The Case for Fair Use in New Zealand

I Introduction

'Copyright reform is in the air.'[1]

Changing technologies and social norms mean that many useful—sometimes essential acts—by consumers and businesses infringe copyright. Copyright Law Review Committees and others have for many years recognised that if socially and commercially valuable practices are to continue, or even to occur, new exceptions are required.[2] Some jurisdictions, such as Canada have heeded the calls. For example, Canada's Copyright Modernization Act 2012 amended Canada's copyright legislation with the purpose *inter alia* of:[3]

> updat[ing] the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards permit[ing] businesses, educators and libraries to make greater use of copyright material in digital form allow[ing] educators and students to make greater use of copyright material permit[ing] certain uses of copyright material by consumers.

Other jurisdictions have gone further and have enacted fair use.[4]

The Australian Law Reform Commission (ALRC) recommended strongly that Australia adopt fair use.[5] Albeit since the ALRC's report was released the Australian Productivity Commission was tasked with undertaking a 12 month public inquiry into Australia's intellectual property system.[6] Curiously—given the international moves—New Zealand has not yet begun its journey along the copyright law reform path. New Zealand, however, is not immune to the changing technological and societal pressures: it is case of when, not if, reform will take place. When reform does occur, New Zealand will be faced with the options of: enacting narrow specific exceptions that cater for current technology which will almost inevitably be out of date by or soon after the exceptions come into force; creating broader

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[1] Irish Copyright Review Committee *Modernising Copyright* (2013) 7.
[2] In the United Kingdom: *Report of the Committee to Consider the Law on Copyright and Designs* (Cmnd 6732, 1977) [676]-[677] (Whitford Committee Report); *Gowers Review of Intellectual Property* (HMSO 2006) [4.67]-[4.93]; and I Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) ch 5. In Australia: Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Right of Copyright Owners* (AGPS, 1998) [6.07]-[6.08]. In Canada: Department of Consumer and Corporate Affairs / Department of Communications *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa, 1984) 35, 49.
[3] Copyright Modernization Act 2012 (Can), Summary.
[4] Copyright Act 2007, s 19 (Israel); Copyright Act 1967, s 35(2) (Singapore); Copyright Act 1957, art 35-3 (South Korea); and Intellectual Property Code of the Philippines, Republic Act No 8293, s 185 (the Philippines). Albeit in Singapore the wording 'fair dealing' is used.
[5] Australian Law Reform Commission *Copyright and the Digital Economy* (ALRC Report 122, 2013), Recommendation 4-1, 13 (ALRC).
[6] See <http://www.pc.gov.au/inquiries/current/intellectual-property#draft> accessed 11 February 2016. The Issue Paper on 'Intellectual Property Arrangements' is available here: <www.pc.gov.au/inquiries/current/intellectual-property/issues/intellectual-property-issues.pdf> accessed 11 February 2016.

technologically neutral exceptions that meet and hopefully address future technological changes; or introducing a broad fair use exception.

Copyright exceptions exist—and are required—because of fairness. As the Whitford Committee in 1977 observed:[7]

> The Copyright laws of th[e United Kingdom] and other countries [including New Zealand] have always accepted that certain dealings with copyright works should not infringe copyright. This view is supported by common sense.
>
> On any given set of circumstances … most people do not have much difficulty in forming a view as to whether the type of dealing in question is or is not 'fair'.

Despite fairness being a useful guide for whether a use of a work is infringing or not, New Zealand's copyright law—unlike in the United States and an increasing number of other jurisdictions[8]—contains no fair use exception for copyright infringement. Fair use at its heart asks whether any given use is fair.[9] 'In deciding whether a use is fair, a number of principles, or 'fairness factors', must be considered. These include the purpose and character of the use and any harm that might be done to a rights holder's interests by the use'.[10] Fair use is a broad standard based on principles that applies to all works, rather than narrow prescriptive exceptions.[11]

New Zealand's closest equivalent to fair use is fair dealing[12] which permits copying for the proscribed purposes of criticism or review, reporting current events and research or private study, so long as the use is fair and, in some circumstances, other requirements are met.[13] Therefore, despite the use of the term 'fair', fair dealing does not extend to all or even most uses of a copyright work that a person—or society in general—would reasonably think was fair. In addition there are a number of narrow specific exceptions. For example, sound recordings can be copied without infringing copyright, but there are many restrictions on this ability to copy without infringing.[14] Moreover, the exception can be overridden by a clause in a contract.[15]

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[7] Whitford Committee Report (n 2) [657] and [668].
[8] Copyright Act (US) § 107 (United States) and see (n 4).
[9] ALRC (n 5) [4.2].
[10] ibid [4.2].
[11] ibid [4.3].
[12] Copyright Act 1994, ss 42 and 43.
[13] Copyright Act 1994, s 42(1) for criticism or review the fair dealing must be 'accompanied by a sufficient acknowledgement'. Section 2 further defines 'sufficient acknowledgement' as meaning an acknowledgement identifying the work by its title or other description; and the author of the work, unless, it is published anonymously or in the case of an unpublished work and it is not possible by reasonable inquiry to ascertain the identity of the author.
[14] Copyright Act 1994, s 81A(1). The exception is limited as: the copy must not be borrowed or hired; be made by the owner of the sound recording acquired legitimately; the copy must be made for the owner's personal use or a member of the household in which the owner lives; only one copy can be made for each device for playing sound recordings, the owner of the sound recording cannot sell or give away the copy made under the section.
[15] Copyright Act 1994, s 81A(2).

Examples of the failure of fair dealing to allow for fair uses that fall outside its scope, or another specific exception, abound. Buckley LJ in *Musical Fidelity Ltd v Vickers*[16] expressed disbelief that a person could infringe copyright by reproducing a solicitor's cease and desist letter on a website: lamenting that fair dealing was narrow and was an 'impoverished means' of resolving the dispute.[17] Had *Musical Fidelity Ltd v Vickers* been decided in New Zealand the outcome would be no different. Nor is there an exception in New Zealand for parody or satire, which means that socially useful commentaries often breach copyright. More practically, many things that we take for granted, and are now necessary for society to operate, infringe copyright law. For example, the servers for search engines providing services to Australians are not located in Australia as their actions would infringe Australian copyright law.[18] New Zealand's law is to all intents and purposes the same as that of Australia in this respect.[19] Fair dealing, applying as it does to the narrow and restricted uses of criticism or review, reporting current events and research or private study, is limited in its application and is no longer fit for purpose.[20]

A number of factors must be uppermost in mind when exploring any copyright law reform. Copyright's continual growth in the scope of protection for copyright owners[21] does not exist in isolation: the public interest is equally important. WIPO's Copyright Treaty 1996[22] recognises 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention'.[23] While New Zealand has not ratified the Copyright Treaty 1996, it is a signatory to the Berne Convention. The current balance between authors' rights and the public interest is maintained currently in New Zealand by fair dealing and other exceptions.[24] However, as we shall see, fair dealing and the current exceptions are no longer able to achieve the fine balance.

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[16] [2003] FSR 50.
[17] ibid [29], and David Vaver, 'Reforming Intellectual Property Law' [2009] IPQ 143, 153.
[18] ALRC (n 5) [11.21].
[19] While there are some safe harbour provisions in the Copyright Act 1994 for internet service providers under ss 92A-92E search engines are not internet service providers.
[20] See generally Giuseppina D'Agostino 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use Healing' (2008) McGill L J 309, 313-314: 'Canada's fair dealing doctrine, along with that of other former UK colonies [such as New Zealand], has been seen as the weak imperial import, and not up for the job.'
[21] The first copyright statute, the Statute of Anne 1709 (An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned 1709, 8 Anne, c 19), protected printed books for 14 years (and a further term of 14 years if the author was still alive at the end of the 14 years), or 21 years for printed books already published when the Statute of Anne came into force. Now copyright protects almost everything recorded in some way and for most works, for life of the author plus 50 years which means that copyright protection can last for more than 100 years, Copyright Act 1994, s 22.
[22] WIPO Copyright Treaty 36 ILM 65 (opened for signature 20 December 1996, entered into force 6 March 2002).
[23] At preamble and Australian Law Review Commission *Copyright and the Digital Economy* (DP 79) (2013) [11.68]. See also *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336; 2002 SCC 34 [30], 'the Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).'
[24] See Copyright Act 1994, pt 3.

Copyright law is looked at to encourage innovation; however, policy makers must be cognisant of the moral hazard that existing industries do not maintain their position by innovating and adopting new technologies, instead the existing industries often use copyright to protect their business models.[25] Much innovation and productivity growth does not come from the large incumbent firms; rather from the smaller and nimbler ones.[26]

Fair use is not a pirates' charter. Fair use does not mean, for example, that any use of a work by a person in their personal capacity will cease to be infringing, such as downloading the latest movie using BitTorrent software. Fourth, new technologies can increase the value of works protected by copyright.[27] For example, the BBC destroyed warehouses full of old television episodes during the 1960s and 1970s including Dr Who episodes as it thought the episodes were valueless because at the time the only means of showing the episodes was on its two television stations.[28] The rise of video cassettes and later technologies such as DVDs and the Internet means that the BBC can now reach audiences never dreamed about.

