

**Copyright and course material distribution:
An analysis of key overseas law reviews, reforms and
cases and their significance to New Zealand university,
institute of technology and polytechnic libraries**

by

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Submitted to the School of Information Management,
Victoria University of Wellington
in partial fulfilment of the requirements for the degree of
Master of Information Studies

June 2015

Abstract

Research Problem: New Zealand tertiary institutions operate within a difficult copyright environment, where education users' rights are restricted under the Copyright Act. Overseas there have been copyright developments of benefit to education users. There is a lack of literature examining education copyright exceptions in the New Zealand context, a gap this research addresses. The purpose of this research was to investigate what significance recent copyright developments in overseas jurisdictions may have in relation to educational copying for course material distribution in New Zealand in order for tertiary libraries to better understand, engage with and respond to copyright reform.

Methodology: Qualitative content analysis was conducted of a purposefully selected sample of documents. Relevant law reviews, reforms and court cases were chosen from Australia, the United Kingdom, Australia and the United States. Some historical research was undertaken to place New Zealand within the wider international copyright arena and to establish the applicability of examining developments in the stated countries. This included a discussion of the major copyright treaties.

Findings: The research attests to the global influence of copyright law. Expanded education exceptions have been recommended or implemented to maintain copyright balance in the digital era. Cases have strongly endorsed that fair use and fair dealing exceptions are a user's right. Education's centrality to copyright's utilitarian purpose of promoting the public good is the fundamental reason for the expansion of education users' rights and favourable court rulings in the countries studied.

Implications: New Zealand tertiary libraries can expect the government to consider international developments during the pending review of the Copyright Act, and tertiary institutions have grounds to lobby for the same user rights as their overseas counterparts enjoy. Should an education exception be enacted, universities, institutes of technology and polytechnics would have the opportunity not to renew the expensive Copyright Licencing Ltd licenses they currently require. Libraries would then need to ensure robust copyright management policies and practices exist in their institutions. If litigation ensued, overseas precedents provide optimism for education users in defending their rights.

Keywords: copyright, exceptions, fair dealing, fair use, education, academic library

Acknowledgements

I would like to thank Dr Chern Li Liew and Dr Brenda Chawner, Senior Lecturers in the School of Information Management, for enabling me to carry out this research. Chern Li provided excellent instruction and suggestions during the Research Methods course, and Brenda supervised my project with patience, giving me indispensable guidance and advice. Thanks also to LeeAnne Templer for proof-reading my report over a holiday weekend.

I would also like to thank my family, friends, colleagues and fellow students for the support and encouragement they have given me in a multitude of ways throughout my degree. In particular Bryony Sinclair, who has been an invaluable ally, and my inspirational children Max and Grace Kaemper, who have been truly awesome.

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1.0 Introduction

The Anglo-American copyright tradition dates back to the English Statute of Anne 1709,¹ which begins by emphasising it is “An Act for the Encouragement of Learning” (Teilmann, 2005, p.73). Inherent in the copyright system is the understanding that all authors draw on those who have come before. While copyright encourages the creation of works by giving copyright to the author, it limits this right for the greater good of society to productively access and use these works (Patry, 2009, pp.5, 8). Copyright law therefore seeks to maintain balance between authors and users, primarily through fair use and fair dealing exceptions.

Copyright is automatically applied to a wide range of works, including literary, dramatic, artistic and musical works, sound recordings, films and communication works (Copyright [New Technologies] Amendment Act 2008, s11). This research focused on examining copyright in relation to course material distribution in New Zealand (NZ) universities, institute of technologies and polytechnics (ITPs), particularly the provision of readings. These come under literary and dramatic works in the Act. Issues and the complexities of law relating to copyright works outside this scope were not addressed.

Copyright has attracted growing interest and controversy over the past three decades from many parties, including creators, users, legislators, academics, and economists. This is largely due to the technological changes that have occurred in the digital environment and the challenges these pose to copyright, including through advanced copying and distribution techniques (Davies, 2002, pp.6-7). There has been an unprecedented rate of copyright developments and reform at both national and international levels (Davies, p. ix). Interest in exceptions to copyright has been particularly heightened, with much discussion on how far they should go (Burrell & Coleman, 2005, p.3). Policy makers are re-evaluating “the relationship between copyright exceptions and innovation, research and economic growth” (Australian Law Reform Commission [ALRC], 2013, 1.9). This research explored developments overseas pertaining to education fair dealing and fair use exceptions and the significance of these developments to NZ.

¹ Although normally referred to as 1709, the Statute was presented to the House of Commons on January 11, 1710 and became effective on April 10, 1710 (Patry, 2009, p.18).

1.1 Rationale for the Research

For roughly the past century the rights provided to copyright owners have increased under law (Davison, Monotti & Wiseman, 2012, p.297). Many scholars, such as Aufderheide and Jaszi (2011, p.16), argue that copyright balance has therefore become unduly weighted towards owners, creating an unstable situation.

The copyright environment that NZ universities and ITPs operate within is difficult. Users' rights under copyright law are considered restrictive (Kingsbury, 2005, p.71) and education exceptions became more so under the 1994 Copyright Act ("Introduction...", 2015, 3.3 Part III). This means users' rights are defined in law (and interpreted by courts) in a narrow manner. The eight universities and eighteen ITPs,² which make up the bulk of the tertiary education sector, require a costly Copyright Licensing Limited (CLL) license because the Act does not allow sufficient provision for teaching requirements. For example, only three percent of a work can be copied for course material distribution.³ The license primarily extends the permitted percentage of multiple copies of print works (e.g. to 10 percent or one chapter, whichever is greater, of a book⁴), though increasing proportions of copying is actually being done from separately licensed electronic resources. This challenging copyright environment was recently epitomised by a lengthy legal dispute between Universities New Zealand and CLL, when negotiations over a new license failed.⁵

Meanwhile, there have been landmark court cases in the United States (US) and Canada in which liberal fair use and fair dealing rulings have been made. These are of consequence to education users' rights and copyright balance generally and to course material distribution. There have also been copyright law reviews and reforms in a number of Commonwealth countries, including Australia, the United Kingdom (UK) and Canada, in which education exceptions to copyright have been expanded. It is timely to examine these and assess their significance to NZ.

² Refer to Appendix A for details of these institutions.

³ Refer to Appendix E for details in Section 44 of the Copyright Act 1994.

⁴ The license covers books, periodicals, journals, newspapers and artistic works published in a book. For further license information see the Education page of the CLL website: <http://www.copyright.co.nz/Licensing/Education/>

⁵ The previous Universities NZ CLL license expired in late 2012. When negotiations over a new license failed CLL filed a reference with the Copyright Tribunal. Central to the stalemate was agreeing the proposed cost of the new license (*CLL v. University of Auckland and Others*, 2013, pp.2-4). The ITP license negotiations, which are carried out separately, were unproblematic but postponed until the Tribunal decision on the Universities licence was made (CLL, 2012, p.1). All licences were carried over until the dispute was resolved. In late 2014 agreement was reached between the Universities and CLL for a pilot license with terms and costs set until end 2016. Negotiations with the ITPs for their new license resumed in 2015. Issues arising from the dispute played out through the Courts - *CLL v. University of Auckland and Others*, NZHC1015 May 2014, NZHC 2281 Sept 2014 and NZCA 123 March 2015.

1.2 Problem Statement

There is a paucity of literature regarding copyright balance, exceptions and educational copying in NZ. A couple of dated research projects discuss the issue in relation to legislation here and overseas (Branthwaite, 1999 and Daniels, 2001), while Kingsbury (2005) relates a 2004 Canadian case, *CCH Canadian Ltd v. Law Society of Upper Canada (CCH)* to the NZ context, Sims (2007) examines the court's use of public policy and Austin (2012) explores fair use from a NZ perspective. Scholars are analysing the impacts of the recent American and Canadian court cases (e.g. Findlay, 2013; Geist, 2013) and reforms in overseas jurisdictions but not in relation to New Zealand. This gap in the literature is worth addressing.

By analysing what has happened in relevant overseas jurisdictions, NZ university and ITP libraries are in a position to better understand what change may occur here and the implications of that. For example, to understand the possible impact on CLL licensing should legislative reform occur, or whether courts may interpret current law differently now than previously. As Hudson (2013, p.216) demonstrates, judicial attitudes are not fixed.

It is in the interests of their user communities that libraries are engaged with copyright developments and examine in light of these whether or not their copyright policies and practices are appropriate. There is also the potential to lobby for any desirable law reform. It is important to universities and ITPs that access to information is not unduly hindered by copyright, and librarians, while respecting the rights of authors, are ethically committed to advocating for such access (International Federation of Library Associations, 2012, Section 4). This can include preparing submissions for law reviews.

1.3 Research Objective and Questions

The objective of this research was to investigate what significance recent copyright developments in overseas jurisdictions may have in the NZ context in relation to educational copying for course material distribution. This was done taking into account NZ's copyright history, law and international treaty obligations. Questions requiring exploration were:

- What copyright reform or reviews have occurred in the past five years in the UK, Canada and Australia in relation to education exceptions?
- What do the recent landmark copyright court cases in the US and Canada mean for education users' rights?
- What is the significance of these international developments to NZ university and ITP libraries?

These countries were selected for the currency and importance of the developments that have occurred there and their relevance to NZ, as is further discussed in the Literature Review and the Historical International Overview sections of this research. The sample documents chosen to address the research objective and questions are explained in the Research Design section.

1.4 Definition of Key Terms

Copyright: The legal, assignable, limited rights given to creators of original recorded works (e.g. written works) (Copyright Act 1994, Part 1).

Copyright balance: The balance between the rights granted to authors to control their work and the rights of the public to use that work, without adversely impacting those rights (ALRC, 2013, 2.8).

Dramatic Work: includes – (a) a work of dance or mime; and (b) a scenario or script for a film (Copyright Act 1994 [NZ], s2[1])

Fair Use: Provides an exception to copyright for the benefit of users. It gives illustrative examples only of what might be fair. The four usual factors governing assessment of fairness are, in brief:

1. Purpose of the use
2. Nature of the work
3. Amount and substantiality of the part copied
4. Effect of use on the work's market (Copyright Act 1976 [US], s107).

Fair Dealing: Provides an exception to copyright similar to fair use but confined to a *prescribed* set of purposes deemed fair (which differ in each jurisdiction). Usual factors governing assessment of fairness are the same as for fair use (ALRC, 2013, pp.24-25).

License: “a licence to do, or authorise the doing of, any restricted act” (Copyright Act 1994 [NZ], s2[1])

Literary work: “any work, other than a dramatic or musical work, that is written, spoken or sung; and includes – (a) a table or compilation (b) a computer program” (Copyright Act 1994 [NZ], s2[1])

2.0 Literature Review

2.1 Theoretical framework

The overarching theoretical concept relating to copyright is that it provides balance between authors' and users' rights (Meese, 2010, p.170). The three most dominant theories within this are: Utilitarianism; John Locke's Labour Theory; and Personality Theory (Fisher, 2001, p.173). The latter relates to the natural moral right of the author and is most applicable to copyright in France and Europe (Deazley, 2006, p.138). The prominence of these theories stems chiefly from the ideas articulated in court case rulings and legislation, particularly in regard to utilitarianism (Fisher, p.173).

Locke's theory (1690, Chapt. V) posits that man has a property entitlement to that which he has laboured over. Furthermore, the state is obliged to enforce that right in law. In the case of copyright, authors labour to create their works, and this theory has historically been viewed as one which primarily supports authors' rights (e.g. Fisher, 2001, p.174). Past legislative reform favoured this view of copyright (Scassa, 2005, p.43) which is considered an Anglo-centric approach to natural rights theory (Deazley, 2006, p.138). 'Locke's proviso' asserts that in claiming a property right man must ensure "there is enough, and as good, left" (Locke, Chapter V, Sect.27). Some scholars, such as Gordon (1993), argue this means the common good is accounted for, rendering the theory compatible with acknowledging users' rights. Craig (2002) acknowledges this interpretation but believes it is of limited value (p.56), contending that Lockean theory should be departed from entirely in order to truly allow a public interest rather than a rights-based approach to copyright (p.1).

Utilitarianism originates from the nineteenth century philosophy of John Stuart Mill, who in "On Liberty" (1859) promoted the liberal principal that the state allow individuals freedom providing no harm is done to others (Pojman & Vaughn, 2014, p.597). Freedom of thought, expression and association are his primary concerns (Fitzpatrick, 2006, p.65). In his later work "Utilitarianism" (1861), Mill argued for the importance of the general good, via the concept of impartiality. He believed that impartiality between one's own and other people's happiness lay at the core of the Greatest Happiness Principal, or Utility (Skorupski, 2006, pp.22-23, 38). Utilitarianism considers that the maximal collective good, or happiness, should govern our actions, and be reflected in law (Daniel, 2006, p.15). Fisher (2001, p.169) refers to this as "maximization of net social welfare."

Utilitarianism aligns with the purpose of copyright law being beneficial to society as a whole (Fisher, 2001, p173) and supports users' rights. Ginsburg (1998, p.131) explains utilitarianism's applicability to Anglo-American copyright through the English Statute of Anne (1709) and the United States Constitution's copyright clause (1787), which both stress the importance of the public good. These are the first two major legislative copyright documents (Davies, 2002, p.4), the latter heavily drawing on the former and both influential. Utilitarianism has become favoured by scholars, who increasingly approach copyright balance as being concerned with advancing 'social utility' by limiting author's rights (Scassa, 2005, p.43).

