FAIR AND FOREGONE USES: REFLECTIONS ON THE FAIR USE DEBATE DOWN UNDER

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In Australian and New Zealand copyright policy discussions, the codification of fair use is the most influential innovation contained in the U.S. Copyright Act of 1976. During the past several years, law reform agencies, politicians, commentators, and academics have urged that the Australian and New Zealand copyright legislation should adopt a similar fair use defense. So far, legislators have resisted. Focusing principally on Australia, where advocacy for adopting fair use has been the strongest, this article discusses the way that U.S. fair use jurisprudence has been presented in domestic policy analysis. One strategy has been to present lists of uses that would be regarded as fair under U.S. law but not permitted under Australian copyright law. This strategy underscores the advantages of a fair use system by drawing attention to uses of copyright-protected material that Australian users must forego. Whatever its rhetorical advantages for fair use advocates, this kind of presentation risks glossing over key characteristics of fair use doctrine, including its context-specific character. Fair use doctrine is seldom amenable to easy conclusions as to which uses need to be licensed or not.

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INTRODUCTION

Of the principal innovations contained in the U.S. Copyright Act of 1976, the enactment of a codified fair use defense in Section 107 has had the greatest influence on

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Australian and New Zealand copyright thinking.[3] During the past several years, law reform agencies, politicians, commentators, academics, and civil society groups have explored—and, in some instances, advocated for—the possibility of inserting a fair use defense into the Australian and New Zealand copyright statutes.[4]

In line with the Commonwealth norm, the Australian and New Zealand copyright statutes currently in force—respectively, the Copyright Act 1968 (Cth) and the Copyright Act 1994—hew to the fair dealing tradition.[5] Unlike the open-ended fair use defense in the United States, fair dealing defenses apply only to specified purposes: reporting news,[6] research or study,[7] and criticism or review[8]—and, in Australia's case, giving legal advice[9] and "parody or satire."[10] The factors to which courts are directed in deciding whether dealings are "fair" are broadly comparable with the mandatory factors listed in Section

[3] The other significant innovations in the Act do not have direct parallels in Australian or New Zealand law. Those innovations included the adoption of a single federal copyright system; a copyright term that is measured, in most instances, by the life of the author plus (initially) fifty years; the availability of a termination right; provisions relating to a copyright notice on visually perceptible copies; and establishing a Copyright Royalty Tribunal. To the extent that parallels exist in Australian or New Zealand law (Australia, for example, has also jettisoned the final vestiges of common law copyright), the U.S. Copyright Act of 1976 has not been the catalyst for the adoption of the relevant measures. Surveys of some of the key innovations in the U.S. Copyright Act include Edward M. Cramer, *Some Observations on the Copyright Law of 1976: Not Everything Is Beautiful*, 1 HASTINGS COMM. & ENT. L.J. 157 (1977); Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 865–84 (1978).

[4] *See infra* Part I.

[5] For discussion of mid-nineteenth century attempts to introduce a fair dealing defense, see Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 56 MCGILL L.J. 309, 356 (2008). The expression "fairly dealing" was used in the *Australian Copyright Act 1905* (Cth), the first common law country to adopt this language. *See* Melissa de Zwart, *A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age*, 1 INTELL. PROP. Q. 60, 80 (2007). Fair dealing was first introduced into UK law with the enactment of § 2(1)(i) of the UK Copyright Act, 1911, 2 Geo. c. 46. Occasionally, "fair use" and "fair dealing" have been used interchangeably, including in official Australian commentary. *See, e.g.*, SELECT COMM. ON ADOPTING A.I., SELECT COMMITTEE REPORT ON ADOPTING ARTIFICIAL INTELLIGENCE 86 (2024), https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000470/toc_pdf/SelectCommitteeonAdoptingArtificialIntelligence(AI).pdf. (stating that "Australia's copyright framework includes 'fair use' exceptions for copyright infringement").

[6] *Copyright Act 1968* (Cth) ss 40, 103B (Austl.); Copyright Act 1994, s 42 (N.Z.).

[7] *Copyright Act 1968* (Cth) ss 40, 103C (Austl.); Copyright Act 1994, s 43 (N.Z.) (allowing the defense to apply to "private" study).

[8] *Copyright Act 1968* (Cth) ss 41, 103A (Austl.); Copyright Act 1994, s 42 (N.Z.).

[9] *Copyright Act 1968* (Cth) ss 43(2), 104(c) (Austl.). The latter is not qualified by the requirement of "fair" dealing.

[10] *Id.* ss 41A, 103AA. A Bill is currently before the New Zealand Parliament that would insert a new fair dealing defense for the purposes of parody or satire into the Copyright Act 1994. Copyright (Parody and Satire) Amendment Bill 2024 (96-1).

107, but the scope of fair dealing is tethered to the specified fair dealing purposes.[11] Each nation's copyright law also contains excruciatingly detailed bespoke exceptions for other activities, such as backing up and studying computer programs,[12] copying for libraries and archives,[13] incidental copying,[14] making films containing depictions of artworks and architectural works,[15] certain forms of parallel importing,[16] and so on. On one estimate, the Australian Copyright Act 1968 contains over ninety separate defenses and exceptions.[17] In this aspect, the pattern is broadly similar to the U.S. Copyright Act: while Section 107 is the most well-known exception, the 1976 Act also contains an array of less glamourous bespoke exceptions, including for certain activities of libraries and archives,[18] uses for the purposes of cable broadcasts,[19] assisting visually impaired people and people with other eligible disabilities,[20] and certain performances of non-dramatic works for agricultural or horticultural fairs,[21] among others.

