

**SERIOUSLY ENTERTAINING: THE PANEL AND THE FUTURE OF FAIR DEALING**

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ABSTRACT

[1] Fair dealing involves questions of degree and impression, on which different minds can reasonably come to different conclusions.<sup>2</sup>

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[I]t needs to be acknowledged that we are in the realm of decision-making where there is room for legitimate differences of opinion as to the correct answer. In some instances it might be impossible to say whether one view is demonstrably right and another view is demonstrably wrong.<sup>3</sup>

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This is a matter on which different persons might legitimately hold different conclusions.<sup>4</sup>

The role of fair dealing within copyright law has received little judicial attention in Australia. The recent Federal Court case of *TCN Channel Nine v Network Ten* provides some interesting observations on the difficulty of applying the principles of fair dealing in practice. This article considers the current law of fair dealing and the challenges posed to the concept by the development of digital technology and the emphasis on the economic interests of copyright owners. It highlights the need to develop a clear understanding of the public interest aspect of fair dealing.

**[2] Introduction**

The recent decision of the Full Court of the Federal Court in *TCN Channel Nine Pty Ltd v Network Ten Pty Limited*<sup>5</sup> illustrates the uncertainty involved in the application of the concept of fair dealing. The principle of fair dealing, which carves out an exception from the exclusive rights granted to copyright owners, has come under increasing scrutiny in recent years. Questions have been raised about its continuing role and relevance in the light of the development of technology which facilitates pay

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<sup>2</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002) [2] (Sundberg J).

<sup>3</sup> *Ibid* [16] (Finkelstein J).

<sup>4</sup> *Ibid* [110] (Hely J).

per use and single use licenses. Further, copyright owners are concerned by the development of technologies such as Napster which blur the distinction between public and private use of works. In the face of the perceived threat posed to copyright owners' economic returns by digital technology, owners have been successful in convincing legislators to strengthen their rights. For example, new laws passed around the world prohibit the distribution and use of circumvention devices.<sup>6</sup> But in this haste to stop the digital pirate has there been sufficient consideration of the cultural role of copyright and, in particular, the role of fair dealing in carving out a free use zone for users?

This article will examine the current state of the law in Australia with respect to fair dealing and compare this with the current US position. In particular it will consider the role and function of fair dealing as a vehicle of social commentary and, in this context, explore the rationale for the concept of fair dealing. It will conclude that the rights granted to users by the concept of fair dealing are an essential part of the copyright balance which needs to be protected in the face of increasing technological challenge. In order to achieve this balance there needs to be a clearer recognition of the importance of preserving the public domain and the rights of users within copyright. The issue of parody and its place within the concept of criticism and review will also be considered.

### **Fair Dealing**

In Australia exceptions are granted to the exclusive rights of the copyright owner pursuant to the concept of fair dealing under the *Copyright Act 1968* (Cth) (the Act). The purposes for which a fair dealing may be made of a copyright work are strictly confined to research and study,<sup>7</sup> criticism or review,<sup>8</sup> reporting news<sup>9</sup> and judicial

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<sup>5</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002).

<sup>6</sup> These amendments are required by the *WIPO Copyright Treaty 1996*, art 11: 'Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.' See Australia: *Copyright Act 1968* (Cth) s 116A; US: *Digital Millennium Copyright Act 1998*; EU: *Information Society Directive* (art 6).

<sup>7</sup> *Copyright Act 1968* (Cth) ss 40, 103A.

<sup>8</sup> *Copyright Act 1968* (Cth) ss 41, 103B.

<sup>9</sup> *Copyright Act 1968* (Cth) ss 42, 103C.

proceedings or professional advice.<sup>10</sup> There is no scope for a fair dealing defence outside these permitted purposes.<sup>11</sup>

‘Fair dealing’ itself is not defined in the Act and the determination of whether a particular use is ‘fair’ is left up to the courts. Australian case law on this subject is limited to a handful of cases,<sup>12</sup> with Lord [3] Denning’s formulation from *Hubbard v Vosper*, still recognised as the classic definition of the concept:

It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as the basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.<sup>13</sup>

Section 40 of the Act, which deals with fair dealing in works for the purposes of research and study contains a list of matters which the court must consider in determining whether ‘a dealing by way of copying’ is fair.<sup>14</sup> These are:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;

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<sup>10</sup> *Copyright Act 1968* (Cth) ss 43, 104.

<sup>11</sup> This is often contrasted with the US provision (s 107 *Copyright Act 1976* (US) which provides a set of factors to consider without tying them to a specified purpose. See discussion below.

<sup>12</sup> *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39; *Commonwealth of Australia v Walsh* (1980) 147 CLR 61; *Copyright Agency v Haines* (1982) 42 ALR 264; *De Garis v Neville Jeffress Pidler* (1990) 18 IPR 292; *Wigginton v Brisbane TV Ltd*; *Queensland v TCN Channel Nine* (1992) 25 IPR 58; *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* [1999] FCA 1864; *TCN Channel Nine & Ors v Network Ten* [2001] FCA 108; *TCN Channel Nine & Ors v Network Ten* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002).

<sup>13</sup> *Hubbard v Vosper* [1972] 2 QB 84, 94. See also *De Garis v Neville Jeffress Pidler* (1990) 18 IPR 292.

<sup>14</sup> Note that although the section refers explicitly to a dealing by way of copying, the section does not operate to limit fair dealing for the purposes of research or study to copying. See Sam Ricketson, *The Law of Intellectual Property* (1999) [11.35].

- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is copied — the amount and substantiality of the part copied in relation to the whole work or adaptation.

There is also a deeming provision in subs (3) which provides that dealing with a work by way of copying for the purposes of research or study shall be taken to be a fair dealing where the use is made of one article in a publication or not more than a 'reasonable portion' of a work or adaptation. A 'reasonable portion' is defined in s 10(2) of the Act as follows:

Without limiting the meaning of the expression reasonable portion in this Act, where a literary, dramatic or musical work is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:

- (a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
- (b) in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

There is no equivalent list of factors or quantitative test in the other sections, but these factors, offering the only legislative guidance on matters to be considered in the context of fairness are applied in the context of the other sections.<sup>15</sup>

The apparently indeterminate scope of the concept of fair dealing is a consequence of its evolution as a judicial restraint upon the rights of copyright owners. Although fair dealing was not introduced into statute in the UK until 1911 and in Australia until 1912,<sup>16</sup> cases decided from the very beginnings of [4] modern copyright, with the

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<sup>15</sup> Copyright Law Review Committee, Parliament of the Commonwealth of Australia, *Report on the Simplification of the Copyright Act 1968, Part 1 — Exceptions to the Exclusive Rights of Copyright Owners* (1998) [4.09] (CLRC Exceptions Report).

