1/27.

²⁹⁷Pistorius (n 295) 1/27.

²⁹⁸Pistorius (n 295) 1/27.

²⁹⁹Pistorius (n 295) 1/27.

³⁰⁰Pistorius (n 295) 1/27-2/27.

³⁰¹Pistorius (n 295) 1/27-2/27.

³⁰²Pistorius (n 295) 2/27.

³⁰³Thompson (n 121) 26-27.

7.1 International requirements

Of importance here is the World Intellectual Property Organisation Copyright Treaty (“WTC”),³⁰⁴ a treaty to which all three jurisdictions under discussion are signatories.³⁰⁵ The “WTC” regulates the additional safeguards of copyrighted material deemed necessary in the “digital environment.”³⁰⁶ In this regard, “contracting parties” are required to “provide adequate legal protection and effective legal remedies” for the avoidance of “technological protection measures (“TPM”) that are used by authors in connection with the exercise of their rights...which are not authorized by the authors concerned or permitted by law”.³⁰⁷ Such additional safeguards potentially severely restricts the application of the doctrines.³⁰⁸

7.2 USA implementation

The USA expression of its international obligation is contained in the Digital Millennium Copyright Act of 1998³⁰⁹ (DMCA).³¹⁰ The DMCA was enacted in response to the perceived “unique threat” posed by the technological advances of the “digital” age.³¹¹ Therefore, the purpose of the DMCA is to modernise USA copyright protection by “protecting intellectual property” and simultaneously advancing and fostering “electronic commerce”.³¹² As for “fair use” two aspects of the DMCA will be considered, namely: the “circumvention of copyright protection systems”³¹³ and certain provisions regarding “limitations on liability related to material online”³¹⁴.

7.2.1 “Anti-circumvention provisions”

The “anti-circumvention provisions”, as contained in section 1201 of Title 17 of the United States Code, has been said to be the most significant development in the attempt to modernize copyright law.³¹⁵ The stated goal of these provisions is to “balance the interests” of protecting

³⁰⁴Adopted in Geneva December 20, 1996 as a result of the WIPO “Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions”:
http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157.

³⁰⁵http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16.

³⁰⁶Pistorius (n 295) 3/27.

³⁰⁷Article 11 of the WTC.

³⁰⁸Pistorius (n 295) 4/27.

³⁰⁹Title 17 United States Code.

³¹⁰Pistorius (n 295) 3/27-4/27.

³¹¹Nimmer “A Riff on Fair Use in the Digital Millennium Copyright Act” 1999-2000 *University of Pennsylvania Law Review* 673 683 and 739.

³¹²Nimmer (n 311) 680 and Hazelwood “Fair use and the takedown/ put back provisions of the Digital Millennium Copyright Act” 2009-2010 *IDEA- The Intellectual Property Law Journal* 307 308.

³¹³17 USC s 1201.

³¹⁴17 USC s 512.

³¹⁵Nimmer (n 311) 675.

copyrighted materials and associated rights with those of the “public” in accessing information and encouraging technological advancements.³¹⁶ The method of achieving this goal has previously only been concerned with the “use” of works and not the way in which such works are accessed or the medium through which the “use” is enabled.³¹⁷ In this way the USA system before the DMCA was “technologically neutral”.³¹⁸ This is no longer the position and the DMCA grants holders a “new right”.³¹⁹

This “new right” means that the holder has recourse against traditional infringement as well as for technology and actions that “facilitates” or “enables” infringement.³²⁰ To simplify the extensive provisions of section 1201, it is convenient to briefly mention the three types of protection³²¹ it grants. The section firstly provides that “no person shall circumvent a [“TPM”] that effectively controls access to a work protected under this title”.³²² Secondly, the section goes on to provide that “no person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device component or part thereof, that” allows for the effect of the first provision.³²³ Thirdly that such trading as provided for in the second provision is not allowed, if such equipment or conduct would avoid “measures” that “protect a right of a copyright owner”.³²⁴ Therefore, the first two types of protection has the effect of preventing a person either directly or with the assistance of another (whether by mechanical advantage provided by or action of that other person), gaining “access” to a copyrighted work without the holders permission.³²⁵ Nimmer³²⁶ has suggested that this is akin to “breaking into a locked room to obtain a copy”. In such a situation both the person actually avoiding the security and the person who provided the technology to do so is liable.³²⁷ The third type of protection applies where a person makes use of a work in a manner that infringers the work, then the person who has assisted the first mention person to “access” the work is liable

³¹⁶Nimmer (n 311) 682.