For some, the exceptions contained in Australian and New Zealand copyright legislation are not enough: copyright still impedes too many things people would like to do with material protected by others' copyrights without securing a license.[22] After all, copyright restricts many uses of creative work for which others would rather not pay. This is not an accidental byproduct of the copyright system. Copyright's system of exclusive rights is the "engine that drives the whole machine."[23] In Australian and New Zealand copyright law, the exclusive rights are the familiar ones: reproduction, publication, public performance, public display, public communication, adaptation, and authorization of activities that would otherwise be infringing.[24]

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[11] For example, Section 40(2) of the Copyright Act 1968 lists the following mandatory factors: "(a) the purpose and character of the dealing; (b) the nature of the work or adaptation; (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in a case where part only of the work or adaptation is reproduced, the amount and substantiality of the part copied taken in relation to the whole work or adaptation." Copyright Act 1968 (Cth) s 40(2) (Austl.). This section applies to uses for the purposes of research or study.

[12] *Copyright Act 1968* (Cth) ss 47B–47C (Austl.); Copyright Act 1994, ss 80, 80C (N.Z.).

[13] *Copyright Act 1968* (Cth) ss 48–53 (Austl.); Copyright Act 1994, ss 50–57A (N.Z.). On the Australian exceptions, see Emily Hudson, *The Copyright Amendment Act 2006—The Scope and Likely Impact of New Library Exceptions*, 14 AUSTLN. L. LIBR. 25 (2006).

[14] *See, e.g.*, Copyright Act 1968 (Cth) s 67 (Austl.); Copyright Act 1994, s 41 (N.Z.). Incidental uses are also individually permitted within an extraordinarily protracted list of individual sections.

[15] *Copyright Act 1968* (Cth) ss 65, 67–68 (Austl.); Copyright Act 1994, s 73 (N.Z.).

[16] *See, e.g.*, *Copyright Act 1968* (Cth) ss 44D–44F (Austl.); Copyright Act 1994, s 12(5A) (N.Z.).

[17] *Exceptions to Copyright*, AUSTLN. LIBRS. & ARCHIVE COALITION, https://alacc.org.au/exceptions-to-copyright (last visited May 20, 2026).

[18] 17 U.S.C. § 108.

[19] *Id.* § 111.

[20] *Id.* § 121.

[21] *Id.* § 110(6).

[22] Matthew Rimmer, *An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture*, 17 DEAKIN L. REV. 385, 406–10 (2012). See the sources discussed *infra* Part I.

[23] Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1151 (1990).

[24] *Copyright Act 1968* (Cth) ss 31, 85–88 (Austl.); Copyright Act 1994, s 16 (N.Z.).

Australia's copyright law also prohibits circumvention of technological protection measures controlling access to copyright-protected works.[25] New Zealand's law will almost certainly follow.[26] These prohibitions create a different kind of right: the right to control access to a copyright-protected work, even when an exclusive right of the copyright owner is not involved.[27] But as in every copyright system, exclusive rights work together with defenses.[28] Adoption of an open-ended flexible exception in line with Section 107 of the 1976 Act would, in the view of many influential commentators, improve the whole system—not just for those who want to remove impediments to unlicensed uses, but for the wider society. In the Australian context, in 2005, the Australia–United States Free Trade Agreement (AUSFTA)[29]—which, among other things, required extending copyright terms in Australia by twenty years—intensified claims that fair use would be an appropriate corrective to the ever-expanding rights of copyright owners.[30] So far, however, the Australian and New Zealand governments have waxed their ears against these calls. Neither country has joined the growing number of others that have adopted statutory exceptions that are broadly in line with the fair use

[25] *Copyright Act 1968* (Cth) ss 116AN–116AQ (Austl.).

[26] This is required by New Zealand's recent entry into two free trade agreements, with the European Union and the United Kingdom. New Zealand–European Union Free Trade Agreement, art. 18.17, Aug. 9, 2023, 2023 O.J. (L 2024) 866; New Zealand–United Kingdom Free Trade Agreement, art. 17.50, Feb. 28, 2022, [2023] U.K.T.S. 36.

[27] For example, rights of access can monetize the private performance of a copyright-protected work. *See* Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 113 (2002).

[28] Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008) (linking the availability of the fair use defense in U.S. copyright law to the capacity for human flourishing); Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1, 12–14 (Daniel Gervais ed., 2d ed. 2010); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV 1105, 1110 (1990) (referring to the fair use defense as a "necessary part" of copyright's "overall design").

[29] Australia–United States Free Trade Agreement, May 18, 2004, 118 Stat. 919 (entered into force on January 1, 2005).

[30] *See, e.g.*, AUSTLN. PRODUCTIVITY COMM'N, INTELLECTUAL PROPERTY ARRANGEMENTS 128–31 (2016) (stating that Australia's copyright term (seventy years *post mortem auctoris*) is "excessive," promoting a concern to adopt measures to reduce the economic and societal impact of long copyright terms). The Productivity Commission's report is discussed in further detail *infra* Part II. Fair use is often characterized as a (partial) corrective to the breadth of rights provided by copyright law. *See, e.g.*, Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2618 (2009) ("Fair use is an essential doctrine in U.S. copyright law that counterbalances what would otherwise be an unreasonably broad grant of rights to authors and an unduly narrow set of negotiated exceptions and limitations." (citing JESSICA LITMAN, DIGITAL COPYRIGHT chs. 2–3 (2001))).

defense in Section 107—among them Singapore,[31] South Korea,[32] Israel,[33] and the Philippines.[34]

The fifty-year anniversary of the U.S. Copyright Act of 1976 offers an opportunity to examine the role fair use has played in Australian and New Zealand copyright policy discussions—specifically, how the "idea" of fair use has been received and promoted in policy thinking. This Article does not concern the merits of adopting a fair use defense into Australian or New Zealand law.[35] That issue has been expertly addressed elsewhere, especially in the Australian context, where, as the discussion below explains, there has been extensive analysis of the merits of adopting fair use.[36] Instead, the Article focuses on aspects of the depiction of fair use in official reports that have urged incorporation of a U.S.-style fair use defense.