Utilitarian theory is evident in much of the reviewed literature and the research project was particularly informed by this dominant public interest theory in its approach to investigating copyright.

2.2 The Literature

As well as providing the theoretical framework for this research, reviewing the copyright literature revealed six important themes, and the following discussion of the literature has been organised around these themes.

Balance

Copyright literature regularly refers to the purpose of copyright law and in this context the concept of balance is invariably discussed. Balance is often said to be a crucial part of copyright law, as in Sims' article (2007, p.80). The Copyright Principles Project (CPP) report proposed guiding principles upon which copyright law in the US should be based. The opening words read: "A well-functioning copyright law carefully balances the interests of the public and of copyright owners" (Samuelson, 2010, p.1181). The report acknowledges that while agreement on this is widespread, how to achieve it is contentious (p.1176).

Where the best balance lies and how to attain it is therefore at the heart of the copyright debate. Scassa (2005, p.65) asserts that in any review of copyright law the main consideration is how proposed reform will affect existing balance in the legislation. Sims (2007, p.86) argues that public policy must be utilised by NZ courts when interpreting legislation to ensure that balance is not weighted too heavily towards copyright owners. Fundamental to Sims' discussion is the understanding that judges are instrumental in law-making (p.80). This is applicable to much copyright literature and this research project, which includes analysis of court cases partly for this reason.

Scholars, such as Aufderheide and Jaszi (p.16), have posited that copyright balance has been tipped in favour of authors, mostly because of an erroneous notion that it exists primarily for their benefit and that they have created their works entirely independently. Patry asserts (in his repudiation that owners' rights are paramount), that there is no basis in the purpose of copyright to consider any one entitlement more important than another (2009, p.472). Commonwealth countries have fair dealing exceptions, interpreted in various ways, as their key balancing mechanism. The US has fair use. These are an essential part of the copyright system (Craig, 2011 p.156), not merely an infringement defence. Fair use and fair dealing are discussed in separate sections to follow.

Kingsbury (2005) demonstrates how similar laws can be interpreted differently in her analysis of the approach to copyright taken by the Supreme Court of Canada in *CCH*. Kingsbury first notes that there had been a trend towards rights being increasingly extended to authors to the detriment of users (p.68). Although the respective laws were similarly restrictive, Kingsbury finds interpretations made in *CCH* offered a broader, more principled approach to users' rights than those made in NZ cases (p.73).

Fair Use

Fair use is considered a highly flexible way of enabling use of copyright works without infringement (Burrell & Coleman, 2015, p.4). There has been a resurgence of advocacy for the value and practice of fair use within the US since the late 1990's (Aufderheide & Jaszi, p.9). Scholars are also increasingly arguing the merits of its use in jurisdictions outside the US. Austin (2012) examined how useful fair use might be in NZ. He concluded it certainly has benefits, including facilitation of downstream activity (p.294-5), but these would be most usefully realised if fair use was introduced with more harmonious features than in American law (p.315). Austin was not convinced the introduction of fair use was preferable to refinements to fair dealing (p.317).

Hudson (2013) however, concludes that multiple factors indicate fair use would be a positive mechanism in Australia, noting the majority of respondents to the ALRC review were in favour of it, and that fair use is better able to cope with changing technologies (pp.206, 207). Hudson asserts that a lack of copyright cases in Australia should not prevent the adoption of fair use, because judges routinely rely on overseas copyright precedents, including from the US (p.218). This point also lends itself to the validity of examining overseas cases in the research study. Fair & Tidmarsh (2014, p.33) also reach favourable conclusions regarding the recommendations of the ALRC report to adopt fair use, noting for example that it would allow copyright works to be used in a way "consistent with the greater public interest of facilitating intellectual progress" (p.33).

Critics of fair use claim it lacks certainty and predictability (Burrell & Coleman, 2005, p.250). However empirical studies have shown this is not the case. Beebe (2007) quantitatively analyses federal rulings and use of the four fair use factors in determining the outcome of cases between 1978 and 2005. Beebe finds consistent predictors of fair use findings, including that non-commercial use (p.603), transformative⁶ use (p.606) and works of a factual nature (p.556) are more likely to attract fair use rulings. Samuelson (2008) qualitatively analyses cases according to policy clusters and finds these groupings provide a useful way of determining the likelihood of fair use findings (p.2537). Samuelson notes a lack of fair use case law in education from which to draw conclusions in this policy area (pp.2586-7). Since then landmark rulings in the US, *Cambridge University Press v. Becker* and *Cambridge University Press v. Patton*, known as *Cambridge*, have established reasons for favourable rulings in education.

⁶ For a purpose different to that for which the material was created (ALRC, p.132)

Fair Dealing

Fair dealing exceptions are often lauded for their ability to provide certainty. This is because in fair use any use is potentially fair, however in fair dealing only prescribed uses can be considered.

As a result of the Copyright Pentalogy,⁷ Canada can be seen as a leading example of recognising users' rights in fair dealing and also the public interest in copyright balance. Tawfik (2013) argues this in her analysis of two Pentalogy cases, *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada (Bell)* and *Alberta (Education) v. Canadian Copyright Licensing Agency [Alberta (Education)]*. Tawfik convincingly demonstrates the courts' prominent belief in the benefit to society of access to works (p. 198) and its reinterpretation of fair dealing in a distinctly Canadian way (p.192), moving away from historical similarity to UK law. The Court did not consider either the British or NZ decisions cited by the defendants helpful, because they showed a restrictive approach to assessing the purpose of copying (p.194). This indicates the gap between NZ and Canada, pointing to a need for change and research on fair dealing reforms. Researching copyright developments using Canada as a benchmark seems warranted.

Scholars such as Patry (2009, p.496) assert that it is not the name of the law but how the law is applied that is significant. Geist (2013) demonstrates this in his argument that Canada has in practice a fair dealing system which operates in a flexible fair use like manner. He uses the Court's approach to copyright balance and consideration of whether use was fair in *CCH*, *Bell* and *Alberta (Education)*, along with the introduction of Bill C-11, as the basis for this argument. The increase in the number of fair dealing purposes (including education) and Geist's evidence of the more liberal interpretations being made of them, support his conclusion.

⁷ Five copyright rulings delivered by the Supreme Court of Canada on 12 July 2012.

Education

As noted in the Introduction to this report, the Statute of Anne explicitly draws attention to the goal of copyright being to encourage learning. There is a wealth of literature discussing the importance of education exceptions in the copyright equation, and general agreement that education advances the public interest. As Xalabarder (2010, p.230) states it: “All copyright instruments mention education as a public interest that justifies an exception or limitation to the authors’ exclusive rights.” She goes on to note however that education is not necessarily receiving appropriate recognition (p.231).

Canada provides an example of where education has been paid due attention. Tawfik’s analysis expounds the Canadian court’s belief that access for educational use is deemed fundamental (2013, p.199). Trosow (2013) investigates what the *CCH* decision, Bill C-11 and the *Pentology* mean for the education sector in Canada. He concludes that the combined message from the courts and legislature is that, regarding the use of copyright work in the educational context, users’ rights have been firmly established (p.213). Trosow further asserts that universities should feel confident to formulate policies utilising the new fair dealing provisions, including terminating licence agreements with Access Copyright “at the earliest possible opportunity” (p.227). Trosow’s approach of considering what his analysis of copyright developments means for university policy was adopted in the research study.

The importance to universities of education exceptions is shown by Universities Australia’s comprehensive and persuasive submission to the ALRC discussion paper on copyright. For example, Universities Australia (2013, p.3) strongly supports the proposed replacement of fair dealing exceptions with fair use, listing education as an illustrative purpose, believing this would enable academics to use copyright material in the more advantageous ways currently afforded to American faculty. They also believe fair use would assist them to remain competitive in a global education market.

Academics in the US and elsewhere have also been following the *Cambridge* case, which saw Georgia State University sued by three academic publishers⁸ for copying without paying licensing fees. In a landmark ruling the judge decided use was fair in 70 of the 75 claims of infringement. Findley (2013, p.612) asserts that the District Court's 2012 decision has emphatically given the message to universities in the US that infringement does not occur if they make copies of extracts of copyright works for educational purposes. The ruling was appealed and in 2014 The Court of Appeals upheld many of the original decisions, but ruled there were some errors in the analysis and referred the case back to the District Court. Smith (Oct 2014, paras.1, 5, 8) claims little benefit can come out of a re-analysis for the publishers.

⁸ Cambridge University Press, Oxford University Press and Sage Publications.

Human Rights

Human rights link to themes of copyright exceptions and education. Copyright law increasingly interfaces with rights articulated via the Universal Declaration on Human Rights (UDHR) particularly Article 27, which begins with the right to participate in cultural life and share in the benefit of scientific advancement (United Nations, 1948). Gervais (2010, p.507) argues that access to and reuse of material through the education copyright exception is fundamental to enabling this and notes the European Copyright Code (ECC) report discusses exceptions specifically in relation to the right to participation in cultural life (p.506). Xalabarder (2010, p.244) also argues that copyright must take into account other rights and that the correct balance of exceptions must be found in copyright law to help ensure the public's right to education and cultural access. The second part of Article 27 reflects the other side of copyright balance, the right to protection of interests resulting from authorship.

Many countries have enacted Human Rights Acts in accordance with United Nations conventions on Human Rights. Burrell and Coleman (2005, p.2) argue that increased interest and controversy around copyright exceptions is partly due to the intersection between copyright and rights expressed in such acts, which also includes freedom of expression. This is covered in Article 19 of the UDHR. Restrictive copyright laws have the potential to impact on users' ability to 'speak' using protected expression (Austin, 2012, p.301). Fair use is sometimes seen as being most compatible with enabling freedom of expression (Austin, p.302) as is evidenced in American case law (p.287). Sims (2011, pp.490, 497) argues that copyright in practice can and does limit freedom of expression, and that in NZ fair dealing is currently too narrow to accommodate it. In NZ it is the Bill of Rights Act 1990 which may need to be considered in tandem with copyright law (Sumpter, 2013, p.xvii).

International Context

Copyright is at its core an international construct (Phillips, Durie & Karet, 1997, p.118). This is demonstrated in different ways in the literature. Gervais (2010) examines the CPP and ECC reports, with reference to international copyright treaties.⁹ He finds they concur that exceptions are integral to copyright law and that internationally public interest is a recognised aspect of copyright balance. Regarding the Berne Convention's 'three-step' test of determining exceptions to copying rights, Gervais argues this gives countries scope to formulate national copyright policy (p.503).

Frankel (2011a, p.5) states it is considered necessary for practitioners in NZ to consider laws and cases from overseas jurisdictions, in order to address copyright matters locally. New Zealand does not have significant case law to draw on regards users' rights, and no recent decisions (Kingsbury, 2005, p.71). Nor does Australia (Austin, 2010, p.620). Kingsbury (p.74) finds that the Canadian *CCH* decision should be given consideration by NZ courts in future copyright cases. This supports the analysis of the international documents selected as the research sample.

The situation is not straightforward however. As Hargreaves states in his report commissioned by the UK government, adopting fair use, although potentially beneficial, was unlikely to be legally feasible under European law (2011, p.46). The European Union, with its author's right tradition, has taken steps to harmonise copyright law (Davies, 2002, p.50). The harmonisation rules have tended toward requiring more protection than is required under international treaties (Goldstein & Hugenholtz, 2013, p.67). The UK has been restricted by this in the law reform it implemented this year and is not necessarily as influential to NZ now as in the past (Frankel, 2011a, pp.5-6). This research included but also looked beyond the UK for meaningful copyright data.

Trade agreements also impact on copyright. Major economic powers have come to recognise the economic advantages intellectual property in general can provide (Davison et al., 2012, p.13). The existence of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) is evidence of the importance to national economies of copyright (Davies, 2002, pp. 238-9). An example of the impact of trade is Australia's extension of copyright protection to life of the author plus 70 years to reach a free trade agreement with the US in 2004 (Goldstein & Hugenholtz, 2013, p.87). Also, the reason the NZ government has put its copyright review on hold

⁹ The Berne Convention 1886, last revised in 1971, the TRIPs Agreement 1994 and World Intellectual Property Organization (WIPO) Copyright Treaty 1996 (Gervais, 2010, p.511).

until after the Trans-Pacific Partnership (TPP) Agreement¹⁰ is finalised is that the Agreement may impact on our copyright law. Taking international agreements into account was a necessary part of this project.

Summary

The reviewed literature supports the purpose of the research project by revealing copyright is viewed and usefully examined in a global context. The literature demonstrates that fair dealing/fair use exceptions are high on the copyright agenda, an integral part of establishing and maintain copyright balance and highly relevant to education. It also shows that human rights now interplay with copyright in a manner that intersects with educational concerns. A qualitative content analysis methodology, which is primarily adopted by scholars in this area, was applied to this research project.