The article first sets out the ALRC's formulation of fair use. Second, the history of fair dealing is looked at—it is difficult to understand the present if we have no knowledge of the past. Third, Parliament's traditional approach of responding to uses that it believes are fair by enacted narrow exceptions is outlined. Fourth, the case for fair use is argued. In addition to explaining how fair use can overcome the narrowness of fair dealing and other exceptions, this part addresses the arguments made against the introduction of fair use. Notwithstanding fair dealing's limitations; however, it has been argued that fair use despite its flexibility is not a panacea for copyright's ill health.[29] One primary objection against fair use is that it creates uncertainty. As we shall see; however, a broad principled approach would not be unique to copyright law and is used successfully in other areas of the law. Indeed, if fair use is so uncertain for business why is the United States the greatest exporter of cultural goods in the form of movies, music, books and other materials?[30] Finally, regardless of what path New Zealand takes, limits must be placed on copyright owners' ability to contract out of copyright exceptions.

The article's thesis is that New Zealand's fair dealing law is broken: the solution is fair use and New Zealand should adopt a broad fair use provision as that proposed in Australia.[31] As the ALRC observed, currently 'copyright law gets in the way of much innovative activity

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[25] R Towse, 'What We know, What We Don't Know and What Policy Makers Would Like Us to Know About the Economics of Copyright' (2011) 8 Review of Economic Research of Copyright Issues 101, 108-109, cited in ALRC (n 5) [3.8].
[26] ALRC (n 5) [3.16]. See also T Zenger, 'Explaining Organizational Diseconomies of Scale in R&D: Agency Problems and the Allocation of Engineering Talent, Ideas, and Effort by Firm Size' (1994) 40 Management Science 708.
[27] ARLC (n 5) [3.13].
[28] See 'The Destruction of Time' <www.missingepisodes.blogspot.co.nz/> accessed 11 February 2016.
[29] See generally Graeme W Austin, 'The Two Faces of Fair Use' (2012) 25 New Zealand Universities Law Review 285.
[30] ALRC (n 5) 22.
[31] The article is not therefore arguing that the United States formulation of fair use is imported into New Zealand.

[and r]eform of copyright law could promote greater opportunities for innovation and economic development.'[32]

II The ALRC's proposal

The ALRC was tasked with considering whether existing copyright exceptions (including fair dealing) were appropriate in Australia and whether the creation of further exceptions were required that would:[33]

> recognise fair use of copyright material;
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> allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
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> allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

The ALRC, with stakeholder input, identified five principles governing copyright reform in Australia: 'acknowledging and respecting authorship and creation'; 'maintaining incentives for creation of works'; 'promoting fair access to and wide dissemination of content'; 'providing rules that are flexible and adaptive to new technologies'; and 'providing rules consistent with Australia's international obligations.'[34] The ALRC determined that a fair use exception was the best fit with the principles,[35] and, in its final Report in November 2013, recommended strongly that Australia adopt a fair use exception.[36] While New Zealand has no clearly articulated principles for copyright reform, the ALRC's principles would apply equally to New Zealand.

The ALRC's formulation of fair use was that it should contain three features: 'an express statement that a fair use of copyright material does not infringe copyright'; 'a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors')'; and 'a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').[37] The non-exhaustive list of fairness factors were:[38]

> (a) the purpose and character of the use;
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> (b) the nature of the copyright material used;
>
> (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
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> (d) the effect of the use upon the potential market for, or value of, the copyright material.

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[32] ALRC (n 5) 20.
[33] Australian Government, 'Terms of Reference: Copyright and the Digital Economy' (29 June 2012) <www.alrc.gov.au/inquiries/copyright/terms-reference> accessed 12 February 2016.
[34] Australian Law Review Commission (n 19) [2.1] – [2.49]. [(DP 79)]
[35] Australian Law Review Commission *Copyright and the Digital Economy* (IP 42, 2012).
[36] ALRC (n 5) [4.1].
[37] ibid 13 (recommendation 5.1).
[38] ibid 13 (recommendation 5.2).

The non-exhaustive list of illustrative purposes were: research or study; criticism or review; parody or satire; reporting news; professional advice; quotation; non-commercial private use; incidental or technical use; library or archive use; education; and access for people with disability.[39] In addition, the ALRC recommended that the fair dealing exceptions be repealed as they would come within the broad fair use exception.[40]

To be sure, fair use is contentious:[41] the Irish Copyright Review Committee noted that:[42]

> Fair use is the issue which aroused the greatest passions both in the submissions and at the public meeting. On the one hand, its critics often characterised it as little better than parasitic larceny, allowing a user to take unfair commercial advantage of a rights-holder's work. On the other hand, its enthusiasts argued that, in the context of innovation, it is better to be bold than to be timid, and that, to support innovation, Irish copyright law must itself be innovative and introduce an exception permitting reasonable uses of copyrighted works. It is impossible to reconcile these extreme positions, but a more balanced outcome may yet be achieved.

Yet, as the ALRC noted, '[f]air use is not a radical exception'.[43] Indeed, it is crucial to note that fair use in the United States has the same historical source as fair dealing. Justice Story in *Folsom v Marsh*[44] imported into the United States what he understood to be fair dealing.[45] Moreover, far from Justice Story using fair use to eviscerate copyright owners' rights in the United States, Justice Story used the opportunity to strengthen copyright owners' rights.[46] Thus the courts in the United States and the United Kingdom and the legislatures took different paths in their development of an exception that recognised 'fair' and thus non-infringing uses of works protected by copyright.

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[39] ibid 13-14 (recommendation 5.3).

[40] ibid 14 (recommendation 5.3) The repealed exceptions under the Copyright Act 1968 (Cth) would be: ss 40, 103C (fair dealing for research or study); ss 41, 103A (fair dealing for criticism or review); ss 41A, 103AA (fair dealing for parody or satire); ss 42, 103B (fair dealing for reporting news); s 43(2) (fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice); and ss 104(b) and (c) (professional advice exceptions).

[41] See generally Austin (n 29).

[42] Irish Copyright Review Committee *Copyright and Innovation: A Consultation Paper* (2012) [10.6].

[43] ALRC (n 5) [4.5]. Contrast Irish Copyright Review Committee (n 1) 7, where the Irish Copyright Review Committee described the ALRC's proposal to introduce fair use as a 'truly radical transformation' of copyright law.

[44] (1841) 9 Fed Cas 342 (CCD Mass 1841).

[45] Justice Story cited United Kingdom cases exclusively in *Folsom v Marsh*: *Dodsley v Kinnersley* 1 Amb 403; *Whittingham v Wooler* 2 Swanst 428; *Tonson v Walker*, 3 Swanst 672-679, 681; *Gyles v Wilcox* 2 Atk 141; *Gee v Pritchard* 2 Swanst 403; *Perceval v Phipps* 2 Ves & B 19; *Pope v Curl* 2 Atk 342; *Thompson v Stanhope* (1774) Amb 737; *Duke of Queensberry v Sheffeare* 2 Eden, 329 (cited 4 Burrows, 2329); *Bramwell v Halcomb* 3 Mylne & C 737; *Saunders v Smith* 3 Mylne & C 711; *Mawman v Tegg* 2 Russ 385; *Wilkins v Aikin* 17 Ves 422; *Roworth v Wilkes* 1 Camp 94; *Sweet v Shaw* 1 Jur (London) 212 [3 Jur 217]; and *Lewis v Fullarton* 2 Jur (London) 127 [3 Jur 669], 2 Beav 6.

[46] Had *Folsom v Marsh* been decided in the United Kingdom the defendant would most likely not have infringed copyright as it had produced an abridgment, Austin (n 29) 291 citing RA Reese, 'The Story of *Folsom v Marsh*: Distinguishing Between Infringing and Legitimate Uses' in JC Ginsburg and R Dreyfuss (eds), *Intellectual Property Stories* (Foundation Press 2006). And see L Ray Patterson, 'Folsom v. Marsh and Its Legacy' (1998) 5 Journal of Intellectual Property Law 431.

The ALRC was not the first Australian Copyright Law Review Committee to recommend that fair use be adopted in Australia,[47] or the first Copyright Committee to recommend such a move.[48] In 2013, the same year as the ALRC made its recommendation, the Irish Copyright Review Committee proposed a restricted fair use exception for Ireland.[49] Other jurisdictions have gone beyond mere recommendations of introducing fair use and have legislated for it: Israel,[50] Singapore,[51] the Republic of Korea[52] and the Philippines,[53] now have fair use exceptions.