³¹⁷Nimmer (n 311) 683.

³¹⁸Nimmer (n 311) 683.

³¹⁹Loos “Fair Use and the Digital Millennium Copyright Act” 2006-2007 *Michigan Telecommunications and Technology Law Review* 601.

³²⁰Nimmer (n 311) 684.

³²¹Nimmer (n 311) 684-685.

³²²17 USC s1201(a)(1)(A).

³²³17 USC s1201(a)(2).

³²⁴17 USC s1201(b)(1).

³²⁵Nimmer (n 311) 686.

³²⁶(n 311) 686.

³²⁷Nimmer (n 311) 686-687.

and not the actual infringer.³²⁸ Of significance, the DMCA was not intended to prevent the creation and development of “technology” that results in non-infringing “use”.³²⁹

As for the effect on “fair use”, there are certain exceptions to the provisions under discussion.³³⁰ Such exceptions include those for “educational institutions”³³¹ and regarding “encryption research”^{332,333} However, s1201(c) merely acknowledges that “fair use” as a “defense against copyright infringement” is maintained.³³⁴ As such, a claim in terms of non-compliance with the “anti-circumvention provisions” cannot be overcome by a counter claim of “fair use”, as such non-compliance is not infringement.³³⁵ Therefore even if a claimant would be able to prove “fair use”, if he/she gained illegal “access” to the work he/she remains liable and in fact such illegal “access prevents ‘fair use’”.³³⁶ The extensive consideration given to protecting the access of a work is also notable in the *Google* case, which involved the digitizing of entire books by Google for a “publically available search function” for user to locate “keywords” in books.³³⁷ The function further enabled the “public” to freely view portions of books.³³⁸ Here it was alleged that the “digitized copies” led to an increased “risk” of “piracy”.³³⁹ It was held that in situations where such exposure is unreasonable, whereby its consequence is to effectively act as a “substitute” for the copyrighted work, it may weigh against a finding of “fair use”.³⁴⁰ Such a negative finding can be overcome if the otherwise “fair use”, has sufficient “security measures” attached to guard against “piracy”.³⁴¹ Furthermore, this case in general emphasized considering not only the content of the use (its “purpose”) but also the “manner” in which it is presented when deciding if it was “fair use”.³⁴²

7.2.2 “Limitations on liability related to material online”

In order to achieve its dual objectives of protecting owner rights and advancing technology, the DMCA also provides for specific situations in which an “internet service provider” will not be

³²⁸Nimmer (n 311) 689-690.

³²⁹Nimmer (n 311) 687.

³³⁰Loos (n 319) 603.

³³¹17 USC s1201(d).

³³²17 USC s1201(g).

³³³Loos (n 319) 603.

³³⁴Loos (n 319) 609.

³³⁵Nimmer (n 311) 723 and Loos (n 319) 609.

³³⁶Nimmer (n 311) 723 and Loos (n 319) 609 and 610.

³³⁷*Google* case (n 89) 1.

³³⁸*Google* case (n 89) 1.

³³⁹*Google* case (n 89) 18.

³⁴⁰*Google* case (n 89) 18.

³⁴¹*Google* case (n 89) 18.

³⁴²*Google* case (n 89) 1-20.

held liable for infringement.³⁴³ In this regard, section 512 provides that in certain circumstances certain “service provider’s” (SP) will be exempt from liability.³⁴⁴ Therefore if, *inter alia*, on delivery of a “take down notification” stating that particular content is infringing use and the SP takes prompt and efficient action to delete the “infringing material”, then he/she/it will not be liable for the infringement.³⁴⁵ Such notification must be in “writing” and contain certain essential information.³⁴⁶ Of relevance for the current discussion, the notice must include a “statement” that the sender “has a good faith belief that the use...is not authorized by the copyright holder, its agent or the law”.³⁴⁷ Usually, the SP is then required to inform the client who put the material up that it has been removed.³⁴⁸ The client has the ability to request the content be “put back”, by way of notice to the SP which contains a “statement of good faith belief that the material was removed...as a result of a mistake or misunderstanding”.³⁴⁹ The material must be “put back” within a certain time period, unless the SP is informed by the owner of the copyrighted work that it has begun the legal process of “restraining” the client.³⁵⁰ Lastly, the DMCA attempts to protect against misuse of section 512 by providing for the liability of a “person who knowingly materially misrepresents...that the material or activity is infringing or that the material or activity was removed...by mistake or misidentification”.³⁵¹