<sup>16</sup> Section 2 of the *Copyright Act 1911* (UK) provided that 'any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary' did not constitute an infringement of copyright. This Act was declared to apply in Australia by the *Copyright Act 1912* (Cth) having effect from 1 July 1912. The US did not grant legislative recognition of fair use until the 1976

introduction of the *Statute of Anne* in 1709, recognised limitations upon the rights of exploitation granted to copyright owners. Early cases that recognise an embryonic form of fair dealing, although not articulated as such, allowed translations and abridgements of works on the basis that they promoted the development and use of material for the public good. Courts also permitted the use of quotations for the purposes of review.<sup>17</sup>

These cases recognised that the scope of rights granted to copyright owners was not absolute and some leeway was needed to allow for creation of further useful works. In particular, there was an emphasis on the social utility of allowing the use of extracts from works: ‘a man may fairly adopt part of the work of another: he may so make use of another’s labours for the promotion of science, and the benefit of the public.’<sup>18</sup>

This public benefit element has become obscured in recent times, with fair dealing increasingly being portrayed as an encroachment on the rights of owners rather than a right itself. Copyright owners have argued that the ability to charge per use has removed the need for a fair dealing exemption. Further, they have argued against the extension of fair dealing to the electronic environment.<sup>19</sup> The lack of a clearly articulated and well-understood rationale for fair dealing makes it difficult to counter such arguments. Further, the lack of a well funded and identifiable user interest group inevitably tilts the balance of the debate in favour of owner interests.

### **Recent Developments: Fair dealing in the electronic environment**

In September 1998 the Copyright Law Review Committee (CLRC) released Part 1 of its *Report on the Simplification of the Copyright Act* (CLRC Exceptions Report). Part 1 dealt with ‘Exceptions to the Exclusive Rights of Copyright Owners’. The Committee recommended that the fair dealing provisions of the Act be simplified by consolidating the current fair dealing provisions into a single open-ended section, similar to the US model. The current stated purposes of fair dealing should be retained

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*Copyright Act* (US). That enactment was intended to recognise but not to alter the judicially developed doctrine, see William Patry, *The Fair Use Privilege in Copyright Law* (2nd ed, 1995) 342.

<sup>17</sup> *Mawman v Tegg* (1826) 2 Russ 385, 38 ER 380; *Bell v Whitehead* (1839) 8 LJ(NS), Ch 141; *Chatterton v Cave* (1878) 3 App Cas 483.

<sup>18</sup> *Cary v Kearsley* (1803) 4 Esp 168, 170 ER 679, 680.

<sup>19</sup> See, eg, CLRC Exceptions Report, above n 15, [6.18–6.22].

as examples of the nature of the use that is permitted but should not represent an exhaustive list of purposes.<sup>20</sup>

The Committee also recommended that the set of factors listed as considerations in relation to dealing with a work by way of copying for the purposes of study or research in s 40 should be generally applied in relation to all fair dealings.<sup>21</sup>

These recommendations have not been acted upon. However, s 10(2) of the Act has now been amended by the insertion of three new subsections (2A), (2B) and (2C) as part of the Digital Agenda reforms.<sup>22</sup> These subsections provide further clarification of the meaning of the term 'reasonable portion' in the electronic environment.

Subsection (2A) provides that if a person makes a reproduction of a part of a published literary or dramatic work (other than a computer program or electronic compilation, such as a database), where that work is in electronic form, the reproduction shall only be considered a 'reasonable portion' if:

1. The number of words copied does not exceed 10% of the number of words in the work; or
2. Where the work is divided into chapters, the number of words does exceed 10% of the total number of words in the work, but comprises no more than a single chapter of the work.

[5] Subsection 10(2B) is a clarifying provision, stating:

If a published literary or dramatic work is contained in a published edition of the work and is separately available in electronic form, a reproduction of a part of the work is taken to contain only a reasonable portion of the work if it is taken to do so either under subsection (2) or (2A), whether or not it does so under both of them.

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<sup>20</sup> Ibid [2.01–2.03].

<sup>21</sup> Ibid [2.04].

<sup>22</sup> *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

Subsection 10(2C) provides that the reproduction will be considered fair only in relation to a single reproduction from the published work, thus preventing ‘serial’ reproductions.

These revisions were intended to extend the quantitative test into the electronic environment where page numbers are less fixed and therefore less reliable as a measure of the size of the portion of the work copied.<sup>23</sup>

Apart from these amendments made as part of the Digital Agenda reforms, the law relating to fair dealing had attracted little attention in Australia. However, in April 2001 the CLRC was instructed to inquire into and report on ‘the extent to which electronic trade in copyright works and other subject matter is subject to agreements which exclude or modify exceptions to the exclusive rights of copyright owners provided under the Copyright Act’ and whether such agreements should be enforceable.<sup>24</sup> At the heart of this enquiry is the question whether fair dealing is an essential part of copyright, defining its boundaries and protecting the public interest, or whether it is an exception to the rights of owners which can be overridden. The Committee was required by the terms of reference to advertise widely and to consult with key interest groups and affected parties. It reported to the Attorney-General on 30 April 2002, with the report being released for public comment on 1 October 2002.<sup>25</sup>

In June 2001 the CLRC released an Issues Paper which canvassed a number of topics relevant to the use of contractual licenses in respect of copyright material and invited submissions on the matters raised. In particular, the Committee sought comments on actual experiences that parties had had regarding the ‘prevalence, effects and desirability of contracts that purport to override copyright exceptions granted under the *Copyright Act*.’<sup>26</sup>

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<sup>23</sup> Revised Explanatory Memorandum — Copyright Amendment (Digital Agenda) Bill 2000 [27–31]. See also, CLRC Exceptions Report, above n 15, [6.45–6.86].

<sup>24</sup> Copyright Law Review Committee, Parliament of the Commonwealth of Australia, *Terms of Reference* (23 April 2001).

<sup>25</sup> Copyright Law Review Committee, Parliament of the Commonwealth of Australia, *Copyright and Contract* (2002).