Australia's copyright law is not identical to New Zealand's: it is similar[54] and both jurisdictions face the same pressure of wanting to: acknowledge and respect authorship and creation; maintain incentives for the creation of works; promote fair access to content and wide dissemination of content; and have rules that are flexible and adaptive to new technologies that are consistent with New Zealand's international obligations.

III Fair Dealing

A Fair Dealing's (pre)history

Fair dealing made its legislative debut in New Zealand in section 5(1) of the Copyright Act 1913 when New Zealand copied the United Kingdom's Imperial Copyright Act 1911.[55] For fair dealing's pre-history we must turn to the United Kingdom. Fair dealing's statutory birth was not Athena like—it did not burst from the head of the United Kingdom's Parliament—nor was it the handiwork of powerful lobby groups.[56] Rather fair dealing was the handiwork of the United Kingdom's courts.[57]

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[47] Copyright Law Review Committee (n 2) [2.01]-[2.03], [6.28], [6.36]-[6.44] and [6.143]. See ALRC (n 5) [4.21]. Note: although the Copyright Law Review Committee used the term 'fair dealing', the proposal was in effect 'fair use'.

[48] In the United Kingdom: the Whitford Committee Report (n 2) [695] and Gowers (n 2) Recommendation 11 (albeit that Gowers was not a Copyright Committee, rather it was an independent review commissioned by the United Kingdom Government). In Canada, see Department of Consumer and Corporate Affairs / Department of Communications (n 2) 35-49.

[49] See Irish Copyright Review Committee (n 1) 93-94, where the Committee recommended that the Irish Copyright Act 2000 be amended to insert a fair use exception under s 49A.

[50] Copyright Act 2007, s 19 (Israel).

[51] Copyright Act 1967, s 35(2) (Singapore), albeit the provision refers to 'fair dealing'.

[52] Copyright Act 1957, art 35-3 (South Korea).

[53] Intellectual Property Code of the Philippines, Republic Act No 8293, s 185 (the Philippines).

[54] The similarities are not surprising given that the Imperial Copyright Act 1911 was a predecessor of the current copyright Acts in New Zealand and Australia jurisdictions.

[55] Australia beat the UK to the post in relation to statutory fair dealing as s 28 of the Copyright Act 1905 (Aust) provided that '[A] book shall not be infringed by a person making an abridgement or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information' (emphasis added). Australia's fair dealing clause appears to have been lifted from cl 4(5) of the UK's Copyright Bill 1900 (295) (An Act to Amend and consolidate the Law relating to Literary Copyright).

[56] Ian Eagles, 'Incidental Copying: The Forgotten Defence to Copyright Infringement' (2004) 10 New Zealand Business Law Quarterly 236, noting that a number of copyright exceptions are 'visibly the product of lobbyists' special pleading'.

[57] See generally Alexandra Sims, 'Appellations of Piracy: Fair Dealings Pre History' (2011) Intellectual Property Quarterly 3; David Vaver, 'Abridgments and Abstracts: Copyright Implications' [1995] EIPR 225;

To understand why the courts in the United Kingdom created what we now know to be fair dealing some context is required because fair dealing was developed in a different time and copyright is substantially different to its original statutory form under the Statute of Anne in 1709.[58] Copyright, under the Statute of Anne, protected published books only and for what seems now a rather limited term—14 years for books published after the statute's commencement,[59] or 21 years for books already published.[60] Fair dealing was not required in 1709 because only the publication of an exact copy of an entire book could infringe copyright. When the courts allowed copyright to break free from its statutory limits and protect more than an exact copy of a protected book, the courts created fair dealing to ensure that copyright owners' rights did not impinge on the valid—and fair— uses to which copyright works were being put. The first fair dealing exception was for abridgments. Abridgments were a condensed form of a longer work (the source work) usually containing extracts of the source work. The purpose of the abridgment was to act as a substitute for the source work, providing the same information in a more streamlined and efficient manner.[61]

Fair dealing grew from simply protecting abridgments,[62] to allowing people to use copyright works for the purposes of criticism,[63] review,[64] quotation[65] and refutation.[66] Fair dealing was a malleable concept in the hands of the courts. For example, prior to 1911 the courts, albeit slowly, decided sensibly that abridgments should no longer be protected under fair dealing as it was recognised that the copyright owner should be one who could condense a long work into a shorter one and abridgments became infringing.[67]

B Fair Dealing in Statutory Form

Melissa de Zwart, 'A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age' [2007] IPQ 60; Kathy Bowrey, 'On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating 'The Humble Grey Which Emerges as the Result of Long Controversy'' (October 1, 2008), UNSW Law Research Paper No 2008-58; Robert Burrell, 'Reining in Copyright Law: Is Fair Use the Answer?' [2001] IPQ 361; and Ariel Katz, 'Fair Use 2.0: The Rebirth of Fair Dealing in Canada' in Michael Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013).

[58] An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned 1709, 8 Anne, c 19. The Statute of Anne was the product of the publishers' lobbying, not a genuine desire to encourage and reward authors for writing those books, *Lucasfilm Ltd v Ainsworth* [2012] UKSC 39; [2012] 1 AC 208 [14] 'the original legislative purpose of … copyright was the protection of the commercial interests of stationers (the early publishers) and booksellers, and the control of unlicensed (and possibly subversive) publications, rather than the vindication of the legal and moral rights of authors.'

[59] Statute of Anne 1709, s 1. If the author was lucky enough to be alive 14 years after the book was published, he or she gained a further 14 year period of protection, s 11.

[60] Statute of Anne 1709, s 1.

[61] Sims, 'Appellations of Piracy: Fair Dealings Pre History' (n 57) 13-14 and Vaver, 'Abridgments and Abstracts: Copyright Implications' (n 57).

[62] *Gyles v Wilcox* (n 45) and *Read v Hodges* (May 19, 1740) Bro PC 13.

[63] *Bell v Whitehead* (1839) 8 LJ (NS) Ch 141.

[64] *Dodsley v Kinnersley* (n 45) 405.

[65] *Mawman v Tegg* (n 45) 384 '[q]uotation, for instance, is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy fixed to it.'

[66] *Perceval (Lord and Lady) v Phipps* (n 45).

[67] See generally Sims, 'Appellations of Piracy: Fair Dealings Pre History' (n 57).

The United Kingdom Parliament brought fair dealing into the statutory fold of the Imperial Copyright Act 1991. By clothing fair dealing in statutory form the United Kingdom Parliament was simply recognising and approving the fair dealing doctrine as created by the courts.[68] So accepted was the courts' doctrine of fair dealing, that commentators at the time the Imperial Copyright Act was passed questioned the need for its statutory incarnation.[69]

Section 2(1)(i) of the Imperial Copyright Act 1911 provided that 'any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary' did not constitute copyright infringement. Canada, Australia and New Zealand duly enacted fair dealing provisions that were to all and intents and purposes identical.[70] Despite the statutory intent to simply reflect the courts' creation, there were problems with the statutory formulation. Notably absent from the proscribed purposes was quotation which had always been accepted as fair dealing;[71] missing too was refutation.[72] The omission of quotation in particular has proved problematic. It is only now, over 100 years after the Imperial Copyright Act, that quotation has been expressly included under fair dealing in the UK.[73]

Given the ill fit of the courts' version of fair dealing to its statutory formulation it was not surprising that in 1912 one commentator remarked 'It is clear that the words 'fair dealing' are likely to lead to considerable litigation'.[74] Yet, there was no stampede to the courts: the first two decades following the passing of the Imperial Copyright Act witnessed only three cases where fair dealing was argued.[75]

Despite the courts' rich tradition of fair dealing pre 1911 and Parliament's clear intent to introduce the courts' doctrine for fair dealing into the Imperial Copyright Act, the United Kingdom courts turned their back upon their creation.[76] Peterson J, in *University of London Press* Ltd,[77] the first case where fair dealing was discussed following the passing of the Copyright Act 1911, made no mention of previous fair dealing cases.[78] The courts, by ignoring fair dealing's jurisprudence, narrowed fair dealing's scope. For example, *Bell v*

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[68] J M Easton, *The Law of Copyright, in Works of Literature, Art, Architecture, Photography, Music and the Drama: Including Chapters on Mechanical Contrivances and Cinematographs* (5th ed, Stevens and Haynes 1915) 144; Sims, 'Appellations of Piracy: Fair Dealings Pre History' (n 57) 4 and David Vaver, 'User Rights' (2013) 25 Intellectual Property Journal 105, 108.
[69] Easton (n 68) 144.
[70] (Copyright Act 1921 (Can) s 17(2)(a); Copyright Act 1912 (Cth) and Copyright Act 1913 (NZ) s 5(1).
[71] *Mawman v Tegg* (n 45) 384 '[q]uotation, for instance, is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy fixed to it.'
[72] Sims, 'Appellations of Piracy: Fair Dealings Pre History' (n 57) 22.
[73] The UK Government has finally enacted a quotation exception in the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.
[74] Herbert G Thring, 'Advantages and Defects of the Copyright Act 1911' *Fortnightly Review* (London, June 1912) 1132, 1136.
[75] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *British Oxygen Co v Liquid Air Ltd* [1925] 1 Ch 383; and *BBC v Wireless League Gazette Publishing Co* [1926] 1 Ch 433.
[76] See generally Alexandra Sims, 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' (2010) Intellectual Property Quarterly 192.
[77] *University of London Press Ltd v University Tutorial Press Ltd* (n 70).
[78] It is a stretch to call *University of London Press Ltd v University Tutorial Press Ltd* a fair dealing case as it looked at fair dealing in passing only. The real issue in that case was whether the plaintiff's maths exam questions were protected by copyright at all.