It has been said that the wording of section 512 has resulted in a situation whereby “everything gets taken down” whether it is “infringing or non-infringing use”.³⁵² This is so because the financial penalty of incorrect notices under section 512(f), is limited to situations where the sender “knowingly materially misrepresents” the nature of the use.³⁵³ Due to court interpretation, this penalty was rendered useless as in order to avoid it all the owner of the material need show is a “subjective belief of infringement”, regardless of whether or not the use actually infringed the work.³⁵⁴ This in turn means that there is no inducement for the owner to be cautious with its notices.³⁵⁵ Additionally, the ability of the user to request the material be “put back” in cases of non-infringement is also, on a theoretical level, unsatisfactory in the

³⁴³Hazelwood (n 312) 309.

³⁴⁴17 USC s512.

³⁴⁵17 USC s512(c)(1)(A) and *Lenz v Universal Music Corp.* 2015 WL 5315388 (C.A.9 (Cal.) 3).

³⁴⁶17 USC s512(c)(3)(A).

³⁴⁷17 USC s512(c)(3)(A)(V).

³⁴⁸17 USC s512(g).

³⁴⁹17 USC s512(g)(3)(c).

³⁵⁰17 USC s512(g)(2)(B)-(C).

³⁵¹17 USC s512(f).

³⁵²Hazelwood (n 312) 315.

³⁵³Hazelwood (n 312) 317.

³⁵⁴Hazelwood (n 312) 325.

³⁵⁵Hazelwood (n 312) 326.

context of “fair use”.³⁵⁶ This is so because if the use is a “fair use” then it does not infringe copyright and as such has no cause for removal.³⁵⁷ Therefore, the fact remains that the notice procedures allows the removal of valid use, and puts the burden on the innocent user to get the valid work posted again.³⁵⁸ Such interpretation and application would negatively affect the “balance” sought between user and owner rights.³⁵⁹

Fortunately however, the United States Court of Appeal (Ninth Circuit) has very recently provided some clarity.³⁶⁰ The court had to decide whether owners of copyrighted work are misusing the “takedown” notices, by issuing such without determining if the material in question is “fair use”.³⁶¹ The court first put to rest any doubt, by unequivocally stating that owners cannot send “takedown” notices without considering if the use is a “fair use”.³⁶² If this was not done then the “subjective belief that the use was not authorized by law” or the owner becomes doubtful.³⁶³ The reasoning of the court being that “fair use” should rather be seen as a “right” and not a “defense”.³⁶⁴ Even if this was not the case, due to section 107 creating a “type of non-infringing use” this means that “fair use is authorized by the law”.³⁶⁵ However, it was made clear that the test remains if the owner had a “subjective good faith belief” that the use did not qualify as “fair use”.³⁶⁶ Turning then to the question of a financial penalty for misuse of the notices under section 512(f), the court maintained that the test was “subjective” meaning that the sender must have “some actual knowledge of misrepresentation”.³⁶⁷ It did clarify further by stating that if the sender does not undertake a consideration of “fair use” then it will be “liable” for the financial penalty, and will only avoid it if it actually reached a “good faith” decision that it is not “fair use” without requiring a previous “intensive” investigation.³⁶⁸ Continuing with the penalty, it was concluded that “the willful blindness doctrine may be used to determine whether a ...holder ‘knowingly materially misrepresented’ its ‘good faith belief’ that fair use was not present”.³⁶⁹ For this doctrine, it must be shown that there was a “subjective

³⁵⁶Hazelwood (n 312) 328.

³⁵⁷Hazelwood (n 312) 328.

³⁵⁸Hazelwood (n 312) 328.

³⁵⁹Hazelwood (n 312) 334.

³⁶⁰Lenz case (n 345).

³⁶¹Lenz case (n 345) 1.

³⁶²Lenz case (n 345) 1.

³⁶³Lenz case (n 345) 1.

³⁶⁴Lenz case (n 345) 5.

³⁶⁵Lenz case (n 345) 6.

³⁶⁶Lenz case (n 345) 6.

³⁶⁷Lenz case (n 345) 6.