Part I surveys the policy discussions in Australia, and, to a lesser extent, New Zealand, in which the adoption of a fair use exception has been considered. Part II discusses a rhetorical strategy that has been deployed in recent policy analyses of the fair use topic: listing activities that would be permitted under the U.S. fair use defense but prohibited under a fair dealing system. Here, the focus is almost entirely on analysis of the benefits of fair use within Australia. In New Zealand there has been less engagement with the issue. These lists serve to demonstrate what is foregone, in terms of access to copyright-protected works, by persisting with the fair dealing system. They are only one aspect of the very full analysis of fair use that has been undertaken in Australian policy settings. Even so, as the discussion below explains, to portray specified activities as fair in the United States but necessarily foregone where fair use is not available risks diverting attention away from important characteristics of the defense—specifically, its fact-specific equitable character.[37] As Part II explains, listing uses that are fair under the U.S. Copyright Act of 1976 but necessarily foregone under Australia's fair dealing system does not capture the non-binary character of the defense and its sensitivity to the contexts of specific disputes. Such an approach also risks overlooking the relevance of technological changes to its operation.

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[31] Copyright Act 2021 (2020 Rev Ed) s 191 (Sing.).
[32] Jeojaggwonbeob [Copyright Act], Act No. 12137, Jan. 28, 1957, art. 35-3, *amended by* Act No. 11110, Dec. 2, 2011 (S. Kor.).
[33] § 19, Copyright Act, 5768-2007, LSI 34 (2007) (Isr.).
[34] INTELLECTUAL PROPERTY CODE, §§ 184–185, Rep. Act 8293 (Phil.).
[35] For an insightful survey of the arguments, see Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer*?, 4 INTELL. PROP. Q. 361 (2001). In the New Zealand context, see Graeme W. Austin, *The Two Faces of Fair Use*, 25 N.Z. US. L. REV. 285 (2012).
[36] *See, e.g.*, Katherine Day, *Fair's Fair (Except When It Isn't*): *The Effectiveness of Fair Dealing in the Australian Publishing Industry*, 66 AUSTLN. HUMANS. REV. 104 (2020); Melissa de Zwart, *Fair Use? Fair Dealing?*, 24 COPYRIGHT REP. 20, 32 (2002); Emily Hudson, *Implementing Fair Use in Copyright Law: Lessons from Australia*, 25 INTELL. PROP. J. 201 (2013).
[37] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984); H.R. REP. NO. 94-1476, at 65 (1976).

I. CALLS FOR FAIR USE IN AUSTRALIA AND NEW ZEALAND

For several years, especially in Australia,[38] government agencies and various commentators have been exploring options for introducing a fair use exception into domestic law—or, at the very least, expanding the fair dealing exceptions to include uses that are treated as 'fair' under U.S. law.[39] The New Zealand government has also acknowledged the possibility of adopting a fair use defense in the context of its most recent review of copyright law.[40]

A 1998 report of the Australian Copyright Law Review Committee ("CLRC"),[41] *Simplification of the Copyright Act*,[42] proposed consolidating the existing Australian fair dealing exceptions into one provision while expanding fair dealing in a manner not confined to the existing fair dealing purposes.[43] Under this approach, courts should be allowed "to determine the existence of additional purposes that are regarded as falling within fair dealing."[44] Fair dealing would be better adapted to changing technology, and this would "move fair dealing into the digital environment."[45] The CLRC noted the influence of Section 107 of the U.S. Copyright Act of 1976 on its thinking but declined to recommend a new exception in precisely the same terms—even if its proposal in favor of an open-ended fair dealing exception "for any purpose" might have been functionally equivalent.[46]

In an appendix to the 1998 report, the CLRC made some interesting observations on the distinctions between Australian and U.S. copyright law that were relevant to its recommendation to avoid the same terms as are used in Section 107. First, it noted that, compared with Australian courts, "US courts . . . play a more active role in providing solutions to major technological innovations, such as reprographic reproduction, which alter the market for copyright materials."[47] This contrasted with the prevalent Australian approach, which was to wait for parliamentary guidance on such questions. Elaborating on these observations, the CLRC explained:

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[38] For an insightful analysis of some of the doctrinal implications of maintaining the fair dealing approach in Australian law, see Michael Handler & David Rolph, *"A Real Pea Souper": The Panel Case and the Development of the Fair Dealing Defenses to Copyright Infringement in Australia*, 27 MELB. U. L. REV. 381 (2003).

[39] For a comprehensive overview and analysis, see Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms*, 31 MELB. U. L. REV. 967, 1016 (2007).

[40] The review began in 2018, with the publication of an issue paper. MINISTRY OF BUS., INNOVATION & EMP., REVIEW OF THE COPYRIGHT ACT 1994 (2018). The review is currently on hold.

[41] The CLRC was established in 1983 to consider and report to the Attorney-General on specific copyright matters referred to it from time to time.

[42] Copyright L. Rev. Comm. [CLRC], *Simplification of the Copyright Act: Part 1—Exceptions to the Exclusive Rights of Copyright Owners* (1998) (Austl.).

[43] *Id.* ¶ 6.10.

[44] *Id*. ¶ 6.08.

[45] *Id*.

[46] *Id.* ¶ 6.143.

[47] *Id.* ¶ C.10.