The Issues Paper recognised at the outset that copyright 'is all about striking an appropriate balance between the need to provide incentives for innovation and creativity and the need to encourage the dissemination of information and ideas.'<sup>27</sup>

The Paper also recognised that the exceptions granted by the Act to the exclusive rights of copyright owners — which it identified as including fair dealing, as well as the library and archives exemptions, exceptions relating to computer programs and various statutory licences — serve an important function in this balancing process.

The Committee received 31 responses to its request for comments on the Issues Paper, most of which are available on the CLRC web site.<sup>28</sup> Predictably the responses fall fairly neatly into two groups: those from copyright owners and those from users, represented largely by libraries.<sup>29</sup> There is a clear message in the submissions that copyright owners and copyright users still maintain fundamental disagreement about the nature of copyright. The submission by the Copyright Agency Limited states:

A policy objective underlying the Act is to facilitate the markets for copyright material so that they may operate in the most efficient way for the benefit of owners and users of copyright material. That operation will include [6] contractual modification of the relationship between the parties where such modification is dictated by the market.<sup>30</sup>

A key message from the library submissions is that the public policy interest in balancing the rights of copyright owners and copyright users should not be allowed to be overturned or overridden by private agreement:

Copyright protection should encourage, not inhibit, use and creativity. Copyright law should not give rightsholders the power to use technological or contractual measures to override the exceptions and limitations to copyright and distort the balance set in

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<sup>26</sup> Copyright Law Review Committee, Parliament of the Commonwealth of Australia, *Issues Paper: Copyright and Contract* (June 2001) 5.

<sup>27</sup> *Ibid* 6.

<sup>28</sup> See <<http://www.clrc.gov.au>>.

<sup>29</sup> Copyright Law Review Committee, above n 25, [4.52].

<sup>30</sup> Submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia, 13 August 2001 [12] (Copyright Agency Limited).

international and domestic copyright legislation. Licensing agreements should complement copyright legislation, not replace it.<sup>31</sup>

Libraries provided extracts from several online agreements that purported to modify copyright in some way.<sup>32</sup> However, in some instances these licences actually increased the rights of the user.<sup>33</sup>

The Australian Digital Alliance submission stated:

... current licence agreements not only purport to modify copyright exceptions but also purport to:

- control public domain or otherwise freely available material;
- control material otherwise outside the control of copyright such as facts or insubstantial portions;
- restrict further legitimate distribution and thereby destroy secondary markets;
- restrict freedom of expression (by directly restricting discussion of the product ... or by restricting the operation of fair dealing for criticism or review).<sup>34</sup>

The submission prepared by the Copyright Subcommittee of the Intellectual Property Committee of the Law Council of Australia stated that 'the existing copyright exceptions provide an appropriate balance between the interests of both sides of the copyright debate'.<sup>35</sup> It noted that this view was shared by the Final Report of the Intellectual Property and Competition Review Committee.<sup>36</sup> On this basis it [7]

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<sup>31</sup> Submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia, undated (Australian Library and Information Association).

<sup>32</sup> See, eg, submissions to Copyright Law Review Committee, Parliament of the Commonwealth of Australia (Australian Library and Information Association; Australian Digital Alliance/Australian Libraries Copyright Committee and Deakin University).

<sup>33</sup> See, eg, the submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia (Australian Digital Alliance/Australian Libraries Copyright Committee): 'Some licence agreements provide for usage conditions that are superior to those offered by the *Copyright Act*. These agreements are typically a function of the superior bargaining position of a particular agency or consortium and are not normally available to smaller institutions or consumers. The capacity of vendors and licensees to make these kinds of agreements should not be affected.'

<sup>34</sup> Submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia, undated, (Australian Digital Alliance/Australian Libraries Copyright Committee).

<sup>35</sup> Submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia [3] (Law Council of Australia).

<sup>36</sup> See Intellectual Property and Competition Review Committee, *Final Report, Review of Intellectual Property Legislation Under the Competition Principles Agreement* (September 2000) 13: 'The Committee believes the Digital Agenda Act strikes a reasonable balance between the interests of copyright owners and the interests of users of copyright material.'

recommended that the CLRC should recommend ‘that the *Copyright Act* be amended to clarify that contracts may not be used to modify or exclude the exceptions to the exclusive rights of copyright owners’.<sup>37</sup>

The CAL submission notes:

It is difficult to discern any public policy reason to exempt any of the exceptions from modification by contract. Each of the exceptions are shaped by a balance of the particular factors contributing to the public interest in the exception — for example, the public policy underlying s 41, fair dealing for criticism or review is different from that underlying s 43, fair dealing for the giving of professional advice. Consequently the policy relating to the existing balance reached in each provision should be carefully considered before making any changes to the Act.<sup>38</sup>

Clearly there is a concern amongst users that contract may be used to erode rights currently granted to them by the *Copyright Act*. Owners, largely relying on economic arguments that seek to secure rights to all derivative uses of a work, are seeking the abolition of such rights as irrelevant in the digital context. It is therefore necessary to revisit the justifications for the existence of fair dealing as part of the copyright balance.

Justification for fair dealing may be found in the UK in the case law leading up to the introduction of the fair dealing provision in 1911. In the US, justification for fair use may be found in art 1 of the *US Constitution* which provides that ‘Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’ Australia has no such readily identifiable rationale for fair dealing.

Further to the Issues Paper, the Committee released a Discussion Paper in September 2001. The purpose of the Discussion Paper was to promote further consideration of certain aspects of the inquiry. In addition to the information received by submissions

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<sup>37</sup> Submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia (Law Council of Australia).

<sup>38</sup> Submission to Copyright Law Review Committee, Parliament of the Commonwealth of Australia, 13 August 2001 [13] (Copyright Agency Ltd).

in response to the Issues Paper, the Committee undertook its own investigation of copyright licences used locally and overseas. The Committee noted that '[p]roblems with contract formation, breaches of consumer-protection standards, onerous and potentially unfair choice-of-law clauses and explicit or implicit modification of exceptions appear to be common.'<sup>39</sup> The Committee 'formed a preliminary view that contracts that try to modify or exclude the copyright exceptions do exist and that they are common enough to warrant further investigation.'<sup>40</sup>

There was considerable uncertainty about the law relating to 'unfair' contracts and whether this law would operate to modify contracts purporting to exclude the exceptions and clarification one way or another was seen as desirable.

On the issue of contracting out of exceptions, the Discussion Paper notes that one alternative is to create a sliding scale of exceptions.<sup>41</sup> That is, rather than forbid any contracting out of any of the exceptions, exemption from some exceptions would be permitted on certain terms. Of course, any exceptions to the rights of copyright owners must also pass the 'three step test' defined by art 13 of TRIPS.<sup>42</sup> The Discussion Paper confirms the view that the policy basis behind the exceptions remains [8] relatively unexplored.