³⁶⁸Lenz case (n 345) 7.

³⁶⁹Lenz case (n 345) 8.

belief” of a “high probability that a fact exists” and that the certainty of this must be consciously not discovered.³⁷⁰ Therefore although the test remains “subjective”, “fair use” is at least more protected by the need to actually consider it.³⁷¹

7.3 UK implementation

For the UK, another important instrument is the Information Society Directive,³⁷² whereby the “European Union” adopts the “WTC”.³⁷³ This Directive requires members to prevent the avoidance of “TPM’s” as well as to regulate the development and distribution of devices used to enable such avoidance.³⁷⁴ These provisions were incorporated into the CDPA, whereby protection is not only granted to the content of a copyrighted work but also in terms of the “access” to such work.³⁷⁵ In this regard the avoidance of a “TPM”,³⁷⁶ the development and distribution of a “device” that would allow for such avoidance,³⁷⁷ and the provision of “services” that allow for such avoidance is prohibited.³⁷⁸ In this way the position is similar to that under USA law, however the CDPA specifically makes provision for “permitted acts” with the work.³⁷⁹ Here a “permitted act” includes, *inter alia*, for “research and private study” and for an “illustration for instruction”.³⁸⁰ As a result, if a “TPM” would preclude a user performing a “permitted act” then such user is entitled to “issue a notice of complaint to the Secretary of State”.³⁸¹ The “Secretary of State” then has the discretion to “direct” the copyright holder as he/her deems necessary to guarantee that the method of accessing the work is made “available to the complainant” as is required, to allow the said person to “benefit” from the use.³⁸² Although any “direction” given must be followed,³⁸³ this exception is applicable only if the said person “has lawful access to the protected copyright work”.³⁸⁴ Therefore although the CDPA provides for an exception, it is of extremely limited application as it is based purely on discretion as well as does not apply to all the “fair dealing” accepted uses. Notably if such

³⁷⁰*Lenz* case (n 345) 8.

³⁷¹*Lenz* case (n 345) 8.

³⁷²Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

³⁷³*Pistorius* (n 295) 5/27.

³⁷⁴Article 6 of the Information Directive and *Pistorius* (n 293) 5/27.

³⁷⁵§296ZA, §296ZB, and §296ZD of the CDPA.

³⁷⁶§296ZA of the CDPA.

³⁷⁷§296ZB of the CDPA.

³⁷⁸§296ZD of the CDPA.

³⁷⁹§296ZE of the CDPA.

³⁸⁰Schedule 5A Part 1 of the CDPA.

³⁸¹§296ZE(2) of the CDPA.

³⁸²§296ZE(3)(b) of the CDPA.

³⁸³§296ZE(5) of the CDPA.

³⁸⁴§296ZE(10) of the CDPA.

exception is only available if the user has “lawful access to the work”, then it is submitted that this “remedy” has been rendered useless. This is so because, relevant to “fair dealing”, the “remedy” is dependent on three grounds, namely that: a “TPM” is in place, the “TPM” is precluding “permitted acts”, and there is “lawful access to the work”.³⁸⁵ However, if a “TPM” is in place it means it is prohibited to “access” the work without the consent of the holder.³⁸⁶ As such no “complainant”, being persons without consent of or indeed “access” to the work, will have “lawful access” to it.

7.4 SA implementation

As the law currently stands, SA has not yet “implemented” the “WTC” into its national legislation.³⁸⁷ However, the Bill does incorporate protection regarding “access” to copyrighted material.³⁸⁸ The Bill seeks to introduce additional infringement provisions under section 23 of the “principle act”.³⁸⁹ Such inclusion would make it a criminal “offense” to circumvent the “TPM” sections in terms of the Act or to perform actions that are precluded by such sections.³⁹⁰ The relevant sections provide against, *inter alia*, the making, importing or distributing of a “device” that facilitates the avoidance of a “TPM” in certain circumstances, the “publishing of information” to avoid a “TPM”, as well as “knowingly” avoiding the “TPM”.³⁹¹ It is required to look at the Electronic Communications and Transactions Act (ECTA) 25 of 2002 when dealing with these issues.³⁹² The relevant sections of the ECTA refer to: the “unauthorized access to, interception of or interference with data”; “computer-related fraud and forgery”; and “attempt and aiding and abetting”.³⁹³ The Bill goes further and suggests the inclusion of an exception to this additional protection, under section 27 of the “principle act” which restricts the “importation of copies”.³⁹⁴ This would provide for an exception only when a “TPM circumvention device” is used to “access” works for purposes of, *inter alia*, “fair dealing”.³⁹⁵ Interestingly, the Bill does not specifically provide that “fair use” is a “permitted act”.³⁹⁶ If the prospective user is unable to “practically” “access” the work for such purpose, then aid from the holder can be sought and failing which the prospective user can approach another person to

³⁸⁵§296ZE(1), (2), and (10) of the CDPA.