¹⁰ The TPP is a regional free-trade agreement being negotiated between 12 Asia-Pacific countries, including the US, Canada, Australia and New Zealand. The decision by the US to be involved was made in 2008, but the first round of negotiations didn't commence until 2010, and are ongoing (Ministry of Foreign Affairs and Trade, 2013, para.1).

3.0 Research Design

3.1 Methodology

The research questions were investigated using a qualitative research design, because this suits an in-depth examination of a specific phenomenon (Leedy & Ormrod, 2013, p.95). Qualitative research was also fitting given the research explored and interpreted a small sample of textual data and analysis involved the subjectivity and predominantly inductive reasoning characteristic of qualitative research (Leedy & Ormrod, p.96).

Document analysis was the chosen research method and required the evaluation and synthesis of data in selected documents (Bowen, 2009, p.28). Document analysis requires that the data is explored and examined to “elicit meaning, gain understanding and develop empirical knowledge” (Bowen, p.27). The main approach to the qualitative analysis of documents is qualitative content analysis, which involves the evaluation of thematic categories (Bryman, 2012, p.557). This was appropriate for investigating concepts relating to users’ rights and education exceptions.

The advantages of using document analysis for this project include some of those identified by Bowen (2009, p.31): efficiency (less time consuming to select, rather than collect, data); availability (publicly accessible documents); the unobtrusive and non-reactive nature of documents (the reflexivity issues inherent in other qualitative methods do not exist); and exactness. Permanence of data, as discussed by Denscombe (2014, p.226) can be added to this list. The data are available in a form that is permanently open to public verification.

To confirm the applicability of examining international documents beyond what has been revealed by the literature review, an historical international overview was provided to demonstrate the interconnections between the copyright laws of the studied countries and NZ, for example via the Statue of Anne. This includes the influence of international treaties on copyright law. An element of historical research using primary and secondary sources was therefore required.

3.2 Research Sample

The research entailed textual analysis of targeted, information-rich documents selected strategically to facilitate meaningful understanding about the topic, a sampling strategy called ‘purposeful sampling’ (Patton, 2002, p.243). Jupp (2006, p.245) notes the advantage purposeful sampling has of providing detailed data relevant to the research question. Purposeful sampling is excellent for creating what Denscombe (2014, p.41) calls an ‘exploratory sample’ in that it enables the researcher to focus on samples which they believe are of central importance for the research. Indeed purposeful sampling is sometimes referred to as ‘relevance sampling’ (Krippendorff, 2013, p.120.) Bowen (2009, p.33) notes the importance in document analysis of choosing documents based on their relevance to the research problem and conceptual framework, which supports the chosen sampling technique.

Purposeful sampling must also be criterion based (Morrow, 2005, p.255). All documents were selected because they are very recent, apart from *CCH* which was included because it was instrumental in opening up Canada’s approach to fair dealing. In addition, the ALRC report was selected because it is a particularly detailed review of copyright by our close neighbours specifically focusing on exceptions to copyright. The Canadian and UK reforms enacted expansions to education exceptions and both countries are of interest to NZ. The court cases for the research were chosen because they are considered landmark rulings and they deal with both fair dealing and fair use copyright issues relevant to education. The documents enable a range of perspectives to be examined, in terms of jurisdictions and court versus legislative decisions. Selecting information from a range of individuals (in this case documents) and settings provides a measure of triangulation (Maxwell, 2013, p.128), which aids in the verification of research findings.

Scott (1990, p.6) establishes four criteria for quality of evidence (a factor in validity of results) in his work on using documents in social research: authenticity; credibility; representativeness; and meaning. He argues that authorship and access influence these criteria, positively in regards the documents being used in the research. Utilising the classification system devised by Scott (p.14), within the dimensions of authorship and access, the documents being used are ‘official, state, open, and published.’ Bryman (2012, p.387) believes official documents are clearly authentic and meaningful, representativeness not applicable in the qualitative paradigm, and credibility dependent on the document. In this research the sample documents are considered to be an accurate account of a sincere viewpoint, and therefore credible (Scott, p.22).

Documents selected for analysis:

- Law review:
 - Copyright and the Digital Economy: The ALRC Report 122, 2013
- Law Reform:
 - The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (UK)
 - Copyright Modernisation Act (CMA) 2012 (Canada)
- Court cases:
 - *Alberta (Education)*, 2012
 - *CCH*, 2004
 - *Cambridge*, 2014

With reference to:

- Treaties:
 - The Berne Convention
 - The TRIPs Agreement
 - World Intellectual Property Organisation (WIPO) Copyright Treaty
- Copyright legislation:
 - From the UK, Canada, NZ, Australia and the US

Patton recommends that qualitative sampling be approached flexibly, allowing additional samples to be added as research progresses if this would add value to the project (2002, p. 246). The researcher was open to additional court rulings or reports being discovered through analysis of those selected. When added, the combination of criterion/intensity and opportunity sampling can provide another measure of triangulation (Patton, p.248). Initially the new UK regulations were to be analysed in isolation. As it transpired, three documents were examined in conjunction with them, partly because one of them (The Hargreaves Report) was cited a number of times in the ALRC Report. Similarly, the Legislative Summary to Bill C-11 was referred to in conjunction with analysing the CMA in Canada. Conversely, the 2012 *Cambridge* ruling became superfluous as a document to analyse as originally planned because the 2014 ruling covers this in some depth.

3.3 Data Collection and Analysis

The court cases, legislation, reports and treaties used as documents for this research are all easily publicly accessible so data collection was unproblematic. The documents are available on the internet and may be freely viewed online, downloaded or printed. This official government publication status has benefits beyond those already noted, which include that no human ethics approval was required and there were no privacy issues.

Document analysis requires a thorough reading of the texts in order to identify meaningful and relevant passages of text (Bowen, 2009, p.32). This reading (and re-reading) is referred to as 'immersion' in the data, and leads to an intimate knowledge of it (Morrow, 2005, p.256; Marshall & Rossman, 2011, p.210), specifically the parts relevant to addressing the research problem. It is useful to think of data analysis beginning with this initial reading and engagement with the documents (Maxwell, 2013, p.105).

The literature review provided a conceptual framework and useful themes around which data was organised as it was reduced. No further themes emerged from the documents themselves. This data reduction is a distinctive aspect of qualitative content analysis compared to other methods of qualitative data analysis (Schreier, 2012, p.7). In-depth interpretation and synthesis of the data proceeded in the Discussion section after the themes were confirmed and data organised and presented in the Findings. It was helpful for brief analytic memos to be written throughout the data analysis process, in part to aid in the final production of a coherent narrative report (Marshall & Rossman, 2011, p.211). The entire process of qualitative document analysis is iterative (O'Leary, 2014, p.306).

Qualitative research is by nature subjective, and it should be stated in the interest of trustworthiness that the researcher's perspective was shaped by her work in a university library. Maxwell (1992, pp.284-5) argues that trust in qualitative findings can be achieved when they are justified by the evidence presented, particularly through what he calls descriptive, interpretive, and theoretical validity. Following these criteria the researcher aimed to achieve trustworthiness in the research project by presenting an accurate account of the data, interpretations that are evidenced by the data, clear explanations of theoretical concepts and appropriate application of these to the data (Maxwell, 1992, pp.286, 289, 292). This involved using what Patton (2002, p.503) and other scholars refer to as 'thick description'.

Similarly Morrow discusses what she terms ‘adequacy of data and interpretation’ (2005, pp.255-256) as two of her criteria for establishing trustworthiness in qualitative research. This includes obtaining a purposeful sample of varied information-rich data, which the researcher must immerse themselves in, and providing an articulated, systematic analysis of the data using a theoretical framework and a balance of interpretation and quotations. The researcher heeded these synonymous criteria during the research process so that findings would be warranted. The researcher does not have a legal background and the documents were approached from the viewpoint of a library practitioner.

3.4 Assumptions and Limitations/Delimitations

Assumptions:

- That the NZ government will honour its commitment to undertake a review of copyright law in NZ. The review has been put on hold until the TPP Agreement has been finalised (Library and Information Association of NZ, 2014, Q6).
- That the current copyright paradigm will not change.

Limitations / Delimitations:

The short timeframe of the research restricted the scope to:

- A select number of countries and documents.
- Focusing on copyright works used on electronic course readings pages or in printed course booklets (specifically, works covered by the CLL license) in specified tertiary institutions.
- Not analysing copyright licensing or licensing reforms, though this was referred to as part of the context of the research.
- Not questioning the applicability of copyright in the digital environment. The researcher accepted the contention of scholars such as Craig (2011, p.2) that the copyright system does have the capacity to enable society to take advantage of new technological and cultural landscapes in the digital era.
- Not examining if or how the copyright paradigm can accommodate indigenous concerns, which are of increasing interest and relevance to NZ university and ITP libraries.

4.0 Historical International Overview

4.1 Introduction

While copyright is legislated at a national level there are international influences, dating back to the Statute of Anne 1709 and including the major copyright treaties. As Seville (2006, p.10) points out, international copyright is complex and the interrelatedness of developments multifaceted. The need for it began with the reprinting (piracy) of British works in the US and French books in Europe, and has increased with the expanding global marketplace and the internet (Goldstein & Hugenholtz, 2013, p.10).

The Anglo-American copyright tradition has historically been united in its fundamental utilitarian concern with recognising the public good and differs in this regard to the European tradition, which is more focused on authors' rights. This difference in emphasis has caused tension internationally. The European position and has contributed to strong international copyright primarily through the Berne Convention, and more recently through harmonisation in Europe. Despite its ideological background the US has also in recent history become an advocate for strong international copyright, in recognition of the economic advantages this brings. US copyright policy has been manifested through the TRIPs Agreement and trade agreements.

The following table shows the dates copyright legislation was enacted in the countries used in this research, when they became signatories to the major copyright treaties and the key agreements that exist between the various parties.

Table 1: Copyright Acts and International Treaties

	UK	CANADA	AUSTRALIA	NZ	US
Copyright Acts (The most recent Act is in bold, subsequent Amendment Acts are noted)	1709/ 1814 1842 1886 ¹¹ 1911 ¹² 1956 1988 ¹³ 2014 ¹⁴	(UK Acts then) 1921 1985 1997 ¹⁵ 2012 ¹⁶	(UK Acts then) 1921 1968 2000 ¹⁷ 2006 ¹⁸	(UK Acts then) 1913 1962 1994 2008 ¹⁹	1790 1831//91 ²⁰ 1909 1976 1998 ²¹
Berne Convention: First joined –	1886 ²²	1886 / 1928	1886 / 1928	1886 / 1928	1988
Latest revision acceded -	Paris 1971 (in 1990)	Paris 1971 (in 1998)	Paris 1971 (in 1978)	Rome (in 1947)	Paris 1971
TRIPs Agreement	1994	1994	1994	1994	1994
WIPO Copyright Treaty Signed (In force)	1997 (2010)	1997 (2014)	(2007)	Not signed, but reflected in legislation 2008	1997 (2002)
Trade agreements with copyright clauses	Member of EU TTIP ²³ under neg.	NAFTA with US	AUSFTA with US TPP under neg.	TPP under neg.	With Canada, Australia, TPP under neg. TTIP under neg.

¹¹ The International and Colonial Copyright Act.

¹² The Imperial Copyright Act.

¹³ The Copyright, Designs and Patents Act, which underwent 11 amendments between 1988 and 2014.

¹⁴ The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations.

¹⁵ Amendments to comply with NAFTA.

¹⁶ Copyright Modernisation Act.

¹⁷ The Copyright Amendment (Digital Agenda) Act 2000.

¹⁸ Amendments to comply with AUSFTA.

¹⁹ The Copyright (Digital Technologies) Act 2008.

²⁰ Two Amendment Acts referred to in this Overview.

²¹ The Digital Millennium Copyright Act, one of a number of Amendments which have been made to the Act.

²² Also signed on behalf of the Colonies.

²³ Transatlantic Trade and Investment Partnership.

4.2 The Statute of Anne

The Statute of Anne was developed in response to the advent of the printing press and to bring order to the London book market once the Stationers' Guild no longer had a monopoly on printing through its exclusive license (Patry, 2009, p.15). The preamble states it is "An Act for the Encouragement of Learning, by Vesting the Copies of Printed books in the Authors or Purchasers of such Copies, during the Times therein mentioned" (1709, p.1). The duration period was fourteen years (extendable to another fourteen if the author was still living). This is the essence of articulated rights, and limitations to those rights, in the Statute. The stated purpose was critical in terms of how courts developed common-law based on it (Patry, pp.19-20). Of importance is that while granting copyrights the Statute limited these for the public good. Rights were not to interfere with the purpose of the act - to encourage learning (Patry, p.5). Utilitarian principles were thus clearly established.

The Statute formed the basis not only of subsequent UK copyright Acts, but also the US federal law of 1790, where its influence continued through to the 1976 US law reform. The Statute of Anne was applied to the UK's colonies through the UK's 1814 Copyright Act (Bentley, 2010, pp.11-12), which was a minor revision of the Statute. It wasn't superseded until the Copyright Act 1842 (Davies, 2002, p.28). Moyse (2010, p. 163) notes that the Statute's influence in Canada is 'indisputable' and that Canadian legislation both past and present is very recognisable in other common law jurisdictions. The Statute is a short but significant legal text and unifying force within Anglo-American copyright law.