> [O]ne reason the US courts play a more active role in providing solutions to technological innovation may be that they are more likely to adopt what has been called the "legal realist" approach. This has been crucial, for example, to the rapid development of US jurisprudence on the scope of copyright protection of computer software. In contrast, the Australian courts have been more restrained, the judges being concerned largely with the interpretation of statutory provisions and looking to parliament for explicit direction regarding the application of intellectual property protection to new technologies. The Committee considers that this approach by the Australian courts is likely to continue.[48]

Secondly, the CLRC noted the distinct constitutional settings within which the two national systems operate, in particular the absence in the Australian Constitution of any equivalent statement to the articulation in the U.S. Constitution of the purpose of copyright law: "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."[49] As in the United States, the Australian Constitution vests the regulation of copyright in the federal government, but it does not include an equivalent "purpose" clause.[50]

Had the CLRC's recommendations been enacted into legislation, the statute may have looked quite similar to Section 107 of the U.S. Copyright Act of 1976. However, the Committee's terminological differentiation—recommending reforms which, formalistically, might have functioned in a broadly similar way while hewing to the "fair dealing" language—signaled a sensitivity to the distinct legal ecosystems within which the defenses operate.[51]

A different perspective was advanced in 2000 by the Intellectual Property and Competition Review Committee.[52] It concluded that the CLRC's recommendations for an open-ended fair dealing defense should not be followed, reasoning that the transaction costs of this change would outweigh the benefits.[53] But just four years later, against the background of the AUSFTA,[54] the Parliamentary Joint Standing Committee on Treaties ("JSCT") took a different view, and recommended replacing the Australian fair dealing doctrines with "a doctrine that resembles the United States' open-ended defence of fair

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[48] *Id*. ¶ C.11.

[49] U.S. CONST. art. I, § 8, cl. 8. The Committee quoted the complete clause, rather than the parts conventionally understood to refer to copyright.

[50] *Australian Constitution* s 51(xviii).

[51] In this context, the CLRC quoted the following observation in the submission of Australian legal academic Professor Brian Fitzgerald: "[S]ection 107 of the US Copyright Act embodies the essence of US copyright law and in a more general sense the American psyche. It noted that there are at least three American principles that are fundamental to the understanding of s. 107: wealth maximisation, free speech and use, and private immunity." CLRC, *supra* note 42, ¶ C.13.

[52] INTELL. PROP. & COMPETITION REV. COMM., REVIEW OF INTELLECTUAL PROPERTY LEGISLATION UNDER THE COMPETITION PRINCIPLES AGREEMENT (2000). This was known as the "Ergas Committee," after its chair, Harry Ergas.

[53] *Id.* at 129.

[54] Australia–United States Free Trade Agreement, *supra* note 29.

use."[55] The JSCT report did not dwell on the kinds of jurisdictional distinctions that had concerned the CLRC. But by this stage, the influence of U.S. copyright law was more obvious and direct, largely as a result of the free trade agreement—which, among other things, required adding twenty years to the duration of rights under Australian copyright law.[56] The copyright term extension was a catalyst for several of the submissions recommending adoption of fair use.[57] Freedom-of-expression concerns also bolstered the view that adopting fair use would be appropriate. One submission urged: "Instituting US style copyright law without US style constitutional free speech protection will lead to a gross miscarriage of justice."[58] As with all other similar recommendations, the government did not act on the JSCT's fair use proposal. But by now, there was a significant shift in tone. The terms of the JSCT's recommendations were now squarely in line with Section 107's "fair use" language. With the changes to the copyright environment wrought by the AUSFTA, it was perhaps assumed that a U.S.-style fair use transplant would find more fertile ground.

In 2005, the Australian Attorney-General's Department released an issue paper on fair use and other copyright exceptions.[59] Drawing extensively on leading Australian academics' submissions, the paper noted the broad dissatisfaction with Australian fair dealing exceptions at the time. The paper proffered several potential "options for implementing reform."[60] Among them was the potential to "retain the existing fair dealing provisions, adding an open-ended fair use exception."[61] No final report was issued,[62] but the call for reform was answered, at least partially, with a sweeping set of amendments to the Copyright Act 1968 in 2006.[63] While the reforms fell short of implementing a fair use exception into Australia's copyright law, the 2006 amendments introduced a new fair dealing exception: "for the purposes of parody or satire."[64]

Official interest in fair use was revived in 2013, when the Australian Law Reform Commission ("ALRC")[65] issued an important report, *Copyright and the Digital*

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[55] PARLIAMENTARY JOINT STANDING COMM. ON TREATIES, REPORT 61: THE AUSTRALIA–UNITED STATES FREE TRADE AGREEMENT 238 (2004) (Austl.), https://www.aph.gov.au/~/media/wopapub/house/committee/jsct/usafta/report/chapter16_pdf.ashx.

[56] Australia–United States Free Trade Agreement, *supra* note 29, art. 17.4.4.

[57] PARLIAMENTARY JOINT STANDING COMM. ON TREATIES, *supra* note 55, at 234 n.41.

[58] *Id.* at 235 (quoting the submission of Mr. Patrick Caldon, Submission 138, at 1). These views were not, however, uniformly endorsed: in their submissions, collective management organizations drew attention to the uncertainties associated with fair use and recommended maintaining the existing fair dealing exceptions. *Id.* at 237.

[59] Att'y-Gen.'s Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age* (2005) (Austl.).

[60] *Id.* ¶¶ 14.1–.14.

[61] *Id.* ¶¶ 14.10–.11.

[62] The Australian Attorney-General issued a press release in May 2006. Press Release, Philip Ruddock, Att'y-Gen. of Austl., Major Copyright Reforms Strike Balance (May 14, 2006).

[63] Copyright Amendment Bill 2006 (Cth) (Austl.).

[64] *Id.* ss 9A and 9B (inserting Sections 41A and 103AA into the *Copyright Act 1968* (Cth)).

