

Copyright & Documentary Film in the Commonwealth: Legal Scholar Reports from Six Countries



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FAIR DEALING AND DOCUMENTARY FILM MAKERS: NORMS AND LAWS IN AUSTRALIA

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INTRODUCTION

This report provides a summary of the history, interpretation, current application and potential reform of fair dealing provisions in Australia,¹ focusing in particular on their relevance to production of content by documentary filmmakers. The report concludes that licensing of third-party material appears to be the main copyright management strategy for Australian documentary filmmakers—at least for those operating within traditional funding and distribution models.² The use of fair dealing, on the other hand, appears to be limited. This report considers why this might be the case, focusing on:

(1) *Legal issues*, especially: the drafting style of the Australian provisions (a suite of closed-ended exceptions that are inherently limited by their own language³); interpretations of the Australian judiciary (to the extent that there is flexibility in the language of some provisions, more restrictive interpretations have been preferred); and uncertainty as to governing principles (due to the dearth of case law, and inconsistent and poorly elucidated statements in key cases);⁴ and

(2) *Industry attitudes*, especially: evidence of a prevailing norm favoring rights clearance, perhaps due to commercial necessity (e.g., funding bodies, broadcasters and distributors require chain of title and/or warranties in relation to intellectual property), risk aversion (particularly given uncertainty as to the law) and lack of harmonization of exceptions at the international level.⁵

Different industry participants appear to have differing views on whether the predominant licensing strategy is a problem, although there appears to be growing concern in relation to use of orphan works and the difficulties associated with accessing and using archival material.⁶

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¹ Copyright Act 1968, (Cth) §§ 40-42, 43(2), 103A-103C (Austl.).

² It should be emphasized that this research was of a preliminary nature, and that conclusions in relation to practice are necessarily tentative. Further, systematic research may be useful to develop a stronger and more nuanced idea of practice across the sector.

³ See Copyright Amendment Act 2006, § 200AB (departing to some extent from this existing model); *see also infra* note 24 and surrounding text.

⁴ *See infra*, Section II.

⁵ *See infra*, Section III.

⁶ *See infra*, Section IV.

Although this report focuses on fair dealing, it should be noted that other elements of copyright law are relevant to reuse of material by documentary filmmakers. For instance, there will be no infringement where less than a ‘substantial part’ of a copyright work is taken⁷ – although judicial interpretation has been that very small components or extracts from a work can be ‘substantial’,⁸ thus divesting ‘substantial part’ of much of its potential analytical significance. The expiry of copyright also serves to deliver content to the public domain.⁹ In that case, issues still arise in obtaining broadcast-quality copies of material; for instance, holders of content will often charge fees for supply of copies to users (regardless of the content’s copyright status), which can be significant for low budget projects or those using high levels of archival footage. Finally, other statutory exceptions may be relevant, particularly in relation to underlying research for a documentary.¹⁰ However, those exceptions often do not extend to the further distribution of content, particularly online.¹¹

I. FAIR DEALING: LAW AND LIMITATIONS

A. History

A statutory ‘fair dealing’ exception first appeared in Australia when the federal parliament adopted wholesale, in 1912, the *Imperial Copyright Act 1911*.¹² It appears that the relevant provision of the 1911 Act was intended to codify the existing ‘fair use’ defence(s) that had developed at common law.¹³ Fair dealing was retained, with some modification, in the current

⁷ Copyright Act 1968 (Cth), §§ 14, 36(1), 101(1).

⁸ See, e.g., *Hawkes and Sons v. Paramount Film Service* [1934] 1 Ch 593; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd*. [1964] 1 W.L.R. 273 (Can.); *Autodesk v. Dyason (No 1)* (1992) 173 C.L.R. 330 (Austl).

⁹ Albeit, after the passage of much time. The copyright term in Australia was extended by 20 years (effective January 1, 2005) for published works, sound recordings and cinematograph films, following the US-Australia free trade agreement. Copyright in unpublished works, sound recordings and cinematograph films remains effectively perpetual. See Copyright Act 1968 (Cth) §§ 33, 93, 94.

¹⁰ In particular, the libraries and archives provisions permit copies of a variety of collection items to be supplied to patrons requiring those copies for the purpose of research or study. See Copyright Act 1968 (Cth), §§ 49, 50, 51, 52, 110A.

¹¹ In relation to limitations on use of copies made under the libraries and archives provisions, see, e.g., Emily Hudson and Andrew T. Kenyon, *Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives* 30(1) U. NEW SOUTH WALES L.J. 12, 34-36, 42-43 (2007).

¹² Section 2(1)(i) of the 1911 Act provided that copyright would not be infringed by any “fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.”

¹³ See, e.g., ROBERT BURRELL AND ALISON COLEMAN, COPYRIGHT EXCEPTIONS: THE

legislation: the *Copyright Act 1968* (Cth). Significantly, in the period between the 1911 and 1968 statutes, understandings of fair dealing narrowed from interpretations in pre-20th century cases.¹⁴ That is, to the extent that fair use defence(s) had developed at common law,¹⁵ they were incrementally read down and disregarded by 20th century UK cases considering fair dealing.¹⁶

B. Current Interpretation

At the outset, it should be noted that analysis of the Australian fair dealing provisions is beleaguered by the lack of relevant domestic case law, particularly at the appellate level. Since the *Copyright Act 1968* came into force on May 1, 1969, only a handful of cases have considered fair dealing in any meaningful detail.¹⁷ Nor has Australia seen any equivalent to the Supreme Court of Canada's decision in *CCH v. Law Society of Upper Canada*, in which the interpretation of fair dealing was situated within a strong philosophical viewpoint on the justification for statutory exceptions.¹⁸ Indeed, the main fair dealing decision of recent times, *The Panel Case*, has been criticized for adding to uncertainty regarding fair dealing, due to inconsistent and poorly explained statements of principle, which in turn spurned ad hoc, impressionistic conclusions.¹⁹

That said, some basic points about the ambit of fair dealing can be gleaned from the *Copyright Act 1968* itself. First, fair dealing is closed-

DIGITAL IMPACT 256-59 (2005). The reference to fair use 'defence(s)' is intended to emphasise the fact that 'fair use' had not developed into single or fixed principle by 1912.

¹⁴ *Id.* at 259-63.

¹⁵ For a review of early UK and US case law, see, e.g., 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 (2007).

¹⁶ See, e.g., *Univ. of London Press v. Univ. Tutorial Press* [1916] 2 Ch. 601; *British Oxygen v. Liquid Air* [1925] 1 Ch. 383; *Hawkes and Sons v. Paramount Film Serv.* [1934] 1 Ch. 593.

¹⁷ The key cases are *De Garis v. Neville Jeffress Pidler Pty Ltd* (1990) 18 I.P.R. 292 and *TCN Channel Nine Pty Ltd. V. Network Ten Pty Ltd.* (2001) 50 I.P.R. 335; (2002) 190 A.L.R. 468. Fair dealing has also been discussed—but without any findings on its application—by courts considering applications for interlocutory injunctions. See *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485; *Nine Network Austl. Pty Ltd v. Austl. Broad. Corp.* (1999) 48 I.P.R. 333; *Telstra Corp. Pty Ltd. V. Premier Media Group Pty Ltd.* (2007) 72 I.P.R. 89.

¹⁸ There, the Supreme Court of Canada—citing the work of Professor David Vaver—argued that provisions such as fair dealing should not be interpreted restrictively, given their status as user rights. See *CCH Canadian Ltd. v Law Soc'y of Upper Can.* (2004) 236 D.L.R. (4th) 395, 418-9.

¹⁹ See, e.g., Michael Handler & David Rolph, *A Real Pea Souper: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia* 27 MELB. U. L. REV. 381 (2003).

ended, meaning that only uses undertaken for the prescribed purposes can fall within the exception. These purposes are: research, private study, criticism, review, news reporting, the provision of legal advice, and (following amendments in 2006) parody and satire.²⁰ Second, the exception applies to dealings with literary, dramatic, musical and artistic works, and “audio-visual items.”²¹ There is no exclusion of unpublished works, although publication status may be relevant to assessing fairness. Third, a “sufficient acknowledgement” is required where the dealing is for the purpose of criticism, review, or news reporting in a newspaper, magazine or similar periodical.²² Finally, there is no restriction on the type of user who can invoke fair dealing.

The *Copyright Act 1968* does not—with the exception of fair dealing for research or study²³—provide any guidance regarding the meaning of “fair.” This is left to the case law.

C. Closed-ended application

As noted above, fair dealing—like most other exceptions in Australian copyright law²⁴—is closed-ended. Inherent in this structure is the possibility of seemingly arbitrary application, due to the exclusion of conduct that, whilst fair, does not serve one of the recognized purposes.²⁵ That is, even if a liberal interpretation is adopted, there is only so much latitude that can be given to the statutory language. For instance, a documentary film may be informative for the viewer, but not fall within ‘research’ or ‘study,’ both of which suggest an active and directed program

²⁰ Copyright Act 1968 (Cth) §§ 40-42, 43(2), 103A-103C.

²¹ *Id.* § 100A (defining audio-visual items as sound recordings, cinematograph films, and sound and television broadcasts). ‘Published editions’ are the only subject matter not covered by fair dealing. By way of brief background, Part IV of the Copyright Act 1968 (Cth) gives separate (but limited) protection to ‘published editions’ of literary, dramatic, musical and artistic works. The protection relates to elements such as layout and typographical features.

²² *Id.* §§ 41, 42(1)(a), 103A, 103B(1)(a).

²³ Copyright Act 1968 (Cth), §§ 40(2), 103C(2).

²⁴ Section 200AB (for libraries and archives, educational institutions, and users with a disability) departs from the detailed, purpose-specific approach that characterizes many existing Australian exceptions. While not as open-ended in its drafting as the US fair use doctrine, it was intended to confer some of the benefits of a flexible exception. For discussion, see, e.g., Emily Hudson, *The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions* 14(4) AUSTRALIAN L. LIBRARIAN 25 (2006); Melissa De Zwart, *The Copyright Amendment Act 2006: the new copyright exceptions* 25(1) COPYRIGHT REP. 4, 12-15 (2007).

²⁵ For discussion on the desirability and consequences of drafting legal regulation in the form of a standard or a rule see, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking* 3(1) THE JOURNAL LEGAL STUD. 257 (1974); Louis Kaplow, *Rules versus Standards: An Economic Analysis* 42(3) DUKE L.J. 557 (1992).

of activity.

Other statutory limitations further narrow the scope of fair dealing; for instance, the criticism and review exceptions only apply where the relevant criticism or review is *of that, or another, work or audio-visual item*.²⁶ This limits the capacity of documentary film makers to use copyright material to illustrate broader themes, under the rubric of fair dealing. For instance, a film criticizing the role of the Governor-General in the infamous dismissal of the Australian government in 1975 may benefit from archival footage; however, fair dealing would not seem to apply in the absence of any criticism or review of that footage, or its underlying thoughts and ideas.²⁷

D. Restrictive interpretation of purposes

In Australia, the risk of under-inclusive operation seems to have been realized all the more so, due to case law that has interpreted the fair dealing provisions relatively narrowly. This narrow interpretation includes, first, the holding that when deciding whether the taking serves a relevant purpose, the court can refer only to the motivation of the alleged infringer (and not to the use by the recipient, reader, viewer, etc.), and second, the recourse to relatively narrow, dictionary definitions of terms like “research,” “criticism” and “review.” These approaches are problematic because they shut down arguments based on agency or the facilitation of a transaction within an approved purpose, and they do not make use of the potential flexibility that exists in the language of fair dealing.

Both of these failings can be illustrated by reference to *De Garis v. Neville Jeffress Pidler*.²⁸ The defendant operated a media monitoring business: it created and supplied copies of newspaper articles to its clients for a fee. The defendant sought to defend proceedings alleging copyright infringement by arguing (amongst other things) that its activities constituted fair dealing for the purpose of research or study, or criticism or review. These defenses failed, a result that does not seem unreasonable, given the commercial context in which the reproductions were made. In reaching this conclusion, however, Judge Beaumont held that: (1) the intended use of the

²⁶ Copyright Act 1968 (Cth), §§ 41, 103A.

²⁷ To emphasize, there is authority from the UK that the criticism of a work can relate to its underlying thoughts or philosophies. *See* *Hubbard v. Vosper* [1972] 2 Q.B. 84. Ultimately, however, the criticism must still be directed at ‘a work,’ and not something more general like a politician’s behaviour. There is UK authority for this point. *See* *Ashdown v. Tel. Group Ltd.* [2001] R.P.C. 659. In that case, reproduction of part of a confidential minute of a meeting held between two politicians was held not to constitute fair dealing, on the basis that there was no criticism or review of the work itself—i.e., the minute—other than the actions of the Prime Minister and the claimant.

²⁸ *De Garis v. Neville Jeffress Pidler Pty Ltd.* (1990) 18 I.P.R. 292.

recipient was irrelevant—the relevant purpose was that of the defendant;²⁹ and (2) the defendant’s activities were not “research,” “criticism” or “review” (which his Honour defined by reference to the Macquarie dictionary), but merely scanning and locating articles for a fee. Importantly, neither of these statements was necessary to decide the case. The judge could have held that whether or not the defendant was participating in research (either itself, or on behalf of its clients), the circumstances of the conduct—in particular, the charging of a commercial fee—meant that the dealing was not fair.

The situation was muddled further by the trial court and first Court of Appeal decisions in *The Panel Case*.³⁰ Proceedings were instituted by Channel Nine in relation to the use of excerpts of Channel Nine programs on Network Ten’s irreverent “infotainment” chat show, *The Panel*.³¹ At first instance, Network Ten succeeded in arguments that it had not re-broadcast a “substantial part” of any Nine programs (and had not, therefore, infringed on a copyright), although Judge Conti indicated how he would have ruled on fair dealing. On appeal, the findings on infringement were reversed,³² and fair dealing became a live issue. Network Ten’s arguments were successful in relation to some, but not all, extracts.

The fundamental problem with the first instance and court of appeal decisions was their failure to provide any clarity on the law of fair dealing in Australia.³³ The trial judge identified various “principles” governing fair dealing, drawing in particular from UK case law, but did not properly discuss the circumstances in which those statements were made or how those principles interrelated.³⁴ On appeal, there was no meaningful attempt to discuss the underlying principles of fair dealing at all. Furthermore, all decisions over-emphasized the analysis of purpose at the expense of any meaningful consideration of fairness.³⁵ The reasoning of all judges appeared

²⁹ See also *Sillitoe v. McGraw-Hill Book Co. (UK)* [1983] F.S.R. 545 (Can.).

³⁰ *TCN Channel Nine Pty Ltd. v. Network Ten Pty Ltd.* (2001) 50 I.P.R. 335; (2002) 190 A.L.R. 468.

³¹ The format of *The Panel* involved a regular group of four to five panelists engaging in humorous and apparently unscripted discussion about a variety of topics, including news, current affairs, sport and politics. A common device was to show excerpts from other television programs, sourced from free-to-air and subscription television channels. Channel Nine identified a series of excerpts from its programs that had been re-broadcast on *The Panel*, and brought an action alleging that this constituted an infringement of Nine’s copyright. These excerpts lasted between 8 and 42 seconds.

³² In a further appeal to the High Court, it was held that the full Federal Court had applied the wrong principles in assessing infringement of copyright in television broadcasts. See *Network Ten Pty Ltd. v. TCN Channel Nine Pty Ltd.* (2004) 218 C.L.R. 273.

³³ See, e.g., *Handler & Rolph*, *supra* note 19.

³⁴ *Id.* at 390-8.

³⁵ *Id.* at 402-5.

impressionistic and ad hoc, and lacking any firm basis that might help guide future analysis—including consideration by filmmakers and other content producers embarking on *ex ante* analysis of whether to rely on a fair dealing argument rather than clear rights.