Just as copyright began due to the impact of technology it has often subsequently developed in response to technological developments, most recently the digital age (Davison et al., 2012, p.11). While authors' rights have greatly expanded since 1710, exceptions and limitations have continued to play an important role in copyright law, and recognition of its purpose as originally articulated in the Statute of Anne persists.

4.3 The Commonwealth

UK legislation impacted on NZ, Australia and Canada through the Imperial system. The 1842 Act extended duration throughout the Empire and also included a section intended to protect the local market by imposing penalties on foreign reprints imported to the colonies from the US, where UK authors were not extended copyright protection. This led to significant difficulties between the UK and Canada - and the smuggling of cheap reprints into Canada from the US (Seville, 2006, pp.10, 25). Canada rebelled in various way against the Imperial copyright regime and twice attempted to implement its own copyright legislation. These laws were rejected by the UK, who had to approve them under the Colonial Laws Validity Act. The 1886 International Copyright Act eased the situation by stating publication in one colony conferred copyright in the others and Canada did, along with NZ and Australia, consent to the UK signing the Berne Convention on behalf of her colonies in 1886 (Seville, p.27).

The UK Copyright Act 1911 was significant and designed to make copyright laws throughout the Empire consistent, again primarily for the benefit of British authors (Frankel, 2011b, p.72). The Act has been described as 'providing the template' for the fair dealing approach to exceptions, especially because it was an imperial instrument, and codified existing common law (Burrell & Coleman, 2005, pp.249, 257). Section 2(1) (i) permitted fair dealing for the purpose of private study, research, criticism, review or newspaper summary (Patry, 2009, p.483). Australia adopted the Act, and NZ and Canada introduced independent acts based on it (Seville, 2006, p.144). All these countries continue to adopt this approach in their legislation.

This codification of exceptions is important, given many of the reforms in the 1911 Act were made to comply with the Berlin revision of the Berne Convention and strengthened rights, including setting the duration of protection to life of the author plus 50 years and making copyright automatic rather than requiring registration. Likewise the 1956 and 1988 Acts were legislated to ratify Berne revisions, though also to respond to technological developments (Davies, 2002, pp.39, 42).

Since the 1988 Act the UK has been increasingly influenced by the harmonisation of copyright in the EU, with its civil-law author's right approach, via a series of European Commission Directives (Davies, 2002, p.51). Implementing these has included amending the duration of protection to life of the author plus 70 years following a 1993 Directive. This European influence has set the UK on a path which may diverge somewhat in the future from Canada, Australia and NZ.

Canada has been in the unique position of being influenced by the UK through being one of its colonies and by the US due to geographical proximity and the resulting close economic relationship. Conflicts with both have occurred. The US essentially used Canada as a way to gain Berne protection for authors who first published there, and for a time Canada denied protection to American authors as a result (Bannerman, 2011, p.86). Canada's 1921 Act was amended multiple times, with significant changes occurring with the 1985 Act. This has also been amended, most recently in 2012. The 1997 amendment was necessary to comply with the North American Free Trade Agreement (NAFTA) copyright requirements stipulated by the US, seen by some as "the selling of Canada's soul" (Handa, 2002, p.423).

Like Canada, Australia introduced independent and short lived legislation, of a defiant nature, in 1905 (Atkinson, 2011, p.34). Australia (with NZ) also fought against the UK and EU during the 1928 Berne negotiations in relation to broadcasting rights and succeeded in getting Article 11bis 2 amended in a manner more favourable to users (Atkinson, p.36). Australia passed a new Act in 1968, partly to ratify the Brussels revision of Berne but also in response to the end of the Imperial system that came with the UK's 1956 Act (Davison et al., 2012, p.191). This has been amended regularly, including the Copyright Amendment (Digital Agenda) Act 2000 and most recently in 2006 when new fair dealing exceptions for parody and satire were included, along with special cases for libraries, archives, educational institutions and people with disabilities (Davison et al., p.195).

While the impact of UK law has been significant, it has been suggested by scholars such as Ricketson & Ginsburg (2006, p.174) that as result of the Australia-United States Free Trade Agreement in 2004 (AUSFTA), copyright law in Australia will inevitably come to resemble US law. The US is certainly having an increasing influence, including courts looking more to American cases as precedents (Davison et al., 2012, p.17).

New Zealand's 1962 and 1994 Copyright Acts drew on the 1956 and 1988 UK Acts, as well as being compliant with international treaties (Sumpter, 2013, p.4). Since 1994 UK law has, as noted, shifted due to EU Directives so this may not be the case in future (Frankel, 2011a, p.206). NZ law does have some features particular to the local environment, including the right to parallel import goods (Finch, p.226), which is also permitted in Australia. This is allowable under TRIPs but is a contentious issue (Frankel, 2011a, p.84). Australian copyright law, under the Closer Economic Relations agreement and as our closest trading partner, is significant to NZ, both in terms of deciding court cases and undertaking law reviews (Sumpter, p. xvi).

The 1994 Copyright Act was revised by the Copyright (New Technologies) Amendment Act 2008, which was itself revised with the Copyright (Infringing File Sharing) Amendment Act 2011. Both of these respond to changes in the digital environment. A full review of the Copyright Act has not occurred since 1994. The current law has no fair dealing exception for education although Section 44²⁴ does provide for specific education exceptions, which enable limited copying for teaching purposes. The CLL license not only extends the amount able to be copied to useful amounts but also the frequency of allowable copying, which is limited by the Act.

Subsequent to the fair dealing provisions from the UK 1911 Act, Canada has introduced education, satire and parody; Australia parody and satire and a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice; and the UK parody as additional fair dealing exceptions. NZ has not expanded its fair dealing exceptions.

All countries in the study have collecting societies formed on behalf of copyright owners which offer licences for their works, including to educational institutions. CLL is one of these in NZ. These licenses are under the scrutiny of independent bodies regulated by copyright legislation – since the 1960's this has been the Copyright Tribunal in the UK, NZ and Australia and the Copyright Board in Canada (Frankel, 2011a, p.184). Part of their role is to “moderate the effect of copyright owners combining their rights through collecting societies” (Frankel, 2011a, p.185). Disputes can be referred to the Tribunal by the collecting society or the organisation holding or wanting a license (Sumpter, 2013, p.58).

The close relationships between the Commonwealth countries regarding copyright law are clear, as is copyright's international range. The following section shows how the US fits in, and the role of the major international treaties is then summarised.

²⁴ Refer Appendix E.

4.4 The US

The 1790 Act was the first federal American copyright legislation, and was enacted under Article I, Section 8, Clause 8 of the US Constitution, “to promote the Progress of Science²⁵ and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Goldstein & Hugenholtz, 2013, p.17). This clearly articulates a public interest purpose, in particular by encouraging learning, and contains the same elements as the preamble to the Statute of Anne.

Both the 1790 Act and 1831 Amendment provided copyright only to American authors, allowing the reprinting of copyright works by foreign authors (Baldwin, 2014, p.161). The US stayed outside international copyright throughout most of the nineteenth century. Universal education and literacy was the US goal and the piracy policy was aimed at achieving an enlightened democracy (Baldwin, p.113-114). Ultimately this became detrimental to American authors and they were instrumental in encouraging the government to extend copyright to foreign authors, which occurred in 1891. At this time however, the US still required foreign authors to have their works printed in the US in order for protection to be extended to them. The American attitude to international copyright also changed as the US become an exporter rather than importer of intellectual property - a pivotal point in the international history of copyright (Baldwin, p.406).

The 1976 Act paved the way for Berne membership and included increasing copyright duration to life plus 50 years (from the 28 years from publication, renewable once, in the 1909 Act) and abolishing formalities (the requirement to register copyright works to gain protection). At this point the US was very much following Europe’s lead in copyright legislation by strengthening authors’ rights (Baldwin, 2014, p.200). Also significant in the 1976 Act was the codification of fair use in Section 107. The law has a range of understandings supporting it, including the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals (Classroom Guidelines). This was part of the House of Representatives’ report on the Copyright Act 1976 and outlines standards for educational fair use, such as allowable copying of 10 percent of a work.

²⁵ Science at this time referred to what would now be called learning.

The US has since the early 1990s pursued an aggressive programme of free trade agreements containing intellectual property components. These began with the NAFTA with Canada and Mexico in 1992 and include the AUSFTA in 2004. As mentioned, the TPP Agreement, of which NZ is part, is currently under negotiation, and so is the TTIP with the EU. These agreements are often controversial, particularly in that they demand signatories strengthen copyright protection beyond the requirements of TRIPs. The US introduced legislation in 1998 to extend duration of copyright to life of the author plus 70 years, which was viewed as staying in line with the new European harmonisation (Davies, 2002, p.269) but was also lobbied for domestically by its content industries and is one of the controversial aspects of trade agreements, including the TPP.

Goldstein & Hugenholtz (2013, p.82) note that trade agreements contribute to global copyright harmonisation through national treatment rules, whereby countries must extend protection to authors from other nations. They also caution that this development of linking copyright principles to trade law risks eroding the important non-economic (cultural and social) foundations of copyright law (p.74). Others have commented in terms of copyright being a “victim to global economic trade pressures” (Handa, 2002, p.44). So far the US has been very successful in getting other countries to adopt its copyright requirements when it is not advantageous for them to do so, in order to gain access to the US market (Haggart, 2014, p.9). This is the situation NZ, Canada and to a lesser extent Australia face in TPP Agreement negotiations.

Canada, Australia and NZ are all net importers of copyright works which minimises the economic incentive to strengthen copyright law. However, outside trade agreements, countries still have room to formulate copyright policy to suit local conditions (Haggart, 2014, p.247). The international copyright treaties do not prohibit this. Additionally, reaction against strong copyright has been vocal by some sectors in the US, particularly academics (Baldwin, 2014, p.339). The public became engaged in the debate and staged online protests known as the ‘internet blackout’ against two copyright bills in 2012, with implications for how international copyright development is influenced in the future (Haggart, p.5).

4.5 The Berne Convention 1886²⁶

As Seville (2006, pp.3-4) discusses in her study of the internationalisation of copyright law, early acts were tailored specifically to the country that formulated them. In the nineteenth century it became more important for cooperation between states to occur as economic, political and industrial conditions developed and markets for copyright works grew. The Berne Convention of 1886 resulted. Among other things this required minimum levels of protection and national treatment (copyright extension to authors from other member states). The Convention was primarily a European treaty with significant French influence, which the US did not join until 1988. The 1908 revision increased authors' rights, with a copyright duration of life plus 50 years (not obligatory until 1948), the abolishing of formalities (the requirement to register copyright) and an expansion of the types of works protected (Baldwin, 2014, pp.156, 159).

Divergences between the two approaches to copyright have played an ongoing part in negotiations on Berne revisions. The Union aims to accommodate countries from both civil and common law traditions (Davies, 2002, p.335), but more aspects from European copyright have come into Commonwealth and American law via Berne than the other way around. The most recent revision was in Paris in 1971.

The Berne Convention includes an article on exceptions and limitations which has provided a model for both the TRIPs and WIPO copyright treaties. Article 9(2) states it is:

A matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author (1971 revision).

This was designed to both formally acknowledge the right to copy and be open enough to recognise the variety of exceptions and limitations allowed in national laws, including fair use (Patry, 2009, pp.474, 477). This is commonly referred to as the 'three-step test.'

²⁶ Refer to Appendix B for extracts of relevant sections.

There is scope for individual countries to determine what in their jurisdiction constitutes ‘special cases’, ‘normal exploitation of the work’ and ‘the legitimate interests of the author’. ‘Special’ has been interpreted by Ricketson in relation to Article 9(2) to mean “justified by some clear reason of public policy or some other exceptional circumstance” (1987, p.482). Article 9(2) has been interpreted in different ways, with some contention over the meaning of each step (ALRC, 2013, 4.138), and over whether it should be viewed holistically or as a step-by-step process.

In some places the Berne convention refers to “fair practice” (e.g. Article 10, Certain Free Uses of Works). This also enables flexibility for countries to devise laws suitable to their own circumstances (Goldstein & Hugenholtz, 2013, p.373). Article 10(2) Illustration for Teaching, provides for countries to include specific exceptions for teaching. While this is an open exception in what it allows for teaching purposes (Xalabarder, 2010, p.233), this differs to education exceptions, which come under Article 9(2), and cover distribution of course materials in tertiary institutions. Ricketson and Ginsburg (2006, pp.790-792) indicate Article 10(2) Illustration for Teaching, is not intended to cover uses such as course packs.

4.6 The TRIPs Agreement 1994²⁷

The US led the TRIPs negotiations, with support from the EU, and the Agreement has meant a considerable increase in global strengthening of copyright (Haggart, 2014, p.83). TRIPs was part of the Uruguay Round negotiations of the General Agreement of Trade and Tariffs (GATT) and is generally seen as the US imposing stringent intellectual property protection on the world, with potentially detrimental impacts on developing countries in particular (Haggart, p.83). Unlike Berne, and again at American request, TRIPs does not cover moral rights – ostensibly because these are not viewed as ‘trade related’ (Phillips et al, 1997, p.126). All WTO members are signatories to TRIPs.