[65] The ALRC was established in 1975 by the Law Reform Commission Act 1973 (Cth) and reconstituted by the Australian Law Reform Commission Act 1996 (Cth). Section 21 of the latter enactment describes the functions of the Commission, which include "bringing the law into line

Economy.[66] By this stage, the ALRC was prepared to recommend the adoption of an open-ended fair use defense.[67] The report extensively surveyed the international agitation for fair use exceptions and the benefits of its adoption, particularly in light of modern digital uses of copyright-protected material. The report canvassed many familiar arguments: fair use assists innovation;[68] fair use better aligns with reasonable consumer expectations as to how they may legitimately use copyright-protected material;[69] fair use is sufficiently predictable and fair;[70] fair use is compatible with moral rights;[71] fair use aligns with the disciplines of international law, by complying with the "three-step" test.[72] The ALRC also noted that fair use can help protect rights holders' markets, noting that if a license can be obtained for a particular use of copyright material, "then the unlicensed use of that material will often not be fair."[73] The report characterized this as "vital to ensuring copyright law continues to fulfil its primary promise in providing creators with sufficient incentive to create."[74]

The Australian Productivity Commission ("PC") has twice recommended adopting a fair use exception. In an expansive 2016 report entitled *Intellectual Property Arrangements*, the PC endorsed the ALRC's recommendations.[75] The report was the outcome of a request by the Australian Treasurer that the Commission conduct an inquiry into "Australia's intellectual property arrangements, including their effect on investment, competition, trade, innovation, and consumer welfare."[76] Unlike the ALRC's project, which focused only on copyright issues, the PC's reference traversed all of the major areas of intellectual property law. As part of this comprehensive analysis, the PC recommended that Australia adopt a "U.S.-style" exception, in line with the other countries which had, by then, emulated Section 107 in some form.[77]

The PC returned to the idea of a fair use exception with its 2021 investigation into the need for a right to repair in Australian law.[78] It noted that extant copyright laws would often prohibit the reproduction of repair information such as manuals or schematics, which are essential to an effective right-to-repair framework.[79] Participants were split on whether an exception to facilitate reproduction of these materials should take the form of another specific category of fair dealing, or by way of general fair use. Ultimately, the PC

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with current conditions and ensuring that it meets current needs," "removing defects in the law," and "simplifying the law."

[66] AUSTLN. L. REFORM COMM'N [ALRC], COPYRIGHT AND THE DIGITAL ECONOMY (2013).
[67] *Id.* at 87 and 122.
[68] *Id.* at 104–08.
[69] *Id.* at 108–10.
[70] *Id.* at 112–15.
[71] *Id.* at 115–16.
[72] *Id.* at 116–22.
[73] *Id.* at 110.
[74] *Id.*
[75] AUSTLN. PRODUCTIVITY COMM'N, *supra* note 30.
[76] *Id.* at iv.
[77] *Id.* at 171. See *id.* at 170–85 for full discussion of the merits of a U.S.-style exception.
[78] AUSTLN. PRODUCTIVITY COMM'N, RIGHT TO REPAIR (2021).
[79] *Id.* at 162–64.

recommended "in light of the Australian Government's current reform directions to copyright law" that a fair use exception be adopted.[80]

In New Zealand, the fair use debate was very much alive by 2016, receiving detailed consideration in academic circles.[81] By 2018, it seemed that the New Zealand government might be ready to move on the issue. The Ministry for Business, Innovation and Employment ("MBIE") published an issue paper on reforms to the Copyright Act 1994, assessing gaps in the existing copyright scheme.[82] Much like the 2005 paper released by the Australian Attorney-General's Department, the MBIE paper made no decisive conclusions or recommendations, only canvassing some arguments for and against a fair use exception and requesting public submissions. More than 100 entities and individuals submitted in response to the report, raising expectations of meaningful discussion about copyright reform. Even so, no official report has been released, and public submissions closed over seven years ago. No other government agency has since picked up the fair use thread in New Zealand.[83]

II. FOREGONE USES

Featuring prominently in the arguments for adopting fair use is the identification of specific uses of copyright-protected material that would be permitted if Australia had adopted a fair use defense but which would not be permitted under Australia's current fair dealing approach. This strategy was adopted in the ALRC's November 2013 report[84] and the PC's 2016 report entitled *Intellectual Property Arrangements*. As noted above, the latter endorsed the recommendations of the former. Together, these reports provided especially full analyses in support of the view that Australia should adopt a fair use principle into the Australian Copyright Act 1968.[85]

While the lists of uses that would be "fair" under the U.S. Copyright Act of 1976 but foregone under Australian law (or would require a license) are only one aspect of the detailed arguments in favor of fair use advanced in each report, they carry rhetorical heft. They starkly portray the disadvantage of maintaining the more constrained fair dealing tradition and, presumably, the many benefits to Australian society that are lost as a result. They convey part of the "idea" of fair use in Australian policy circles: adopting fair use would put many more unlicensed uses on the permitted side of the ledger.

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[80] *Id.* at 192.
[81] *See, e.g.*, Alexandra Sims, *The Case for Fair Use in New Zealand*, 24 INT'L J.L. & INFO. TECH. 176 (2016). This discussion continued in the years following. Melanie Johnson, Robin Wright & Susan Corbett, *Harmony and Counterpoint: Dancing with Fair Use in New Zealand and Australia*, *in* MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC: JUXTAPOSING HARMONISATION WITH FLEXIBILITY (Susan Corbett & Jessica Lai eds., 2018); George Barker, *More Unfair Claims About Fair Use: This Time in New Zealand* (Aug. 5, 2018), https://ssrn.com/abstract=3214827.
[82] MINISTRY OF BUS., INNOVATION & EMP., *supra* note 40.
[83] A Bill is currently before the New Zealand Parliament that would adopt a new fair dealing defense for the purposes of "parody or satire." *See* Copyright (Parody and Satire) Amendment Bill 2024 (96-1).
[84] ALRC, *supra* note 66.
[85] *Copyright Act 1968* (Cth) (Austl.).