In its final report, *Copyright and Contract*, the CLRC stated that fair dealing is 'fundamental to defining the copyright interest'.<sup>43</sup> It concluded that allowing fair dealing to be modified or excluded by contract would upset the traditional copyright balance and that it was not clear the extent to which such agreements would be enforceable. It therefore recommended that the *Copyright Act* be amended to make it clear that an agreement or provision of an agreement having the effect of excluding or

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<sup>39</sup> Copyright Law Review Committee, Parliament of the Commonwealth of Australia, *Discussion Paper* (prepared for Meeting with the Copyright Law Review Committee on 4 October 2001) (2001) [14].

<sup>40</sup> *Ibid* [20].

<sup>41</sup> For further analysis of such an approach see Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (2002) 302–4.

<sup>42</sup> 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.' See also art 9(2) Berne Convention.

<sup>43</sup> Copyright Law Review Committee, above n 25 [2.01]. See also [7.25].

modifying the fair dealing provisions has no effect.<sup>44</sup> The Government has indicated that it will respond to the report and its recommendations in 2003.<sup>45</sup>

### **TCN Channel Nine v Network Ten**

This is the most recent case raising the question of fair dealing under Australian law. This case<sup>46</sup> concerned the claim by Channel Nine that by showing extracts from twenty of its broadcast programs as part of commentary on *The Panel*, Channel Ten had infringed Nine's copyright in those programs. The extracts were of various lengths, ranging from eight seconds to 42 seconds in duration and were taken from a variety of news, sport and entertainment programs. *The Panel*, broadcast weekly on Wednesday evenings on Channel Ten, is a 60 minute television program on which a panel of regulars and guests discuss the events of the preceding week including news, current affairs, entertainment and sport. Channel Ten responded that by screening extracts from various programs which were discussed by the panelists, it had not taken a substantial part of such programs sufficient to constitute infringement and, even if it had, that use could be excused on the basis of a fair dealing. It claimed that use of extracts from the various programs could be excused on the grounds that such uses were a fair dealing, either for the purposes of criticism or review, or additionally or in the alternative, for the purposes of reporting news.<sup>47</sup>

#### ***The decision at first instance: Conti J***

Conti J concluded that Channel Nine had not succeeded in establishing that a substantial part of the subject matter of each of the program segments originally broadcast on Channel Nine had then been shown on *The Panel*.<sup>48</sup> Therefore there was no infringement and it was not necessary to consider if use of the excerpts was justified on the basis of fair dealing. Nevertheless, Conti J went on to consider in relation to each excerpt, if the use would have been found to be a fair dealing.

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<sup>44</sup> Ibid [7.50].

<sup>45</sup> Attorney-General, Media Release, 1 October 2002.

<sup>46</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002).

<sup>47</sup> Channel Ten claimed a fair dealing with the excerpts on the basis of *Copyright Act 1968* (Cth) ss 103A, 103B.

<sup>48</sup> *TCN Channel Nine v Network Ten* [2001] FCA 108 (unreported, Conti J, 20 February 2001) 108. See also *TCN Channel Nine v Network Ten* [2001] FCA 841 (unreported, Conti J, 4 July 2001) which deals with the issue of infringement of individual images comprising the excerpts from the various Channel Nine broadcasts: *Copyright Act 1968* (Cth) s 87(a).

Conti J set down a list of principles on fair dealing which he had extracted from a consideration of the relevant authorities:

- (i) Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept.
- (ii) Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review, or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing [sic] truth of purpose;
- (iii) Criticism and review are words of wide and infinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment; criticism and review may be strongly expressed; [9]
- (iv) Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
- (v) An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; ‘the path of criticism is a public way’;
- (vi) criticism and review extends to thought underlying the expression of the copyright works or subject matter;
- (vii) ‘News’ is not restricted to current events; and
- (viii) ‘News’ may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.<sup>49</sup>

Applying these principles to the twenty segments used in *The Panel*, Conti J reached a variety of conclusions upon whether the use would have been considered ‘fair’ in the absence of his findings on substantiality. A few examples will illustrate the difficulties confronted by Conti J in determining whether the use of an individual extract was ‘fair’.

*Midday* — Prime Minister singing Happy Birthday to Sir Donald Bradman: this clip showed the Prime Minister, Mr John Howard, being persuaded by the presenter of the *Midday* program, Ms Kerri-Anne Kennerley, to sing ‘Happy Birthday’ to Australian cricketing legend Sir Donald Bradman. Mr Howard’s admiration for ‘The Don’ is

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<sup>49</sup> *TCN Channel Nine v Network Ten* [2001] FCA 108 (unreported, Conti J, 20 February 2001) [66].

well known. Channel Ten unsuccessfully argued that its use of this extract constituted fair dealing for the purposes of criticism or review of the *Midday* program and the role of the presenter. Conti J concluded that the purpose of showing the clip was to satirise Ms Kennerley's performance and political allegiances, rather than the program, and therefore, any criticism was of Ms Kennerley herself. Further, he rejected any claim that the footage was newsworthy.<sup>50</sup>

*A Current Affair — Masquerade of Introduction Agency: A Current Affair* had screened a story about a brothel that had been mistaken for an introduction agency. As part of that story, a person who had visited the brothel and a person employed by the brothel as a receptionist had been interviewed in disguise. *The Panel* segment highlighted the fact that the disguises did little to hide the identity of the people interviewed. One of *The Panel* members imitated one of the disguises used, eliciting laughter from the other panel members and the studio audience. Conti J rejected the argument that the fact that the story had been presented in a humorous manner meant it could not be excused on the basis of criticism or review. He stated: 'It is legitimate to criticise a rival telecaster for inadequately protecting the anonymity of its interviewees, even if the criticism takes advantage of humorous incidents to the rival's inadequacy.'<sup>51</sup>

*Simply The Best*: this segment focussed on a discussion of the sets used for the Ray Martin program *Simply The Best* and the nature of the program, which asked viewers to vote on various questions, such as their favourite music television program. Conti J said there was insufficient evidence to understand the nature of the supposed criticism and rejected any finding of fair dealing.