Whitehead[79] which was decided in 1839, no infringement had been found because the defendant was criticising the ideas contained in the plaintiff's work.[80] Yet, in *British Oxygen Co v Liquid Air Ltd*[81] decided in 1925, Romer J, in obiter, found that the defendant would not have been able to come within criticism because 'the word 'criticism' means a criticism of a work as such'[82] and the defendant was criticising the plaintiff's business practices (its ideas), not the literary merit of its work.[83]

Moreover, after 1911 the courts failed to treat statutory fair dealing with the same flexibility as before: in the pre-1911 era the courts moulded fair dealing to meet circumstances as they arose.[84] In *Hawkes & Son (London) Ltd v Paramount Film Service Ltd*[85] the defendant film company had filmed the opening of a school in which the school band played 20 bars of a military march. At first instance, Eve J found that a substantial part had not been copied, and even if it had been, there had been 'a fair dealing with the work'. The Court of Appeal disagreed and found that fair dealing was not made out. Slesser LJ observed that:[86]

> [fair dealing] must be dealt with strictly, and when it says 'newspaper summary' it means newspaper summary and nothing else. Now here there is neither a summary nor a newspaper, and it is impossible, I think, to hold that this case comes within that protection.

Such a strict interpretation was in direct contrast to the courts' treatment in other settings.[87] Films were simply not in the legislature's contemplation in the lead up to the 1911 Act. Not surprisingly the United Kingdom's Report of the Copyright Committee in 1952 (the Gregory Report) addressed concerns over 'the actual and probably unintentionally restrictive wording of [fair dealing].'[88] Following the Gregory Report, section 6 of the ensuing Copyright Act 1956 (UK), which New Zealand copied,[89] provided that:

> (1) No fair dealing with a literary, dramatic or musical work for purposes of research or private study shall constitute an infringement of the copyright in the work.
>
> (2) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgement.

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[79] *Bell v Whitehead* (n 63).
[80] Sims, 'Appellations of Piracy: Fair Dealings Pre History' (n 57) 13-14.
[81] *British Oxygen Co v Liquid Air Ltd* (n 75).
[82] ibid 393.
[83] See also Burrell, 'Reining in Copyright Law' [2001] IPQ 361, 371. The defendant in an attempt to draw attention to the plaintiff's sharp business practices made copies of a letter that the plaintiff had sent to it which it circulated to the plaintiff's customers.
[84] *Perceval (Lord and Lady) v Phipps*(1813) 2 V & B 19; 35 ER 225 (refutation).
[85] *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] 1 Ch 593.
[86] ibid 604.
[87] See for example *Taylor v Goodwin* (1879) 4 QBD 228 where bicycles were found to come within the meaning of 'any sort of carriage' in s 78 of the Highways Act 1835 (5 & 6 Wm 4, c 50) as there was a high probability that bicycles were unknown when the Act was passed.
[88] Sims, 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' (n 76) 198 – 199.
[89] Copyright Act 1962, s 19(1)-(3).

> (3) No fair dealing with a literary, dramatic, or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of reporting current events--
>
> (a) In a newspaper, magazine, or similar periodical; or
>
> (b) By means of broadcasting, or in a cinematograph film,--
>
> and, in a case falling within paragraph (a) of this subsection, is accompanied by a sufficient acknowledgment.

The reformulated statutory provisions made three key changes to fair dealing.[90] First, literary, dramatic and musical works could be used for the purposes of research, private study, criticism or review, not other works such as artistic works. Second, a sufficient acknowledgment had to be made if the work was criticised or reviewed. Third, fair dealing was amended to take into account new technology and prevent a repetition of the result in *Hawkes & Son (London) Ltd v Paramount Film Service Ltd*.

The United Kingdom's attempt to remedy fair dealing following the Gregory Report appears to have been unsuccessful. In 1977 the Whitford Committee found that the submitters' mood was not to limit the scope of fair dealing; rather there was a need for 'clarification and some enlargement' of fair dealing.[91] Clarity, in the Committee's opinion, was unlikely to be achieved by adding more express exceptions for special cases, except for those activities that would not normally be thought as 'fair' because 'the greater the number of special cases dealt with, the greater the scope for uncertainty in relation to cases not specifically dealt with.'[92] Instead, the Whitford Committee recommended that:[93]

> [T]here should be a general exception covering all classes of copyright works and subject matters in favour of 'fair dealing' which does not conflict with the normal exploitation of the or subject matter and does not unreasonably prejudice the copyright owner's legitimate interests.

The UK Government did not take up the Whitford Committee's recommendation for a general exception when the UK revised its copyright law in the form of the Copyright, Designs and Patents Act 1988 (UK). Sections 42 and 43 of New Zealand's Copyright Act 1994 loosely followed the Copyright, Designs and Patents Act 1988 (UK) equivalents.[94] The statutory formulation of fair dealing in New Zealand now provides in section 42 that:

> (1) Fair dealing with a work for the purposes of criticism or review, of that or another work or of a performance of a work, does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement.
>
> (2) Fair dealing with a work for the purpose of reporting current events by means of a sound recording, film, or communication work does not infringe copyright in the work.

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[90] A fourth change was that criticism did not have to be of the work itself, Sims, 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' (n 76) 200.
[91] Whitford Committee Report (n 2) [657] and [668].
[92] ibid 668.
[93] ibid 695.
[94] Copyright, Designs and Patents Act 1988 (UK), ss 29(1) and (2), 30.

(3) Fair dealing with a work (other than a photograph) for the purposes of reporting current events by any means other than those referred to in subsection (2) does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement.

43 Research or private study

(1) Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work.

(2) For the avoidance of doubt, it is hereby declared that fair dealing with a published edition for the purposes of research or private study does not infringe copyright in either the typographical arrangement of the edition or any literary, dramatic, musical, or artistic work or part of a work in the edition.

(3) In determining, for the purposes of subsection (1), whether copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, a court shall have regard to—

(a) the purpose of the copying; and

(b) the nature of the work copied; and

(c) whether the work could have been obtained within a reasonable time at an ordinary commercial price; and

(d) the effect of the copying on the potential market for, or value of, the work; and

(e) where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.

(4) This section does not authorise the making of more than 1 copy of the same work, or the same part of a work, on any one occasion, but in this subsection copy does not include a non-infringing transient reproduction to which section 43A applies.

The narrowness of fair dealing can be demonstrated by the lack of protection for parodies. In 2013, University of Auckland law students in a Law Revue made a clever parody of a misogynistic song 'Blurred Lines'[95] and video,[96] which many applauded.[97] Yet, as the parody used the music from the song,[98] the parody would have infringed copyright as there is no

[95] Robin Thicke, 'Blurred Lines'. A number of UK Universities banned the playing of the song: 'Robin Thicke's Blurred Lines gets banned at another university' *The Guardian* (online ed, London, 12 November 2013) <www.theguardian.com/music/2013/nov/12/robin-thicke-blurred-lines-banned-another-university> accessed 12 February 2016.

[96] <www.georgefm.co.nz/Video-Defined-Lines---Blurred-Lines-Feminist-Parody/tabid/238/articleID/153995/Default.aspx> accessed 12 February 2016.

[97] Kirsty Johnston, 'Blurred Lines parody wins smart praise' *Sunday Star Times* (online ed, 8 September 2013) <www.stuff.co.nz/ entertainment/music/9139321/Blurred-Lines-parody-wins-smart-praise>.