The uses that the CLRC identified as being unnecessarily stifled by fair dealing[86] included the creation of accessible formats of texts for blind or visually impaired persons; caching and indexing by search engines and internet service providers, uses of copyright-protected material in educational courses; uses of orphan works; "using material to satisfy personal curiosity, rather than to undertake formal research," the "communication to the public of works created by students and researchers using museum collections"; "3D printing"; "the use by a student of extracts from a state Hansard or state government media releases in a play"; and "copying portions of a confidential document, such as a Cabinet minute, for the purpose of commenting on a matter of public importance."[87]

The PC's 2016 report also includes a list of "[i]llustrative US fair uses of copyright works that require a licence in Australia."[88] The PC's list of foregone activities was said to be "based on US case law and guidelines; dependent on application of the fairness factors."[89] It included the following: "[a]n Internet search engine publishes thumbnail images of websites in its search results"; "[a]n author quotes a number of unpublished letters and journal entries in its biography"; "[a]n artist creates a collage using images from a photography book"; "[a] rap song pays homage to another well-known song by using the opening lyrics"; and "[r]esearchers access a database for text and data mining." The acknowledged "sources" for the items in the list were submissions by Google Australia, the National Copyright Unit (a body whose responsibilities include negotiating licenses on behalf of schools and technology-training institutions), and Stanford University.

This is not the occasion to quibble with any of the legal conclusions that sit behind each of the items included in the lists[90]—or with the normative assumptions that appear to inform the view that such uses ought to be in the public domain for the purposes of copyright law.[91] The interest here is with the rhetorical effect of these lists of foregone uses—that is, with how they contribute to the idea of fair use as it is portrayed in Australian policy contexts. While a footnote in the PC's list acknowledges that these forgone uses would be "dependent on application of fairness factors,"[92] the purpose of these tables was presumably to underscore Australians' comparative disadvantage: users of copyright-protected material in nations with fair use may do many more things with copyright-protected works without securing a license than Australians.

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[86] The complete list is set out in the ALRC's report. ALRC, *supra* note 66, at 102–03.
[87] *Id.*
[88] AUSTLN. PRODUCTIVITY COMM'N, *supra* note 30, at 170 tbl. 6.1.
[89] The table also included four uses designated as "potentially fair use" which would also not be regarded as "fair dealing" under Australian law.
[90] Some items have since been superseded by legislative reforms. For example, the inability to use "copyright material with no owner that can be identified—known as 'orphan works'," was addressed earlier in 2026 by a new Australian orphan works regime. *Copyright Amendment Act 2026* (Cth) (Austl.).
[91] For example, whether "use of third party images or text in a presentation to illustrate the point being made" should go unlicensed is surely debatable. *See, e.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023). There, the defendants' use of the image to illustrate a magazine article, held not to be a fair use, could presumably have been characterized as such.
[92] AUSTLN. PRODUCTIVITY COMM'N, *supra* note 30, at 170 n.b.

Portraying fair use in this binary way risks deflecting attention from important characteristics of the fair use defense. To be sure, some scholars have suggested that fair use is not as uncertain or *ad hoc* as it is often portrayed.[93] However, as Jennifer Rothman has observed, it is one thing to claim that certain categories of use might be considered fair; it is quite another to know how a particular case will play out.[94] The lists of fair and foregone uses provide, at best, broad categories: they say little about whether any particular user will have freedom to operate. The fair use analysis is most often contextual, and technological changes are relevant to whether a use is fair.

A. The Relevance of Context

The PC's rap song "homage"—fair under U.S. law but forbidden under the Australian Copyright Act 1968—is presumably a reference to *Campbell v. Acuff-Rose Music, Inc.*, where the U.S. Supreme Court considered whether a rap parody version of Roy Orbison's "Oh, Pretty Woman" was a fair use. But legal conclusions as to the fairness of any parody use might not be as straightforward as its place on the "fair use" side of the ledger might suggest. While the Supreme Court confirmed in *Campbell* that a parody could come within the fair use defense, it did not hold the specific use in the case—by rap artists Two Live Crew—to be a fair use. Instead, the Court remanded the case to the lower courts, with an admonition to the parties to develop a fuller record on the potential damage to the plaintiff's market for non-parody rap derivatives of Roy Orbison's song. And, as we know, the parties eventually settled: the dispute became a transaction,[95] suggesting that neither party was entirely confident about which side of the fair use divide Two Live Crew's version fell.

Some parody[96] (or homage) uses may indeed have a strong claim to be shielded by the defense. As has been explained many times, parodies advance freedom of expression; they typically involve the creation of a new work; for the parody to work, reasonably extensive taking of the parody's target may be required. Fair use can correct market failures arising from a reluctance to be lampooned.[97] But to put a "homage" rap on the permitted side of the fair use ledger (assuming this example is meant to refer to *Campbell*) risks glossing over the fact-specific character of the fair use inquiry. Confirming that parody uses could be fair is not equivalent to holding that *this* purported parody could be marketed without a license.[98]

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[93] *See, e.g.*, Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Samuelson, *supra* note 30.

[94] Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act*," 29 BERKELEY TECH. L.J. 1595, 1602 (2014).

[95] *Id.* at 1604 (citing *Acuff-Rose Settles Suit with Rap Group*, MEM. COM. APPEAL, June 5, 1996, at A14).

[96] *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

[97] *See* Graeme W. Austin, *EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire*, 39 UNSW L.J. 684 (2016).

[98] Had the litigation continued, it would have required a detailed consideration of, among other things, the effect of the use upon the potential market for or value of the copyrighted work—the fourth and most important fair use factor. *See* Andy Warhol Found. for the Visual Arts, Inc. v.