*The Inaugural Allan Border Medal Dinner*: the Prime Minister also features in this clip, showing the winner of the medal, Glenn McGrath, failing to notice Mr Howard's attempts to congratulate him. Channel Ten argued that 'unusual or incongruous moments in an Australian Prime Minister's life are inherently and necessarily news', akin to a photograph showing a very young Bill Clinton shaking hands with President

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<sup>50</sup> The author's discussion of these examples is derived from Melissa de Zwart. 'Recent Developments in Fair Dealing in Australia' (2001) 5(2) *The Copyright and New Media Law Newsletter* 7, 8–9.

<sup>51</sup> *TCN Channel Nine v Network Ten* [2001] FCA 108 (unreported, Conti J, 20 February 2001) [72].

John F Kennedy.<sup>52</sup> Conti J distinguished this from the clip showing the Prime Minister singing ‘Happy Birthday’ and found it would have been excused as a fair dealing for the reporting of news.

[10] *Who Wants to be a Millionaire* — Ingredients of Christmas Pudding: this segment showed an extract from the quiz show, *Who Wants to be a Millionaire*, highlighting the easy nature of one of the questions. Conti J said that the criticism ‘is undertaken in a humorous or lightly entertaining way.’<sup>53</sup> This was found to have been a fair dealing.

This aspect of the decision is interesting because it raises the question of whether humour in the form of parody, burlesque and satire enjoys any special protection against being considered an infringement of the original work. Conti J undertook an examination of the difference between these concepts and concluded that both parody and burlesque involved the ‘imitation’ (or copying) of the original material. Satire, on the other hand, is not an imitation of the subject material but rather a ‘form of ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses’.<sup>54</sup> This distinction enabled Conti J to reach the conclusion that satire, in contrast to parody and burlesque, did not require the copying of the original material but depended rather on the inherent recognition of that material. He stated that the ‘taking of a relatively miniscule segment of a competitor’s television broadcast for the object or purpose for instance of satire, comedy, or light entertainment’<sup>55</sup> could in the circumstances be considered legitimate. Parody, on the other hand, requiring copying, could only escape infringement if it could be justified as a fair dealing. This illustrates the close relationship between the question of substantiality and the concept of fair dealing which were not separately considered until the codification of the law of fair dealing in the 1911 *Copyright Act* (UK).<sup>56</sup>

Much of the evidence presented to the Court in *TCN Channel Nine* by Channel Ten was aimed at establishing that *The Panel*, although presented in a lighthearted

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* [17].

<sup>55</sup> *Ibid* [46].

<sup>56</sup> Sam Ricketson, *The Law of Intellectual Property* (1999) [11.15].

manner, dealt with serious issues and was 'not necessarily entertainment'. A key issue before the Court was the nature of *The Panel* and whether it was a comedy program or whether it was in the form of a more serious, analytical current affairs program. The case therefore also raised questions about whether the fact that the copyright material is used in the course of entertainment makes it harder to establish fair dealing. The characterisation of the nature of the program was important because in order to qualify for fair dealing, the use of the extract had to be for the purposes of criticism or review or reporting news.<sup>57</sup>

### ***Full Court Decision***

On appeal to the Full Court, the Court rejected Conti J's finding as to infringement.<sup>58</sup> The Court then went on to consider the application of fair dealing to the individual segments and held that there was infringement in relation to the screening of eleven of the extracts, including the extract from the *Midday* show, showing the Prime Minister singing and the extract from *A Current Affair*, dealing with the disguises used in an interview about a brothel masquerading as an introduction agency.<sup>59</sup> However, amongst the three [11] judges there was still disagreement about whether the use of particular extracts was a fair dealing.

The leading judgment was given by Hely J. Hely J cited the findings of the primary judge on the principles he had extracted from the cases on fair dealing with apparent approval.<sup>60</sup> Channel Nine had challenged the conclusion by Conti J that the fairness of the dealing should be judged by an objective standard in relation to the relevant purpose (point (ii)) and argued that Channel Ten should be required to provide evidence of the purposes, intentions and motives of the programs' producers. Hely J confirmed that the purpose is to be ascertained objectively. Further, he confirmed that

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<sup>57</sup> In addition there had to be a 'sufficient acknowledgement' of the original item being used to satisfy the legislative scheme under *Copyright Act 1968* (Cth) s 103A, which was found to be present in some of the instances and not others.

<sup>58</sup> The Full Court found that by making videotapes of the various segments, Ten had infringed *Copyright Act 1968* (Cth) s 87(a) and that the re-broadcast of the segments was an infringement under ss 87(c) and 101. See *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002) [26]–[93] (Hely J).

<sup>59</sup> Not all of the findings of Conti J with respect to fair dealing in the extracts were challenged on appeal. No appeal was made in relation to the finding that use of the following extracts was a fair dealing: *The 72nd Academy Awards*; *The Sale of the Century*; *The Today Show*, 'Opera House' segment and *Who Wants to be a Millionaire*, 'Ingredients of a Christmas Pudding' segment.

<sup>60</sup> See principles quoted at above n 49.

the fact that the program may have been prepared with a commercial motive, to entertain and achieve ratings, did not bar a finding of fair use: 'The fact that news coverage is interesting or even to some people entertaining, does not negate the fact that it could be news'.<sup>61</sup> Hely J then considered ten segments which were the subject of the appeal by Channel Nine or Notice of Contention by Channel Ten. Hely J agreed with Conti J's conclusions in relation to seven of the ten segments. In relation to the poor disguises used during the brothel interview on *A Current Affair*, Hely J concluded that *The Panel* members were not criticising the producers of the program for failing to protect the anonymity of the people being interviewed, which would have amounted to criticism of the program: 'Rather, The Panel were simply poking fun at the disguises which the people had chosen, and using the Panel Segment for the purposes of entertainment.'<sup>62</sup> Similarly Hely J believed that the footage of the Prime Minister being ignored by Glenn McGrath was not newsworthy as the incident had only been shown on *The Panel*: 'The only public embarrassment was created by The Panel's publicising of a background and unnoticed incident.'<sup>63</sup> *The Panel* could not in effect use the footage to create the newsworthy event.

Finkelstein J reached a different conclusion in relation to three broadcasts: an extract from the *Today* show which shows Boris Yeltsin shaking hands with three former Russian Prime Ministers, the extract showing the Prime Minister singing 'Happy Birthday' to Sir Donald Bradman and the discussion of *Simply The Best*. In relation to the *Today* show extract, Finkelstein J said that the extract had to be considered in the context of current events:

When the segment was broadcast, the question whether Australia should become a republic was a significant political issue. The referendum for constitutional amendments had been announced, and the segment must be considered in that context. The discussion whether there should be an age limit imposed on a president,

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<sup>61</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002) [104]. See also *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333, 340.