In contrast, in the 2007 case of *Telstra Corporation Pty Ltd. v. Premier Media Group Pty Ltd.*, Judge Allsop, in denying Telstra’s motion for an interlocutory relief, refused to rule out an argument that the provision of content to third parties was not a fair dealing associated with the reporting of news *by those recipients*.³⁶ This illustrates that the restrictive approach, particular of *De Garis*, does not reflect settled opinion but is an approach that has yet to be overturned by any case, and, hence, continues to inform the behaviour of potential defendants and their legal advisors.

II. FAIR DEALING AND DOCUMENTARY FILMMAKERS

There is not a lot of publicly accessible information in Australia regarding the use of fair dealing by documentary filmmakers. This, of itself, hints that reliance on fair dealing does not constitute a major copyright management strategy (on the basis that an established and accepted practice would be evident in industry publications). To the extent that information on practice is available, it seems to suggest that the prevailing norm is to seek to license all rights. This is not to suggest that fair dealing is irrelevant, but that a number of factors including legal issues (discussed in Section II) and industry attitudes (discussed here) tend to militate against its use.

First, there are the requirements of other entities in the film industry, such as funding bodies, archives, broadcasters and distributors. That is, even if individual producers believe that a robust attitude should be adopted to copyright management, “those who own the money that you need to make the film do not think the same way.”³⁷ Examination of the guidelines of leading Australian funding organizations reveals that such bodies will not, in general, consider or approve a project unless “chain of title”³⁸ has

³⁶ *Telstra Corporation Pty Ltd. v. Premier Media Group Pty Ltd.* (2007) 72 I.P.R. 89, 98. Telstra had acquired exclusive rights in relation to the communication of footage from national rugby league matches over the Internet and 3G mobile phones. Telstra instituted proceedings in relation to sports news content created by PMG for use on the Fox Sports website and by mobile telephone suppliers Hutchison and Vodafone. This content included extracts of up to two minutes from each game. PMG argued that its use fell within section 103B: fair dealing for the purpose of reporting the news.

³⁷ Shane Simpson, *Establishing the Copyright Chain of Title*, speech given to the seminar *Entertainment Law—Advanced* held by the Screen Producers’ Association of Australia, March 20 1997.

³⁸ The Film Victoria website defines ‘chain of title’ as ‘a series of documents which

been documented. The Investment Guidelines of Film Finance Corporation (which, since July 1, 2008, is part of Screen Australia) are typical:

[10.4] Producers must establish clear rights to all works required for the making and exploitation of the project. . . . The FFC will require chain of title documentation before the project is considered for investment.³⁹

Filmmakers wishing to source content from archives may also find that, in the absence of evidence of a copyright license, those archives will not release broadcast-quality material for use in their film. According to the Australian Film Commission, this can be particularly significant, given the high levels of orphaned material in collections under its management.⁴⁰ In addition, when producers are negotiating for the broadcast and distribution of their films, they will be required to: (1) grant rights in relation to use of intellectual property; and (2) warrant that they are able to make such a grant, and that exercise by the licensee will not infringe the rights of any third party.⁴¹

Second, to the extent that there is uncertainty in relation to the operation of fair dealing, a producer who wishes to ‘play it safe’ may prefer to license all rights. For instance, the Australian Digital Alliance, in a submission to the Attorney-General’s Department in 2005,⁴² claimed that as a result of statements in *The Panel Case*, industry practice amongst documentary film

establish that you own all the necessary rights (including copyright) to allow you to develop, produce and market your project. Documents which might typically form the chain of title for a project include: Writer’s Agreements; Script Editor’s Agreements; Option and Assignment Agreements (if you are basing the script for your project on someone else’s work, such as a novel); Producer’s Agreements; and Director’s Agreements.’ See Film Victoria Australia, Glossary C, <http://film.vic.gov.au/www/html/900-glossary-c.asp> (last visited Sept. 22, 2008).

³⁹ See Film Victoria, *Industry Development and Investment Content Creation Guidelines: Documentary Development*,

http://film.vic.gov.au/resources/documents/05_guidelines_-_doco_development_august_06.pdf; Screen Tasmania, Guidelines – Production Investment,

http://www.screen.tas.gov.au/funding/programs_new/Special_Initiatives_ProductionInvestment.php; South Australian Film Corporation, Production Investment,

http://www.safilm.com.au/library/PRODUCTION%20INVESTMENT%20Guidelines%202005_2006.pdf.

⁴⁰ Submission of Australian Film Commission to the Copyright Exceptions Review of 2005, at 19-20. See *infra* notes 47-56 and surrounding text.

⁴¹ For examples of the types of rights that broadcasters and distributors require, see, e.g., Australian Broadcasting Corporation, ‘ABCTV doing business brochure’: http://www.abc.net.au/corp/pubs/documents/abctv_doing_business_broch.pdf; Film Australia & Holding Redlich, *Introduction to Copyright and Related Issues for Documentary Film Makers* (2008) 10-13.

⁴² See *infra* Part IV.

makers has been revised so that “licenses are obtained as a matter of course even if only a few seconds of footage are being copied.”⁴³ This conservatism is also reflected in some legal guidelines directed at film makers. For instance, the copyright guide prepared for the Sony Tropfest Short Film Festival described fair dealing as “quite narrow” and noted that “it’s often safer to ask for permission to use the work.”⁴⁴ In a copyright guide for documentary film makers prepared by Film Australia and lawyers, Holding Redlich, the analysis of fair dealing was brief and reflected relatively conservative understandings of the law.⁴⁵

Finally, filmmakers have been advised to clear all rights whenever international distribution is contemplated, on the basis that exceptions that operate in Australia may have no equivalent in overseas jurisdictions.⁴⁶

In short, there is a commercial imperative, based on investment and distribution structures, risk aversion in response to legal uncertainty, and lack of international harmonization of exceptions, for filmmakers to embrace ‘documented certainty’ through licensing and assignment of rights. While filmmakers operating outside dominant structures may have more leeway to adopt new approaches to rights management, they may encounter problems if they later wish to seek funding from, or have content distributed by, “traditional” entities.

III. FUTURE OF THE FAIR DEALING PROVISIONS

This report has observed that current evidence suggests fair dealing is not particularly relevant to Australian documentary filmmakers. However, it is not clear whether filmmakers consider the emphasis on rights clearance a problem that needs to be solved, rather than an annoying, but inevitable, component of documentary filmmaking.

For instance, in 2005, the federal Attorney General’s Department undertook a review of copyright exceptions.⁴⁷ Two key questions underscored the review: first, whether the current suite of exceptions are

⁴³ Submission of the Australian Digital Alliance to the Copyright Exception Review of 2005, at 18. A similar statement was made in the submission of the Copyright in Cultural Institutions (CICI) Group, at 10. *See infra* notes 47-56 and surrounding text.

⁴⁴ Sony Tropfest 2008 and Music Industry Piracy Investigations, Sony Tropfest Filmmaker’s Guide to Music and Copyright, <http://www.tropfest.com/documents/sonytropfestcopyrightguide.pdf>.

⁴⁵ Film Australia & Holding Redlich, *supra* note 41; *see also supra* notes 6-8.

⁴⁶ *See, e.g.*, Australian Copyright Council, *FILM & COPYRIGHT 9* (2003); Film Australia & Holding Redlich, *supra* note 41, at 14.

⁴⁷ *See* Attorney General’s Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age: Issues Paper* (May 2005), available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005

sufficient, particularly given changes in the digital environment;⁴⁸ and second, if the exceptions are not sufficient, whether this is best remedied through the mechanism of further closed-ended exceptions and/or the introduction of a flexible exception in the style of fair use.⁴⁹ While the Issues Paper focused primarily on private copying—as did many of the 160 submissions⁵⁰—many other concerns were ventilated by respondents, such as the legal treatment of “orphan works.” *No submissions dealt exclusively or even primarily with the position of documentary filmmakers*, although issues with producing, preserving, accessing and distributing film were referred to by peak bodies,⁵¹ cultural institutions⁵² and television networks.⁵³ A few submissions noted that, amongst film makers, licenses are obtained “as a matter of course,” even where only small amounts of footage are taken.⁵⁴ More generally, submissions highlighted the impact of transaction costs and orphaned material on those clearing rights—including for the production of film. For instance, the submission of the Arts Law Centre of Australia, which runs legal advice, education and advocacy services for artists, noted that one issue “commonly raised by Arts Law clients” was:

the difficulty experienced tracing some current copyright owners, especially those of old unpublished texts of historical interest such as private letters, and the owners of some copyright material available online. Documentary filmmakers can be particularly affected by the current requirement to obtain permission to use substantial parts of copyright material in circumstances where current exceptions do not apply to their proposed use.⁵⁵

The Screen Producers Association of Australia argued against any expansion of the fair dealing exceptions, on the basis that the existing

⁴⁸ See *id.* at [1.6], [2.9]-[2.10], [11.1]-[11.21].

⁴⁹ *Id.* [1.1], [1.3]-[1.5], [13.1]-[13.6], [14.1]-[14.15].

⁵⁰ See Australian Government Attorney General’s Department, http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005 (providing links to submissions to the Issues Paper).

⁵¹ See, e.g., submissions of: Arts Law Centre of Australia, 7; Australian Digital Alliance, 18; Australian Film Commission, 17-23; Copyright in Cultural Institutions (CICI) Group, 8, 10.

⁵² See, e.g., submissions of: Australian War Memorial, 2-4; National Archives of Australia, 12.

⁵³ See, e.g., submission of: Australian Broadcasting Corporation, 16-17; Network Ten Pty Ltd., 3-4; Special Broadcasting Service Corporation, 6.

⁵⁴ Submission of the Australian Digital Alliance, 18. A similar statement was made in the submission of the Copyright in Cultural Institutions (CICI) Group, 10.

⁵⁵ Submission of the Arts Law Centre of Australia, 7.

provisions were fair and comprehensive. They did note, however, uncertainty in the application of provisions (in particular, the criticism or review exception), and called for further clarification on their content.⁵⁶

In summary, it can be said that Australia's unsatisfactory legal landscape, and a degree of conservatism amongst those in the film industry, appear to have resulted in fair dealing playing only a small role in documentary film making practices in Australia. There are perhaps tentative signs that filmmakers are beginning to re-evaluate the role to be played by the "balancing features" of Australian copyright law, particularly in light of concerns about orphan works. It is possible that this interest may spill over into a renewed interest in the role that fair dealing may have in preventing copyright from stifling creativity within the industry. It must be emphasized, however, that these conclusions are tentative. There is clear need for both more information gathering about industry practices and improved education programs targeted at the sector more generally. Attention also needs to be given to developing a series of illustrative cases of circumstances in which we could be reasonably confident that a fair dealing defense might apply, together with more general and open-ended guidelines.

⁵⁶ Submission of the Screen Producers Association of Australia, 3-4.

APPENDIX: EXTRACTS FROM THE *COPYRIGHT ACT 1968* (CTH)

A. *Part III: Copyright in original literary, dramatic, musical and artistic works*

1. **Division 3:** Acts not constituting infringements of copyright in works

Section 40: Fair dealing for the purpose of research or study

- (1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.
- ...
- (2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the work or adaptation;
 - (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
 - (e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

Section 41: Fair dealing for purpose of criticism or review

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

Section 41A: Fair dealing for purpose of parody or satire

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

Section 42: Fair dealing for purpose of reporting news

- (1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:
 - (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
 - (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.
- (2) The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

Section 43: Reproduction for purpose of judicial proceedings or professional advice

- (1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.
- (2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by:
 - (a) a legal practitioner; or
 - (b) a person registered as a patent attorney under the *Patents Act 1990*; or
 - (c) a person registered as a trade marks attorney under the *Trade Marks Act 1995*.

B. Part IV: Copyright in subject-matter other than works

2. **Division 6:** Infringement of copyright in subject-matter other than works

Section 103A: Fair dealing for purpose of criticism or review

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of criticism or review, whether of the first-mentioned audio-visual item, another audio-visual item or a work, and a sufficient acknowledgement of the first-mentioned audio-visual item is made.

Section 103AA: Fair dealing for purpose of parody or satire

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.

Section 103B: Fair dealing for purpose of reporting news

- (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if:
 - (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the first-mentioned audio-visual item is made; or
 - (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

Section 103C: Fair dealing for purpose of research or study

- (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of research or study.
- (2) For the purposes of this Act, the matters to which regard shall be had in determining whether a dealing with an audio-visual item constitutes a fair dealing for the purpose of research or study include:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the audio-visual item;
 - (c) the possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the audio-visual item; and
 - (e) in a case where part only of the audio-visual item is copied—the amount and substantiality of the part copied taken in relation to the whole item.

Section 104: Acts done for purposes of judicial proceeding

A copyright subsisting by virtue of this Part is not infringed by anything done:

- (1) for the purpose of a judicial proceeding or a report of a judicial proceeding; or

- (2) for the purpose of seeking professional advice from:
 - (a) a legal practitioner; or
 - (b) a person registered as a patent attorney under the *Patents Act 1990*; or
 - (c) a person registered as a trade marks attorney under the *Trade Marks Act 1995*; or
- (3) for the purpose of, or in the course of, the giving of professional advice by:
 - (a) a legal practitioner; or
 - (b) a person registered as a patent attorney under the *Patents Act 1990*; or
 - (c) a person registered as a trade marks attorney under the *Trade Marks Act 1995*.

FAIR DEALING FOR FILMMAKERS: A REPORT ON USER RIGHTS FOR DOCUMENTARY FILM MAKERS IN CANADA

*Jeremy de Beer**

ABSTRACT

This report briefly summarizes the historical evolution, current interpretation and future direction of fair dealing norms in Canada. In the past, restrictive statutory provisions were interpreted narrowly. The Supreme Court of Canada substantially broadened the scope of users' rights of fair dealing with its balanced interpretation in *CCH Canadian Ltd. v. Law Society of Upper Canada*. Efforts are underway to develop best practice guidelines for documentary filmmakers, but they could be undermined by legislative reforms proposed recently.

INTRODUCTION AND OVERVIEW

Fair uses of or dealings with copyrighted works are permitted under the laws of most countries. Fair dealing rights are one of the ways in which the needs of creators and copyright owners are balanced with those of others in society and the public interest in general. Documentary filmmakers are especially and uniquely impacted by the norms of fair dealing, because they are, by definition, simultaneously users and creators of copyrighted content.

In Canada, statutory provisions exist to allow individuals and organizations to deal fairly with works for several specified purposes, including research and private study, criticism and review, and news reporting. In the past, courts had interpreted these provisions narrowly, but a recent case from the Supreme Court of Canada has substantially broadened the scope of fair dealing. While the implications of that decision are still being debated, and guidelines developed on that basis, the Government of Canada has proposed amendments to Canadian copyright law that would impact upon fair dealing rights.

This report provides a short summary of the evolution, current state and potential future developments of fair dealing norms in Canada, with particular focus on documentary filmmaking. It begins with an overview of the statutory and interpretive history of fair dealing in Canada. It then explains the current state of the law, before assessing proposed statutory reforms as well as ongoing efforts to establish best practice guidelines. It concludes with a recap and recommendations for moving forward.

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I. HISTORICAL EVOLUTION

A. *Statutory Provisions*

Canada's current fair dealing provisions can be traced back to the *Canadian Copyright Act 1921*,⁵⁷ which was modelled heavily on the law of the United Kingdom at the time. The 1921 statute provided: "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" shall not be an infringement of copyright.⁵⁸ An updated version of the *Act* from 1970 employed similar language.⁵⁹

This relatively rigid pigeonhole approach drew criticism in reports drafted for the Canadian government in the early 1980s.⁶⁰ Commentators recommended moving toward a more flexible "fair use" standard based upon an American model. That advice, however, was rejected by the government committee then responsible for copyright reform.⁶¹ The committee felt that the paucity of litigation was evidence of the success of the *status quo*, though modern scholars point out that the absence of case law might be better seen as a symptom of the impotence of fair dealing rights.⁶²

Thus, the modern law of fair dealing in Canada is stated mainly in sections 29, 29.1 and 29.2 of the current *Copyright Act*, reproduced in Appendix A to this report. Section 29 permits fair dealing for purposes of "research or private study"; section 29.1 allows "criticism and review"; and section 29.2 relates to "news reporting." Notably, these last two categories come with a statutory requirement for attribution of source and authorship to qualify as fair dealings.