³⁸⁶§296ZA, s296ZB, and s296ZD of the CDPA.

³⁸⁷Pistorius (n 295) 7/27.

³⁸⁸§1, 28, 29 and 31 of the Bill.

³⁸⁹§28 of the Bill.

³⁹⁰§28 of the Bill.

³⁹¹§29 and s31 of the Bill.

³⁹²§31 of the Bill.

³⁹³§86, s87, and s88 of the ECTA.

³⁹⁴§31 of the Amendment Bill.

³⁹⁵§31 of the Amendment Bill.

³⁹⁶Jooste “A diamond in the rough” Vanderstraeten (October) *without prejudice* (2015) 1 13.

assist in gaining such “access”.³⁹⁷ Therefore it is suggested that, although “fair dealing” is then protected, as with the English position it is of a limited extent as it only applies if a “circumvention device” is used.

7.5 Impact on “fair use” and “fair dealing”

The impact on these doctrines is similar and therefore will be dealt with together. As is clear from the above the safeguard, regardless of jurisdiction, does not sufficiently differentiate between “unauthorized access” leading to a lawful use and that leading to infringement.³⁹⁸ There is no exception under the USA system for “fair use”,³⁹⁹ and those provided for “fair dealing” in the UK and as suggested for SA is of limited application and usefulness.⁴⁰⁰ Furthermore, there is an imbalance between traditional uses and “digital” uses.⁴⁰¹ Thus the use through a traditional medium (such as a hardcopy of a textbook) would not be prevented, but the same use through a modern medium (such as an e-book) would be- despite both being “fair use”.⁴⁰² This has also resulted in a market for “access” whereby a “pay-per-view system” has developed (the inappropriateness of such a system was dealt with in the previous chapter).⁴⁰³

However, the problem extends further than merely this inappropriateness. This is because, if a new “market” is created then any use of that work not requiring permission and payment, would impinge the economic rights of the holder and as such fall foul of the “market impact” factor of “fair use”, and thereby further restrict the application of the doctrine.⁴⁰⁴ Overall then, as the various “TPM” provisions excessively favours the copyright holder the stated goal of copyright in general, and the “TPM’s” in particular, of “balancing interests” is not achieved.⁴⁰⁵ Additionally the application of the doctrines is restricted, if not crippled in certain circumstances, as the “TPM’s” effectively grants the holder of the rights the ability to decide if a “fair use” or a “fair dealing” of the work will be permitted and at what cost.⁴⁰⁶ As such this application threatens to outdate and render the doctrines effectively useless and meaningless to

³⁹⁷s31 of the Bill.

³⁹⁸Pistorius (n 295) 9/27.

³⁹⁹Pistorius (n 295) 9/27.

⁴⁰⁰See s296ZE(1), (2), and (10) of the CDPA and s 1, 28, 29 and 31 of the Bill.

⁴⁰¹Pistorius (n 295) 9/27 and 11/27.

⁴⁰²Pistorius (n 295) 9/27-10/27.

⁴⁰³Schonwetter (n 3) 46.

⁴⁰⁴Schonwetter (n 3) 46.

⁴⁰⁵Nimmer (n 311) 739-740.

⁴⁰⁶Pistorius (n 295) 11/27.

a certain extent, especially given the increasing trend of society to transfer to a “digital” medium.⁴⁰⁷

Therefore it is suggested that in order to avoid the above result, the implementation of such new protection in national legislation should take into account the “technological” advancements that led to and caused the need for the protection.⁴⁰⁸ As the purpose is to prevent “piracy”, it then becomes clear that a differentiation is required between infringing and non-infringing use.⁴⁰⁹ This in turn means that an exception on the basis of “fair use” or “fair dealing” is essential.⁴¹⁰ This is of even greater importance to SA as a “developing” country, which requires to a large extent cheap and easy “access to knowledge” via the availability of works on the “Internet”.⁴¹¹ If a “pay-per-view” system were to be created, this would greatly impact on the ability of copyright to achieve the purpose of encouraging “creativity and innovation”.⁴¹²



⁴⁰⁷O'Donnell (n 126) 65.