<sup>62</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002) [116].

<sup>63</sup> *Ibid* [122].

while considered in a humorous way because of Yeltsin's known drinking and memory problems, was newsworthy.<sup>64</sup>

This appears to be a considerably broader test than that applied by the other judges and serves to illustrate the scope for debate about what falls within the concepts of criticism or review and the reporting of news. In relation to the Prime Minister singing 'Happy Birthday', Finkelstein J concluded that fair dealing was made out both on the grounds of criticism or review, as a review of the *Midday* show and its host, and as the reporting of news:

... an incident where the Prime Minister of a country has behaved in a way some might call 'silly' is certainly newsworthy. It is not only the political activities of a person such as a Prime Minister that make the news. His or her perceived indiscretions or other unusual actions warrant reporting. In a sense, all behaviour of a Prime [12] Minister can be regarded as 'political' because it may affect voters' perceptions and is newsworthy for that reason.<sup>65</sup>

Sundberg J agreed with Hely J's conclusions on the availability of fair dealing, except with respect to the extract from *Simply The Best*. Sundberg J stated that on each of his viewings of the broadcast of this extract it was clear to him that the criticism related to the set and 'the fact that it was not possible to determine the basis on which the audience was being asked to vote.'<sup>66</sup> Therefore he concluded that fair dealing was made out with respect to that extract.

Whilst judges can agree broadly on the principles of fair dealing, they can vary widely in their application. This decision highlights yet again the malleable and uncertain nature of fair dealing. The difficulty of not knowing with any certainty in advance whether a use will be deemed 'fair' acts as a significant deterrent to many uses of copyright material. The key advantage of the fair dealing test is its flexibility. The flipside of this, of course, is its unpredictability. Creators wishing to make use of material already in existence must take a punt on whether the use to which they put the work will ultimately be deemed fair by the court.

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<sup>64</sup> Ibid [20].

<sup>65</sup> Ibid [22].

<sup>66</sup> Ibid [4].

### **Recent US developments**

The US courts have had similar problems in attempting to determine whether a parody or satire qualifies as fair use. In 2001, a book was published in the US which created enormous controversy and, fortunately for the sales of the book, a great deal of publicity. That book — Alice Randall's *The Wind Done Gone* — was described as a parody of Margaret Mitchell's *Gone With the Wind*. *The Wind Done Gone* is a story of post Civil War reconstruction, told by Cynara, the illegitimate daughter of Scarlett's plantation owning father. It plays havoc with the characters created by Mitchell and revered throughout the US, in particular the South, as cultural icons. Scarlett, portrayed in Randall's book as 'Other' is petulant, alcoholic and ultimately killed off. This alone was cause for scandal in the US where *Gone With the Wind* remains one of the nation's top selling books. Further, the creation of *Gone With The Wind* sequels and related merchandising is closely protected by the Mitchell trusts.

Randall is quite open about the fact that her book is intended to be a parody of *Gone With the Wind*. She claimed that her book was written to 'draw attention directly to the pain *Gone With the Wind*'s many portrayals have caused' and in the hope that it 'might heal some of our culture's oldest and deepest wounds by forcing readers to confront their own experience of reading *Gone With the Wind*.'<sup>67</sup> Randall stated that she feels that *Gone With the Wind* is a racist book that perpetrates racist stereotypes. All of the black characters are shallow and one-dimensional. Her concern in writing the book was not only with the African-American experience of the Civil War, but more particularly with the influence that *Gone With the Wind* continues to exert on American culture. Randall's publisher claims:

Randall needed to take on Mitchell's work directly to undermine its myths, make readers question its world, and explode the archetypes that have leapt off its pages into America's consciousness.<sup>68</sup>

The Mitchell estate trust was initially successful in obtaining an injunction from the District Court for the Northern District of Georgia to prevent publication of the

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<sup>67</sup> See Houghton Mifflin, '*The Wind Done Gone: Questions and Answers About The Dispute*' <[www.houghtonmifflinbooks.com/features/randall.url/qandas.shtml](http://www.houghtonmifflinbooks.com/features/randall.url/qandas.shtml)>.

<sup>68</sup> *Ibid.*

book.<sup>69</sup> However the United States Court [13] of Appeal (11th Circuit) vacated that injunction on the basis that the defendant was likely to succeed on the basis of fair use.<sup>70</sup> The Court considered the four statutory fair use factors stipulated by s 107 of the *Copyright Act* (US):

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or the value of the copyrighted work.

The Court found that *The Wind Done Gone* was a specific parody of *Gone With The Wind*, performing a valuable social function as a parody of the original work. The Court stated that it wished 'to stress that the public interest is always served in promoting First Amendment values and in preserving the public domain from encroachment.'<sup>71</sup>

The Supreme Court undertook a parallel exercise in exploring the meaning of the terms parody and satire in *Campbell v Acuff-Rose Music*.<sup>72</sup> In that case the 2 Live Crew recorded a parody of the Roy Orbison classic 'Oh Pretty Woman'. The Court struggled with the proper characterisation of the 2 Live Crew version 'Pretty Woman' which was a rap track incorporating some of the lyrics of the original as well as the opening music. Justice Souter, delivering the judgment for the Supreme Court, revisited the history of fair use law, noting its origin in the fair abridgement cases brought in the UK under the Statute of Anne.<sup>73</sup> Further, he emphasised that it is a judge made doctrine, intended to provide some measure of balance to fulfil

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<sup>69</sup> *Suntrust Bank v Houghton Mifflin Company* (2001) 136 F Supp 2d 1357.

<sup>70</sup> *Suntrust Bank v Houghton Mifflin Company* (2001) WL 1193890 (11th Cir (Ga)).

<sup>71</sup> *Ibid* 17. Although Mitchell's trustees indicated that they would be appealing this decision, the case was settled in May 2002 with Houghton Mifflin, making an undisclosed contribution to an Atlanta school, which has a long association with the Mitchell family. See, "'Wind Done Gone' Suit is Settled', *Washington Post*, 10 May 2002, C02.

<sup>72</sup> 114 S Ct 1124 (1994).