Similar issues arise from the generality of some of the fair uses in the PC's list. Consider the data mining example. In the age of AI, whether accessing a database for the purposes of data mining qualifies as a fair use is fiercely debated, and will no doubt require resolution by the U.S. Supreme Court. The ALRC's list included a similar item: "use of technologies that analyse copyright material looking for patterns and trends—known as 'data mining'."[99] Neither the ALRC nor the PC could have anticipated the extensive use of machine learning in the AI context. But even without the complexities of AI machine learning, it would have been next to impossible to conclude that accessing a database for data mining qualifies as fair use without knowing anything about the content of the database. In the fair use stakes, a database of code comprising different application programming interfaces is surely different from a database containing significant portions of novels on the current New York Times bestseller list. And as *Bartz v. Anthropic PBC* confirms, mining a database of pirated material, even for the purposes of "research," is highly unlikely to be fair.[100] Nor would it be possible to assess the fairness of the use without knowing the reason for the data mining. Whether the data mining is for the purposes of social media slop or the creation of a new medication is surely relevant to the fairness of the use.[101]

The same point applies to the collage example. Not all collages are created equal in the fair use stakes. A collage conveying a political message with relatively small uses of informational works will surely be treated differently for the purposes of fair use from one that makes prominent use of a copyright-protected painting or photograph.[102] And factors that are not apparent on the face of the collage, such as an appropriation artist's "artistically plausible story about what he intended to communicate through his work," might be a heavy thumb on the fair use scale.[103]

To be sure, the application of the fair use defense can sometimes crystallize in the form of more-or-less incontestable permitted uses. After *Sony Corp. of America v. Universal City Studios, Inc.*,[104] few would today seriously question whether time-shifting of free-to-air television programs is a fair use. But even here, whatever certainty the *Sony* decision might once have provided, its utility as a brightline rule is surely diminished by changes in television-viewing patterns since it was decided in 1984.[105] Most intermediate

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Goldsmith, 598 U.S. 508, 555 (2023) (Gorsuch, J., concurring); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) ("This last factor is undoubtedly the single most important element of fair use.").

[99] ALRC, *supra* note 66, at 103.

[100] 791 F. Supp. 3d 1038 (N.D. Cal. 2025).

[101] For an insightful examination of these issues in the context of the scope of defenses for AI training models, see Emily Hudson & James Parish, *Submission to the UK Intellectual Property Office: Copyright and AI* (Feb. 25, 2025), https://ssrn.com/abstract=5175875.

[102] Sonya del Peral, Comment, *Using Copyright Visual Works in Collage: A Fair Use Analysis*, 54 ALB. L. REV. 141 (1989).

[103] Laura Heymann, *Reasonable Appropriation and Reader Response*, 9 U.C. IRVINE L. REV. 343, 348–50 (2019) (discussing Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)).

[104] 464 U.S. 417 (1984).

[105] Ashleigh Dharmawardhana, Ramon Lobato & Alexa Scarlata, *A Streaming Generation? Interrogating Assumptions About Young-Adult Audiences, Content Discovery, and Engagement*

copying of computer programs for the purposes of interoperability is also likely to be fair,[106] as will the use of small amounts of code for the purposes of interoperability.[107] Accordingly, some uses might confidently be placed on lists of uses of copyright-protected material that do not require a license. Some of these are, however, already accommodated in both Australian and New Zealand law. Bespoke time-shifting and interoperability defenses are included in the copyright legislation of both nations.[108]

Furthermore, doctrinal perspectives on fair use evolve, as is suggested by changing perspectives on the weight to be given to the transformative character of the defendant's use.[109] The Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,[110] for example, invites a more nuanced analysis of the interplay between the first and the fourth fair use factors than had perhaps occurred in earlier case law. *Goldsmith* underscores the importance of the particular use made of the plaintiff's work and the effects of the use on the plaintiff's market for derivative works. The decision resists straightforward categorization of transformative uses as "fair," and casts a more critical light on how the use might compete with, or even usurp, the copyright owner's licensing income. Going forward, earlier assumptions as to the relevance to the defense of the transformative character of a defendant's activities may be less secure.[111]

B. Technological Changes

Technological changes may also be relevant to assumptions that any use would be regarded as fair. The PC's example of graphical search engine results illustrates the point. Presumably, the two decisions of the U.S. Court of Appeals for the Ninth Circuit in *Kelly v. Arriba Soft Corp.*[112] and *Perfect 10, Inc. v. Amazon.com, Inc.*[113] provide the legal

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with Broadcast Television, 39 J. Media Cultural Stud. 898, 907 (2025) (confirming "the broad generational drift away from broadcast television and the widening of this trend in recent years").

[106] Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000) (holding reverse engineering of BIOS firmware for the purposes of developing a Macintosh program allowing PlayStation games to be played on Macintosh devices to be a fair use).

[107] Google LLC v. Oracle Am., Inc., 593 U.S. 1 (2021) (holding use of code comprising application programming interfaces to be fair).

[108] *Copyright Act 1968* (Cth) s 47D (Austl.); Copyright Act 1994, s 83 (N.Z.).

[109] *Compare* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *with Kienitz v. Sconnie Nation*, 766 F.3d 756 (7th Cir. 2014) (Easterbrook, J.) (expressing concern that the emphasis in the former case on the transformative nature of the defendant's use could override the copyright owner's derivative work rights). In *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016), the U.S. Court of Appeals for the Second Circuit suggested that the *Cariou* decision was the high-water mark in its application of fair use. In *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), the Second Circuit started to walk back what Professor Jane Ginsburg describes as the outcome-determinacy of a finding of "transformativeness." Jane C. Ginsburg, *US Second Circuit Court of Appeals Tames "Transformative" Fair Use; Rejects "Celebrity-Plagiarist Privilege"; Clarifies Protectable Expression in Photographs*, 16 J. Intell. Prop. L. & Prac. 638, 638 (2021).