As recently as 1990, attempts at further statutory reform of fair dealing in Canada have failed. Bill C-316, which would have moved Canadian fair

⁵⁷ The Copyright Act 1921, 1921 S.C., ch. 24 (Can.).

⁵⁸ *Id.* § 16(1)(i).

⁵⁹ 11-12 Geo. V., ch. 24, § 17(2).

⁶⁰ See JUDY EROLA & FRANCIS FOX, FROM GUTENBERG TO TELIDON: A WHITE PAPER ON COPYRIGHT (Consumer & Corporate Affairs Canada, 1984); BARRY TORNO, FAIR DEALING: THE NEED FOR CONCEPTUAL CLARITY ON THE ROAD TO COPYRIGHT REVISION, (Consumer & Corporate Affairs Canada, 1981).

⁶¹ CANADA, STANDING COMMITTEE ON COMMUNICATION AND CULTURE, A CHARTER OF RIGHTS FOR CREATORS, (Minister of Supply and Services, 1985).

⁶² Carys Craig, *The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW, 437 (Michael Geist ed., 2005), available at <http://www.irwinlaw.com/PublicInterest/three_1_craig.htm>.

dealing closer to the law as it is in the U.S., was withdrawn before it could become law.⁶³ A comprehensive report on the operation of the *Copyright Act* prepared by the Canadian government in 2002 mentioned the lingering possibility of an amendment to broaden fair dealing, but nothing immediate came of that suggestion.⁶⁴ Most recently, the government has introduced a Bill proposing minor reforms to permit limited time and format shifting of some types of content as fair dealing.⁶⁵ That proposal is discussed in more detail below.

Before moving on, it is worth mentioning two other somewhat new statutory provisions relevant to documentary filmmaking, which are also reproduced in Appendix A to this report. Section 30.7 allows the incidental inclusion of one work in another, such as incidentally and unintentionally including some or all of an audio, visual or other work in a documentary film. Moreover, filmmakers are expressly permitted under subsection 32.2(1) of the *Copyright Act* to include a sculpture or architectural work (*i.e.*, a building) in a cinematographic work of their own. Unlike Canada's fair dealing provisions, however, these latter exceptions have received little or no judicial attention.

B. Judicial Application

Throughout the 20th century, Canada's fair dealing provisions were interpreted restrictively in most cases. One of the best examples is a case concerning the possibility of a parody defence under fair dealing. The Trial Division of the Federal Court of Canada held that the express exception for "criticism or review" could not include parody because:

American case law permitting parody as criticism under the American doctrine of "fair use" is not applicable nor terribly persuasive in the Canadian context of a different legal regime and a longstanding trend to deny parody as an exception. As well, exceptions to copyright infringement should be strictly interpreted.⁶⁶

That decision has been criticized sharply by Canadian scholars,⁶⁷ and as

⁶³ *Id.*

⁶⁴ INDUSTRY CANADA, SUPPORTING CULTURE AND INNOVATION: REPORT ON THE PROVISIONS AND OPERATION OF THE COPYRIGHT ACT, B.2.8. (2002), available at <http://strategis.ic.gc.ca/epic/site/crp-prda.nsf/en/rp00873e.html#B2_8>.

⁶⁵ An Act to Amend the Copyright Act, Bill C-61, 2d Sess., 39th Parliament, 56-57 Elizabeth II (2008), available at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3570473&file=4>>.

⁶⁶ *Companie Générale des Établissements Michelin - Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, [1997] 2 F.C. 306, ¶ 64, available at 1996 F.T.R. LEXIS 2163.

⁶⁷ See David Fewer, *Constitutionalizing Copyright* [1997] 55(2) U. TORONTO FAC. L. REV. 175; Jane Bailey, *Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process*, in IN THE PUBLIC INTEREST: THE FUTURE OF

discussed below, it may no longer reflect the law in Canada. However, it does reflect the pattern of previously narrow judicial interpretations of Canada's fair dealing provisions.

Another example of judicial attitudes toward fair dealing can be found in the case where a substantial portion of an interview with country music star Shania Twain was copied. The judge in that case remarked that "the use contemplated by private study and research is not one in which the copied work is communicated to the public."⁶⁸ In another case, this one involving the category of criticism and review, it was held that fair dealing requires, at minimum, something other than merely condensing another person's work.⁶⁹

It should be noted that for historical, legal and cultural reasons, British cases have had a persuasive though not authoritative influence on Canadian law. For that reason, several British decisions might be mentioned as relevant to fair dealing for Canadian filmmakers. Specifically, a British court held that the use on television of clips, ranging from 30 seconds to 8 minutes long, from other films or programs constitutes fair dealing.⁷⁰

II. CURRENT INTERPRETATIONS

A. *The Leading Authority: CCH v. LSUC*

In 2004, the Supreme Court of Canada's decision *CCH Canadian Ltd. v. Law Society of Upper Canada*⁷¹ radically changed the law of fair dealing in Canada. As such, it is worthwhile explaining the case in some detail.

The lawsuit was brought by some of Canada's largest publishers of legal materials such as case reporters, journals and books. They sued the Law Society of Upper Canada, a professional organization representing roughly 30,000 lawyers in the province of Ontario, for activities carried out at or by its "Great Library," whose vast collection of resources is available to the lawyers, judges and other researchers province-wide. It was the Library's practice to offer to make single copies of works and deliver those copies in person, by mail or by fax to researchers requesting them. The Library also maintained freestanding photocopiers on its premises, which could of course be used for a variety of infringing or non-infringing purposes. When

CANADIAN COPYRIGHT LAW 125 (Michael Geist ed., 2006), available at <http://www.irwinlaw.com/PublicInterest/two_2_bailey.htm>.

⁶⁸ Hager v. ECW Press Ltd. et. al. [1998], 85 C.P.R. (3d) 289.

⁶⁹ The Queen v. James Lorimer & Co. [1984], 77 C.P.R. (2d) 262 (F.C.A.).

⁷⁰ Pro Sieben AG v. Carlton UK Television Ltd., [1999] 1 W.L.R. 605; Time Warner Entm't Co. v. Channel Four Television Corp. [1993], 28 I.P.R. 456 (C.A.).

⁷¹ File 29320, 2004 SCC 13 (Mar. 4, 2004), available at <<http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html>>.

the Law Society refused to capitulate to the publishers' demands for a licensing deal, litigation ensued.

The Federal Court Trial Division agreed with the publishers that the Library's activities could not be fair dealing, based on the traditional strict construction of an exception to copyright protection. The Federal Court of Appeal disagreed, suggesting that fair dealing might apply, but declined to rule that all of the Library's various activities on behalf of patrons in different circumstances were non-infringing. The Supreme Court sided with the Court of Appeal, but went even further. The Court declared that the written policy guidelines drafted and followed by the Library when the Library provided copies was sufficient to immunize it from liability. As long as the Law Society took reasonable steps to prevent abuse of its system, it was not responsible for occasional infringements that might ultimately occur.

Contrary to earlier cases, the Court called fair dealing "a user's right" that deserves a "fair and balanced reading."⁷² The category of fair dealing for research, therefore, was not limited to non-commercial private research. Lawyers carrying on the business of law for profit, according to the Court, fell within the ambit of the fair dealing provisions.⁷³

Moreover, though the Library itself wasn't conducting the research (its patrons were), the Law Society was allowed to be what I've described as a "fair dealing facilitator."⁷⁴ In this respect, Canadian law seems to be more flexible than the law in the United States,⁷⁵ Britain,⁷⁶ Australia⁷⁷ and New Zealand,⁷⁸ for example.

The Court held that to be permissible, a dealing must not only fall within an enunciated category (reasonably defined), it must also be "fair." Here, the Supreme Court adopted the list of factors described by Justice Linden of the Federal Court of Appeal, which itself was derived from a combination of British case law and the United States Code.⁷⁹ The following factors were endorsed by the Supreme Court of Canada as relevant to an assessment of fair dealing. Not all will arise in every case, and there is no particular hierarchy of considerations. The 'fairness factors,' as I call them, are:

- (1) the purpose of the dealing;

⁷² *Id.* at ¶ 48.

⁷³ *Id.* at ¶ 51.

⁷⁴ Jeremy de Beer, *Legal Strategies to Profit from Peer Production* [2008] 46 CAN. BUS. L.J. 269, 278-9.

⁷⁵ *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

⁷⁶ *Sillitoe and Others v. McGraw-Hill Book Co.* (U.K.), [1983] F.S.R. 545 (Ch. D.).

⁷⁷ *De Garis v. Neville Jeffress Pidler Pty. Ltd.* [1990], 37 F.C.R. 99.

⁷⁸ *Longman Group v. Carrington Technical Inst. Bd. of Governors*, [1991] 2 NZLR 574 (H.C.).

⁷⁹ *See, e.g., Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) 17 U.S.C. § 107 (year).

- (2) the character of the dealing;
- (3) the amount of the dealing;
- (4) alternatives to the dealing;
- (5) the nature of the work; and
- (6) the effect of the dealing on the work.⁸⁰

The Court spent several pages explaining and applying these considerations to the facts of the case, and ultimately determined that dealings under the Library's guidelines were fair.

In a nutshell, because of *CCH v. LSUC*, the Canadian law of fair dealing has changed dramatically. Though it is still necessary for a dealing to fall within particular pigeonholes to be allowed, the categories are now defined reasonably rather than restrictively. And a flexible, open-ended list of fairness factors now provides guidance on how a court is likely to rule in any particular case.

B. Most Recent Cases

Some courts have recently failed to fulfill the potential of the *CCH v. LSUC* case. Last year, a Québec court held that copyright apparently always trumps expression, thus limiting available user rights including fair dealing.⁸¹ On the other hand, in the context of a tariff-setting decision, the Copyright Board of Canada held that online music services need not pay licence fees to offer prospective customers 30-second song samples because customers would be dealing fairly with the works in researching potential purchases.⁸² This decision is currently pending review by the Federal Court of Appeal. A decision is not expected until at least late 2008 or more likely 2009.

III. FUTURE DIRECTIONS

A. Best Practice Guidelines

While lawyers cautiously advise their clients and judges slowly advance the law, there are significant efforts underway to establish a clearer and more predictable legal framework for filmmakers. These efforts have so far been spearheaded by the Documentary Organization of Canada (DOC).

The first step was to study the scope of the problem by conducting a

⁸⁰ *CCH v. LSUC*, *supra* note 71, ¶53.

⁸¹ *Corp. Sun Media v. Syndicat canadien de la fonction publique*, 2007 QCCS 2943, <<http://www.canlii.org/fr/qc/qccs/doc/2007/2007qccs2943/2007qccs2943.html>>.

⁸² STATEMENT OF ROYALTIES TO BE COLLECTED BY SOCAN FOR THE COMMUNICATION TO THE PUBLIC BY TELECOMMUNICATION, IN CANADA, OF MUSICAL OR DRAMATICO-MUSICAL WORKS (18 October 2007), *available at* <<http://www.cb-cda.gc.ca>>.

survey of documentary filmmakers in Canada.⁸³ In late 2006, based partly on the results of that survey, copyright expert Howard Knopf prepared a white paper that outlined the applicability of copyright law, including fair dealing, to documentary filmmakers.⁸⁴ The paper's objectives were to provide a general overview of the law and practice in Canada, and to make concrete recommendations for law reform. A key theme throughout the report was that lawyers and filmmakers can and should be less risk averse given the various user rights that exist under Canadian copyright law.

Building on this work, DOC, with the help of the Canadian Internet Policy and Public Interest Clinic (CIPPIC), has held consultations on a document, "Copyright and Fair Dealing: Guidelines of Documentary Filmmakers."⁸⁵ These guidelines were presented and discussed at the 2007 Hot Docs festival in Toronto, Ontario. A polished and public version is expected to be available soon.

Scholars have suggested that efforts to create practice guidelines, like those being developed by DOC, are the best way to facilitate use of the fair dealing provisions in Canada.⁸⁶ Others, however, believe that statutory reform is needed to properly recalibrate fair dealing under Canadian copyright law.⁸⁷

B. Statutory Reform

Efforts to meaningfully reform fair dealing under Canada's *Copyright Act* have for decades been unsuccessful. Reforms proposed by the then Liberal government in 2005 contained no changes to the *Act's* core fair dealing provisions.⁸⁸

The most recently proposed legislation, Bill C-61, tabled by the current Conservative government on 12 June 2008, would make minor changes to fair dealing. However, any positive effects of the proposed changes would

⁸³ Kirwan Cox, *Censorship by Copyright: Report of the DOC Copyright Survey* (November, 2005), available at <<http://www.docorg.ca/pdf/Censorship%20by%20Copyright%20Survey%20Report.pdf>>.

⁸⁴ Howard Knopf, *The Copyright Clearance Culture and Canadian Documentaries*, (2006), available at <<http://www.docorg.ca/pdf/Dec3-06%20HPK%20White%20Paper%20Final%20November%2022%202006.pdf>>.

⁸⁵ DOC, *COPYRIGHT AND FAIR DEALING: GUIDELINES FOR DOCUMENTARY FILMMAKERS*, (November, 2007), draft on file with author.

⁸⁶ Pina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use* (September 13, 2007), CLPE Research Paper No. 28/2007, available at <<http://ssrn.com/abstract=1014404>>.

⁸⁷ Craig, *supra* note 62.

⁸⁸ An Act to amend the Copyright Act, Bill C-60, 1st Sess., 38th Parliament, 2005, cl. 29.

be negligible for filmmakers. The new provisions would merely permit activities such as format shifting and time shifting, and even then, only under strictly limited circumstances.⁸⁹

Much more problematically for filmmakers, the Bill contains provisions that would make technological protection measures sacrosanct, prohibiting most acts of circumvention and most kinds of circumvention devices.⁹⁰ The penalty under the proposed law for circumventing TPMs in a commercial context is up to \$1,000,000 and 5 years in prison. It is terrifically unclear what might constitute a commercial context. Documentary filmmakers have legitimate cause to fear that the content necessary to continue making world-class films in Canada would be locked down and inaccessible if the proposal passes into law. For that reason, DOC has already been highly critical of Bill C-61.⁹¹

CONCLUSIONS AND RECOMMENDATIONS

The law of fair dealing in Canada was radically transformed by the Supreme Court's decision in *CCH v. LSUC*. A restrictive interpretation of Canada's fair dealing provisions is no longer required. To the contrary, the provisions should receive a balanced interpretation.

While lawyers and judges struggle to apply the Court's ruling, scholars and filmmakers themselves are establishing guidelines for best practices. These efforts should continue. Once the guidelines have been fully developed, energies should be directed at continued education of filmmakers about the guidelines and about copyright more generally. Work with other organizations should also be a priority, including industry executives, collective licensing agencies, insurance companies, the Copyright Board and more.

Law reform is essential if the potential of Canada's fair dealing provisions is to be maximized. Canada's current pigeonholes of research and private study, criticism and review and news reporting will be more broadly interpreted than in the past, but are still restrictive. The potential of Bill C-61 to promote a commercial culture and legal environment of digital lock-down is extremely problematic for documentary filmmakers. Continued efforts at influencing law reform ought to be carried out simultaneously with the work on best practices and education described above.

A final option for solving any real or perceived copyright problems faced by documentary filmmakers is test litigation to further clarify the

⁸⁹ Bill C-61, *supra* note 65, § 17.