[98] The music itself would be protected as a musical work. Section 2 of the Copyright Act 1994 defines a musical work as meaning 'a work consisting of music, exclusive of any words intended to be sung or spoken with the music or any actions intended to be performed with the music'. The recording of the music, which was presumably copied and used in the parody, would be protected as a sound recording. Section 2 of the Copyright Act 1994 defines a sound recording as, a recording of the whole or any part of a … musical work, from which sounds reproducing the work or part may be produced,— regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced'.

exception for parodies in New Zealand.[99] In contrast, parodies (and satires) are now expressly covered by fair dealing in Canada[100] and Australia,[101] and the UK has finally enacted an exception for caricature, parody or pastiche[102] and the law student's parody would be protected in the United States under fair use.[103] The lack of a parody and satire defence has been noticed in New Zealand.[104]

Playing the devil's advocate, it could be argued the lack of a parody exception in New Zealand is irrelevant: no one was sued for copyright infringement for the Blurred Lines parody. Inaction in one instance does not mean that all copyright owners treat parodies as indulgently, especially when organisations are being ridiculed. In *Solid Energy New Zealand Ltd v Mountier*[105] an interim injunction was sought and granted against an organisation that had produced an environmental report which savaged Solid Energy's environmental record by producing a mock Annual Report which inter alia reproduced Sold Energy's logo—a work protected by copyright.[106]

IV The Traditional Approach to Allowing Fair Uses

Traditionally when the New Zealand Parliament recognises than a certain act should not infringe copyright, Parliament keeps fair dealing as it is—narrowly defined and of limited application—and instead creates a specific ad hoc exception. For example, section 81A[107] allows a person to copy a sound recording such as a song on a CD under certain conditions.

The creation of ad hoc exceptions, while commendable because it is an attempt to maintain a balance between the copyright owners and users, is unsatisfactory for a number of reasons. First, the legislature cannot keep pace with the need to create exceptions. Despite the obvious

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[99] While 'criticism' is one of the enumerated purposes that fair dealing protects, the students' parody (while being a perfect criticism of the song's lyrics and its video and the objectification of women by the media and society in general), would be extremely unlikely to be found to be 'fair' as all of the musical work and soundtrack was copied and the parody failed to contain a sufficient acknowledgement of the parodied work. The requirement to provide a sufficient acknowledgement, of course, takes much of the sting out of the parody. See generally *Solid Energy New Zealand Limited v Mountier* HC Christchurch CIV 2007 409 441 26 July 2007 where Solid Energy's trade mark was used in a mock annual report. An interim injunction was granted inter alia for copyright injunction as the court rejected a fair dealing exception and found an arguable case of copyright infringement [29-30].

[100] Copyright Act 1985 (Can) s 29.

[101] Copyright Act 1968 (Cth) ss 41A and 103AA.

[102] The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014. The slightly strange wording of 'caricature, parody or pastiche' is due to European Copyright Directive 2001, art 5(3)(k).

[103] *Campbell v Acuff-Rose Music* 510 US 569 (1994).

[104] On 23 September 2008 the then Associate Minister of Commerce, Judith Tizard, announced a review of whether an exception for parody and satire should be created, and a discussion document was intended to be released in December 2008 <www.beehive.govt.nz/release/commissioning-rule-be-repealed-and-parody-satire-review-announced> accessed 12 February 2016. However, a change of Government saw the review halted and no further work has been done the question of whether New Zealand should create such an exception.

[105] *Solid Energy New Zealand Limited v Mountier* (n 99).

[106] See also *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [1997] 2 FC 306 where a striking union was found to have infringed copyright when it used the employer's 'Michelin Man' in leaflets in its campaign against the employer which depicted inter alia the beaming marshmallow-like round figure composed of tires about to stomp on a hapless employee.

[107] Introduced by Copyright (New Technologies) Amendment Act 2008, s 44.

and justifiable need for an exception for parodies and satires in New Zealand, no exception has been forthcoming. In respect to sound recordings, the delay between the realisation of the need to create such an exception and the implementation has arguably been even slower: the practice of copying sound recordings to make compilation tapes was many decades old by the time the exception was created in 2008. Experience shows that there is often a 'lengthy delay' between the time a new use emerges and the legislature even considering whether a new exception is required.[108]

Second, New Zealand has traditionally enacted narrow specific exceptions. The practice of the UK Parliament, which has been adopted by the New Zealand Parliament has resulted in a system where:[109]

> [r]igidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls.

The culmination of rigid, tightly defined exceptions is inflexible and outdated copyright legislation. For example, the exception for format shifting is for sound recordings only; a person could not use that exception to scan a page from her passport and email that page to herself so she can access it while travelling. If Parliament had instead legislated for a broad right of users being able to format shift work acquired legitimately—a right that has been created in Canada[110]—a new exception would not be need to solve this problem.

Finally, many organisations are risk adverse they will not innovate if that innovation falls outside of an exception.[111] Thus the narrower an exception, the more it stifles competition. Copyright should not be dictating how innovation occurs.[112]

V The Case for Fair Use

This part outlines the case for fair use as well as responding to arguments made against it.

A Arguments in favour of fair use

There are numerous arguments in favour of introducing fair use into New Zealand. This part focuses on the following: indispensable and socially valuable technology is infringing; fair use facilitates creativity and innovation; and fair use may help to affirm copyright's legitimacy in the eyes of the public.

1 Indispensable and socially valuable technology is infringing

The ALRC has explained that:[113]

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[108] ALRC (n 5) [4.46].
[109] Laddie J, 'Copyright: Over-strength, Over-regulated, Over-rated?' (1996) European Intellectual Property Review 258.
[110] Copyright Act 1985 (Can), s 29.22.
[111] ALRC (n 5) [2.60].
[112] ibid [2.62].
[113] ibid [11.5].

> Reproduction and communication of copyright material has not only become ubiquitous, but necessary for the effective and efficient functioning of the internet, networks, and technological processes that facilitate lawful consumption of copyright material.

Indeed, Parliament has recognised the importance of the need for technological processes not to infringe copyright. For example, there is now an exception that allows for the reproduction of a work not to infringe copyright if it is transient or incidental and is an integral and essential part of a technological process for the making or receiving a communication that does not infringe copyright or enabling the lawful use of, or lawful dealing in, the work; and it has no independent economic significance.[114] Such exceptions, however, do not go far enough. Google, and others, have argued that had they not had the protection of fair use in the United States they would not have been able to start their revolutionary businesses.[115] For example, it is odd that servers running search engines in Australia that benefit Australian businesses and consumers, and thus the economy, are not located in Australia because of the real fear of copyright infringement.

Another example is cloud computing. Increasingly businesses, organisations, and individuals are turning to cloud services to store their documents, thus documents and data are not stored on users' computers, instead they are stored by the cloud service provider's servers that may be located physically in New Zealand or elsewhere in the world. The use of cloud services means that business and others can do without expensive IT personnel and hardware resulting in more efficiency and will be essential to the future of New Zealand's economy.[116] Cloud services; however, infringe copyright if the user uploads works, the copyright in which belongs to another.

2 Fair use facilitates creativity and innovation

The United States Supreme Court in *Stewart v Abend*[117] was clear that fair use fosters creativity. The Court observed that that the fair use doctrine is an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.[118] As the Hargreaves Review in the United Kingdom noted, instead of copyright owners leading the innovation charge:[119]

> Copyright holders have a long history of resisting the emergence of technologies which threaten their interests, including audio tape recorders and VHS recorders. When the first sound recording technologies emerged, some music rights holders opposed the recording of music. At that time, it was the recorded music industry who were seen as dangerous innovators.

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[114] Copyright Act 1994, s 43A.
[115] ALRC (n 5) [4.82].
[116] See generally ALRC (n 5) [11.9].
[117] *Stewart v Abend* 495 US 207 (1990).
[118] ibid 236 citing *Sony Corporation of America v Universal City Studios Inc* 464 US 417 (1984) at 448. Cited by Austin (n 29) 294.
[119] Hargreaves (n 2) [5.20]. For a detailed account of Hollywood's failed attempt to block the new recording technology see James Lardner, *Fast Forward: Hollywood, the Japanese, and the Onslaught of the VCR* (Norton 1987).

The Hargreaves Review went on to state that fair use has been used in the United States 'to build in sufficient flexibility to realise the benefits of new technologies, without losing the core benefits to creators and to the economy that copyright provides.'[120] The strength of fair uses is that it is flexible so that new technologies can be accommodated.[121] The benefits of flexibility was a strong influence on the ALRC's recommendation that fair use be introduced in Australia.[122] Moreover as the ALRC observed, as a general rule, innovation thrives when there is competition, thus allowing more uses of works through exceptions will necessarily boost competition and stimulate innovation.[123]

Curiously the argument that fair use would fuel creativity and innovation runs counter to the premise underlying copyright law and other intellectual property rights that stronger intellectual property rights results in more creativity and innovation.[124] For example, over two hundred years ago the Courts were clear that the incentive theory was the driver of copyright law:[125]

> It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works. . . .
>
> He who engages in a laborious work, (such, for instance, as Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family.