The Preamble states that the agreement is made “*Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property...” and there are other passages recognising the public good. Article 7, in discussing the objectives of the Agreement, uses the phrases ‘social and economic welfare’ and ‘balance of rights and obligations’.

The TRIPs Agreement article on limitations and exceptions, based on Berne 9(2), is Article 13. This states:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. (Part I)

The use of the word “confine” indicates a more restrictive approach is desired than is expressed in the Berne text. The US has been questioned on how its fair use provision complies with this Article and has responded that it believes fair use is applied in a manner that is completely consistent with Article 13 (Patry, 2009, p.497). Seville (2006, p.272) notes that US dominance in international copyright makes it unlikely that the WTO would ever find fair use to be in conflict with the TRIPs Agreement. This article does enable balance to be sought in national copyright laws.

Because the TRIPs Agreement is enforceable via a dispute settlement process, TRIPs is now arguably the most important international copyright treaty (Goldstein & Hugenholtz, 2013, p.91). Trade sanctions can be imposed on countries which do not comply with the copyright requirements. The US, via the Office of the US Trade Representative, is vigilant at monitoring compliance and ‘threatening’ sanctions (Atkinson & Fitzgerald, 2014, 11.4), but any member may initiate proceedings against a country believed to be breaching regulations.

²⁷ Refer to Appendix C for extracts of relevant sections.

4.7 The WIPO Copyright Treaty (WCT) 1996²⁸

The WCT is closely connected to the 1971 Paris Act of the Berne Convention, and members must comply with Articles 1 – 21 of the Convention. The WCT primarily addresses issues relating technological developments in the digital environment, such as computer programmes, data and public distribution rights. The place of education exceptions in copyright law are acknowledged by the WCT with reference to this in the Preamble, “*recognising* the need to maintain a balance between the rights of authors and the larger, public interest, particularly education, research and access to information.”

The WCT has a double clause under Article 10 dealing with limitations and exceptions. The first relates to the new rights of the WCT and the second to applying the Berne Convention, which stipulates that exceptions and limitations must be ‘confined’ in the manner of the TRIPs agreement. The WCT extends the scope of 9(2) of the Berne Convention to make the exceptions applicable to all authors’ rights not just the reproduction right and has a note explicitly detailing that these may extend to the digital environment.

NZ is not formally a member of the WCT, but complies with the provisions of the treaty through the Copyright (Digital Technologies) Act 2008 (Frankel, 2011a, p.45). All other countries included in this research are signatories to the WCT.

Beyond the WCT, the WIPO has been actively reviewing exceptions and limitations to copyright in recent years, in the areas of educational activities, libraries and archives, and disabled persons (Davison et al., 2012, p.200). Despite a number of studies on educational exceptions being presented to the Standing Committee for Copyright and Related Rights (WIPO, n.d., Limitations and Exceptions) no concrete progress on harmonisation has been made in this area. Progress regards disabled persons has however resulted in the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. This sets out a range of exceptions and limitations nations can make regarding accessible format copies, and links the treaty to the WCT and Berne. The US, UK and Australia have to date become signatories.

²⁸ Refer to Appendix D for extracts of relevant sections.

4.8 Summary

NZ is part of the global, and particularly Anglo-American, copyright arena. NZ and the other countries studied are linked via a complex web of factors such as colonialism, international treaties, trade agreements, and geographical location. The international treaties have provided a set of important agreed norms which have harmonised international copyright, while also enabling countries some freedom to take account of local conditions when revising copyright laws. The copyright laws of the countries studied have often developed with close correlations. Over a long period of time copyright strengthened in favour of authors, which is particularly evident in the increased term of protection, but the type of works covered has also expanded.

Exceptions to copyright have remained a critical balancing tool, even as the US has used trade agreements as a powerful, and in many eyes unwelcome, new method of influencing and further strengthening intellectual property regulations. The utilitarian principles articulated in the Statute of Anne underpin the law in each of the countries included in the study and this public policy concern is important in understanding the role exceptions play in their copyright laws. An examination of developments in overseas jurisdictions is of relevance to NZ due to the international reach of copyright and the particular connections between NZ and the countries the documents are drawn from.

5.0 Findings

This section presents the findings obtained from analysing the six key documents (and supporting documents) selected for this research. The Australian copyright review was analysed first and then the two law reforms, enacted in the UK and Canada respectively. The two Canadian fair dealing court cases are then presented (in chronological order) and finally the US fair use court case. This Findings section is followed by a Discussion section which synthesises and interprets the findings.

5.1 Copyright and the Digital Economy: The ALRC Report 122, 2013

This document is the result of an independent inquiry undertaken by the Australian Law Reform Commission regarding, as stated in the Terms of Reference, “whether the exceptions and statutory licences in the Copyright Act 1968 are adequate and appropriate in the digital environment” (para. 3). The ALRC was specifically directed to consider whether further exceptions should recognise fair use of copyright material. Significant attention was paid to this in the report and the adoption of fair use, with education included as an illustrative purpose, was the key recommendation.

Balance

The Report recognises the necessity of balancing the interests of authors and users in copyright law reform. The Terms of Reference note that the inquiry is to have regard to:

- The objective of copyright in providing an incentive to create and disseminate original copyright materials;
- The general interest of Australians to access, use and interact with content in the advancement of education, research and culture. (para.1)

These became two of the “five specific framing principles to define the policy settings for this Inquiry” (2.0):

Principle 2: Maintaining incentives for creation and dissemination

Principle 3: Promoting fair access to content

With regard to Principle 3 the Report elaborates that “the principles of access, use and interaction with content are to be considered on the basis that this is done in a manner which is fair to copyright creators and owners, and intermediaries controlling the rights” (2.41). There is no question some access and use is legitimate.

The Report acknowledges the divergent views of users and authors:

In line with the principle of fair access to material, one submission urged as a leading principle that copyright law should “focus on the end-user and their ability to access copyright material and not be used to unreasonably restrict the ability of end-users to view or use material” [Optus, Submission 183]. (2.46)

However, allowing access on terms decided by the content owner is also considered fundamental by many stakeholders. (2.47)

The ALRC considered 870 submissions (and undertook 109 consultations), representing opinions from both sides of the copyright equation. In recommending increased exceptions (increased access and use), the ALRC’s message is that copyright in Australia is currently unbalanced and needs redress. The Report asserts “The introduction of a broad, flexible exception for fair use into Australian law should allow flexible and fair mediation between the interests of owners and users in the digital environment” (4.116).

Fair Use

The Report makes a strong case for fair use, first explaining that it “incorporates principles, rather than detailed prescriptive rules” and that as such fair use is more “flexible and adaptive” and can be “applied to new technologies and new uses, without having to wait for consideration by the legislature” (4.3). Given the rapid rate of change in new technologies and the uptake of these in higher education this advantage seems of general benefit to tertiary institutions.

The Report describes fair use as:

A statutory provision that provides that a use of copyright material does not infringe copyright if it is ‘fair’, and that when considering whether the use is fair, certain principles or ‘fairness factors’ must be considered. The provision also includes a list of ‘illustrative purposes’. (4.8)

It asserts “Fair use at least has the flexibility to ask the question of fairness of any type of use, and any type of copyright material” (4.36). It therefore broadly expands users’ rights, and this would include course materials in universities and ITPs.

The Report acknowledges that in relation to rights holders' markets "concerns were expressed with respect to the likely harm to creators such as artists, and book publishers" (4.111). However it states:

Many businesses are both owners and users of copyright materials and the experience in the US is... use has not 'eclipsed or displaced' the sale or licensing of particular copyright content, for example, educational materials. (4.112)

Tertiary institutions are such businesses, and market harm is in any case one of the factors always considered in determining fair use.

Concerns were also expressed that "the lack of clear and precise rules would result in uncertainty about what uses are fair" (4.118). The ALRC agrees that "certainty is important for both rights holders and users of copyright material" (4.118) but believes "a clear principled standard is more certain than an unclear complex rule" (4.117). In their view:

Fair use is sufficiently certain and predictable, and in any event, no less certain than Australia's current copyright exceptions... owners and users of copyright material will be guided by the fairness factors, the list of illustrative purposes, existing Australian case law, other relevant jurisdictions' case law, and any industry guidelines and codes of practice that are developed. (4.121)

Universities and ITPs are among those who require a high degree of certainty, including about what would and wouldn't be fair in terms of distributing course materials to students.

The fairness factors proposed are similar to those in use in the US and "no one factor is to be more important than another" (5.25). They are:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material;
- (c) the amount and substantiality of the part used; and
- (d) the effect of the use... (Recommendation 5-2)

In explaining the first of these the ALRC's view is "whether a use is transformative should be a key question when applying the fair use exception" (5.34). However, it points out this "should not be considered determinative.... Some exceptions...are less likely to be transformative – notably, private and educational uses. Such uses may be less likely to be fair for this reason, but other reasons for finding fair use may be found" (5.45). Course materials are generally not used for transformative purposes, so this would need to be countered by other factors.

Under factor (b) “factual works are considered more apt to be available for use under a fairness test” (5.63), which is predominantly positive for universities, and ITPs. Factor (c) is critical to education institutions and there is no quantitative test in relation to it. Along with how much is taken it needs to be asked “how important was that taking, in the context of the plaintiff’s work?” (5.71). Industry guidelines become necessary for lecturers and librarians in providing parameters around this factor in particular (whether fair use or the fair dealing exception is adopted). These are discussed under Education in this section, as is the issue of licenses, which the Report introduces in relation to market harm under factor (d).

The Report proposes a list of eleven illustrative purposes “that may tend to favour a finding of fair use” (5.131). This list includes the current fair dealing purposes, and quotation, non-commercial private use, incidental or technical use, library or archive use, education and access for people with disability.

Fair Dealing

The ALRC offers an alternative to fair use, “namely, a ‘new fair dealing exception’ that consolidates the existing fair dealing exceptions in the Copyright Act and introduces new purposes” (6.1). These are the same as the illustrative purposes in the fair use provision, but in fair dealing the uses are prescribed. The inclusion of education is significant for education institutions. The Report notes that fair use and fair dealing: “both require the same fairness factors to be considered” (6.14).

Further, the ALRC “recommends that the new fair dealing exception should explicitly state that the fairness factors must be considered when determining whether a given use is fair” (6.29).

The ALRC acknowledges that “despite the many advantages of fair use over a confined fair dealing exception, the Australian Government may prefer to enact the new fair dealing exception” (6.37) in part due to the “widespread, and often strong, objections among rights holders to introducing fair use” (6.39). The ALRC is clear in its view that “the new fair dealing exception is a pragmatic second-best option...considerably confined by its prescribed purposes... Australia is ready for, and needs, a fair use exception now” (6.40).

From a users’ perspective, fair use offers all users the opportunity to fairly use copyright material. In terms of education, universities and ITPs will benefit under either fair use or the fair dealing exception, and both enable unremunerated copying and distribution of course materials.

Education

The Report refers to the Statute of Anne in arguing that “copyright has always been concerned with promoting the public interest” (4.65). There is a chapter devoted to education, indicating the importance of this in the context of the inquiry, and stating at 14.2 “the existing exceptions for educational use of copyright material are due for reform.” It also cites Garnett, Davies & Harbottle (2011) who call education “one of the clearest examples of a strong public interest in limiting copyright protection” (14.8).

In The Case for Fair Use, the ALRC notes stakeholder suggestions that Australia is lagging behind other jurisdictions in not providing exceptions for educational purposes and that this is inconsistent with other allowed uses of copyright material. The ALRC argues:

Copyright Advisory Group (CAG) Schools compiled a table comparing...copyright laws that apply to schools in Australia, the US and Canada and submitted that the results suggest that the “balance struck in the Australian Copyright Act does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes” [Submission 231]. (4.67)

Universities Australia stated that Australian universities were in a ‘worse position’ than large commercial enterprises in terms of being able to use third party copyright material for socially beneficial purposes. Commercial news organisations can rely upon the fair dealing exceptions for news reporting but there is no equivalent specific exception for universities for fair use for educational purposes. Universities Australia submitted that, from a policy perspective, “this makes little sense” [Submission 754]. (4.68)

The ALRC is mindful of the importance of the utilitarian public interest aspect of copyright law, education’s role in this regard and current undervalued position.

While the Report notes that the current Act “contains a number of unremunerated exceptions for educational institutions”, these are specific exceptions and the ALRC believes “education shouldn’t be hampered or stifled by overly prescriptive and confined exceptions” (14.3). Instead:

Including an illustrative purpose for education in Australia’s fair use exception will signal ... an educational purpose will weigh in favour of fair use. (14.23)

If the recommendation to adopt fair use is not adopted then the alternate option is fair dealing with a prescribed purpose for education:

This is a second best option, but it is more likely to enable educational institutions to make use of new digital technologies and opportunities than the existing or amended specific exceptions. (14.82)

The Report also notes regarding the alternative of fair dealing:

Some have argued that the existing exceptions for fair dealing for research or study should be interpreted to extend to copying by educational institutions... these exceptions have been interpreted not to extend to uses by educational institutions, but only to private research and study by individuals. The Supreme Court of Canada has taken a broader interpretation to Canada's fair dealing for research provision, finding that the "teacher/copier... shares a symbiotic purpose with the student/user who is engaging in research or private study" [*Alberta*, 2012]. (14.83)

In any event, Canada has since introduced an exception for fair dealing for the purpose of education, and the ALRC recommends the introduction of a fair dealing for education exception. (14.84)

The most recent NZ case²⁹ on this issue ruled that, as in the earlier Australian cases, the fair dealing exception for research did not extend to educational institutions making copies on behalf of students. Whether the Australian or NZ courts would rule differently now is uncertain. A legislated fair dealing exception for education would reliably improve access and use.