⁹⁰ *Id.*, *supra* note 65, § 41.1.

⁹¹ DOC, PRESS RELEASE: DOC DEPLORES NEWLY PROPOSED COPYRIGHT LEGISLATION (June 12, 2008), *available at* <http://www.docorg.ca/PR_copyright_bill_2008.pdf>.

scope of fair dealing. This strategy was extremely successful for the Law Society of Upper Canada, though of course is both highly risky and potentially expensive. Nonetheless, it remains an option that ought not be ruled out.

* * *

APPENDIX A: RELEVANT USER RIGHTS CURRENTLY IN FORCE IN CANADA

Copyright Act, R.S.C. 1985, c. C-42

Fair Dealing

Research or private study

29. Fair dealing for the purpose of research or private study does not infringe copyright.

Criticism or review

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

News reporting

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

...

Incidental Inclusion

30.7 It is not an infringement of copyright to incidentally and not deliberately

- (a) include a work or other subject-matter in another work or other subject-matter; or
- (b) do any act in relation to a work or other subject-matter that is incidentally and not deliberately included in another work or other subject-matter.

...

Miscellaneous

32.2 (1) It is not an infringement of copyright

...

- (b) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work
 - (i) an architectural work, provided the copy is not in the nature of an architectural drawing or plan, or
 - (ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building;

FAIR DEALING AND DOCUMENTARY FILM IN INDIA

Lawrence Liang^{*}

INTRODUCTION

Despite having the largest film industry in the world, the documentary film scene in India has existed largely at the fringes of the mainstream industry. In the initial decades of postcolonial India, documentary films were largely controlled by the state through the National Films Division.⁹² The independent documentary scene started gaining importance as an alternative source of information and analysis in the seventies after the internal emergency in India. In the last two decades, documentary film has gained political and cultural importance. A number of documentary filmmakers have been at the forefront of campaigns, including the anti-censorship movement. Additionally, with the onset of digital video, we have seen a dramatic increase in the number of documentary filmmakers in India.

Infrastructure, distribution and finance problems continue to plague documentary film. The advent of the cable revolution of the 90's did little to mitigate the problems of exhibition, as most of the television channels tended to move towards film and entertainment.

While filmmakers continue to rely on grants from donor agencies, international support and individual finances to support their films, they rely on independent screenings to exhibit their films. It is with this background of the larger problems that plague India's documentary film industry that we can begin to examine the question of the legal infrastructure.⁹³

While the primary problem that has occupied documentary filmmakers is censorship, the question of copyright has, in recent times, troubled film makers as well. Documentary filmmakers have always relied on the ability to use existing film footage, music, and images as a part of their films. Although the digital era has made the use of pre-existing material easier, it has also been accompanied by the growth of copyright consciousness. This note examines some of the tensions produced, as well as future areas of research and intervention.

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⁹² See, B.D. GARG, FROM RAJ TO SWARAJ: THE NON-FICTION FILM IN INDIA, (2007).

⁹³ In 2006, the Alternative Law Forum submitted a review of the Proposed Amendment to the Copyright Act on behalf of a number of organizations including the Independent Documentary Producer's Association (IDPA). These comments are available at http://www.altlawforum.org/ADVOCACY_CAMPAIGNS/copyright_amdt.

I. EXCEPTIONS AND LIMITATIONS IN THE COPYRIGHT ACT

As in many other former colonies, copyright was introduced into India as a part of the colonial legal administration. The Copyright Act in India therefore mirrors the English statute in many regards. However, some of its key exceptions and limitations were specifically designed with the needs of a developing country in mind. Section 52 of the Copyright Act, which deals with fair dealing, is a fairly elaborate provision that covers a wide gamut of exceptions to copyright. What distinguishes the Indian position on fair dealing from that of the US is the fact that, while the US code provides for a set of guidelines that determine the ways in which fair use should be interpreted, the Indian Act does not specifically state any such principles. Instead, section 52 of the Act provides a very detailed outline of the various uses that may be considered fair dealing, and hence, are not acts of infringement; the principles have to be gleaned from the handful of cases that exist on fair dealing. In addition to fair dealing under Section 52, the Act provides for compulsory and statutory licensing of works, which are withheld from the public.⁹⁴

An analysis of the various exceptions that are provided for in section 52 reveals that the core philosophical consideration guiding section 52 is the idea of equitable access. A number of the exceptions, therefore, deal with the question of availability of materials, for educational use and non-commercial use, in libraries in India. This is also mirrored in the compulsory licensing provision. According to Professor N.S. Gopalakrishnan, a member of the Drafting Committee of the Copyright Act, a number of the provisions in section 52 were included from the perspective of a developing country, keeping the educational requirements of the country in mind.⁹⁵ It is important to bear in mind that the difference behind the normative basis of Access and that of Reuse, the significance of which we shall return to shortly in our examination of fair dealing for film makers.

There are also certain provisions that were introduced in 1984 and 1991, keeping in mind the then burgeoning music and computer industry in India.⁹⁶ So, it could be said that while the fair dealing provision in India

⁹⁴ See The Copyright Act, No. 14 of 1957, § 31; INDIA CODE, available at <http://www.indiacode.nic.in> (setting forth the rule regarding “[c]ompulsory works withheld from public”).

⁹⁵ Personal conversation with the author. See *id.* § 52(o) (allowing for “the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India”).

⁹⁶ Section 52(1) (ab) for instance effectively allows for reverse engineering. It allows for “the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme, provided that such information is not

has been fairly strong with respect to education and political economy, the provision is considerably weaker when it comes to understanding cultural production, particularly in the digital era. This is perhaps the lacuna that most seriously affects documentary film makers.

The most significant provision is section 52(1)(a) which allows for (i) private use, including research; and (ii) criticism or review, whether of that work or of any other work. The words “criticism” and “review” are critical because, in the case of literary works, artistic works, etc., they would include using extracts, etc. This provision is, however, not applicable to cinematograph films or sound recordings. The only exception in section 52 for cinematograph films is the ability of educational institutions to show films to their students and staff. While there are a number of exceptions for sound recordings, they are not related to the kind of uses that filmmakers would be interested in.

II. FAIR DEALING AND FILM

The absence of cinematograph films and sound recordings from works that are excepted from copyright protection in the case of personal use, research, criticism and review is curious, but not mala fide. Perhaps, it has to do more with the technological conditions that prevailed when the Act came into place. While there were set precedents for the importance of quotation in the domain of books, it was hardly imaginable that people would be able to use clips of films and music in their work.

So what then is the current positioning of this Bermuda triangle in the fair dealing provision on cinematograph films and sound recordings? One could take an approach of a 'strict interpretation' in which case copyright owners could argue that because films and sound recordings are excluded from the ambit of section 52(1)(a), then there can be no fair dealing with them in any manner. This would be based on a cumulative reading of section 51 with sections 2(f), 2(ff) and 14(d). Section 14 provides that only the owner of the copyright in a film has the right:

To make a copy of the film, including the photograph of any image forming part thereof.

Alternatively, one could look at a more liberal reading of the law, where it could be argued that what is prohibited is merely the reproduction of the work as a whole. But this might be a little tricky given that the definition of a cinematograph film includes “any image forming part

otherwise readily available”. While section 52(1)(j)(i) allows for version recording, which helped break the monopoly that HMV had on the music industry in India.

thereof.” Our argument that section 52(1)(a), in spirit, includes cinematograph films and sound recordings, and was perhaps a technological oversight is supported by the fact that the proposed amendment to the Copyright Act changes the restrictive language of the current provision to include all works.

The current situation as it stands, therefore, means that filmmakers do not have recourse to a fair dealing defense if they are accused of infringing copyright. In the absence of a specific provision that allows them to use pre-existing material, the only option available to filmmakers is to seek permission from owners of copyright directly. There are three possibilities in this route:

1. a no-strings, royalty-free permission (This is the most unlikely, given the drive to commercially exploit all forms of media. Film makers have testified that the only way they are able to use footage from news channels’ archives is by paying hefty fees.);
2. permission conditioned on payment of a royalty; and
3. denial of permission (This will lead to a whole range of interesting possibilities both from the Copyright Act and from the right to freedom of speech and expression.).

The experience of filmmakers who have sought copyright permission has not been very encouraging, as copyright owners have little understanding of the distinction between mainstream commercial films, ad films, and documentary films. Two years ago, we provided assistance in case where a filmmaker who was creating a short animation film on Mahatma Gandhi for the Gandhi Foundation wanted to use a ten-second soundtrack of a performance by Kumar Gandharva. Her total budget for the film was Rs. 100,000 (approx \$2,500), but was asked to pay Rs. 25,000 (approx \$600) for the ten-second clip. There are many other similar instances where filmmakers have been asked to pay unreasonable royalty fees; given the extremely tight budgets with which filmmakers work, the question of paying a royalty is not a feasible option.

It is also important to note the distinction between the de jure system and the de facto system, where, even though the law has been around for decades, it is only in the recent past that people have started worrying about this distinction. In the past, filmmakers simply used clips they needed for their films without worrying about being sued or having to pay a royalty. Their belief was that, since the audience for documentary films was so small, it was unlikely that anyone would even bother to sue. The shift in

mindset has arisen as a result of three developments:

1. When Indian filmmakers submit their films to international festivals and competitions, they are often asked to sign an indemnity form which states that they have received copyright clearances for all the works that they have used or incorporated in their films. Festivals in the United States and Europe are reluctant to accept entries that have not sought copyright permission.
2. Collecting societies and producers have increased their enforcement of copyright.
3. Ironically, an increased awareness of copyright amongst documentary filmmakers themselves. Filmmakers have started using the rhetoric and language of copyright in speaking about their own films; this awareness creates a situation in which they themselves do not want to fall afoul of copyright while making their films.

The serious challenge for IP activists and filmmakers is the manner in which we can introduce specific exceptions into the Copyright Act for use of pre-existing material by documentary filmmakers. While this may take long-term advocacy, the immediate concern would be to ensure that the amendment to section 52 extending the scope of personal use, criticism and review to cover cinematograph films and sound recordings is passed.

Assuming that section 52 is amended to cover films, the question is whether the amendment would be an adequate defense for filmmakers using pre-existing material. To determine this, we would have to examine the scope of criticism and review as fair dealing. Unfortunately, there are very few cases that deal with the issue. The only case to consider the point at some length is *Civic Chandran v. Ammini Ammai*.⁹⁷ In this case, the defendant, Civic Chandran, took an iconic Communist play *Ningal enna communistakki*, written by Thoppil Bhasi, and created a counter drama which was a critique of the original play.

Thoppil Bhasi's legal representatives filed an injunction suit against the defendant, arguing that Chandran's play copied the characters and scenario from the original play, thereby amounting to an adaptation (or derivative work). Civic Chandran argued that a counter drama was a recognized literary genre, in which a play is counter-posed by using the same characters and themes. Chandran noted that even Thoppil himself had used it in the past.

The judges held that when determining infringement, one had to examine the intention behind the act of reproduction, and if the

⁹⁷ (1996) 16 PTC 670.

reproduction is done with the intention of criticizing the original work, then it could not be said to be an act of infringement. The court stated that:

Accordingly, it may be reasonable to hold that the re-production of the whole work or a substantial portion of it as such will not normally be permitted and only extracts or quotations from the work will alone be permitted even as 'fair dealing'. In the circumstances, the quantum of extracts or quotations permissible will depend upon the circumstances of each case. It may not be proper to lay down any hard and fast rules to cover all cases where infringement of copyright is alleged on the basis of extracts or quotations from the copyrighted work. In a case like the one on hand, courts will have to take into consideration (1) the quantum and value of the matter taken in relation to the comments or criticism; (2) the purpose for which it is taken; and (3) the likelihood of competition between the two works.

The judges approved the test laid down in *Hubbard v. Vosper*, (1972) 2 W.L.R. 389:

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then, you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But after all is said and done; it must be a matter of impression.

The critical question is whether *Civic Chandran* would apply to filmmakers using film and music clips if section 52 were amended to include cinematograph films. While section 52 seems to frame the idea of fair dealing rather narrowly through the use of the word criticism and review, the *Chandran* decision seems to have a broader understanding of fair dealing. It remains to be seen whether the criteria for fair dealing laid out in *Chandran* will stand in any future challenge to use of pre-existing material by filmmakers.

CONCLUSION

One of the challenges for future action in India on fair dealing and films is to enthruse documentary filmmakers to take it up as a campaign

issue. In the early 21st century, the experience of censorship saw documentary filmmakers coming together as a part of the anti-censorship movement. There now exist two vibrant online communities of documentary filmmakers (Vikalp and Docuwallahs). Through sustained interaction with these filmmakers, it is possible to pursue reform that enables greater flexibility for filmmakers to use pre-existing material.

* * *

A SHORT SUMMARY ON THE BALANCING FEATURES OF COPYRIGHT LAW FOR DOCUMENTARY FILMMAKERS IN NIGERIA

*Ayodele Kusamotu**

I. BACKGROUND TO NIGERIAN COPYRIGHT LAW

Before the Colonialists' invasion of the Nigerian territories, Nigerian society did not have laws on copyright. The society created and produced cultural goods, namely performances, music, art and stories, which were committed to memory and passed from generation to generation. Many of these cultural products were stolen and taken to palaces, museums, and private homes in the western world. For example, in February 1897, the British army looted the Benin kingdom, stealing bronze sculptures, which have still not been returned to this day.

Nigeria's current copyright law has its origin, concept, ideology and philosophy in the western capitalist system. Arguably, copyright aims to provide maximum gain to the creators. This, however, is diametrically opposed to the jurisprudence of African property rights, which are communalist, socialist and collectivistic.⁹⁸ Many of the African systems are similar to the utilitarian theory of government. Even today, familial and communal ownership of land is recognized under Nigerian Law.

The history of Nigerian copyright law can be divided into three eras: pre-colonial, colonial and post-colonial.

II. HISTORICAL INFORMATION

Nigeria was formerly a British Colony, and it imbibed copyright law through the Colony of Lagos in 1862 by the application of the English Copyright Act of 1842 via Ordinance No. 3 of 1863. Ordinance No. 3 of 1863 applied the Laws of England to Lagos. There is no evidence that this Act was ever applied in Lagos. However, in 1911, the 1842 Act was repealed and replaced by the 1911 Copyright Act, which became applicable in Nigeria by virtue of the Order-in-Council 912 of 1912. The 1911 Act was applicable in Nigeria until 1970.

In 1970, Nigeria introduced her first indigenous Copyright Act. This came in the form of a Decree issued by the Military Government after having suspended the Constitution. In 1972, the Copyright Reciprocal

* Project lead, Creative Commons, Nigeria.

⁹⁸ See J. O. ASEIN & E.S. NWAUCHE, A DECADE OF COPYRIGHT LAW IN NIGERIA 84 (2002).

Extension Order was promulgated. According to Folarin Shyllon, author of *Intellectual Property Law in Nigeria*, the International Intellectual Property Alliance (IIPA), a coalition of U.S. industrial groups, categorised Nigeria amongst the 12 other nations responsible for pirating copyrighted works, resulting in the annual loss of \$1.3 billion in sales to U.S. Companies. It is noteworthy that the 1970 Decree was less restrictive than the 1988 Decree.

The 1988 Copyright Decree (No. 47) was promulgated to amend the 1970 Decree. The 1988 Decree introduced some reform which included an administrative body called the Nigerian Copyright Commission. The Commission was responsible for Copyright matters in Nigeria and anton piller orders.

III. BRIEF OVERVIEW OF COPYRIGHT IN DOCUMENTARY FILM IN NIGERIA

Cinematograph films are eligible for copyright in Nigeria. The extent of effort required for a cinematograph film to be eligible for copyright is not defined in the Act, unlike that for literary, artistic, and musical works.