The argument from copyright owners is therefore that if their rights are limited—for example, by introducing fair use—fewer socially desirable things will be produced. Such an argument is problematic for a number of reasons. First, copyright's original purpose was not to encourage creativity and innovation, rather it was to appease the London booksellers who complained bitterly when they were left unprotected after a series of licensing laws expired and to control unlicensed publications.[126] Indeed, the Statute of Anne 1709, in addition to protecting books published after the statute's commencement, protected books that had already been published.[127]

Second, as we have seen above with the attempts to prevent the use of audio and VHS recorders,[128] copyright owners have demonstrated in the past that they have no wish to innovate if it means a disruption of their business models. As the Hargreaves Review has

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[120] Hargreaves (n2) [5.22].
[121] See also *Sony Corporation of America v Universal City Studios, Inc* (n 118), where the United States Supreme Court held that using video cassette recorders to time shift television programmes did not infringe copyright as it was fair use.
[122] ALRC (n 5) [9.45].
[123] ibid [3.12].
[124] ibid [3.11].
[125] *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201, per Willes J, at 218.
[126] See generally *Lucasfilm Ltd v Ainsworth* (n 58) [14]. 'the original legislative purpose of … copyright was the protection of the commercial interests of stationers (the early publishers) and booksellers, and the control of unlicensed (and possibly subversive) publications, rather than the vindication of the legal and moral rights of authors.'
[127] See (n 60).
[128] Hargreaves (n 2) [1.5].

noted most of the innovation and productivity growth is not coming from the large incumbent firms, rather it is from the smaller and nimbler ones.[129] The smaller, nimbler ones, however, find it difficult to operate in the online environment in the absence of a fair use provision.[130]

Third, there is not much evidence either in support or against the proposition that people will not innovate and create in the absence of protection. The evidence that there is, however, tends to point to creativity being nurtured by fewer rights.[131] In the United States databases were left without copyright protection following the Supreme Court of the United States' decision in *Feist Publications v Rural Telephone Service Co.*[132] In contrast, in Europe database owners were granted even stronger rights.[133] If the theory that stronger rights lead to more creativity and innovation was correct, following *Feist* more databases would have been created in Europe and fewer in the United States—indeed, the database market should have collapsed in the United States. However, the opposite occurred: in the years following *Feist* the United States saw a greater rise in the number of databases than in Europe.[134]

Looking a bit further back at first there was no copyright or other protection for computer programmes, yet this did not prevent the creation of a mulitude of computer programmes and significant sums of money from those programmes being made. True to form, once significant amounts of money had been made in the absence of protection, Bill Gates and others fought, and were successful, despite compelling arguments to the contrary,[135] in obtaining copyright protection for computer software.

We should not be surprised therefore that more protection does not necessarily translate to increased levels of innovation. As Fritz Machup observed in 1958, in relation to patents, there is no conclusive evidence that greater protection led to more innovation and it would thus be 'irresponsible' to recommend the introduction of a patent law if none were in existence.[136]

Finally, the Irish Copyright Review Committee was clear when it stated: '[t]o assert that only one group of copyright stakeholders can drive innovation, to the exclusion of innovation from

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[129] ALRC (n 5) [3.16].
[130] ibid [11.10] describing how Pandora, an internet streaming radio service, struggled to negotiate licences it needed to operate in Australia.
[131] R Ghafele and B Gibert, 'The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore' (2012) <www.infojustice.org/download/copyright-flexibilities/articles/Roya%20Ghafele%20and%20Benjamin%20Gibert%20-%20The%20Economic%20Value%20of%20Fair%20Use%20in%20Copyright%20Law.pdf> accessed 12 February 2016. For a study on how innovation, productivity and societal utility was effective with a combination of patent and open source protection see Andrew W Torrance and Bill Tomlinson, 'Patents and the Regress of the Useful Arts' (2009) 10 Columbia Science and Technology Law Review 130.
[132] (1991) 499 US 340.
[133] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[134] Stephen M Maurer, P Bernt Hugenholtz and Harlan J Onsrud, 'Europe's Database Experiment' (2001) 294 Science 789.
[135] S Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 Harvard Law Review 281.
[136] F Machlup, 'An Economic Review of the Patent System', Study No 15 of Committee on Judiciary, Subcommittee on Patents, Trademarks, and Copyrights, 85th Cong, 2d Sess (Comm Print 1958) 80.

any other quarter, simply claims too much … exceptions facilitate a great scope for beneficial user innovation'.[137]

3 Fair use may help affirm copyright's legitimacy

Copyright, as it is presently constituted, fails to recognise social norms: many people infringe copyright unwittingly by 'privately copying and recording in a way that has been commonplace for decades and in using devices that have been marketed to them vigorously.'[138] When people are educated to understand that their acts are infringing, this does not mean they stop doing what they have always done: if people do not believe in laws because those laws do not appear to be fair and reasonable they are not likely to follow them.[139] In turn, a Government will find that it is difficult to enforce laws if most people are not following those laws.[140] The Australian legislature, at least, is cognizant of the dangers of the public's lack of respect for the law. The Explanatory Memorandum for the Copyright Amendment Bill 2006 noted that failure to recognise practices people routinely engaged in such as time and format shifting 'diminishes respect for copyright and undermines the credibility of the Act'.[141] The Hargreaves Review expressed similar concern about the risk of the law falling into disrepute when in the United Kingdom 'millions of citizens are in daily breach of copyright for shifting a piece of music or video from one device to another.'[142] The Hargreaves Review went on to note that there was a 'growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people' and this was a 'significant problem'.[143] In New Zealand, it is artificial and makes no sense to tell a person she is permitted to format shift the tracks from a CD that she owns on to her mobile phone,[144] but she cannot do the same for a movie on a DVD.[145] People who sell unwanted items on online auction sites infringe copyright innocently when they post a photo of those items online.[146] Indeed, most photographs infringe copyright if they depict man-made objects such as cars, clothes, shoes, phones, the list goes on.[147] Everyday acts such as forwarding emails often involves copyright infringement as the text of the email will be protected as a literary work and forwarding that email will create a copy.[148] It has been estimated that it is possible for a person in the United States to, in the course of a normal

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[137] Irish Copyright Review Committee (n 1) 73, quoted in ALRC (n 5) [3.21].
[138] ALRC (n 5) [3.29].
[139] Jessica Litman, *Digital Copyright* (Prometheus Books 2001) 195.
[140] ibid 195.
[141] ALRC (n 5) [9.27] and see generally [9.20] – [9.32].
[142] Hargreaves (n 2) 5, cited in David Vaver, 'Harmless Copying' (2012) 25 Intellectual Property Journal 19.
[143] Hargreaves (n 2) [5.10], quoted by ALRC (n 5) [4.52] and cited in Vaver, 'Harmless Copying' (n 142) 19. And ALRC (n 5) [9.20] '[i]n Australia, many private uses of copyright material are commonly thought by members of the public to be fair.'
[144] Provided that the copyright owner has not contracted out of this exception, see Copyright Act 1994, s 81A(1)(h).
[145] Copyright Act 1994, s 81(A) covers sound recordings only, its protection does not extend to films.
[146] ALRC (n 5) [4.53].
[147] There are some exceptions under the Copyright Act 1994 to assist people taking photographs of buildings and art in specific places (s 73), and incidental copying (s 41), but the latter defence is narrow, see generally Eagles (n 56).
[148] See generally John Tehranian, 'Infringement Nation: Copyright Reform and the Law/Norm Gap' (2007) Utah Law Review 537, 543.

day's activities,[149] infringe copyright over 80 times and face civil liability to the tune of $US 12.45 million.[150] To be sure, infringement of New Zealand's copyright laws would not result in such high civil liability, nonetheless it is difficult to operate in our society and undertake what are considered normal activities without infringing copyright.

In a similar vein, thousands of users are infringing copyright on a daily basis when they engage in other common place activities of creating works (and often posting them online) which incorporate parts or even the whole of other works protected by copyright.[151] That is, when users create transformative user-generated works such as a video of their child dancing to a song protected by copyright, that work would infringe the copyright in the song.[152]

Simply because people are engaging routinely in illegal behaviour does not mean that the law should be changed automatically. It was argued before the ALRC that because underage people drink alcohol this does not mean that the age should be lowered, or that marijuana should be legalised due to the high rate of marijuana use in society.[153] The age of drinking and legalising marijuana use are not, perhaps, the most convincing arguments. In New Zealand the drinking age was lowered in 1999 from twenty years of age to eighteen[154] and the legalisation of marijuana is being debated seriously throughout the world with some jurisdictions legalising it.[155] The ALRC conceded that the law could not be dictated entirely by social norms,[156] but equally it recognised correctly that policy makers cannot ignore social harms: 'if a practice is very widespread, and commonly thought to be harmless, then this should be considered when determining whether the practice should be prohibited.'[157]

Not surprisingly, the lack of alignment between the law and what people do, led the Gowers Review[158] in the United Kingdom to recommend that the European Directive[159] on the harmonisation of certain aspects of copyright and related rights in the information society be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne three-step Test.[160] The Canadian legislature, for example, has taken the step of creating an exception for non-commercial user-generated content.[161]

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[149] Such activities include recording on a mobile phone people singing 'Happy Birthday' in a restaurant.
[150] Tehranian (n 148) 543-547.
[151] See generally Teresa Scassa, 'Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law' in Michael Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013).
[152] *Lenz v Universal Music Corp* 572 F Supp 2d 1150, 1154-55 (ND Cal 2008) where the Court discussed fair use. Although the Court was not required to decide whether the use was fair use or not, it is clear that the Court was of the opinion that the use was fair.
[153] ALRC (n 5) [10.45].
[154] Sale of Liquor Amendment Act 1999, s 2(2).
[155] As an aside, New Zealand's experiment of allowing legal highs failed as the synthetic drugs had arguably worse side effects than the naturally occurring substance they were attempting to replicate.
[156] ALRC (n 5) [10.47].
[157] ibid [10.47].
[158] Gowers (n 2).
[159] Directive 2001/29/EC of the European Parliament and the of the Council of of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
[160] Gowers (n 2) Recommendation 11.
[161] Canadian Copyright Act, s 29.21.