<sup>73</sup> *Ibid* 1169.

copyright's purposes of fostering creation. The Court accepted that parody may claim to be a fair use, concluding that:

Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victims' (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.<sup>74</sup>

The Court stressed that all four factors listed in s 107 were of equal weight in determining whether a use was fair. In relation to the third factor (amount and substantiality of the portion used) the Court recognised the particular difficulties when it comes to parody:

Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable ... What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.<sup>75</sup>

In relation to the question of market harm, the Court stressed that this factor measures whether the [14] new work acts as a substitute for the original work. Any harm done to demand for the work due to the critical nature of the parody is not a harm which copyright seeks to remedy.<sup>76</sup> The Court remanded the case for further proceedings and it was settled before the hearing.<sup>77</sup>

### **Economic Approaches**

The lack of a clear rationale for fair dealing leaves the doctrine open to attack from owners' interest groups and creates uncertainty for users. In recent years a number of

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<sup>74</sup> Ibid 1172.

<sup>75</sup> Ibid 1176.

<sup>76</sup> Ibid 1178.

<sup>77</sup> Other recent US cases that deal with parody include: *Dr Seuss Enterprises LP v Penguin Books USA Inc* (1996) 924 F Supp 1559; *Leibovitz v Paramount Pictures Corp* (1998) 137 F 3d 109; *Columbia Pictures Industries, Inc v Miramax Films Corp* (1998) 11 F Supp 2d 1179.

attempts have been made to boost the intellectual rigour of the fair dealing/ fair use doctrine by appealing to economic rationales.<sup>78</sup>

In her influential article in the *Columbia Law Review* in 1982,<sup>79</sup> Wendy Gordon argued that fair use could be better understood and applied by the courts if analysed in terms of a response to market failure. At base she claimed fair use was concerned with three issues:

1. Is the contended use of the copyright material a result of market failure?
2. Balancing the harm caused to the copyright owner and the benefit gained by the defendant, is the use by the defendant of the copyright material socially desirable?
3. Is it likely that the grant of fair use in this case will impair the incentive to create?

Gordon notes that the cases of criticism and review and, in particular, satire, make strong cases for fair use because 'the owner's antidissemation motives make licensing unavailable in the consensual market, and because the free flow of information is at stake'.<sup>80</sup> Recently, Gordon has revisited that article, noting that the recommendations she made have sometimes been misapplied.<sup>81</sup>

Recognising the difficulty of providing a simple justification for fair use, Gordon now states that although market failure still provides the key to understanding the operation of fair use, not all market failure should be treated the same way. Gordon suggests that market failure be categorised into 'market malfunction' or 'excuse': where there is a failure of perfect market conditions, and 'market limitation' or 'justification': where the market norms fail to provide suitable criteria for resolving a dispute. Using the *Wind Done Gone* case as an example, Gordon argues that Randall's book is an example of the principle of justification. The author of the original work which causes harm has no right to prevent the later author from copying parts of the

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<sup>78</sup> William Fisher, 'Reconstructing the Fair Use Doctrine' (1988) 101 *Harvard Law Review* 1659; William Landes and Richard Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325; Michael Anderson and Paul Brown, 'The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law' (1993) 24 *Loyola University of Chicago Law Journal* 143.

<sup>79</sup> Wendy Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 *Columbia Law Review* 1600, 1614.

<sup>80</sup> *Ibid* 1633.

<sup>81</sup> Wendy Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' in Neil Netanel and Niva Elkin-Koren (eds), *The Commodification of Information: Social, Political and Cultural Ramifications* (2002).

work to counter that harm. So Randall should not be prevented from using *Gone With the Wind* nor be required to seek permission, which would in any case be refused, to do so. In cases of justification, market failure is not the sole criteria for permitting fair use. In other words, if a market remedy is introduced, such as an ability to negotiate cheap one off licences, that may not be sufficient to warrant the removal of a right of fair use. Other social factors come into play. Gordon suggests that there are three tiers of inquiry: first, what is the use that the alleged infringer has made of the original work (behaviour)? Then ask whether such a use should have required the copyright owner's [15] permission and, finally, whether such use should be subject to a payment from the end user.

Gordon also argues that such an approach is supported by economic theory. For example, parody and review can operate to protect the public from wasting money on a bad film or a bad novel. The end use is socially desirable and therefore should not be subject to the requirement of permission. Fair use therefore plays an important economic role by preventing creators from granting licences to use their material only to parties who will be complementary towards their works.

In their article 'An Economic Analysis of Copyright Law',<sup>82</sup> Landes and Posner assert that their economic model of copyright 'explains the major applications of the fair use principle'.<sup>83</sup> According to their analysis fair use operates to allow use of a work where there is a benefit to the user and no harm to the owner. For example, a user wishes to quote from a work and would be happy to pay a fee to the owner in respect of such use, which the owner would be willing to accept, but the cost of negotiating such a license would be prohibitive. Landes and Posner state that two important applications of the fair use doctrine, supported by their economic model, are book reviews and parody.<sup>84</sup> Book reviews may be justified as a fair use on the basis that, because they act as a substitute for advertising, it is likely that publishers will grant permission for the use of extracts in any event. Fair use avoids the unnecessary transaction costs which would be incurred in individual licence negotiations. If, on the other hand, because the review is likely to be unfavourable, the publisher would have refused

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<sup>82</sup> Landes and Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325.

<sup>83</sup> *Ibid* 357.

permission to use the material, the fact that use is free makes the overall function of reviews as advertising more credible. Landes and Posner argue that if the public is aware that only positive reviews will be likely to have permission to quote from the reviewed material, they will discount them as an authoritative source. Further, consumers have an interest in receiving advance 'product' information prior to purchase and 'suppression of an unfavourable review would be comparable to concealment by an ordinary seller of a defect in his goods.'<sup>85</sup> As parodies perform a critical function, they should be justified as a fair use, whereas burlesque which serves only to entertain, may potentially be considered a substitute product and therefore infringing.<sup>86</sup>

Posner expanded upon these views in a later article in the *Journal of Legal Studies*: 'When Is Parody Fair Use?'<sup>87</sup> He stated that fair use should only provide a defence to infringement in the case of parody where the following three conditions are met:

1. The parody must use the parodied work as the target of criticism, not merely as the vehicle for that criticism.
2. The parody must not use such a large proportion of the original work that it serves as a substitute for that work. 'The parodist should be entitled to take from the original no more than is necessary to make the parody effective.'<sup>88</sup>
3. The fact that the parodist takes only a small amount of the copyrighted features is not determinative of fair use.