A cinematograph film includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being reproduced. It also includes the recording of a sound track associated with the cinematograph film. Even though documentary film is not defined in the Act, the definition of documentary by film theorist Paul Rotha is helpful:

Documentary defines not subject or style, but approach. It denies neither trained actors nor the advantages of staging. It justifies the use of every known technical artifice to gain its effect on the spectator. . . . To the documentary director the appearance of things and people is only superficial. It is the meaning behind the thing and the significance underlying the person that occupy his attention. . . . Documentary approach to cinema differs from that of story-film not in its disregard for craftsmanship, but in the purpose to which that craftsmanship is put. Documentary is a trade just as carpentry or pot-making. The pot-maker makes pots, and the documentarian documentaries.⁹⁹

From the foregoing, the act of documenting by film is subject to copyright law. However, contents used in the making of these films may be excepted from copyright clearances if the making of the documentary film falls under the umbrella of the second and third schedules of the Nigerian Copyright Act outlined in Appendix 1.

These exceptions form an implicit part of the law and are otherwise

⁹⁹ JACK C. ELLIS, *THE DOCUMENTARY IDEA: A CRITICAL HISTORY OF ENGLISH LANGUAGE DOCUMENTARY FILM AND VIDEO* (1989)..

referred to as statutorily derived flexibilities or balancing features in the copyright law. This is a very nebulous area of the law often untested by the courts. However, the meanings are easily deciphered by applying the literal rule of interpretation of statutes.

IV. CURRENT STATE OF FLEXIBLE NORMS

It is worth observing that the 1988 Copyright Act extended the term of copyright for cinematograph films from twenty-five years after the end of the year in which the work was first 'recorded' to fifty years after the end of the year in which the work was first 'published.' Not only was the period extended, but the fixation of the work changed from 'recording' to 'publishing,' which gave further protection and extension to the Author.

The extension of copyright in the legislation was in reaction to an outcry by authors that the 1970 Copyright Law did not sufficiently protect 'works' from infringement and piracy.

The balancing features of copyright law are depicted in sections 6(1) and 6(4) and itemized in schedules 2 and 3 respectively.¹⁰⁰ These exceptions are quite extensive and include 'fair dealing.' The difference between fair dealing as a balancing feature and other exceptions in Nigerian Copyright Law is that 'fair dealing provisions' need an assessment of whether the dealing is fair. The courts are usually the determinant of this assessment, but there is a dearth of Nigerian Authorities in this area. Consequently, because Nigeria is a common law jurisdiction, the practice by the English courts will be very instructive. The courts would have to decide if the person is really using the work for the stated purpose.

Due to this uncertainty, it will be necessary to have an international consensus on fair dealing which can be adopted worldwide. Otherwise, there will be a lot of ambiguity and guessing on what is and what is not fair.

A guideline for the Nigerian courts to apply in considering fair dealing is best described by resolution 7, which was pronounced on October 12, 1996 at a National Symposium on Copyright for Judges held at Nicon Noga Hilton Hotel, Abuja. Resolution 7 states:

[T]he control of copyright has exceptions in schedule II of the Act. The test for determining what is fair dealing should be based on quality and not quantity; hence the degree varies from case to case. The following questions may be helpful: is there a conflict between the exploitation of the original work and the alleged copy with regard to sales and the like? Trade practices such as agreed limits suggested by associations on limitations of use and dealing can guide the courts.

¹⁰⁰ See *infra* Appendix 1.

This resolution, however, is not law, but a set of guiding principles. The resolution unfortunately does not provide much guidance except that the boundaries of fair dealing appear to be quite subjective. In my opinion, this guiding principle introduced at the judges' conference suggests that the industry should develop a set of best practices for fair dealing.

Nigerian Copyright Law does not define 'fair dealing.' However, clause (a) of the second schedule excludes, by way of fair dealing, otherwise infringing acts for the purposes of research, private use, criticism, review, or the reporting of current events. It goes further to state that if the use is public, the use shall be accompanied by an acknowledgment of the title of the work and its authorship, except where the work is incidentally included in broadcast.¹⁰¹ From this statutory language, the fact that the work is for purposes of research, criticism, or reporting of current events does not automatically exclude the work from copyright protection; the secondary use *must* be by way of *fair dealing*.

V. SOCIAL ISSUES AS THEY RELATE TO DOCUMENTARY FILMMAKERS

The current Nigerian Constitution¹⁰² provides for the fundamental right to freedom of expression, which includes freedom to hold opinions and to receive and impart ideas and information without interference. This is a very wide umbrella, which unfortunately has not yet been judicially interpreted with regard to fair dealing. For instance, according to the second schedule, general historical or news related items are excluded from copyright control. Through coercion, however, the government has prevented documentary filmmakers from accessing this type of information. The fundamental right of free expression is often transgressed by the national government through its security operatives under the guise of 'official secrets.' Consequently, an artist, photographer or documentarian faces the possibility of criminal charges once it appears that he or she has accessed and disseminated information of which the government may want little record. It would be ill-advised for a filmmaker to visit the Niger Delta oil region of Nigeria, for instance, as he or she could be arrested on trumped-up charges. The chances of successfully prosecuting anyone under these charges are quite slim, but the system of adjudication is so slow that the government's objective would be indirectly achieved by denying the filmmaker bail through the cooperation of a 'willing judge.'

The Official Secrets Act is the legislative instrument often abused to prevent filmmakers and documentarians from recording history or current

¹⁰¹ See Copyright Act, (revised edition 1999) Cap. 68, Second Schedule, Section (a). Laws of the Federation of Nigeria, available at <http://www.nigeria-law.org/LFNMainPage.htm>.

¹⁰² Constitution (1999) (Nigeria).

events. In 2007, in the case of *FGN v. Asuni & Ors*, some German filmmakers were charged under the Official Secrets Act for filming a ‘protected place.’ In actual fact, they did not film any protected place. These were ordinary trumped-up charges to serve as a signal to other reporters and filmmakers not to visit the Niger Delta of Nigeria. Eventually, with an aggressive legal defense and a ‘proactive’ communications policy, the German filmmakers and their alleged host, an American/Nigerian (Dr. Judith Asuni), were eventually released when the Director of Public Prosecution entered a ‘nolle prosequi’ in the matter.

Typically, the use of the balancing features is determined by the type of contractual arrangement and purpose of the film. If a filmmaker is party to a contract with an international organisation like the BBC, an element of the contract would require appropriate clearances from copyright holders. In such a scenario, the filmmaker would seek to obtain all the necessary rights from the copyright holders. However, there are no defined parameters for fair dealing standards, and, as mentioned above, there is no definition of fair dealing in Nigeria. In order to enhance the use of flexible norms, it will be necessary to promulgate a set of guidelines on permitted acts in order to bring some level of certainty to documentary filmmakers.

However, in the case of independent filmmakers who are mainly working for local companies or making films for themselves, their attitude towards copyright and clearances would depend entirely on the level of exposure of the film. Copyright is a hindrance to local filmmakers when they want to broadcast their works or license them to international audiences. Many of the locally produced films cannot be broadcast on international networks because of problems associated with copyright restrictions of international channels. The international channels need total clearance of all copyrighted material, especially on works by international artists. This unfortunately has been a big hindrance for local producers who often take copyright issues lightly. Local independent filmmakers rarely bother with copyright issues or make use of the balancing features in the copyright law. They habitually violate copyright law, especially in using material from international artists, who often will not even be aware of the infringements.

There are extensive provisions in the second and third schedules of permitted acts that fall outside the purview of the prohibited acts. The following are some of the exceptions¹⁰³ that directly apply to documentary filmmakers:

- 1) parody
- 2) the inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public

¹⁰³ See *supra* note 4.

- 3) the incidental inclusion of an artistic work in a film or broadcast
- 4) the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational broadcast
- 5) non-commercial documentation centres and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived there from and no admission fee is charged for the communication, if any, to the public of the works so used
- 6) the reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof are intended exclusively for a lawful broadcast and are destroyed before the end of the period of six months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work

The balancing features in the Nigerian Copyright Law are under used. The features are quite extensive, and it would appear that the general public, creators and courts are not quite conversant with these features. Therefore, there is a gap between practice and law 'as is'. The judiciary needs extensive education in the meaning and extent of the balancing features in order to understand the limits of copyright holders' rights.

The Nigerian National Assembly has for some time been discussing the establishment of an Intellectual Property Commission of Nigeria (IPCON), an umbrella body that will administer Copyright, Trademarks, Patents and Designs in Nigeria and Plant Breeder's Rights. However, this Bill is yet to become law, and there has been considerable quiet about it of late. There is a lot of agitation by authors for stronger copyright laws and longer extensions. However, the Educational Institutions, Librarians and Nigerian Library Association are at the forefront of advocating for even greater flexibilities.

Appendix 1

SECOND SCHEDULE
[Section 6 (1)]

Exceptions from copyright control

The right conferred in respect of a work by section 6 of this Act does not include the right to control -

- (a) the doing of any of the acts mentioned in the said section 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship, except where the work is incidentally included in a broadcast;
- (b) the doing of any of the aforesaid acts by way of parody, pastiche, or caricature;
- (c) the inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public.
- (d) the reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public;
- (e) the incidental inclusion of an artistic work in a film or broadcast;
- (f) the inclusion in a collection of literary or musical work which includes not more than two excerpts from the work, if the collection bears the statement that it is designed for educational use and includes an acknowledgement of the title and authorship of the work;
- (g) the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational broadcast;
- (h) any use made of a work in an approved educational institution for the educational purposes of that institution, subject to the condition that, if a reproduction is made for any such purpose it shall be destroyed before the end of the prescribed period, or if there is no prescribed period, before the end of the period of 12 months after it

was made;

(i) subject to the Third Schedule to this Act, the making of a sound recording of a literary or musical work, and the reproduction of such a sound recording by the maker or under license from him, where the copies thereof intended for retail sale in Nigeria and the work has already been previously recorded under license from the owner of the relevant part of the copyright, whether in Nigeria or abroad, subject to such conditions and to the payment of such compensation as may be prescribed;

(j) the reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement:

Provided that such reading or recitation is not for commercial purposes.

(k) any use made of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the works so used;

(l) the reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof are intended exclusively for a lawful broadcast and are destroyed before the end of the period of six months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work, so however that any reproduction of a work made under this paragraph-

(i) may, if it is of an exceptional documentary character, be preserved in the archives of the broadcasting authority (which shall for the purpose of this paragraph be deemed to be part of the National Archives) established under the National Archives Act;

(ii) subject to this Act, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;

- (m) the broadcasting of a work already lawfully made accessible to the public and subject (without prejudice to the other provisions of this Schedule) to the condition that the owner of the broadcasting right in the work shall receive a fair compensation determined, in the absence of agreement, by the court;
- (n) news of the day publicly broadcast or publicly communicated by any other means;
- (o) the communication to the public of a work, in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making;
- (p) any use made of a work for the purpose of judicial proceeding or of any report of any such proceeding;
- (q) the making of not more than three copies of a book (including a pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such a book is not available for sale in Nigeria.

[1999 No. 42.]

- (r) the reproduction for the purpose or research or private study of an unpublished literary or musical work kept in a library, museum or other institutions to which the public has access;
- (s) reproduction of published work in braille for the exclusive use of the blind, and sound recordings made by institutions or other establishment approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled person.

THIRD SCHEDULE

[Section 6 (4).]

Special exceptions in respect of a sound recording of a musical work

1. The copyright in a musical work is not infringed by a person (in this Schedule referred to as “the record producer”) who makes a recording of the work or of an adaptation thereof in Nigeria, if-

[1992 No. 98.]

- (a) records of the work, or as the case may be, of a similar adaptation of the work, have previously been made in, or imported into Nigeria for the purposes or retail sale, and were so made or imported by, or with the license of, the owner of the copyright in the work;

[1992 No. 98.]

- (b) before making the recording, the record producer gave to the owner of the copyright the prescribed notice of his intention to make it;
 - (c) the record producer intends to sell the record by retail, or to supply if for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be sold or supplied; and
 - (d) in the case of a record which is sold by retail, the record producer pays the owner of the copyright in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the provisions of this Schedule.
2. Subject to the following provisions of this Schedule, the royalty mentioned in subparagraph (d) of paragraph 1 of this Schedule shall be of an amount equal to a percentage of the ordinary retail selling price of the record calculated in the prescribed manner.
 3. If, at any time after the end of the period of one year beginning with the coming into operation of a prescribed rate of royalty it appears to the Commission that the ordinary rate of royalty, or the minimum

amount thereof, as prescribed has ceased to be equitable, either generally or in relation to any class of records, the Commission may hold a public inquiry, in the prescribed manner, and if, in consequence of such an inquiry, the Commission is satisfied of the need to do so, he may make an order prescribing such different rate or amount, either generally or in relation to any one or more classes of records, as he may consider just;

4. In the case of a record which comprises (with or without other material, and either in their original form or in the form of adaptations) two or more musical works in which copyright subsist, if the owners of the copyright in the works are different persons, the royalty shall be apportioned among them in such manner as they may agree or as, in default of agreement, may be determined by arbitration.
5. Where a record comprises (with or without other material) a performance or a musical work, or of an adaptation of musical work, in which works are sung, or are spoken incidentally to or in association with the music, and either no copyright subsists in that work or, if such copyright subsists, the conditions specified in paragraph 1 of this Schedule are fulfilled in relation to that copyright, then if-

[1992 No. 42.]

- (a) the works consist or form part of a literary or dramatic work in which copyright subsist; and
- (b) such previous records as are referred to in sub-paragraph (a) of paragraph 1 of this Schedule were made or imported by, or with the licence of the owner of the copyright in that literary or dramatic work; and
- (c) the conditions specified in sub-paragraphs (b) and (d) of paragraph 1 of this Schedule are fulfilled in relation to the owner of that copyright, the making of the record shall constitute an infringement of the copyright in the literary or dramatic work:

Provided that, this paragraph shall not be construed as requiring more than one royalty to be paid in respect of a record; and if copyright subsists both in the musical work

and in the literary or dramatic work, and their owners are different persons, the royalty shall be apportioned among them (or among them and any other person entitled to a share thereof in accordance with the last preceding sub-paragraph) as they may agree or as, in default of agreement, may be determined by arbitration.

6. For the purpose of this Schedule, an adaptation of a work shall be taken to be similar to an adaptation thereof contained in previous records if the two adaptations do not substantially differ in their treatment of the work, either in respect of style or (apart from any difference in number) in respect of the performances required for performing them.
7. Where, for the purposes of sub-paragraph (a) paragraph 1 of this Schedule, the record producer requires to know whether such previous records as are mentioned in that sub-paragraph were made or imported therein mentioned, the record producers may make the prescribed inquiries; and if the owner of the copyright fails to reply to those inquiries within the prescribed period, the previous record shall be taken to have been made or imported, as the case may be, with the licence of the owner of the copyright.
8. The provisions of paragraph 7 of this Schedule shall apply in relation to records of part of a work or adaptation as they apply in relation to records of the whole of it:

Provided that paragraph 1 of this Schedule—

- (a) shall not apply to a record of the whole of a work or adaptation unless the previous records referred to in sub-paragraph (a) of that paragraph were records of the whole of the work or of a similar adaptation ; and
 - (b) shall not apply to a record of part of a work or adaptation unless those previous records were records of, or comprising, that part of the work of a similar adaptation.
9. Nothing in this Schedule shall be construed as authorising the importation of records which could not lawfully be imported apart from this Schedule; and accordingly, for the purposes of any provision of this Act relating to imported articles, where the

question arises whether the making of a record outside Nigeria would have constituted an infringement of copyright if the record had been made in Nigeria, that question shall be determined as if paragraph 1 of this Schedule had not be enacted.

10. In this Schedule, “**prescribed**” means prescribed by regulations made under this Schedule by the Minister and any such regulations made for the purposes of sub- paragraph (d) of paragraph 1 of this Schedule may provide that the taking of such steps as the Minister considers most convenient for ensuring the receipt of the royalties (by the owner of the copyright) shall be treated as constituting payment of the royalties in accordance with that paragraph.