[110] 598 U.S. 508 (2023).

[111] Sag, *supra* note 93, at 79–81.

[112] 336 F.3d 811 (9th Cir. 2003).

[113] 508 F.3d 1146 (9th Cir. 2007).

foundation for the characterization of this kind of use as "fair" under U.S. law. No specific provision in the Australian Copyright Act 1968 provides a defense for such activity,[114] nor would graphical thumbnails fall within any of the fair dealing purposes. Hence the suggestion that graphical thumbnails would be a fair use under the U.S. Copyright Act of 1976 but necessarily foregone under Australian copyright law. Even so, these cases excused only low-resolution thumbnails and do not necessarily speak to the generation of higher-resolution images.[115]

As Jane Ginsburg and others have recently noted, among the many challenges to copyright doctrines distilled by the rise of AI technologies is the relevance of the security of any copies retained by the defendant[116] in the course of some purportedly "transformative" use.[117] The security of copies made by parties relying on fair use is likely to be relevant to the application of the defense. The decisions holding that mass digitization of books for various purposes was a fair use[118] were premised in part on the security of the copies.[119] The Second Circuit found this security to be "impressive."[120] The analysis of Ginsburg and her co-authors suggests that the conclusion that these uses would be fair would be less sustainable if, for example, advances in hacking technology rendered the copies less secure. A broadly similar point applies, they suggest, if it transpires that AI platforms generate outputs that resemble copyright-protected inputs (whether or not they come from pirated or licensed sources).[121] The fair use analysis would then partly turn on whether sufficient guardrails are in place to prevent the generation of such outputs, and the extent to which they were amenable to circumvention.[122] Again, technological changes might undermine the certainty of conclusions as to whether any specific use would be shielded by the defense.

As these examples suggest, however attractive it might be to suggest that fair use would allow uses that are hitherto forbidden under Australia's fair dealing systems, the position is likely to be much more nuanced. It will often not be possible to say on which side of the fair use line any particular use will fall. As Jennifer Rothman observes, "in the

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[114] Nor is there any specific defense for such activity in New Zealand copyright law.

[115] Xinyue Liu, Niloofar Mireshghallah, Jane C. Ginsburg & Tuhin Chakrabarty, *Alignment Whack-a-Mole: Finetuning Activates Verbatim Recall of Copyrighted Books in Large Language Models* (Colum. L. Sch., Public Law Research Paper No. 6449179, 2026). For completeness, it is perhaps worth noting that the absence of a specific defense in Australian and New Zealand law appears to have caused few problems in either country for firms disseminating browser programs that produce such results. The uses might not be "fair," but they are not foregone.

[116] The district court's decision in the *Google Books* case was issued shortly before the ALRC's report, preventing full engagement with the significance of the decision. *See* Authors Guild, Inc. v. Google, Inc. (*Google Books*), 804 F.3d 202 (2d Cir. 2015)**.** However, the ALRC does include on its list of uses that would be covered by the fair use defense "storing legally acquired copyright material on remote servers."

[117] *Id.*

[118] *Google Books*, 804 F.3d 202; Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

[119] *HathiTrust*, 755 F.3d at 100.

[120] *Google Books*, 804 F.3d at 228.

[121] Liu et al., *supra* note 115, at 11–12.

[122] *See* U.S. Copyright Off., Copyright and Artificial Intelligence: Part 3: Generative AI Training 59 (2025).

gray areas (and even outside them) the case law is littered with overturned assessments of fair use and cases that point in different directions."[123]

CONCLUSION

In Australian copyright policy discussions—and, to some extent, those occurring in New Zealand—fair use has thus far proven to be elusive. It is a little like "Moscow" for Chekhov's *Three Sisters*: much yearned for but never realized. As we note above, the reports of the ALRC and the PC urging adoption of fair use contain detailed discussion of fair use and rightly characterize it as a nuanced multifaceted analytical process. The lists of fair and foregone uses discussed above form only a small part of the analyses in each document. Even so, by drawing attention to uses that would be "fair" under the U.S. Copyright Act of 1976 but forgone under the fair dealing system, these lists add rhetorical heft to the argument that the Australian fair dealing system imposes unnecessary burdens on those wanting to make use of copyright-protected material. We are likely to see a similar approach deployed in New Zealand policy discussions in any future review of its copyright laws.

The idea of fair use that is advanced by these lists burnishes the promise of a codified fair use defense: more things will be able to be done with copyright-protected material without securing a license. Untethering the defense from the specified fair dealing uses certainly offers the possibility that more uses would be regarded as "fair." Even so, in such discussions it is also helpful to remember that transplanting fair use into the copyright law of Australia or New Zealand would not be the same as legislating bespoke exceptions for the various uses that are depicted as being on the "foregone" side of the ledger. Fair use does not support easy conclusions as to what does or does not need to be licensed. It is susceptible to doctrinal shifts. The factual context of the litigation in which the defense is pleaded can be critically important, and past conclusions as to whether a use is fair might prove to be unsustainable in the light of technological changes. Finally, it is also possible that the fair use analysis might play out differently in the light of domestic legal concerns, including taking appropriate account of the rights of Indigenous Peoples in Australia and New Zealand.[124] Listing fair and foregone uses, as if the former were the equivalent of bespoke copyright exceptions, risks glossing over key characteristics of one of the important innovations of the U.S. Copyright Act of 1976.

[123] Rothman, *supra* note 94, at 1602–03.

[124] In the New Zealand context, there has been an extensive analysis of these issues by the Waitangi Tribunal. WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI (2011) (Wai 262).