⁴⁰⁸Pistorius (n 295) 10/27.

⁴⁰⁹Pistorius (n 295) 18/27 and Nimmer (n 311) 684.

⁴¹⁰Pistorius (n 295) 10/27 and 18/27.

⁴¹¹Pistorius (n 295) 10/27.

⁴¹²Pistorius (n 295) 10/27.

CHAPTER 8: CONCLUSION

As stated the rationale of granting copyright protection is to encourage creation, development and the advancement and improvement of society. This requires a dual consideration of the “private” and “public” interests involved. In order to strike a balance between these competing interests, exceptions such as “fair use” and “fair dealing” were introduced. In turn, these exceptions have been said to be the statutory expression of “fundamental” rights. Thus, the purpose of this dissertation has been to consider the effectiveness and application of these doctrines in achieving such a balance.

As for the position subsisting in the USA, “fair use” is a wide and flexible doctrine. The doctrine is currently regulated by section 107 of the American Act, and the interpretation of this section was greatly affected by the *Campbell* decision. The interpretation by the courts noticeably creates a hierarchy of the four statutory factors. The seesaw effect became apparent, whereby transformation and economic damage are at opposite ends. Thus although the most important barrier for a user to overcome remains economic damage to the holder, as soon as the use has a “transformative” nature the focus starts to shift away from such damage purely because the more “transformative” the use the less likely that it competes with the original.

Compared to the USA, the position subsisting in the UK is based on a “closed list” of recognised purposes. As for the specific purposes, the judiciary has adopted a flexible approach to avoid a restrictive interpretation of what would qualify. Once it has, the enquiry moves to whether the use is fair. In this regard, the relevant case law has set an objective test and developed various factors. However, once again whether the use “competes” with the original was emphasized. Therefore regardless of whether “fair use” or “fair dealing” is applied, a user must overcome this barrier of economic harm— either by showing that no legitimate harm is caused or that the work is “transformative” and in the “public interest” and so cannot cause harm.

SA currently also follows a “closed list approach”, whereby in order to potentially be viewed as “fair dealing” the use involved must qualify as a recognised purpose. Due to the lack of direction in the Act, the concept of “fairness” is dependent on judicial interpretation. Unfortunately, to date the judiciary has not provided such specific interpretation. However, it seems that the findings of the *Laugh it Off* case will apply. The essence of this case was, that to overcome protected “expressive conduct” a “likelihood of substantial economic detriment” must be caused by such conduct and that “parody” is relevant when considering potential infringement of intellectual property rights. Given the emphasis on the economic aspect, in both

the USA and UK, the importance placed on the “likelihood of substantial economic detriment” by *Laugh it Off*, is in line with these jurisdictions. The SA position is however potentially subject to amendments. The Bill seeks to introduce an overlapping “fair use” in addition to the current “fair dealing” exception. Notably, the “fair use” exceptions are limited to non-commercial uses, and includes “cartoon, parody and pastiche” as a specific exception. The inclusion of a “cartoon, parody and pastiche” exception is laudable, as such uses represent the very purpose of copyright.⁴¹³ However, there can be no general presumption regarding the fairness of “parody”.⁴¹⁴ Finally it introduces near identical factors to those under the USA system, to consider when determining fairness. However, despite the interpretation of the doctrines at national level, it is still necessary to ensure compliance with international requirements by the doctrines to ensure their survival.

These requirements, as contained in various international instruments, center on compliance with the “three-step test”. Guidance to this test was provided by the “panel”. In this regard, given the “closed list” approach of “fair dealing” and its emphasis on non-competing use, it is in line with the test. Whereas, the compliance of “fair use” is contentious due to its “open ended” nature. Although the arguments in favour of its compliance are convincing, the fact remains that until a definitive ruling is made on its compliance the “fair use” doctrine is potentially not a proper expression of international obligations, putting its survival into doubt. The uncertainty surrounding these doctrines can lead to their failure merely due to cautious users attempting to avoid litigation.