SUMMARY OF THE EVOLUTION, CURRENT STATE, AND
POTENTIAL FUTURE DEVELOPMENTS OF THE FAIR OR
FLEXIBLE DEALING NORMS IN SOUTH AFRICA THAT
ALLOW THE USE OF COPYRIGHTED MATERIAL,
ESPECIALLY IN DOCUMENTARY FILMS, WITHOUT
PERMISSION OF THE COPYRIGHT HOLDER

*Tobias Schonwetter**

INTRODUCTION

Before dealing with the specific subject-matter of this paper, a few general remarks regarding the legal *status quo* of copyright protection in South Africa seem appropriate.

South Africa is a member of various international treaties and agreements on intellectual property in general and copyright in particular, most notably the 1886 Berne Convention for the Protection of Literary and Artistic Works (Paris Act (1971)) (“Berne Convention”)¹⁰⁴ and the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”). In addition, South Africa has signed, but not yet ratified, the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”).¹⁰⁵

On the national level, all matters relating to copyright are governed by the Copyright Act 98 of 1978 (“the Act”)¹⁰⁶ and regulations made under the Act.¹⁰⁷ Hence, no protection of copyright exists in terms of the common law.¹⁰⁸ The Act has been amended several times and is—in essence—based on the provisions of the Berne Convention.¹⁰⁹ Currently, the Act protects:

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¹⁰⁴ See Berne Convention for the Protection of Literary and Artistic Works, art. 22-38, Sept. 9, 1886, 25 U.S.T. 1314 (last revised at Paris July 4, 1971); *id.* art. 33(2) (relating to the International Court of Justice).

¹⁰⁵ WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (South Africa signed both treaties on December 12, 1997).

¹⁰⁶ The Act as well as the regulations made under the Act can be accessed online on the website of the Open Review of the South African Copyright Act 1978 project, http://copyright.shuttleworthfoundation.org/wiki/SA_Copyright_Act_1978.

¹⁰⁷ See generally OWEN H. DEAN, HANDBOOK OF SOUTH AFRICAN COPYRIGHT LAW 1-2A *et seq.* (2006) (outlining a brief history of South African copyright law).

¹⁰⁸ Copyright Act 98 of 1978 s. 41(4) (“[N]o copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.”).

¹⁰⁹ J.T.R. GIBSON, SOUTH AFRICAN MERCANTILE AND COMPANY LAW 706 (2003).

- (1) literary works;
- (2) musical works;
- (3) artistic works;
- (4) cinematograph films;
- (5) sound recordings;
- (6) broadcasts;
- (7) programme-carrying signals;
- (8) published editions, and
- (9) computer programs.¹¹⁰

The Act defines the exact nature of copyright in the different works in sections 6-9 and 10-11B, and it stipulates that a material form is required for all works except broadcasts and programme-carrying signals.¹¹¹ In general, copyright is “transmissible as movable property by assignment, testamentary disposition or operation of law.”¹¹²

The term of copyright protection in South Africa is regulated in section 3(2) of the Act. As a general rule, works (except photographs) are protected for fifty years after the occurrence of a certain event, such as the death of the author or the first publication, performance or broadcasting. The relevant event is dependent upon the nature of the work.

Under the Act, moral rights are also protected in South Africa.¹¹³ These rights encompass the right to claim authorship of a work (right of paternity), as well as the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the creator (right of integrity).¹¹⁴ Moral rights are arguably not transferable. Hence, the creator of a work retains the moral rights in her work, regardless of a possible transfer of the economic rights. As a result, a transfer of the economic rights is, in practice, often accompanied by a waiver of the moral rights in the work. The duration of

¹¹⁰ Copyright Act 98 of 1978 s. 2(1); *see also id.* s. 1 (defining each type of protected work).

¹¹¹ *Id.* s. 2(2).

¹¹² *Id.* s. 22(1).

¹¹³ *Id.* s. 20.

¹¹⁴ It is noteworthy in this context that s. 20(1) of the Act also states that “an author who authorizes the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.”

moral rights protection is unclear in South Africa, but it has been suggested that, as a general rule, the term corresponds with the protection term of the economic rights in the relevant work.¹¹⁵ However, whether or not moral rights should survive the author is disputed.

As to the issue of copyright infringement, the Act stipulates in section 23 that “[c]opyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorize.” However, copyright violations are limited to the reproduction of at least a substantial part of protected works.¹¹⁶

The South African Copyright Act of 1978 is generally considered outdated, which is partly attributable to the fact that it was originally drafted at a time when the former apartheid government defiantly maintained that South Africa was not a developing country – a belief which arguably influenced the drafting process of the Act. Furthermore, the Act does not sufficiently take into account new (digital) technologies; therefore, a number of everyday activities, such as the copying of music onto an MP3 player, currently constitute copyright infringements. Against this backdrop, preparations for a long term amendment process of the South African copyright law have recently begun.

Copyright law aims to strike a balance between the often competing interests of copyright owners and copyright users, including new creators. In essence, and subject to certain international treaty obligations in this respect, three balancing features are available for lawmakers to achieve a just balance: (1) the definition of the scope of copyright protection, (2) the determination of the duration of copyright protection, and (3) the introduction of copyright exceptions and limitations. While the legal *status quo* regarding the first two balancing features has been briefly described above, the remainder of this paper will focus on copyright exceptions and limitations as the main balancing features of copyright law in South Africa.

¹¹⁵ DEAN, *supra* note 4, at 1-62.

¹¹⁶ Copyright Act 98 of 1978 s. 1(2A).

I. WHAT IS THE SHORT HISTORY OF THE EVOLUTION OF THE BALANCING FEATURES OF COPYRIGHT LAW IN SOUTH AFRICA? WERE THE FEATURES STATUTORILY OR CASE LAW DERIVED? WHAT MAJOR POLICY CONCERNS GUIDED THE EVOLUTION?

The South African history of copyright law in general and copyright exceptions and limitations in particular are intimately connected with South Africa's colonial past.

Copyright protection on the territory of the present-day Republic of South Africa was first introduced in 1803 in the Cape of Good Hope colony by way of a variant of Roman-Dutch common-law copyright which in fact was based upon the Batavian Republic's Copyright Act of the same year.¹¹⁷ The Batavian Republic was a legal predecessor of the present-day Netherlands, and the Cape of Good Hope was a colony of the Batavian Republic between 1803 and 1806. In subsequent years, this copyright law also became part of the law in three other colonies in the region: the Orange Free State, the Transvaal and Natal.¹¹⁸ The Batavian Republic's Copyright Act itself contained only a few copyright exceptions and limitations, chiefly pertaining to translations¹¹⁹ and a relatively random selection of works, including Greek and Roman classical works.¹²⁰ Later, the aforementioned colonies, with the exception of the Orange Free State, adopted their own Provincial Copyright Acts.¹²¹ Only the Transvaal Copyright Law of 1887 contained significant copyright exceptions and limitations; for instance, it had a provision stipulating that no copyright exists in laws, resolutions, ordinances, etc. (s. 4), an exception for quotations (s. 7), and an exception for the publishing of reports of public meetings (s. 8). Furthermore, s. 19(2) of the Transvaal Copyright Law of 1887 stipulated that the author's right of taking possession of infringing copies "shall however not be exercised in respect of a single copy of a work which may be in possession of a person, who does not trade in such articles, and who has obtained such copy for his own use."

In 1910, the Union of South Africa came into being, and the aforesaid four colonies became the founding provinces of the Union. Until 1931, the Union of South Africa was a self-governing dominion of the

¹¹⁷ *Wet van de Bataafsche Republiek van 3 Juni 1803*, reprinted in SCHRIKS, HET KOPIJRECHT – 16DE TOT 19DE EEUW 691-694 (2004).

¹¹⁸ DEAN, *supra* note, 4 at 1-3.

¹¹⁹ *Wet van de Bataafsche Republiek* s. 5.

¹²⁰ *Id.* s. 10.

¹²¹ The most important pieces of legislation in this respect were: The Copyright Act (Act No. 2 of 1873) (Cape of Good Hope); The Copyright Act (Act No. 17 of 1897) (Natal); Copyright Law (Law No. 2 of 1887) (Transvaal).

British Empire and then became a Commonwealth realm. In 1916, the Patents, Designs, Trade Marks and Copyright Act (Act No. 9 of 1916) was enacted in the Union of South Africa which repealed the previous Provincial Copyright Acts. Section 143 of this Act declared—subject to certain variations¹²²—the British Copyright Act of 1911 to be in force in the Union of South Africa. Hence, the 1916 Patents, Designs, Trade Marks and Copyright Act also adopted the exceptions and limitations of the British Copyright Act (including fair dealing) which were predominantly contained in section 2(1).

In 1965, four years after the Republic of South Africa came into existence, the 1916 Patents, Designs, Trade Marks and Copyright Act was repealed by the Copyright Act (Act No. 63 of 1965). Despite being an independent piece of legislation this time, the 1965 Copyright Act nonetheless bore strong resemblance to British law due to the fact that substantial provisions of the newly introduced 1956 British Copyright Act were widely adopted. The 1965 Copyright Act contained numerous statutory copyright exceptions and limitations, including general exceptions for literary, dramatic and musical works (such as fair dealing) in section 7, special exceptions for libraries and archives in section 8, special exceptions regarding records of musical works in section 9 and general exceptions for artistic works (including fair dealing) in section 10. The Act also contained a special exception for industrial designs in section 11 as well as exceptions with regard to sound recordings (s. 13), cinematograph films (s. 14), television and sound broadcasts (s. 15), published editions (s. 16) and public records (s. 42). Moreover, certain uses of copyrighted material for educational uses were also exempted (s. 41). It is noteworthy that the 1965 Copyright Act, like its successor, emphasised the statutory nature of copyright law.¹²³ On January 1, 1979, the current Copyright Act of 1978 came into force.¹²⁴

In sum, the evolution of copyright exceptions and limitations in South Africa was, from a policy perspective, for a long time predetermined by the very considerations that guided the evolution of exceptions and limitations in the former colonial powers (most notably Britain) whose copyright legislations were often adopted verbatim here. In other words, no independent policy considerations existed for a long time in South Africa for copyright exceptions and limitations. Nowadays, however, the

¹²² With regards to copyright exceptions and limitations, s. 144 (d) of the 1916 Patents, Designs, Trade Marks and Copyright Act contained a noteworthy additional copyright exception in favour of licensed broadcasters.

¹²³ See Copyright Act 63 of 1965 s. 44(4).

¹²⁴ With the exception of ss 1, 39 and 40, which came into operation upon promulgation in the Gazette (30 June 1978), and s. 45, which “shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.” See Copyright Act 98 of 1978 s.47.

justification of such exceptions and limitations in South Africa is based on the awareness that under certain circumstances, the public interest outweighs the copyright owners' interests in such a way that the copyright owners' interests have to give way for the larger benefits of society.

III. WHAT IS THE CURRENT STATE OF THE BALANCING FEATURES? WHAT DOCTRINAL FEATURES DEFINE THE LAW, AND HOW ARE THEY ADMINISTERED?

As mentioned, copyright law in South Africa is nowadays governed by the Copyright Act of 1978 as amended (“the Act”).

It was pointed out above that copyright violations are limited to the reproduction of a substantial part or more of protected works. The requirement of substantiality in this context is to be understood qualitatively rather than quantitatively¹²⁵ and represents, in essence, the equivalent of the *de minimis* requirement under U.S. law. In order to substantiate the element of substantiality, the plaintiff carries the burden to prove a certain degree of similarity between the original and the alleged infringing copy. Only once a substantial reproduction has taken place does the question of applicable copyright exceptions and limitations arise.

Specific copyright exceptions and limitations are contained in chapter 1 (“Copyright in original works”) of the Act. The legislative technique employed by the South African lawmaker with regard to copyright exceptions and limitation is to specify a number of general exceptions and limitations in section 12 of the Act for literary and musical works and to expand the scope of these exceptions and limitations to other kinds of protected works by way of a *mutatis mutandis* application of section 12. Furthermore, section 12(9) of the Act stipulates that the provisions of subsections 12(1)-(7) of the Act also apply with reference to adaptations of a work. With regard to the issue of translations, section 12(11) of the Act states that the provisions of subsection 12(1)-(4), (6), (7) and (10) of the Act shall embrace the right to use a work in both the original and a different language. In addition, several special and general exceptions and limitations for the different kinds of protected works are contained in sections 14-19B of the Act.

In detail, the Act contains the following exceptions and limitations:

- (1) Fair dealing, ss 12(1), 15(4), 16(1), 17, 18, 19A, 19B
- (2) Use for judicial proceedings, ss 12(2), 15, 16, 17, 18, 19A, 19B
- (3) Quotations, ss 12(3), 16, 17, 18, 19B

¹²⁵ See *Galago Publishers (Pty) Ltd v. Erasmus* 1989 (1) SA 276 (A).

- (4) Use by way of illustration for teaching, ss 12(4), 15, 16, 17, 18, 19A, 19B
- (5) Ephemeral reproductions by a broadcaster, ss 12(5), 15, 17, 18, 19A, 19B
- (6) Reproduction or broadcast of works delivered in public for informatory purposes, s. 12(6)
- (7) Reproductions or broadcast of an article on current events, s. 12(7)
- (8) No copyright in official texts of a legislative, administrative or legal nature; political and legal speeches; news of the day that are mere items of press information, ss 12(8), 19A
- (9) *Bona fide* demonstration of technical equipment by a dealer in such equipment, ss 12(12), 15, 16, 17, 18, 19A, 19B
- (10) Broadcast of residual works, ss 12(13), 15, 16, 17, 18, 19A, 19B
- (11) Reproductions permitted by regulations, s. 13¹²⁶
- (12) Exception in respect of records of musical works, s. 14
- (13) Background or incidental use of artistic material in a cinematograph film, television broadcast or transmission in diffusion service, s. 15(1)
- (14) Reconstruction of a work of architecture, s. 15(2)
- (15) Reproduction or inclusion of artistic works, situated in public places, in a cinematograph film, television broadcast or transmission in diffusion service, s. 15(3)
- (16) Three-dimensional reproductions or adaptations of authorised three-dimensional reproductions of artistic works for utilitarian purposes by an industrial process (“reverse engineering”), s.15(3A)¹²⁷
- (17) Use of a record which embodies literary and musical works which are also embodied in a sound-track, s. 16(2)
- (18) Distribution of short excerpts from program-carrying signals, s.19(1)
- (19) Back-up copies of computer programs, s. 19B(2)

¹²⁶ See Regulation 2530, published in *Government Gazette* no 6252 of 22 December 1978, as amended by Regulation 1211, published in *Government Gazette* no 9775 of 7 June 1985.

¹²⁷ Other protective rights, such as patent and design rights may, however, be available to the right owner as well as unfair or unlawful competition and passing off rules

In addition, copyright is not infringed if an act is conducted in compliance with a compulsory licence granted by the South African Copyright Tribunal, for which provision is made in ss 29-36 of the Act. It is also noteworthy in this context that ss 70-79 of the Electronic Communications and Transactions (ECT) Act 25 of 2002 contain certain limitations regarding the liability of online service providers.¹²⁸

It goes beyond the scope of this research paper to scrutinize all of the above exceptions and limitations. However, several of the available exceptions and limitations are potentially relevant for documentary filmmakers, such as the quotations exception (s. 12(3))¹²⁹ and the exception for works delivered in public for informatory purposes (s. 12(6)).¹³⁰ It may also be of interest for documentary filmmakers in certain cases that according to s. 12 (8) of the Act, “no copyright subsists in official texts of a legislative, administrative or legal nature, or official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.” Arguably even more important in this context are, however, the exception regarding articles on any current economic, political or religious topic published in a newspaper or periodical, or in a broadcast (s. 12(7))¹³¹ and the exception for incidental as well as background uses of artistic works contained in s. 15(1) of the Act.¹³² Furthermore, documentary filmmakers should at least take note of s. 12(9) of the Act which states that numerous exceptions and limitations do also apply “with

¹²⁸ Basically, the ECT Act distinguishes between four acts carried out by online service providers (‘mere conduit’, system caching, hosting and linking) and applies different standards of liability to these acts

¹²⁹ Copyright Act 98 of 1978 s. 12(3) (“The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.”).