In regard to the concern some stakeholders expressed about the difficulty educators may have in determining whether uses are fair, the ALRC's maintains "guidelines should play an important part in providing this necessary help and certainty for teachers" (14.87). This is supported by submissions, such as Hinze, Jaszi & Sagwho who assert:

"Statements and codes of Best Practices created by and for various communities (including libraries and educators) have shown considerable potential as a tool to promote both understanding and relative predictive certainty" [Submission 483]. (3.146)

Universities Australia further submitted that:

"The potential for industry guidelines and codes of practice as an appropriate policy tool in copyright law, has been recognised for many years" [Submission 754]. (3.148)

The ALRC "considers that it is best left to the market to develop relevant guidelines as industry participants consider necessary" (5.159). This would necessitate tertiary institutions formulating guidelines for their own use.

²⁹ *Copyright Licensing Ltd v. University of Auckland* (2002), 3 NZLR 76.

Attention is paid to the issue of licensing in the Report and the following points are made:

Like all other users of copyright material, educational institutions... should not need to obtain a licence for a use of copyright material that is permitted under an unremunerated exception. This should be clarified in the Copyright Act, particularly if fair use or the new fair dealing exceptions recommended in this Report are enacted. (8.54)

The ALRC considers that it would be unjustified and inequitable if educational institutions... could not rely on unremunerated exceptions such as fair use. (8.60)

The Report makes recommendations (8.1-8.4) in regards to licensing which would enable tertiary institutions to apply fair use or fair dealing to copying of course materials in many instances.

Human Rights

In relation to Principle 3: Promoting fair access to content, the Report states:

A fundamental value in Australia is freedom of expression and this is inherent in any principle concerning dissemination of information. Furthermore, it is essential to recognise that “the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part in the digital economy” [ABC, Submission 210]. (2.43)

Education is one of the avenues through which culture is both accessed, progressed and expressed.

International Context

In explaining the fifth framing principle “Providing rules consistent with international obligations of the inquiry” the Report affirms “Australia is bound by treaty obligations requiring the protection of copyright, notably under the *Berne Convention*” (2.66). The Report also notes the similar clause in the TRIPs Agreement and trade agreements. While recognising the “precise meaning of each step of the test is far from certain” (p.117) the ALRC concludes:

Fair use is consistent with the three-step test. This conclusion is based on an analysis of the history of the test, an analysis of the words of the test itself, and on the absence of any challenge to the US and other countries that have introduced fair use or extended fair dealing exceptions. (4.139)

The Report also contends that:

This Inquiry may also provide an opportunity for suggesting policy parameters within which future international negotiations may take place. This might include an interpretation of the three-step test in the Berne Convention which allows for greater flexibility in the “general interests of Australians to access, use and interact with content in the advancement of education, research and culture,” as set out in the Terms of Reference for this Inquiry. (2.71)

While the ALRC are confident that fair use is not at odds with the Article 9(2) of the Berne Convention, they indicate a desire to establish clarity around this test, in a manner that takes a more utilitarian approach to users’ needs.

In The Case for Fair Use, the Report declares:

Fair use is an extension of Australia’s longstanding and widely accepted fair dealing exceptions. The principles encapsulated in fair use and fair dealing exceptions also have a long common law history, traced back to eighteenth century England. Many of the benefits of fair use...are also the benefits of the fair dealing exceptions. (4.31-2)

Highlighting the commonalities between the countries and exceptions serves to connect fair use with the more familiar (to Australians) fair dealing in a manner advantageous to the argument for change.

The Report quotes the US fair use provision and in recommending fair use states:

The structure and interpretation of s107 of the United States Copyright Act 1976 provides an appropriate model for an Australian fair use exception. (5.2)

In response to stakeholder submissions:

The ALRC considers that it would be helpful for the Explanatory Memorandum [to the Act] to contain an express statement that the scope of the Australian provision can be informed by US and related foreign law. This would assist in countering concerns about uncertainty. (5.152)

It is not surprising that the ALRC is proposing a fair use provision closely aligned to that of the US, given the AUSFTA and the advantage of having US case law to draw on. The ALRC view substantiates the arguments of Ricketson and Ginsburg (2006, p.174) and Davison et al. (2012, p.17), noted in The Historical International Overview section, regarding the influence of US copyright law on Australia.

The Terms of Reference required the ALRC to consider related reviews during the inquiry. This perusal of international reviews demonstrates there is global interest in copyright exceptions and that reviews have the potential to influence other jurisdictions. The UK and Ireland reviews are mentioned in The Case for Fair Use. The Report also notes Canada's introduction of education as a fair dealing exception in the CMA (1.22) and cites international cases such as *CCH*, *Alberta* and *Cambridge* in support of its arguments. The Report cites international treaties, reports, laws and scholars in presenting its arguments demonstrating the global influence of copyright.

Summary

The ALRC Report articulates the need for reform to copyright exceptions and balance in copyright law. The Report argues strongly for the adoption of fair use and recognises the important public interest benefit of enabling intellectual progress by including education as an illustrative purpose. This permits "some unremunerated use of certain copyright material for education purposes, without undermining the incentive to creators and publishers of educational material" (1.56). The Report refers frequently to the international context of copyright law and both sought and recommends ongoing guidance from relevant jurisdictions.

5.2 The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 - UK

These Regulations came into force on 1 June 2014 and amend The Copyright, Designs and Patents Act 1988. They were informed by an independent review commissioned by the UK government and conducted by Professor Ian Hargreaves. His 2011 report “Digital Opportunity: A Review of Intellectual Property and Growth” (the Hargreaves Report) has been examined in conjunction the new regulations, as has “The Government Response to the Hargreaves Review of Intellectual Property and Growth” (the Government Response Report, 2011), which expresses support for Hargreaves’ recommendations. “Modernising Copyright: A modern, robust and flexible framework – Government response to consultation on copyright exceptions and clarifying copyright law” (Modernising Copyright, 2012) has also been analysed.

These documents provide valuable information about exceptions and copyright reform in the UK that is not apparent from examining the changes made to the law in isolation, given the new Regulations neither adopt fair use or a fair dealing exception for education that enables copying for course materials distribution. Users have benefited from the reform though, including in the education sector.

Balance

Professor Hargreaves was specifically directed to “consider whether our IP framework needs to adapt in the interests of encouraging innovation and [economic] growth” (2011, p.3). The Report therefore devotes significant attention to economic evidence and impacts. It acknowledges however that “policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests” (p.20) and that “taking advantage of these EU sanctioned exceptions will bring important cultural as well as economic benefits to the UK” (p.4).

The Hargreaves Report further recognises the balance between authors’ and users’ rights, in statements such as:

Copyright involves a necessary balancing of divergent interests. When new opportunities arise, the law sometimes needs to adapt so that the right balance is maintained. In education and research in particular ... there is a clear need to make that adaptation happen. (p.41)

Education is identified as an area where imbalance needs to be addressed.

Likewise, Modernising Copyright states:

The Government aims to find a balance between the interests of rights holders, creators, consumers and users by introducing through Parliament a revised framework of boundaries for copyright and related rights in the digital age” (p.3).

This recognises the digital environment has, at least in part, necessitated the rebalancing of copyright.

Fair Use

The Hargreaves Report notes that in contrast to the restrictive EU copyright exceptions “the US has a more flexible approach to copyright exceptions... fixing what might otherwise be imbalances in the copyright system” (p.42). The Report discusses advantages of fair use, but concludes that “the advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law” (p.46). The review therefore “sought to isolate the particular benefits for economic growth that Fair Use exceptions provide in the US with a view to understanding how these benefits can be most expeditiously obtained in the UK” (p.46).

The Hargreaves Report recommends “pursuing urgently specific exceptions” (p.47) and that the government work at EU level on “a new mechanism in copyright law to create a built-in adaptability to future technologies” (p.47). This is a function fair use in many ways covers. In Modernising Copyright the government acknowledges that “changes are in line with the Hargreaves Review recommendations, and are set in a UK context in which there is existing case law and compliance with EU law on copyright” (p.3). That the UK is limited in its ability to implement reform is clear throughout the documents, and there are signs of frustration at this.

Fair Dealing

The Hargreaves Report explains that “EU law confines copyright exceptions to a closed list of categories...there is no flexibility to create exceptions in new areas. The UK does not currently exploit all the exceptions available” (p.42). A fair dealing exception for education is not one those permitted under EU law and it was therefore not possible for the UK to introduce this.

In the Government Response Report it is stated “the Government agrees with the Review’s central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK...” (p.7). The government could, and did, extend or adopt exceptions in the following areas, as detailed in Modernising Copyright (p.4-5): Private copying; education; quotation and news reporting; parody, caricature and pastiche; research and private study; data analytics; access for people with disabilities; archiving and preservation; and public administration.

In Modernising Copyright the government explains that “fair dealing is a concept relevant to the scope and impact of many of the UK’s permitted acts” (p.14). The government has chosen to “retain and use ‘fair dealing’ as the standard when the fairness and degree of use of a work is relevant to a permitted act” (p.14). There is no statutory definition of fair dealing in the UK, but factors identified by courts to assess it align with those in other Commonwealth jurisdictions, as noted in Modernising Copyright (p.14).

Education

The expanded specific exceptions for education in the new Regulations are allowed under the EU ‘illustration for teaching’ exception. The Hargreaves Report discussed the need for education exceptions to be amended:

Administrators spend substantial sums of public money to entitle academics and research students to access works which have often been produced at public expense by academics and research students in the first place... Senior figures and institutions in the university sector have told the Review of the urgent need to reform copyright to realise opportunities, and to make it clear what researchers and educators are allowed to do. (p.41)

In Modernising Copyright, the government explains the rationale for “letting users do more with content” and states “there are some instances where allowing creators control over certain uses of works would amount to giving them a veto power over... the direction of teaching or academic research” (p.8).

While the changes in relation to education exceptions are by necessity small, in Modernising Copyright the government explain changes will:

Make it easier to use interactive whiteboards and similar technology, provide access to copyright works over secure networks...and allow use of all media in teaching and education. (p.4)

Section 4 of the new Regulations relates to Education and the parts of the Copyright Act which are to be replaced by revised sections or paragraphs.³⁰ These do not relate to course material distribution but are specific exceptions relating, for example, to illustration for instruction.

The government noted in Modernising Copyright that:

Only limited use of works will be allowed without a licence, so educational institutions will continue to require licences for general reprographic copying – for example copying significant extracts from text books to hand out to students. (p.4)

The government intended to “simplify copyright licensing for the education sector” and believes that modernising the education exceptions “will provide a fair basis for future licensing” (p.4). This refers to the development of a Copyright Hub which will require an examination of the licensing environment and review of exceptions at a later date (p.28). Modernising Copyright affirms that “the Government rejects the argument that the mere availability of a licence should automatically require licensing a permitted act” (p.28).

International Context

The Hargreaves Report first discusses the EU framework and then the broader international framework within which UK copyright sits. The Report notes that “IP harmonisation in Europe is... a high priority” and that in relation to copyright it is “partly harmonised, but in a piecemeal manner” (p.22). Globally the Report states “the basic structure of rights [is] generally established by international treaties and in particular the TRIPs Agreement” (p.24). The Government Response Report states “the UK must work within international agreements and European law” (p.1).

In Modernising Copyright the government concedes that “many common law countries, including the United States, Canada and Australia...allow more flexible use of copyright materials than is currently permitted in the UK” (p.12). The government dismisses respondents to the review who suggested “UK work should be put on hold until various international-level discussions on exceptions had been concluded and/or begun” arguing that:

While it is important for the UK to remain compliant with international treaties and European law, it is also important for the UK to adapt rapidly and effectively to the changing conditions of digital technology. Waiting for international debate to cease is not a recipe for achieving this. (p.12)

³⁰ Refer to Appendix F for details.

It could be also be argued that NZ's stance of putting on hold its copyright review until after the TPP negotiations are finalised is questionable – and increasingly so the longer they take.

Summary

While particularly concerned with the economic impacts of copyright reform, both Professor Hargreaves and the government refer to the concept of copyright balance. Fair use is deemed unfeasible due to EU law but expanded exceptions have been introduced via the Regulations in a number of areas, including education. The need to comply with EU directives was emphasised but wider international obligations also recognised.

5.3 Copyright Modernisation Act 2012 – Canada

Bill C-11: An Act to Amend the Copyright Act received its first reading in Parliament in September 2011 and was the re-introduction of Bill C-32. The bills passed through Canada's legislative process with significant debate and accompanying public submissions and discussion. The resulting Copyright Modernisation Act (CMA) was assented to on 29 June 2012, and amends the 1985 Copyright Act.

In Canada government bills are impartially summarised and contextualised by the Library of Parliament legislative summaries. The Legislative Summary of Bill C-11 (Legislative Summary), written in 2011 and revised in April 2012 by Lithwick & Thibodeau, has been examined in conjunction with the CMA for the additional data it provides for the research.