Copyright law by not allowing reasonable uses of works, is undermining its legitimacy and the copyright system as a whole suffers. If the New Zealand Parliament wishes for people to respect copyright law, then copyright ought to resemble a reasonable law.

B Arguments against Fair Use

The arguments against the introduction of fair use fall into four broad types. First, fair use does not meet the requirements of the three-step test under the Berne Convention. Second, considerable uncertainty would be introduced with the introduction of a three step test. Third, breaches of copyright are technical and it is unlikely for a copyright owner to attempt to sue for copyright infringement. Finally, there is the lack of legislature appetite for fair use. Each of these criticisms will be looked at in turn. There is also the argument that stronger rights means more incentive to create and innovate thus the expansion of exceptions will necessarily reduce incentives and with it innovation. However, as we have seen in the previous section the argument that innovation will decrease was refuted as exceptions help to fuel creativity and innovation.

1 Fair Dealing fails to comply with the Berne three-step test

New Zealand is a signatory to the Berne Convention.[162] The creation of new exceptions or amendments to existing exceptions must be consistent with art 9(2) of the Berne Convention which sets out a three-step test:

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

It has been argued that fair use does not comply with the three-step test.[163] The most obvious counter argument against a possible breach of the three-step test is, of course, that the United States uses fair use and believes that it meets the requirements of the test.[164] The ALRC has demonstrated that fair use meets the three-step test.[165]

2 Fair use creates uncertainty

As the Irish Copyright Review Committee observed, there is a conflict between certainty and flexibility.[166] The US Supreme Court in *Campbell* was clear that fair use in the US was not a set of bright line rules, 'the [copyright] statute, like the doctrine it recognizes, calls for a case-by-case analysis'.[167] New Zealand currently favours certainty over flexibility. For example, it is clear that a person can, subject to an agreement to the contrary in a contract, format shift a

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[162] Berne Convention for the Protection of Literary and Artistic Works (Paris Act), opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).
[163] Ruth Okediji, 'Towards an International Fair Use Doctrine' (2000) 82 Columbia Journal of Transnational Law 75, 114 -23.
[164] ALRC (n 5) [4.159].
[165] ibid [4.134] – [4.164].
[166] Irish Copyright Review Committee (n 1) 118.
[167] *Campbell v Acuff-Rose Music Inc* (n 103) 577, quoted by Austin (n 29) 293.

track from a CD owned by that person onto that person's computer, but a person cannot format shift a movie on a DVD to that person's computer.[168] The law is certainly clear—albeit illogical from a lay person's viewpoint. Why should it matter if what the user wants to format shift are songs or a movie? Fair use, in contrast, with the favouring of flexibility over certainty does not say expressly that the contents of a CD, a DVD or passport owned by that person could be format shifted, yet these types of format shifting would be considered a fair use.

Given that fair use does not set down bright line rules, it is not surprising that some commentators have cautioned against opening up what they see as a Pandora's box and have argued that fair use may not in practice expand user rights and help to clarify matters.[169] The concern is that lawyers will be the primary beneficiaries.[170] However, equally it has been argued that that fair use is reasonably settled in the United States.[171] To be sure, cases on fair use go to the courts in the United States and it impossible to be one hundred percent certain of the outcome. However, if the outcome of all litigation was predictable the parties would have either not commenced litigation or they would have settled.[172] Again it comes back to the simple question of why, if fair use is so uncertain, is the United States the largest cultural exporter of movies, music, books and other materials?[173] Moreover, as the ALRC notes, 'a clear principled standard is more certain than an unclear complex rule.'[174] Some of the most successful and well understood laws in New Zealand are broad principled such as the Consumer Guarantees Act 1993 and s 9 of the Fair Trading Act 1986.[175] As increasing numbers of jurisdictions adopt fair use, there will be an increasing pool of jurisprudence for the New Zealand courts to draw upon.

3 Breaches are technical only

As we have seen, copyright does not reflect societal norms: people are infringing copyright on a daily basis.[176] Yet, despite such unlawful conduct, most infringers are not being sued for copyright infringement by overzealous copyright owners as it is not economically viable for copyright owners to sue individuals. Thus the argument goes that there is no need for a fair use exception. While such arguments may have been true in the pre-internet age when what occurred in people' homes could not be detected by copyright owners or their agents, it is no

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[168] Copyright Act 1994, s 81(A) covers sound recordings only. Format shifting a DVD would require copying both a sound recording and a film and is therefore not protected under s 81(A).
[169] See generally Austin (n 29).
[170] Vaver, 'Harmless Copying' (n 142) 22, 'Fair use [in the United States] spells 'lawyers, lawsuits, uncertainty and confusion'' quoting *Moseley v V Secret Catalogue Inc* 537 US 418 (2003), *Arguendo*, 12 November 2012, 34 <www.supremecourt.gov/oral_arguments/argument_transcripts/01-1015.pdf> accessed 12 February 2016.
[171] P Samuelson, 'Unbundling Fair Uses' (2009) 77 Fordham Law Review 2537 and M Sag, 'Predicting Fair Use' (2012) 73 Ohio State Law Journal 47, cited in ALRC (n 5) [4.123]-[4.124].
[172] ALRC (n 5) [4.129].
[173] ibid 22.
[174] ibid 22 and [4.117].
[175] Albeit Fair Trading Act 1986, s 5D now permits businesses when dealing with businesses to contract out of s 9 of the Act in certain circumstances. Contracting out of the Consumer Guarantees Act 1993 when supplying goods or services to those in trade is also permissible in certain circumstances, s 43(2)-(2A).
[176] ALRC (n 5) [4.117].

longer the case: lives are played out online increasingly. Copyright owners do attempt to prevent the use of their work that most people would regard as fair.[177]

To be sure, it is unlikely that large numbers of users in New Zealand will be sued individually by copyright owners; however, companies and others offering innovative technology will be sued by copyright owners in an effort to prevent users from infringing copyright. In the United States when copyright owners attempted to prevent the use of video cassette recorders by members of the public to record television programmes and movies it was not the individual users that were brought before the courts, rather it was the manufacturer of the technology that enabled the copying of such works.[178]

One area, of the many areas where companies are providing innovative technology that currently infringes copyright is in relation to cloud computing. If copyright owners are successful and shut down cloud computing and other useful things—technological advances will be stifled. Despite this, copyright owners claim that a large number of innovate online platforms have been launched in Australia and they are operating successfully 'free of any active threats of litigation.'[179] However, innovative businesses should not operate with the sword of Damocles hanging over their heads. If the use is fair businesses should be able to operate confidently in the knowledge that they are not infringing copyright.[180]

4 Lack of legislature appetite

The primary stumbling block for the introduction of a fair use exception in New Zealand would be the reaction of well-resourced copyright owners. For example, the Hargreaves Review—the latest UK governmental sponsored Review into intellectual property and growth— noted the 'powerfully stated objections of the UK creative sector'[181] and was quick to point out, that the 'American creative businesses, such as the film industry, argu[e] passionately that the UK and Europe should resist the adoption of the same US style fair use approach with which these firms coexist in their home market.'[182] Similarly, the Australian and Irish Copyright Review Committees were faced with strong assertions from copyright owners that copyright protection and not exceptions were necessary to drive innovation. That the creation of a fair use exception would be unpopular amongst some powerful interest groups is not a reason to explore the introduction of fair use into New Zealand.

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[177] *Lenz v Universal Music Corp* 572 F Supp 2d 1150, 1154-55 (ND Cal 2008) video of child dancing to music. Although the Court was not required to decide whether the use was fair use or not, it is clear that the Court was of the opinion that the use was fair.

[178] *Sony Corporation of America v Universal City Studios, Inc* (n 118). In the United Kingdom a similar strategy was used in the attempt to prevent users from using double cassette decks that allowed a user to copy from one cassette to another, *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013. No copyright infringement was found in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* as the House of Lords found that Amstrad had not authorised the making of the infringing copies.