¹³⁰ *Id.* s. 12(6)(a) (“The copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose.”).

¹³¹ *Id.* s. 12(7) (“The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.”).

¹³² *Id.* s. 15(1) (“The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.”).

reference to the making or use of an adaptation of a work”, and section 12(13) of the Act which stipulates that “an authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film.”

However, the Act's semi-open fair dealing provision appears to be by far the most crucial and promising exception for documentary filmmakers and, thus, deserves a closer examination. The fair dealing provisions are certainly the centre-piece of South Africa's copyright law regarding limitations and exceptions. The concept of fair dealing as found, for instance, in South Africa, Australia, and the UK is not to be confused with the US concept of fair use. Arguably, both concepts do share the same fundamental idea of permitting uses which are considered fair. However, the concept of fair use is, in general, much broader than fair dealing due to the fact that fair use is not confined to specific purposes. In addition, some of the uses permitted under the concept of fair dealing only pertain to certain kinds of protected works. Hence, fair use and fair dealing are analogous rather than synonymous. In a way, both concepts could even be described as converse due to the fact that under the fair dealing concept the types of permitted uses are regulated by law, and the courts are required to derive certain principles from those kinds of uses. By contrast, under the fair use doctrine, the principles for permitted uses are specified, and it is left to the courts to determine certain kinds of uses.

The specific purposes mentioned in section 12(1) of the Act are *research* and *private study, personal or private use, criticism and review, and reporting current events*. Interestingly, research is not qualified by the requirement “private” and consequently, research for purely commercial purposes appears to be permissible under South African law. Insofar as the Act differentiates between personal and private use, Pienaar has explained comprehensibly that such a distinction, which appears redundant at first, can be useful. For instance, a use in a public lecture may qualify as personal but surely not as private.¹³³

However, the precise limits of fair dealing in South Africa remain uncertain and vague.¹³⁴ It has been suggested that a rule-of-thumb for personal use exists that allows unlicensed copying of copyright-protected material that amounts to up to 10% of the original work. Yet such a rule is neither generally accepted, nor does it sufficiently consider the differences between different kinds of copyright protected works as well as the quality of the copied material. Against this background, a 2004 report by the South

¹³³ PIENAAR, STATUTORY DEFENSES AGAINST ACTIONS FOR INFRINGEMENT OF COPYRIGHT 8 (1988).

¹³⁴ GIBSON, *supra* note 6, at 725.

African Print Industries Cluster Council on intellectual property rights pointed correctly to the fact that fair dealing in South Africa remains a highly contentious issue.¹³⁵

The problem in South Africa is first and foremost the lack of relevant case law regarding the issue of fair dealing.¹³⁶ For that reason it seems advisable to take recourse to court decisions from other jurisdictions with similar fair dealing provisions. In this respect, the interpretation of sections 29 and 30 of the UK Copyright, Designs and Patents Act of 1988 by British courts might be of value.¹³⁷ However, an unexamined adoption of foreign court judgments is always a double-edged sword because such decisions might not sufficiently reflect specific domestic policy considerations in the adopting country; yet, such policy considerations are of crucial importance in the context of copyright limitations and exceptions. Section 39(2) of the South African Constitution reinforces the relevance of domestic considerations by stating that “when interpreting any legislation [...], every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights.”

Currently, four private collecting societies exist in South Africa: the Southern African Music Rights Organization (SAMRO), representing music performing rights; the Dramatic Artistic and Literary Rights Organisation (DALRO), protecting a broad range of copyright in literary, dramatic and artistic works; the National Organisation for Reproduction Rights in Southern Africa (NORM), operating in the interests of music publishers and composers and charged with the mechanical licensing of the repertoire of its members; and the South Africa Recording Rights Association (SARRAL), representing the rights of composers of musical works. These collecting societies operate within a voluntary system of collective licensing.¹³⁸

¹³⁵ EVE GREY & MONICA SEEGER, PICC REPORT ON INTELLECTUAL PROPERTY RIGHTS IN THE PRINT INDUSTRIES SECTOR 72 (2004).

¹³⁶ William Baude et al., *Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Material in South Africa*, 7 S. AFR. J. INFO. & COMM’N 82, 85 (2006) (noting that no South African court has yet explained the meaning of fair dealing in the Copyright Act).

¹³⁷ See *Hubbard v. Vosper*, (1972) 2 W.L.R. 389; *British Broad. Corp. v. British Satellite Broad. Ltd.*, (1992) Ch. 141; *Time Warner Entm’t Co. v. Channel Four Television Corp.* (1994) EMLR 1; *Pro Sieben Media AG v. Carlton UK Television Ltd.* (1999) 1 W.L.R. 605 (A.C.); *Newspaper Licensing Agency Ltd. V. Marks & Spencer* (2003) 1 A.C. 551.

¹³⁸ It is noteworthy in this context, that in 2006, the Minister of Trade and Industry issued Collecting Society Regulations, promulgated in GN 517/2006 and published in GG28894/2006.

IV. WHAT INFORMATION IS AVAILABLE ON HOW THE BALANCING FEATURES ARE USED, ESPECIALLY BY DOCUMENTARY FILM MAKERS? ARE THE FEATURES UNDER-USED OR OVER-USED? IS THERE A GAP BETWEEN THE LAW ON THE BOOKS AND THE LAW ON THE GROUND? IS COPYRIGHT PERCEIVED AS A LARGE BARRIER TO CREATIVE FILM PRODUCING?

While some of the aforementioned specific copyright exceptions and limitations in the South African Copyright Act are phrased relatively unambiguously, the most important and far-reaching concept of fair dealing remains pitifully unclear. Scholarly literature as well as enlightening case law is scarce in this regard. Hence, the risk of committing unintended copyright infringements combined with the fear of potentially high litigation costs and significant claims for damages arguably result in a severe under-usage of this most fundamental balancing feature provided for under South African copyright law.

Documentary filmmakers in South Africa increasingly perceive intellectual property law in general and copyright law in particular as a considerable barrier to creative film producing.¹³⁹ This situation is aggravated by the fact that the South African free-to-air TV market is clearly dominated by the state-owned South African Broadcasting Corporation (SABC) which provides three of the four free-to-air TV broadcasts in the country. According to the Documentary Filmmakers Association (DFA) of South Africa, the SABC utilizes its market dominating position to get and retain all commercial rights in works that it commissions¹⁴⁰ and charges high prices for any subsequent usage of its material. The current per minute (or part thereof) price for the use of SABC footage which is then broadcast, for instance, in the United States is US \$2,500 for a 2 year period which includes up to 3 broadcasts.¹⁴¹

When the use of third-party material is intended, South African documentary filmmakers in general, do not sufficiently take into account copyright balancing features that could enable them to use copyright protected material without the consent of the right owner. Rather, permission to use the material is often asked directly from the fellow filmmaker who created the material or a license fee is readily paid to the owning broadcaster or institution for the use of the material.¹⁴² It appears that no easily accessible information or set of guidelines exist in South Africa which could advise documentary filmmakers of permission-free uses

¹³⁹ Interview with Catherine Muller, Co-Secretary, Documentary Filmmakers Association (DFA) South Africa, conducted via email (Nov. 5, 2007).

¹⁴⁰ *Id.*

¹⁴¹ Email from SABC to the author (Nov. 13, 2007).

¹⁴² Interview with Catherine Muller, Co-Secretary, Documentary Filmmakers Association (DFA) South Africa, conducted via email, (Oct. 29, 2007).

of third-party material. However, the DFA has expressed the wish to provide such guidelines to its members in the future.

As to the matter of incidental use, especially with regard to music, rights are usually not cleared by South African documentary filmmakers due to the fact that it is often perceived as too difficult to establish who the actual performer is and whether the relevant rights have been registered with a collecting society. Legal disputes in this respect are nonetheless rare in South Africa, partly because documentary filmmakers usually avoid using well-known material from famous artists.¹⁴³

In sum, the issue of copyright balancing features, particularly in the context of documentary filmmaking, has not been sufficiently addressed in South Africa so far. It is noteworthy, however, that in the recent past, there have been an increasing number of discussions on this topic.¹⁴⁴

V. WHAT ARE SOME OF THE POTENTIAL FUTURES OF THE BALANCING PROVISIONS? ARE LEGISLATIVE OR REGULATORY CHANGES BEING DISCUSSED? IS THERE POLITICAL PRESSURE TO ALTER THE LAW IN ONE DIRECTION OR ANOTHER? IS THERE A DIRECTION OF USE COMMUNITIES TO EXPAND OR CONTRACT THEIR USE OF THE FEATURES IN PRACTICE?

It was stated in the introduction of this paper that the South African copyright legislation is outdated for several reasons and that preparations have therefore begun at the competent Department of Trade and Industry (DTI) for a long term amendment process regarding the South African copyright law. Of course, such an amendment process is also going to address the issue of copyright exceptions and limitations as well as other balancing features such as the copyright protection term.

It appears at this point that the DTI intends to initially prepare a policy document before new legislation is drafted. Against this backdrop, lobbying from both sides—copyright owners as well as users of copyright protected works—is currently gaining momentum, and while copyright owners openly call for a heightened level of protection, several projects have been launched lately in order to voice and support user interests.¹⁴⁵

In October 2007, the DTI jointly organised and held a seminar with WIPO in Cape Town entitled “WIPO International Seminar on the Strategic Use of Intellectual Property for Economic and Social Development.” Some commentators have interpreted this co-operation with WIPO, which has a

¹⁴³ Interview with Catherine Muller, Co-Secretary, Documentary Filmmakers Association (DFA) South Africa, conducted via email, (Oct. 31, 2007).

¹⁴⁴ See, Daniela Faris, Filmmaker Shares some “Wheeling and Dealing” Advice, (2007) <http://www.icommons.org/articles/filmmaker-shares-some-wheeling-dealing-advice> (discussing the 2007 Encounters Film Festival).

¹⁴⁵ For instance the *The African Comparative Copyright Review (ACCR)* and the *South African Copyright Act Open Review Project*.

reputation of following a rather protectionist IP agenda, as a sign that the DTI favors a more protectionist approach towards copyright law. However, such an assumption is not supported here. First, there is generally nothing wrong about consulting and co-operating with stakeholders from both sides during the decision-making process. On the contrary, such a procedure is, in fact, inevitable in order to achieve a just result. Second, WIPO's agenda is by no means as one-sided and protectionist as it is often portrayed. Rather, WIPO has conducted instructive and sound research, for instance, in the area of copyright limitations and exceptions in the past; and the recent appointment of Dr. Kenneth Crew, a well-respected scholar in the field, to prepare a study on copyright limitations and exceptions for libraries spurs hopes that WIPO is determined to proceed on this path.

After all, the future of South African copyright law in general, and its balancing features in particular, is best described as uncertain from today's perspective. South Africa is at a crossroads in this respect, and the debate about the future shape of copyright law and its balancing features has just begun. The following months—maybe years will surely have a major impact on how copyright-protected material, especially, but not exclusively, of educational value, can be accessed and used in South Africa.

The author of this paper believes that South Africa's legislature will adequately take into account and benefit from recent legislative experiences in the area of copyright law in comparable countries, such as Australia, Brazil and New Zealand. In addition, it seems advisable to monitor the present legislative efforts in this respect in India.

SUMMARY, CONCLUSION, AND FURTHER REMARKS

South African copyright law does not contain a statutory equivalent to the broad U.S. fair use doctrine that broadly allows the permission-free use of copyright protected material in certain circumstances and thereby aids documentary filmmaking. Instead, the South African Copyright Act of 1978 includes a number of more narrowly phrased copyright exceptions and limitations of which the fair dealing provision in s. 12(1) of the Act is the most flexible and important one. Several of these exceptions and limitations are potentially relevant for documentary filmmakers, such as the quotation exception; the exception for works delivered in public for informatory purposes; the exception for official texts; the exception regarding articles on any current economic, political or religious topic published in a newspaper or periodical, or in a broadcast; and the exception for incidental as well as background uses of artistic works. The categories and purposes specified in the fair dealing provision, however, appear to be too narrow to accommodate many of the typical uses of documentary filmmakers.

After all, it can be concluded that there is considerable uncertainty

and lack of knowledge about the scope of existing copyright limitations and exceptions in South Africa. Much more fundamental research is necessary to provide greater clarity. As a result, documentary filmmakers in South Africa arguably either pay too much money and spend too much time for the clearance of rights or, alternatively, behave too carelessly in this context. In other words, a clear gap exists between the law in the books and the law in action. Therefore, the drafting of at least semi-binding guidelines seems advisable and would surely be welcomed by the various filmmaker associations. However, preparations for a major revision of the South African Copyright Act have begun, and copyright law is about to undergo its most significant changes in decades in the near future. Against this backdrop, an active involvement in the legislative processes seems, at this point, more appropriate than the preparation of guidelines for the soon to be replaced Copyright Act of 1978. The drafting of just and adequate provisions for the future copyright act has, right now, a higher priority than the publication of clarifying guidelines, which is, naturally, a subsequent task. The outcome of the current legislative revision process in South Africa is difficult to anticipate. At present, even the introduction of a US-style fair use provision seems possible. However, the author of this paper strongly advises against such a move due to the high level of legal uncertainty that is usually associated with the fair use doctrine and has resulted in the doctrine being referred to as “the most troublesome [doctrine]” in American copyright law.¹⁴⁶ This disadvantage is, of course, to some extent compensated by the more flexible nature of the doctrine in comparison with more precise but rather inflexible fair dealing provisions or other enumerative lists of copyright exceptions and limitations. Yet, the lack of relevant and clarifying case law in South Africa pertaining to fair uses might eventually lead to a violation of the “certain special case”—requirement of the so-called “three-step test”—the international standard contained in most of the relevant multilateral copyright treaties as well as an increasing number of bilateral Free Trade Agreements against which national copyright exceptions must be tested.

In addition, more research is necessary about the meaning of the Copyright Act's substantiality requirement for copyright infringement, which is, basically, the South African equivalent of the *de minimis* requirement under U.S. law. This is because the question of applicable copyright exceptions and limitations for which guidelines need to be drafted arises only once a substantial reproduction has taken place.

Lastly, another issue of potential future contention is to be mentioned only in brief here. As mentioned, the SABC has basically established, with taxpayers' money, market dominance in the free-to-air segment which allows it to get and retain all commercial rights in works

¹⁴⁶ *Dellar v. Goldwyn, Inc.* 104 F.2d 661, 662 (2d Cir. 1939).

that it commissions from documentary filmmakers. On this basis, it has created arguably the most comprehensive archive of documentary footage in the country. As far as older archive material is concerned, the SABC does in fact possess a full-blown monopoly. If documentary filmmakers, who are also taxpayers after all, want to use such archive material for new works they are asked to pay—again—dearly for it. This situation appears to be at least debatable, especially against the background that other material that is *directly* created by the state with taxpayers' money is often not copyright protected in South Africa, such as official texts of a legislative, administrative or legal nature.¹⁴⁷

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¹⁴⁷ Copyright Act 98 of 1978 s. 12(8a).

BALANCING FEATURES IN UGANDA'S COPYRIGHT LAW

*Jeroline Akubu**

INTRODUCTION

Copyright law in East Africa is largely based on English law as a result of the English colonial legacy. The copyright regime in Uganda is governed by the Copyright and Neighbouring Rights Act No.19 of 2006. The Act came into force in August 2006 as a result of a Private Member's bill before Parliament and it included recommendations from the Uganda Law Reform Commission which had carried out a comprehensive study on reform of copyright and other intellectual property laws.