Balance

The Summary to the CMA specifies that it amends the Copyright Act in ways which include to:

- (a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet...
- (c) permit businesses, educators and libraries to make greater use of copyright material in digital form;
- (d) allow educators and students to make greater use of copyright material
- (e) permit certain uses of copyright material by consumers (para.1)

Copyright balance is being addressed when, as in these points, both owners and users are considered in copyright reform. There is also a Preamble written to the CMA which draws attention to a number of issues considered important regarding copyright law and the reform. One of these is that “the exclusive rights in the Copyright Act provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter” (para.6). This statement particularly pertains to copyright balance.

Fair Dealing

Clause 21 of the CMA replaces Section 29 of the Copyright Act and expands the number of fair dealing exceptions in law to include new purposes as follows “fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.” The education fair dealing exception is of particular relevance to the research as it enables the copying and distribution of course materials in tertiary institutions.

In order for dealing to be fair it must first be for one of the purposes stated in Section 29 of the Copyright Act. However the Act does not stipulate how fairness should then be assessed. As the Legislative Summary explains, this means:

There are no guidelines that define the number of words or passages that can be used without permission from the author. Only the courts can rule whether fair dealing or infringement is involved. (1.1 para.10)

The Legislative Summary goes on to cite the Supreme Court’s 2004 *CCH* ruling that fair dealing “must not be interpreted restrictively” (1.1 para.11) and also states:

As there is no definition for what is ‘fair’, the Court enumerated six factors that provide a ‘useful analytical framework to govern determination of fairness in future cases’ [CCH, 2004]: (1) the purpose of the dealing; (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. (1.1 para.10)

This was the most recent authority on assessing fairness at the time the CMA Act was passed, and clearly points to what was appropriate to consider going forward. There have subsequently been further fair dealing rulings from the Supreme Court which consolidate this approach to determining fairness.

Education

Educators are highlighted in the Summary to the CMA as among those who are going to be permitted to make greater use of copyright material as a result of the amendments. The Preamble to the CMA also has a paragraph specifically referencing education: “And whereas Canada’s ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education” (para.8). The introduction of a fair dealing exception for education in the CMA validates this attention in the opening sections.

Along with introducing a fair dealing exception for education the CMA expands specific education exceptions in a number of areas. These have similarities to the new education Regulations in UK law, and pertain primarily to instruction in the digital environment, but do provide additional benefit to educators.

Because the Copyright Act does not enumerate what is ‘fair,’ the Council of Ministers of Education, Canada (CMEC) developed Fair Dealing Guidelines for educational institutions. These “provide reasonable safeguards for the owners of copyright-protected works in accordance with the Copyright Act and the Supreme Court decisions” (n.d., para. 4). The Guidelines include that extracts may be provided to each student, for example “up to 10 per cent of a copyright-protected work... one chapter from a book... a single article from a periodical” (n.d., point 4). Distribution of course materials is explicitly permitted in the Guidelines, up to the quantified levels of copyright works. The Canadian Association of University Teachers has developed its own Guidelines, written in less exact language, for example “copying 10 percent of a work is likely to be fair” (2013, p.3).

International Context

Nearly half of the Preamble to the CMA relates to the international scope of copyright, emphasising the relevance of this to the reforms. The first two paragraphs are:

Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;
Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

The Legislative Summary explains that “international treaties on copyright have been central to the development of copyright law in Canada” (1.2.1 para.1) and that the reforms have in part been implemented to “enable ratification and implementation of these two treaties [WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty].” (1.2.2 para.1).

The Legislative Summary also mentions the three-step test in the Berne Convention and that “during hearings on Bill C-32, some witnesses... proposed that the language of the three-step test be incorporated in the Copyright Act, while others suggested that proposed amendments expanding the fair dealing provisions of the Act could violate the three-step test” (1.2.3 para.2).

The government was not swayed by these arguments. The language was not introduced and there is no evidence the expanded fair dealing violates the Berne Convention.

Summary

Copyright balance has been taken into account in the CMA, which has been particularly concerned with ensuring the law is appropriate for the digital environment. The reform sees an expansion of education user rights in Canadian copyright law through the introduction of additional exceptions and limitations. These include a fair dealing exception for education. Fair use has not been adopted in place of fair dealing. Canada's international obligations have also been central and the CMA implements two important treaties.

5.4 CCH Canadian Ltd v. Law Society of Upper Canada (2004)

This is a unanimous Judgement of the Supreme Court of Canada, delivered on 4 March 2004 by Chief Justice Beverley McLachlin. The background to the case is provided in an opening summary, the key points being:

Publishers commenced copyright infringement actions against the Law Society, seeking a declaration of... ownership of copyright in specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works... The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of a text from a treatise is made by the Great Library staff... for the purpose of research. (para.1)

The publishers involved were CCH Canadian Ltd, Thomson Canada Ltd, and Canada Law Book Inc. The relevant operations of the Law Society are that it:

Maintains and operates the Great Library... a reference and research library... The Great Library provides a request-based photocopy service for Law Society members, the judiciary and other authorized researchers... legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters. (para.1)

The Trial Court found some of the works were copyright and the purpose was not research or study and therefore not fair dealing. The Court of Appeal found all of the works were copyright and the purpose was research and potentially fair, though there was not sufficient evidence to prove this. The Supreme Court concurred that the works were copyright and delivered an emphatic decision in favour of the Law Society:

I conclude that the Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service... the Law Society's dealings with the works were for the purpose of research and were fair dealings within s. 29 of the Copyright Act. I would therefore allow the appeal. (Summary, para.6)

It is the finding of fair dealing and the liberal interpretation of the Copyright Act in this regard that has made this case a landmark precedent in Canadian copyright law, and widely known internationally.

Balance

The judgement stresses that balance is a critical factor to be considered by courts in copyright cases. McLaughlin notes:

Binnie J. recently explained in *Théberge*, [2002] *supra*, at paras. 30-31, that the Copyright Act has dual objectives:

‘The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator

The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.’

In interpreting the Copyright Act, courts should strive to maintain an appropriate balance between these two goals. (10)

The utilitarian principles of public interest and policy are expressed in these paragraphs. In relation to the case in hand she states: “This case requires this Court to interpret the scope of both owners’ and users’ rights under the Copyright Act” (13).

Fair dealing’s place in balance is of specific relevance to the research. McLaughlin states:

The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. (48)

This has been a highly influential statement, cited in the Legislative Summary to the CMA (as shown above in the CMA Findings) and in much scholarly literature. This opinion rebukes the Trial judge’s comment that “the fair dealing exception should be strictly construed” (62) and is vital to the ruling in favour of the Law Society in this and subsequent cases.

Fair Dealing

One of the key issues addressed in the appeal is “were the Law Society’s dealings with the publishers’ works “fair dealing[s]” under s. 29 of the Copyright Act” (4.3)

McLaughlin explains:

The exceptions to copyright infringement, perhaps more properly understood as users’ rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29 to 29.2. In general terms, those who deal fairly with a work for the purpose of research, private study... do not infringe copyright.

Fair dealing is considered more than just a defence by the Supreme Court:

As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available... a library can always attempt to prove that its dealings with a copyrighted work are fair... (49)

This framing of fair dealing as an integral part of copyright law has been influential in advancing the public policy aspect of copyright in Canada and was also central to the success of the appeal.

In relation to ‘dealing’ McLaughlin details the Access Policy that governs the Law Society’s copy service at 61. She then asks:

Is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices... This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. (63)

McLaughlin considers that the Law Society does this as follows.

In fair dealing cases the Court first has to establish whether the purpose is one of those listed in the Act. McLaughlin affirms her view that fair dealing must not be interpreted restrictively in her comment on the purpose of Research:

‘Research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research. (51)

Other purposes (including the new education purpose) could arguably also be interpreted in such a manner: “allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights” (54). In NZ and Australia the research exception is not limited to non-commercial use, though in the UK it is, as the result of a EU Directive.

In respect to establishing that the Law Society's purpose was for Research McLaughlin states:

Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process... There is no other purpose for the copying... Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an... allowable purpose under s. 29 of the Copyright Act. (64).

This is significant in that the purpose of the end user has been considered critical, rather than the person doing the copying. It is in this way that fair dealing is being treated as a users' right.

Having established it was a fair dealing purpose, the Court has to establish if dealing was 'fair'. As has been discussed in the CMA Findings, the Court used the six factors proposed by the Court of Appeal judge to determine fairness. In paragraphs 65-73 McLaughlin finds that in relation to all of the factors use was fair. The Access Policy provides safeguards that use is for research ('purpose of the dealing'), single copies were made for a specific purpose ('character of the dealing'); the amount taken from the works was reasonable and governed by the policy ('amount of the dealing'); there were no alternatives to the service provided ('alternatives to the dealing'); the works were "essential to legal research" and it is in the public interest that access to this type of material not restricted ('nature of the work'); and finally there was no evidence that there was market harm as a result of the copying and therefore use cannot be said to unfair on this basis ('effect of the dealing').

In conclusion of her analysis of the factors McLaughlin states:

On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright. (73).

Education

This fair dealing case does not involve an education institution. The ruling is relevant to the research because principles of law are established of importance to users' rights and exceptions to copyright generally, including educational users.

International Context

The judgement summary is followed by references to cases, statutes and regulations and authors cited in the document. These include cases from the US, UK and Australia, the Berne Convention and books and articles written about copyright globally not just Canadian copyright law. This reflects copyright's international reach and the Court's regard for this.

Summary

Balance is a significant theme in the Supreme Court's ruling and users' rights are expressed as an important part of this and of exceptions to copyright. The focus on the end user shows awareness of the importance of the public purpose of the Copyright Act. The ruling centres on an analysis of fair dealing and is a liberal interpretation of exceptions in Canadian law made with the support of international references.

5.5 Alberta (Education) v. Canadian Copyright Licensing (2012)

This Judgement of the Supreme Court of Canada is one of five copyright rulings made on 12 July 2012 which, as noted in the Literature Review, are known as the copyright ‘pentology’. Two of these relate to fair dealing, and this case specifically to education.

Background to the case is provided in the opening paragraphs. Access Copyright (the Canadian Copyright Licensing Agency) offers licenses to elementary and secondary schools. The dispute began when negotiations to renew the royalty agreement with “the provincial parties [all the provinces and territories of Canada other than Quebec] and the Ontario School Boards” (3) failed. “Access Copyright therefore filed a proposed tariff with the Copyright Board [of Canada]...” (4). The provinces and territories were represented by their respective Ministers of Education. After agreeing how to determine volumes of copying being done, the issue key for the Board became whether or not the fourth category of copying measured met fair dealing. The ruling explains that this category:

dealt with copies of works made at the teachers’ initiative with instructions to students that they read the material. Teachers would photocopy short excerpts from textbooks... as a complement to the main textbook the students used. (7)

The Copyright Board concluded that the copies:

were made for the allowable purpose of “research or private study” under s. 29 of the *Act*, but found, applying the *CCH* fairness factors, that the Category 4 copies did not constitute fair dealing and were therefore subject to a royalty. (9)

The Court of Appeal found the Copyright Board’s conclusion to be reasonable. The Coalition appealed to the Supreme Court maintaining that “the Board’s conclusion was not in accordance with the *CCH* test and was therefore unreasonable” (11). The majority judgement of the Supreme Court was delivered by J. Abella who ruled “I agree and would therefore remit the matter to the Board for reconsideration in accordance with these reasons” (11).

The judgement focuses on assessing fairness in accordance with the *CCH* fairness factors “the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work” (summary, para.1). Abella notes that she has “concerns over how the Board applied several of those factors” (14) and gives her reasons for upholding the appeal.

Balance

The ruling notes that:

As discussed in the companion appeal *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326 (*SOCAN v. Bell*), the concept of fair dealing allows users to engage in some activities that might otherwise amount to copyright infringement. (12)

This refers to the paragraph 11 in *SOCAN v. Bell* which reads:

One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision “must not be interpreted restrictively”: *CCH*, at para. 48.

This indicates the Court’s ongoing interest in copyright balance and ultimate reference back to the *CCH* precedent.

Fair Dealing

Fair dealing is a two-step process. The first step is not in contention - the purpose is fair dealing. In assessing whether dealing is fair, purpose is again examined as one of the six fairness factors. Abella states that in her view “the key problem is in the way the Board approached the ‘purpose of the dealing’ factor” (15). She explains:

This was based on its observation that in *CCH*, the Great Library was making copies at the request of lawyers. Because there was no such request for Category 4 copies, the Board concluded that the predominant purpose was that of the teacher, namely, “instruction” or “non-private study”. (15)

Abella also notes that Access Copyright argued “the purpose of the dealing should be seen, as it was by the Board and the Federal Court of Appeal, from the copier’s, or teacher’s perspective” (16).

Abella declares that “there is no separate purpose on the part of the teacher” (23), explaining:

The teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological. (23)

Abella continues:

The Board's approach... drives an artificial wedge into these unified purposes.... Nowhere in *CCH* did the Court suggest that the lawyer had to "request" the photocopies of legal works from the Great Library before those copies could be said to be for the purpose of "research". On the contrary, what the Court found was that the copies of legal works were "necessary conditions of research and thus part of the research process" [64]. (24)

The Supreme Court found that the purpose is to be from the perspective of the user, the students, which is research or private study and therefore fair. This aligns with the *CCH* finding.