[179] Australian Film/TV Bodies Australian Film/TV Bodies ALRC Discussion Paper Submission at [53] <www.alrc.gov.au/sites/default/files/subs/739._org_australian_film__tv_bodies.pdf> accessed 12 February 2016, quoted in ALRC, [4.84].

[180] ALRC (n 5) [4.85].

[181] Hargreaves (n 2) [5.15].

[182] ibid.

VI Contracting out

In New Zealand only two copyright exceptions cannot be contracted out of,[183] thus a copyright owner that does not want to be bound by any of the other exceptions can state so in the contract, if there is one.[184] Indeed, the current format shifting exception for sound recordings expressly contemplates that the exception can be circumvented by contract.[185] The Hargreaves Review noted that the ability for contract law to trump copyright 'means a rights holder can rewrite the limits the law has set on the extent of the right conferred by copyright. It creates the risk that should Government decide that UK law will permit private copying or text mining, these permissions could be denied by contract.'[186] Without a provision preventing contracting out of the exceptions the exceptions will be of limited practical use as contracts that purport to contract out of copyright exceptions are commonplace and their numbers are increasing as the market for electronic services grows.[187] Indeed, the Australian Broadcasting Commission noted that it was 'often placed in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its competitors for those rights, who have no such contract and who can fair deal with that content across platforms'.[188]

The restriction of user rights is not limited just to dealings with material to which that particular contract relates; potentially all of an institution's users, such as a library, will in effect be subject to the terms of one contract. As the Hargreaves Review noted:[189]

> Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted. Often the result will be that, for legal certainty, the institution will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law. Even if unused, the possibility of contractual override is harmful because it replaces clarity ("I have the right to make a private copy") with uncertainty ("I must check my licence to confirm that I have the right to make a private copy").

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[183] Copyright Act 1994, s 80D '[a] term or condition in an agreement for the use of a computer program has no effect in so far as it prohibits or restricts any activity undertaken in accordance with section 80A(2) [decompilation of computer program] or s 80B(1) [copying or adapting computer program if necessary for lawful use].'

[184] For a detailed discussion on contracting out of copyright law see Alexandra Sims, 'Copyright and Contract' (2007) 22 NZULR 469.

[185] Copyright Act 1994, s 81A(2) 'for the avoidance of doubt, subsection (1) [which provides that the copyright in a sound recording and in a literary or musical work contained in it is not infringed by copying the sound recording, provided certain criteria are met] does not apply if the owner of the sound recording is bound by a contract that specifies the circumstances in which the sound recording may be copied.'

[186] Hargreaves (ibid) [5.40].

[187] In Australia the ALRC reported that a number of submitters such as universities, libraries and archives were parties to contracts that prohibited uses that fell within clear copyright exceptions, ALRC (n 5) [17.16]-[17.22]. M Kretschmer, E Derclaye, F Favale and R Watt, 'A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy' (2010) 4 cited by ALRC, [17.14].

[188] Australian Broadcasting Corporation Submission 210 at 42 <www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc#org> accessed 12 February, accessed 12 February 2016, quoted by ALRC, [17.21].

[189] Hargreaves (n 2) [5.40].

If certainty of legal rights is considered desirable, allowing private ordering to rewrite copyright law can mean more uncertainty not less.[190] Not surprisingly, the Hargreaves Review recommended that the UK 'Government should change the law to make it clear no exception to copyright can be overridden by contract.'[191] Similarly, the Irish Copyright Review Committee proposed that the ability of contract to override copyright law be limited.[192] While the UK Government did not accept the Hargreaves Review's recommendation of preventing contract from being able to override all exceptions, the UK Government decided to prevent the contracting out of its newly introduced exceptions.[193] (This has the curious result of permitting the contracting out of the fair dealing exceptions of criticism or review, reporting current events and non-commercial research[194].)

The ALRC did not recommend a blanket ban on contracting out; instead it recommended that the limitation on contracting out be confined to those exceptions that are clearly for public uses.[195] Those uses would be the exceptions for libraries and archives as well as the proposed fair use exception in so far they as applied to the existing fair dealing purposes, plus quotations.[196] The ALRC also made the salient point that amendments to the technological protection measures provisions would likely need to be made as 'there may be little point in restricting contracting out of exceptions, if TPMs [technological protection measures] can be used unilaterally by copyright owners to achieve the same effect.'[197]

VII Conclusion

How best can copyright law evolve to meet changing technology and balance the interests not just of creators and copyright owners, but society in general? The internet means that many

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[190] ibid '[w]here an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted.'

[191] ibid.

[192] Irish Copyright Review Committee (n 1) 138.

[193] For example, the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations that will amend the Copyright, Designs and Patents Act 1988 on 1 October 2014 by inserting s 28B will create a private copying exception that would permit a person to make a copy of a lawfully acquired work if 'that copy is made for that individual's private use for ends that are neither directly nor indirectly commercial'. s 28B(10) in turn would provide that: 'To the extent that a term in a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.' See also UK Government *Modernising Copyright: A modern, robust and flexible framework* (2012) 19 <www.ipo.gov.uk/response-2011-copyright-final.pdf> accessed 12 February 2016.

[194] In New Zealand fair dealing for the purposes of research is broader than in the UK as only fair dealing for the purposes of non-commercial research is permitted in the UK, Copyright, Designs and Patents Act 1988, s 29(1).

[195] ALRC (n 5) [17.115].

[196] ibid [17.118]. The 'existing' fair dealing exceptions in Australia were: research and study (ss 40 and 103C); criticism and review (ss 41 and 103A); parody and satire (ss 41A and 103AA); reporting news (ss 42 and 103B); and giving professional advice (s 43 A).

[197] ibid [11.130]. In relation to the circumventing of TPMs in New Zealand, Copyright Act 1994, s 226E2 makes limited allowance for the circumvention of a TPM is a person wishes to do a permitted act, for example, copy a small section for the purposes of criticism. Section 226E2, however, is very narrow. First a user of work protected by a TPM must apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act and if the copyright owner or exclusive licensee refuses to assist or fails to respond within a reasonable time, then the user can engage a permitted person to exercise her rights. Section 226E is simply too restrictive and should be amended to provide that no infringement of the TPM occurs when a person circumvents a TPM to enable the person to do a permitted act.

copyright owners no longer need to operate large warehouses and expensive distribution chains. However, along with the great opportunities, there are, of course, real threats as material protected by copyright can be downloaded at the touch of a button. Fair use does not promote piracy, instead it would allow legitimate uses of works protected by copyright, and contrary to the argument that stronger rights result in more creativity and innovation, the evidence leans towards creativity and innovation increasing under less protection.

The well-trodden path of continuing to legislate for ad hoc exceptions requires a legislator that is able to predict both the necessity of creating new exceptions before they are needed and to craft them to address the issues required, including ensuring that the judiciary does not interpret them narrowly. Such a legislative actor is, of course, the stuff of fantasy—'no legislature can anticipate or predict the future'.[198] As the Hargreaves Review noted, 'a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke exception' was not desirable.[199]

The solution in New Zealand to the current impasse of fair dealing and the current exceptions failing to be flexible and adaptive to new technologies is to create a broad fair use exception. As this article has explained, the idea of a broad, flexible exception is not new. Multiple Reviews around the world have argued cogently for the creation of a broad flexible fair use exception. Granted fair use is contentious and powerful interest groups would lobby against such a move, yet that does not mean that fair use should be dismissed out of hand in New Zealand. Given that other jurisdictions with a common copyright history are exploring and even legislating for fair use, the question of fair use in New Zealand requires serious consideration. If fair use is too much of a step for the New Zealand Government to take, a middle path of enacting new broader exceptions must be looked at.

Crucially, the New Zealand Government, when addressing reform of copyright law, must operate under the understanding that the strengthening of user rights does not mean a corresponding loss to copyright owners. If done properly the strengthening of user rights and relaxing of copyright owner's rights would 'make those works more valuable, and creators and rights owners stand to gain some of that value, particularly where they themselves are innovating.'[200]

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[198] ibid [4.47] paraphrasing from submissions by Yahoo!7 'A submission in Response to the Australian Law Reform Commission's Issues Paper on Copyright and the Digital Economy (IP 42)' <www.alrc.gov.au/sites/default/files/subs/276._org_yahoo_ip42.pdf> accessed 12 February 2016 and Google 'Google submission to ALRC discussion paper Copyright in the Digital Economy (ALRC DP 79)' <www.alrc.gov.au/sites/default/files/subs/600._org_google.pdf> accessed 12 February 2016. See also Hargreaves (n 2) [5.23] where copyright legislation requires 'built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today's policy makers' and the Irish Copyright Review Committee (n 1) 93: 'it is simply not possible to predict the direction in which cloud computing and 3D printing are going to go, and it is therefore impossible to craft appropriate ex ante legal responses'.

[199] Hargreaves (n 2) [5.23].

[200] UK Government (n 193) 3.