Regional treaties including the African Regional Intellectual Property Organisation (ARIPO) and the East African Community Treaty have necessitated a harmonisation of the East African laws including intellectual property laws. Efforts to comply with international treaties, in particular the Trade Related Intellectual Property Rights (TRIPS) under the World Trade Organisation (WTO), have also contributed to this harmonization. In a bid to attain compliance, Uganda, Kenya and Tanzania have amended their copyright laws.

I. UGANDA

Until August last year, Uganda operated under the Copyright Act, Cap 215, which was repealed and replaced by the Copyright and Neighbouring Rights Act, 2006. The object of this new law is to provide for the protection of literary, scientific and artistic intellectual works and their neighbouring rights. The repealed Copyrights Act was based on the United Kingdom Act and commenced operation in Uganda in January 1953. It had not been revised since its introduction despite the fact that the parent Act from which it was derived had many reforms.

The Copyright Act of 1953 did not contain any balancing features. This gap was filled by the inclusion of balancing features in Uganda's Copyright and Neighbouring Rights Act. The features were introduced into our law as a best practice from other jurisdictions.

The new law, which provides *inter alia* for fair use and other balancing

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features, was driven by several factors, including:

1. **WTO/TRIPS obligations:** As a member of the World Trade Organisation (WTO), Uganda is required to have laws that are in line with her obligations. The reform of copyright law was part of a bid to bring our laws in line with the requirements of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.
2. **East African Community (EAC) obligations:** The Treaty establishing the EAC calls for member countries to harmonise their laws. The reform was also cognizant of the East African Community Council of Minister's decision, requiring Uganda to expeditiously update her laws on copyright and strengthen the institutional framework to ensure that artists benefit from their work.
3. **Clarity and broader protection:** Ugandan law required clear and broad provisions regarding permitted free use (fair use) and the protection of neighbouring rights and moral rights. It also needed to broaden the area of work protected. The Copyright Act only provided protection for literary, musical or artistic work; thus the need to include electronic data banks, computer programs and multi media works, works published on the internet, data bases, works embodied in electronic form, compilations and any other works in the field of literature, science and art in whatever manner delivered, known or to be known in the future.
4. **Innovation and modernization:** In order to encourage investment and invention, Uganda's copyright law required strengthening of its enforcement provisions and adequate remedies against infringement. There was also a need to modernise the law to cope with global changes.

Under section 15 (1) of the Copyright and Neighbouring Rights Act No.19 of 2006, certain acts that constitute infringements of copyright are, nevertheless, permitted acts. These permitted free use provisions exist in order to restore the balance between the rights of the owner of the copyright and the rights of society at large. They restrict the exclusive rights granted by copyright in cases where it is felt that they go too far.

The Act provides that:

- (1) The fair use of a protected work in its original language or in a translation shall not be an infringement of the rights of the author

and shall not require the consent of the owner of the copyright where:

- a) the production, translation, adaptation, arrangement or other transformation of the work is for private use only;
- b) a quotation from a published work is used in another work, including a quotation from a newspaper or periodical in the form of press summary, where —
 - (i) the quotation is compatible with fair practice; and
 - (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used; and
 - (iii) acknowledgement is given to the work from which the quotation is made;
- c) a published work is used for teaching purpose to the extent justified for the purpose by way of illustration in a publication, broadcast or sound or visual recording in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;
- d) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;
- e) the work is reproduced, broadcast or communicated to the public with acknowledgement of the work, in any article printed in a news paper, periodical or work broadcast on current economic, social, political or religious topic unless the article or work expressly prohibits its reproduction, broadcast or communication to the public;
- f) any work that can be seen or heard is reproduced or communicated to the public by means of photograph, audio-visual work or broadcast to the extent justified for the purpose when reporting on current events;
- g) any work of art or architecture in a photograph or an audio-visual or television broadcast is reproduced and communicated to a public where the work is permanently located in the public place or is included by way of background or is otherwise incidental to the main object represented in the photograph or audio-visual work or television broadcast;

- h) for the purpose of current information, a reproduction in the press, broadcast or communication to the public is made to —
 - (i) a political speech or a speech delivered during any judicial proceeding; or
 - (ii) an address, lecture, sermon or other work of a similar nature delivered in public;
- i) for the purpose of a judicial proceeding, work is produced;
- j) subject to the conditions prescribed by the Minister [of Justice and Constitutional Affairs], a reproduction of literary, artistic or scientific work by a public library, a non-commercial documentation centre, a scientific work by a public library, a non-commercial documentation centre, a scientific institution or an educational institute if the reproduction and the copies made —
 - (i) do not conflict with the normal exploitation of the work reproduced;
 - (ii) do not unreasonably affect the right of the author in the work; and
- k) any work is transcribed into Braille or sign language for educational purpose of persons with disabilities.

The Kenyan equivalent of balancing features is contained in section 26 of the Copyright Act No. 12 (2001), The Laws of Kenya. The Tanzanian equivalent is in section 12 of the Copyright and Neighbouring Rights Act, Act No. 7 (1999).

II. KENYA

Section 26 (1) of the Copyright Act No. 12 (2001), Laws of Kenya, provides that copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing of any of the following acts in Kenya, namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original; but copyright in any such work shall not include the right to control -

- a) the doing of any of those acts by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source;

- b) the reproduction and distribution of copies or the inclusion in a film or broadcast, of an artistic work situated in a place where it can be viewed by the public;
- c) the incidental inclusion of an artistic work in a film or broadcast;
- d) the inclusion in a collection of literary or musical works of not more than two short passages from the work in question if the collection is designed for use in a school registered under [the Education Act](#) or any university established by or under any written law and includes an acknowledgement of the title and authorship of the work;
- e) the broadcasting of a work if the broadcast is intended to be used for purposes of systematic instructional activities;
- f) the reproduction of a broadcast referred to in the preceding paragraph and the use of that reproduction in a school registered under [the Education Act](#) or any university established by or under any written law for the systematic instructional activities of any such school or university;
- g) the reading or recitation in public or in a broadcast by one person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement of the author;
- h) the reproduction of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived there from;
- i) the reproduction of a work by or under the direction or control of a broadcasting station where the reproduction or copies thereof are intended exclusively for broadcast by that broadcasting authority authorized by the copyright owner of the work and are destroyed before the end of the period of six calendar months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work; and any reproduction of a work made under this paragraph may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcasting authority, but, subject to the provisions of this Act, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;

- j) the broadcasting of a literary, musical or artistic work or audio-visual works already lawfully made accessible to the public with which no licensing body referred to under section 46 is concerned:
- k) Provided that subject to the provisions of this section the owner of the broadcasting right in the work receives fair compensation determined, in the absence of agreement, by the competent authority appointed under section 48; and
- l) any use made of a work for the purpose of a judicial proceeding or of any report of any such proceeding.

Section 26 (2): Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original; but the copyright in any such work shall not include the right to control the reconstruction of a building to which that copyright relates in the same style as the original.

III. TANZANIA

Section 12 – Fair use provisions;

- 1) Notwithstanding the provisions of section 9, the following uses of a protected work, either in the original or in translation, shall be permissible without the author's consent and obligation to pay remuneration for the use of the work.
- 2) in the case of any work except computer programmes and architectural works, that has been lawfully published –
 - (a) the production, translation, adaptation, arrangement or other transformation of such work exclusively for the user's own personal and private use that such production does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author;
 - (b) the inclusion, subject to mention of the source and the name of the author or quotations from such work in another work, provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries;
 - (c) the utilisation of the work by way of illustration in publications, broadcasts, programmes distributed by cable, or sound or visual recordings for teaching, to the extent

justified by the purpose or the communication for teaching purposes of the work broadcast or distributed by cable for the use in schools, education, universities and professional training, provided that the use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast, the programme distributed by cable or the recording.

- 3) the distribution by cable or any work broadcast, where the beneficiaries of the distribution by cable live in the one and the same building, or group of buildings none of which is separated from another building by a public street or road, if the cable distributed originated from the same building or group of buildings and the distribution by cable is done without gainful intent.
- 4) In the case of any article published in newspaper or periodicals on current economic, political or religious topics, and in the case of any work of the same character broadcast or distributed by cable, the reproduction of such article or such work in the press, or the communication of it to the public, unless the said article when broadcast or distributed by cable was accompanied by the express provision prohibiting such use, and provided that the source of it when used in the said manner is clearly indicated.
- 5) For purposes of reporting a current event by means of photography, cinematography or communication to the public, the reproduction, to the extent justified by the informatory purpose, of any work that can be seen or heard in the course of the said event.
- 6) The reproduction of works of art and of architecture in an audio-visual or video recording, and the communication to the public of the works so reproduced, if the said works are permanently displayed in a place where they can be viewed by the public or are included in the audio-visual work or video recording only by way of background or as incidental to the essential matters represented.
- 7) The reproduction, by photography or sound or video recording, or electronic storage, by public libraries, non-commercial documentation centres, scientific institutions and educational establishments of literary and artistic works which have already been lawfully made available to the public, provided such reproduction, the number of copies made, and the use thereof are limited to the needs of the regular activities of the entity reproducing the work, and neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interest of the author.
- 8) The reproduction in the press or the communication to the public of:

- (a) any political speech delivered in public or any speech delivered during legal proceedings; or
 - (b) any lecture, address, sermon or other work of the same nature delivered in public, provided that the use is exclusively for the purpose of current information, the author retaining the right to publish a collection of such works.
- 9) The recordings by any broadcasting organisation for the purpose of its own broadcasts and by means of its own facilities, in one or several copies, of any work which it is authorised to broadcast. All copies of such recording shall be destroyed within six months or any longer period agreed to by the author.
- 10) Where a recording made under sub section (9) has an exceptional documentary character, a copy of it may be preserved in official archives, without the prejudice to the application of the provisions of this Act.

IV. GENERAL PRACTICE

In general practice, exclusive rights granted by copyright are restricted. This is particularly useful as copyright is extremely wide in scope and its term of protection is long. These restrictions may include:

A. Fair Use

Copyright allows fair use of work that attracts copy. Essentially, copyright will not be infringed if the use made of the work is fair. Copying of copyrighted work under fair use may include:

- (1) copying of work for research and private study; and
- (2) review and criticism. Copyright will not be infringed if sufficient acknowledgement of the author is given. It is fair to deal with another's work in order to criticize and comment on it.

In determining whether the use made of a work in any particular case is "*fair use*," the following factors are considered:

- (a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes;
- (b) the nature of the protected work;
- (c) the amount and substantiality of the portion used in relation to the protected work as a whole; and

- (d) the effect of use upon the potential market for value of the protected work.

The defence of fair use only becomes relevant when the part taken from the work is substantial, otherwise no copying arises in the first place and any defence is without purpose. Determining what is substantial is a question of fact and may vary from one case to another. The fairness issue is determined by a judge taking into account all circumstances of the case. The fact that a piece of work is not published does not waive the above requirements of fair use.

B. Incidental Inclusion

When a foreign tourist visits Kampala and takes some photographs, it is inevitable that at least one of the photographs will include work protected by copyright, such as a building, an artistic work or just the front page of a newspaper. The same applies when a television news crew films a demonstration in the city and the report is broadcast. It is not reasonable to require that copyright permission be obtained in advance on each of these occasions because such a requirement would make it impossible to create these photographs, films and broadcasts. As a solution, copyright law contains a rule that the accidental inclusion of a copyrighted work in an artistic work, a sound recording, a film, a broadcast or a cable program is not an infringement.

The inclusion must be accidental. This defense will not be available if a work is included deliberately. To go back to the news crew for example, imagine that they decided to add some background music to the sound track of their film. The background music is not included accidentally; thus, if the copying through the inclusion is substantial and no advance copying permission was obtained, copyright in the musical work will be infringed.

C. Educational Use

Copyright will not be infringed if a literary, artistic or musical work is copied, in whole or substantial part, in the course of instruction or while preparing instruction if two conditions are met. The copying must be done by the person giving instruction or the person receiving instructions and it may not be done by means of a reprographic process. When a student writes down a substantial part of a legal article in his or her essay in support of his or her own point of view, copyright in the article as a literary work will not be infringed. Neither will it be infringed when a lecturer writes down the same quote on the black board for discussion with the students during the

lecture.

Similarly, copies of a sound recording, a film, a broadcast or a cable program can be made in the making of a film or soundtrack for the purpose of instruction, without infringing copyright.

In an exam situation, copyright will not be infringed by anything done in setting the questions, communicating them to the students, or answering them. The questions can thus contain a large quote taken from a literary work before asking students to analyse it and comment on it. The only exception to this rule is the making of reprographic copies of a musical work that is to be performed by the students during the examination; in such circumstances, copyright permission is required.

The educational exception does not cover any subsequent dealings in the copies made for educational use. Copyright will be infringed if the copies are sold, let for hire, or offered or exposed for sake of hire.

There is a big gap between the law in the books and the law on the ground because Uganda has still failed to implement this copyright law efficiently.

For a long time, rights holders decried the law which was in place and demanded amendments. Post amendments, there has been no increase in the number of cases brought to the courts for infringement of rights, and no increase in arrests.

People deal in pirated material and photocopied works for commercial gain. The movie and documentary film industries are still in their infant stage and have not yet been properly tested by the law. Most of the DVDs, CDs and videos on sale in the country from within and outside Uganda are pirated. According to James Wasula, General Secretary of the Uganda Performing Rights Society (UPRS), legitimate music dealers are competing unfavourably with pirates and this adversely affects the industry. Another example: there are more than 100 licensed FM radio stations in Uganda but only three have legitimately signed contracts permitting them to play artists' music.

Creators of works have appealed to the government to better implement the law. They suggest training police officers and operationalising the provisions of the Copyright and Neighbouring Rights Act to bring infringers to book. One of the reasons cited for the government's failure to implement the law is the inability of the police to tell the difference between

genuine and pirated material and their lack of knowledge of the provisions in the law.

Documentary producers and filmmakers (foreign and a few Ugandans) usually seek permission when they intend to use protected work, or, where they do not get the consent of the rights holder, they acknowledge the source of the work. For instance, when ‘The Last King of Scotland’ was being filmed in Kampala in 2005, permission was sought from Afrigo Band (a prominent local band) before some of their musical work was used as a sound track to the movie.

In Uganda, however, balancing features are under-used because the majority of Ugandans do not know about copyright law or the effect of using protected work without consent or acknowledgment.

There is not much information available on how the balancing features are being used. The law has been in place only a year, and the balancing features have not been fully utilised. The majority of Ugandans do not know about the law and even more cannot tell the difference between a genuine copyrighted material and a counterfeit. Furthermore, it is difficult to get Ugandan filmmakers to comment on how they utilise fair use provisions because they seem to perceive fair use as immoral and unfair (most likely as a result of their ignorance of the provisions of the law) and thus are weary of disclosing any information or truth that might be used against them.

There is currently no political or other pressure to alter the law.

The film industry in Uganda is still in its infancy. Most filmmakers are simply employees under contract by employers who also double as executive producers. Basically the onus of compliance to copyright laws is bestowed to the employer/producer. These employers usually include Non-governmental Organisations (NGOs), International Companies and Charity organisations.

CONCLUSION

In order for copyright to promote and encourage creativity with a view to benefiting society as a whole, it is necessary to strike a balance between the rights of the owners of copyright and neighbouring rights on the one hand, and the rights of those wishing to use protected works on the other. This is because all creativity is, to a great extent, dependant upon what has come before, and so, excessive protection can amount to a fetter on subsequent creativity. Above all, there is need to sensitize all stakeholders

to the law and how it can be used to protect rights holders so as to enhance creativity, improve the work of other people and provide inspiration to users of the works.

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