Posner acknowledges that there may be some objections to his proposal, in particular the requirement that the parodied work be the target rather than the weapon of the criticism. However, he states that there is no 'compelling reason to subsidize social criticism by allowing writers to use copyrighted materials without compensating the copyright holder.'<sup>89</sup> Market failure operates only where the owner [16] would act out of personal interest in refusing permission to licence a work.

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<sup>84</sup> Ibid 358–60.

<sup>85</sup> Ibid 359.

<sup>86</sup> These views were endorsed by the United States District Court, SD California in *Dr Seuss Enterprises LP v Penguin Books USA Inc* (1996) 924 F Supp 1559, 1568–9.

<sup>87</sup> Richard Posner, 'When is Parody Fair Use?' (1992) 21 *Journal of Legal Studies* 67.

<sup>88</sup> Ibid 72.

<sup>89</sup> Ibid 73.

Alfred Yen challenges the ‘completeness’ of the efficiency model as applied to copyright and in particular the doctrine of fair use. He argues that due to the critical nature of most parodies, it is ‘highly unlikely that an author will sell parody rights to his work at any price.’<sup>90</sup> Therefore without the fair use doctrine there would be little parody, consequently depriving the public of the benefits of parody. Yen therefore suggests differentiating between parodies which provide only humour, and those which involve criticism of literary or social conventions. This latter category provides a unique social benefit beyond entertainment, furthering the goals of copyright in stimulating thought and discussion, and should be protected as a fair use.

The social benefit of parody is strongly supported by Patry and Perlmutter,<sup>91</sup> who claim that the US courts have distorted the fair use doctrine by focussing largely on market harm. They suggest that a finding of harm to the market for the plaintiff’s work should not necessarily be conclusive of a rejection of a fair use defence.<sup>92</sup> Rather, the court should enquire if the parody will supplant demand for the original work, which it rarely will.<sup>93</sup>

Finally, Pallas Loren notes that courts in the US have adopted a narrow focus in the application of the market failure approach, choosing to look only at high transaction costs and other forms of market failure. The existence of a ‘permission system’ to administer collection of fees for use of copyright material may avoid market failure which is due to registration costs but it does not account for market failure due to external benefits which are not dealt with in a bargained for exchange:

This kind of market failure deserves particular notice when examining non-transformative uses of a copyrighted work being made in the context of research, scholarship, or education.<sup>94</sup>

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<sup>90</sup> Alfred Yen, ‘When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law’ (1991) 62 *University of Colorado Law Review* 79, 90.

<sup>91</sup> William Patry and Shira Perlmutter, ‘Fair Use Misconstrued: Profit, Presumptions, and Parody’ (1993) 11 *Cardozo Arts & Entertainment Law Journal* 667.

<sup>92</sup> *Ibid* 697.

<sup>93</sup> *Ibid* 693.

<sup>94</sup> Lydia Pallas Loren, ‘Redefining the Market Failure Approach to Fair Use in An Era of Copyright Permission Systems’ (1997) 5 *Journal of Intellectual Property Law* 1.

## Conclusions

The above examination of the current state of play of fair dealing law indicates that in order to preserve the vital balance of interests of owners and users within copyright, some further investigation of the nature and rationale for the range of permitted exceptions is required.<sup>95</sup> With the development of digital technology, which is making it possible to monitor and charge for individual uses of a work, owners now have a strong basis for arguing for the abolition of fair dealing. For this reason, it is important to avoid adopting an overly simplistic view of the role of market failure as a justification for fair dealing. Fair dealing is not simply a response to market failure in the sense that it allows use of a work when the costs of negotiating a licence to use the work are too high. There are also many circumstances in which the public interest lies in permitting the use of a work without the permission of the owner of copyright, with or without payment. *The Panel* decision provides a good example of circumstances in which a licence would not be granted (between competitors). Without a clear understanding of the function that fair dealing is intended to serve, however, it will be difficult for users to resist the argument that [17] electronic licences can remove the need for uncompensated use of a work.

It is essential to avoid accepting the conclusion that copyright owners have a right to charge for all uses of a work, but this will be difficult without a clearer understanding of the public policy functions that the exemptions are intended to serve. Parody and criticism provide some insights into the broader social function of copyright, highlighting the need for public interests to be recognised alongside those of the copyright owner. Economic arguments, such as those being developed by Wendy Gordon, are emerging to support this view. It is vital to recognise the public interest element of copyright and a more detailed analysis of the historical development of fair dealing is being undertaken by this author to further support this exercise. Copyright is not solely concerned with economic returns for the owner. Neither was copyright intended to enable owners to exploit all possible uses and derivations of the work. The public domain is an important legacy of copyright law and its existence should also be protected in the face of the growth of digital capture and licensing of works.

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<sup>95</sup> The CLRC Copyright and Contract report undertakes a brief review of the evolution of fair dealing. It states that 'the concept of fair dealing has evolved as an integral part of copyright as understood in

The availability of copyright material for use in critical reviews and analysis of that material is a sign of a robust creative society. Locking up access to creative material and making it subject to permission and payment of a fee will stifle debate and creativity and return copyright to the days prior to the Statute of Anne, when ownership of copies served a dual function of commerce and censorship. *The Panel* serves as a vehicle for social comment and criticism, albeit in a relaxed, humorous fashion. *The Wind Done Gone* generates new food for thought in the analysis of the social consequences of slavery. Copyright is a social as well as a commercial construct and its role in facilitating new creations as well as protecting existing creations should not be forgotten.

Some reassurance may be derived from the words of Finkelstein J in *TCN Channel Nine* indicating there is recognition of the importance of fair dealing as the guardian of the public domain:

There are exceptions to the monopoly rights given to copyright owners. Fair dealing is one of those exceptions. The Copyright Act confers a privilege on third parties to use copyright material without the consent of the owner in certain circumstances. The doctrine developed to resolve the tension between, on the one hand, the monopoly granted to the owner and, on the other hand, the public interest.<sup>96</sup>

However, the decision itself may ring some alarm bells, due to the fine line it walks between legitimate and illegitimate uses of a work. *The Panel* is an irreverent program that seeks to critique the foibles of the television medium. It provides an important forum to review the broadcast programs of the preceding week. It may not itself be free of the constraints of commercialism, but if the right of fair dealing is not available to permit it to demonstrate the points it is making the message is weakened. Fair dealing is a right to protect the public, but it is right of which the public remains essentially unaware.

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the common law tradition': Copyright Law Review Committee, above n 25, [3.24]. It leaves open the question of how this interacts with the enforcement of technological protection measures.

<sup>96</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146, (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002) [7].