This cautiousness also leads to an alarming “pay-per-use” system despite the use itself being lawful. The chapter dealing with this issue focused on the Bill in order to reflect the problems of such a system. The Bill requires payment for certain uses for purposes of “cartoon, parody or pastiche”, but such requirement was shown to be illogical and inappropriate. This is because, when considering “parody”, the use by definition requires it to create a new work that is both “original” and “derivative”. Thus, such a use is not merely a “new distribution” of the same content. Additionally limiting the payment to situation involving the entire work is arbitrary, as the amount taken and its reasonableness is dependent on the facts of each case. Finally, such works have a high likelihood of being “transformative” in nature and as such is extremely unlikely to cause legitimate economic harm to the owner. Thus, requiring payment for a use that does not affect the rights of the holder, but does adhere to the very aim of allowing the

⁴¹³van der Walt and Shay (n 280) 5-6.

⁴¹⁴Visser (n 12) 327.

exception should not be countenanced. Connected to this issue, is that of a changing society with ever developing “technology”.

The creation of new “technology” greatly influences the manner in and extent to which works are protected. As a result, the “WTC” requires protection not only for the content itself but also the “access” to it, if it is contained in a “digital” medium. In order to fulfil this obligation, the USA enacted the DMCA. Although, the DMCA was not intended to restrict lawful use of works, it does not provide for an exception on the basis of “fair use”. Regarding the “take down notice” sections, again “fair use” is not an exception but is subject to minimal protection by requiring it to be considered before the notice is sent. Furthermore, the UK has similar protection regarding “access” of a “digital” work. However, the CDPA attempted to allow a limited “fair dealing” exception. Unfortunately, this exception is purely at the discretion of the “Secretary of State”. However more devastating to this is the fact that the exception will only apply on the ground of “lawful access”, while no person needing to use the exception to gain permission to “access” the work will have “lawful access”. Turning to SA, the current Act does not contain this additional protection, however the Bill does have suggested sections for its implementation. The Bill provides that it is a criminal offense to circumvent this type of protection. It does attempt an exception for lawful uses, however it only applies when a “device” is used to avoid the protection, and only refers to “fair dealing” and not “fair use”. Overall the additional safeguards to the rights of the copyright holder severely restricts the effectiveness of the doctrines under discussion, as the copyright holder is put in the position of power in determining when a “fair use” or “fair dealing” of the work is permissible. As such, reform is needed to limit the safeguard to situations of “piracy” as originally intended.

From the above, it is clear that both doctrines have positives and negatives. For “fair use” the positives would be flexibility and easier adaptability to advances in society, and the negatives of uncertainty and doubtful compliance with international requirements. Whereas, although “fair dealing is more certain” it can be more rigid due to its threshold requirement. Thus, reform is plainly needed. However, as a developing country that relies on “digital” formats of work, having a vague and uncertain system is not appropriate.⁴¹⁵ This is so because, such as system has been shown to lead to cautious users which in turn creates a “pay-per-use” system, which would violate the very aim of copyright law.⁴¹⁶ Accordingly, it is submitted that Schonwetter’s

⁴¹⁵Schonwetter (n 3) 49.

⁴¹⁶Schonwetter (n 3) 46.

suggestion of following a “middle-way approach” is desirable⁴¹⁷ rather than the current suggested change of a dual overlapping system. This would involve retaining a threshold requirement of specific purposes, while bringing in the various established factors to help determine fairness.⁴¹⁸ Consequently there would be clear legal certainty, as required by the “three-step” test, in terms of both the purposes and what would be seen as fair. Also following the UK trend in widely interpreting the recognised purposes, would allow for a level of flexibility to avoid a rigid application of the chosen doctrine.⁴¹⁹ Further with FOE rights regulating the extent and scope of such doctrines,⁴²⁰ the aim of balancing interests can be achieved especially when looking at the rationale of the seesaw effect. However despite any internal merits of the doctrines, their survival is threatened by the overreaching new “TPM” provisions. If the reach of these provisions is not curtailed, then copyright laws will disproportional prefer the holder of the copyright over the general public. This would mean that the purpose of copyright in general, and “fair dealing” or “fair use” in particular, would fail.



⁴¹⁷Schonwetter (n 3) 49.

⁴¹⁸For example, see Part III Division 3 of the Australian Copyright Act of 1968.

⁴¹⁹O'Donnell (n 126) 67.

⁴²⁰Shay (n 9) 593.

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