The other fairness factors the Supreme Court had issue with were, firstly, that the Board's approach to the 'amount of the dealing' factor was flawed, due to its flawed opinion regards purpose. The Court asserted that "teachers do not make multiple copies of the class set for their own use, they make them for the use of the *students*" (29). Abella also notes that in any case this should only be considered under 'character of the dealing', and that 'amount of the dealing' should examine "the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated" (29).

As regards the 'alternatives to the dealing' factor, the Board found the "educational institutions had an alternative to photocopying textbooks: they could simply buy the original texts to distribute to each student or to place in the library for consultation" (31). Abella strongly rejects this, asserting:

The schools have already purchased originals that are kept in the class or library, from which the teachers make copies... Under the Board's approach, schools would be required to buy sufficient copies for every student of every text, magazine and newspaper in Access Copyright's repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. (32)

This is equally unrealistic in the tertiary environment regarding course readings.

Finally, as regards the ‘effect of the dealing on the work’ the Court disagreed with the Board’s finding that the market harm is caused by the copying made it unfair, noting:

In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased as a result of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales. (35).

The Court also asserted that if copying didn’t take place it is likely:

students would simply go without the supplementary information, or be forced to consult the single copy already owned by the school. (36)

This applies equally to tertiary students.

The *CCH* case is cited in all the Court’s arguments relating to the fairness factors, indicating the degree of its influence on fair dealing deliberations in Canada. Abella’s closing statements are:

Because the Board’s finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable. (37)

I would therefore allow the appeal with costs and remit the matter to the Board for reconsideration based on these reasons. (38)

The Copyright Board of Canada subsequently found, in its September 2012 ruling:

The decision of the Supreme Court is clear and leaves no room for interpretations: based on the record before the Board and the findings of fact of the Supreme Court, Category 4 copies constitute fair dealing for an allowable purpose and as such, are non-compensable. (para.3)

The authority of the Supreme Court is clear.

Education

The Board first began hearings in the *Alberta* case in 2004, well before education became a fair dealing exception in Canada, although the CMA was assented to shortly prior to the Supreme Court judgement. Some key points are made moot in the Canadian context as a result of the CMA. The Courts view that the teacher shares a symbiotic purpose with the students is however of interest to other jurisdictions where education remains outside fair dealing. The view that it is unrealistic for an educational institution to purchase copies of a work for many students, or believe students will purchase them, is also pertinent.

International Context

Access Copyright cited “three key Commonwealth cases” (16) in its argument that the purpose of dealing should be seen from the teacher’s perspective, two from the UK and one from NZ. The Supreme Court rejected these as helpful. The NZ case was *Copyright Licensing Ltd. v. University of Auckland*, (2002) in which:

Several universities provided copies of copyrighted works to students as part of course packs, and charged the students for these materials... The universities argued that the copying constituted fair dealing for the purposes of research or private study. The court held that the ‘purpose’ must be that of the person ‘doing the copying’ (18).

Abella’s assessment is that the NZ case:

“Does not stand for the proposition that ‘research’ and ‘private study’ are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purpose.” (21)

The court is dismissive of the Plaintiff’s argument relating to perspective, believing that the demonstrably commercial purpose of charging a fee for the readings made the dealing unfair at the second step. There were also two UK cases, and Abella notes in relation to these that “courts in the UK have tended to take a more restrictive approach to determining the ‘purpose’ of the dealing than does *CCH*.” (19)

The Court focuses on the *CCH* case, but does cite the UK Act, and an article³¹ which compares fair dealing in Canada to that in the UK and fair use in the US.

Summary

Copyright balance is acknowledged in the ruling. The case addresses fair dealing within education institutions across Canada, when there was no education exception. The judgement focuses on examining the fairness factors, with attention to and strong endorsement of the precedent set by *CCH*. This includes an emphasis on the importance of the user’s perspective which enables the research fair dealing exception to be applied favourably. Overseas cases were again considered, showing this is accepted practice and these have the potential for international impact.

³¹ D’Agostino, G. (2008). Healing fair dealing? A comparative copyright analysis of Canada’s fair dealing to U.K. fair dealing and U.S. fair use. *McGill Law Journal* 53(2), 309-363.

5.6 Cambridge University Press v. Patton (2014)

This is a Judgement of the US Court of Appeals for the Eleventh Circuit.³² The plaintiffs were Cambridge University Press, Oxford University Press and Sage Publications and the defendants were officials (Patton and others) of Georgia State University (GSU). The initial court action was heard by the US District Court for the Northern District of Georgia, *Cambridge University Press v. Becker* (2012). The case specifically concerns fair use in relation to electronic course material distribution and the majority ruling was delivered by Judge Tjoflat. Part I provides background information about the parties and the history of the case - the salient details follow.

GSU maintains ERes, “an electronic reserve system... to allow GSU students to access course materials – including... excerpts from books” (p.7) and uLearn, “a course management system... through which professors may make course material available, including digital copies of excerpts of books” (p.8). “Copyright Clearance Center (CCC) licenses excerpts from copyrighted works for a fee, acting on behalf of publishers... These licenses are called ‘permissions’ (p.9).

The publishers alleged in 2008 that “GSU professors have made... copyrighted works [books] available on GSU’s reserve systems without obtaining permissions, and that GSU’s administration facilitated... this practice” (p.12). This was denied by the University who asserted “a defense of fair use” (p.13). GSU amended their copyright policy in February 2009. Under this professors wishing to post excerpts onto ERes or uLearn must first “determine whether they believe that doing so would be fair use” (p.15) by filling out a checklist for each excerpt. In 2010 the District Court agreed to rule only on alleged infringement after the enactment of this policy (p.18), the result being “in reaching its decision, the District Court considered a total of seventy-four individual claims of infringement” (p.25).

The District Court assessed these claims individually and found that the Defendants had only “infringed Plaintiffs’ copyright in five of the seventy-four instances at issue” (p.25) and that the “2009 policy had caused the five instances” (p.37). The GSU policy was revised “in accordance with the District Court’s May 11, 2012 order” (p.38). The Court of Appeals found much of the District Court ruling correct but ultimately referred the case back for a revised case-by-case analysis based on the Court of Appeals opinion.³³

³² The 11th Circuit’s jurisdiction is Alabama, Florida and Georgia.

³³ The publishers filed for a rehearing at the Court of Appeals, unhappy with many of the findings. This was denied in January 2015.

Balance

The Court of Appeals notes that the case is one in which “technological advances have created a new, more efficient means of delivery for copyrighted works, causing copyright owners and consumers to struggle to define the appropriate boundaries of copyright protection” (p.3). In drawing these boundaries it must be ensured:

copyright law serves its intended purpose, which is to promote the creation of new works for the public good by providing authors and other creators with an economic incentive to create... If copyright’s utilitarian goal is to be met, we must be careful not to place overbroad restrictions on the use of copyrighted works, because to do so would prevent would-be authors from effectively building on the ideas of others. (pp.3-4)

The balance required in copyright law, the digital era’s impact on it and the utilitarian principles underpinning US copyright are all clearly articulated here. The Court goes on to describe fair use as “a means by which a court may ascertain the appropriate balance in a given case” (p.4).

The Court returns to balance and utilitarianism on pages 46-55 when it overviews the theoretical foundation of copyright and in particular fair use. The Court quotes both the Copyright Clause of the US Constitution and the Statute of Anne in asserting “promoting the creation and dissemination of ideas has been the goal driving Anglo-American copyright law” (47). It also cites *Twentieth Century Music Corp v Aiken*, (1975, at 156) “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good” (p.47). Because of this the rights of authors are limited. “The fair use doctrine also critically limits the scope of the monopoly granted to authors under the Copyright Act in order to promote the public benefit copyright is intended to achieve” (p.49).

Fair Use

Fair use is considered an integral part of copyright law, and a users’ right, as is shown by the Court’s statement “In a sense, the grant to an author of copyright in a work is predicated upon a reciprocal grant to the public by the work’s author of an implied license for fair use of the work” (p. 50). To succeed in a fair use case:

A defendant must convince the court that allowing his or her unpaid use of copyrighted material would be equitable and consonant with the purposes of copyright. In order to make this determination the court must carefully evaluate the facts of the case at hand in light of four considerations. (4)

The ruling cites Section 107³⁴ of the Copyright Act 1976, which lists the four fairness factors. In brief these are:

- (1) the purpose and character of the use
- (2) the nature of the copyrighted work
- (3) the amount and substantiality of the portion used
- (4) the effect of the use

This case centres around determining “whether the unpaid copying of scholarly works by a university for use by students – facilitated by the development of systems for digital delivery over the Internet – should be excused under the doctrine of fair use” (p.5).

The publishers argued the ruling should be determined on GSU’s deficient Policy, not each instance of infringement, but the Court of Appeal considered this would be contrary to Section 107. The Court of Appeals found that the “work by work approach.... was the proper one” (p.55). In making its ruling on each case the District Court “held that fair use applied whenever at least three of the four factors favoured Defendants” (p.35) and in the case of a tie a review was done “reweighing the importance of the factors” (p.37). The Court of Appeals found “the District Court erred in giving each of the four factors equal weight, and in treating the four factors as a simple mathematical formula” (p.57), clarifying that “the Supreme Court has explained... ‘all are to be explored, and the results weighed together, in light of the purposes of copyright’ [*Campbell v. Acuff-Rose Music Inc* 1994, 1170]” (p.56).

Having established these points, the Court of Appeals judgement examines the fairness factors, noting that the “Plaintiffs argue that the District Court erred in its application of each of the four fair use factors” (p.57).

The District Court held the first fair use factor favoured the GSU “in all instances because ‘the use is for strictly non-profit educational purposes’ [*Cambridge*, 2012, 1224]” (p.30). The Court of Appeals fully explores the issue of whether “use is ‘transformative’ rather than merely superseding use of the original work” (p.60), transformative uses being more likely to be fair. “Here, Defendants’ use of excerpts of Plaintiffs’ works is not transformative” (p.62). The Court of Appeals weighs this against whether “use is for a nonprofit educational purpose” (p.64), noting that the “Supreme Court has recognized in dicta that nonprofit educational use may weigh in favour of a finding of fair use under the first factor, even when nontransformative” (p.65).

³⁴ Refer to Appendix G for full text of Section 107.

The Court of Appeals contends that:

Allowing some leeway for educational fair use furthers the purpose of copyright by providing students and teachers with a means to lawfully access works in order to further their learning in circumstances where it would be unreasonable to require permission.

The Court of Appeals also states “Congress devoted extensive effort to ensure that fair use would allow for educational copying under the proper circumstances” (p.74). The conclusion reached by the Court is therefore that:

Use for teaching purposes by a nonprofit, educational institution such as Defendants’ favors a finding of fair use under the first factor, despite the nontransformative nature of the use. Accordingly, we find that the District Court did not err in holding that the first factor favors a finding of fair use. (p.74)

This ruling, and its inclusive wording, is positive for educational institutions, and provides confidence on this factor going forward. The ALRC view aligns with this.

The District Court also held that the second fair use factor favoured the GSU “in all instances because ‘the books...are properly classified as informational in nature’ [1226]” (p.30). The Court of Appeal found the District Court erred in this, stating:

Where the excerpts of Plaintiffs’ works contained evaluative, analytical, or subjectively descriptive material... the District Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material. (p.80)

This factor will need to be reassessed, however the Court of Appeals made the point that it is “of relatively little importance in this case” (p.81).

The District Court found the third factor “ ‘favor[ed] either Plaintiffs or Defendants, depending on the amount taken from each book’ [1235]” (p.30). The Court determined “all of the selections furthered the legitimate educational purpose of the courses in which they were used” (p.31). In its analysis the District Court took a qualitative approach, allowing no more than 10 percent or one chapter of a book. The Court of Appeals ruled that “the District Court’s blanket 10 percent-or-one-chapter benchmark was improper, serving “as a substantive safe harbour... an approach which is incompatible with the prescribed work-by-work analysis” (p.84). The District Court should have considered in each instance “the quantity and the quality of the material taken – including whether the material taken constituted the heart of the work” (p.92).

The Court of Appeals did find that the “District Court properly took into account whether the amount copied suited GSU’s pedagogical purposes” (p.86), and that “educational purpose may increase the amount of permissible copying” (p.111), something the publishers challenged. The District Court refused to be “bound by the standards provided in the Classroom Guidelines” (p.32). The publishers argued the District Court wrongly found fair use for excerpts which exceeded the Guidelines. The Court of Appeals refuted this, declaring that the Guidelines “although part of the legislative history of the Copyright Act, do not carry force of law” (p.88) and in any case “were intended to suggest a minimum, not maximum, amount of allowable educational copying” (p.89).

For this factor a re-evaluation of the extracts is required on the basis of the error in methodology. The Court of Appeals does not say any of the amounts of copying were unfair, only that the District Court should not have presumed them to be fair on a percentage basis. Ultimately the same findings of fair use may be made.

For factor four, the District Court found that use of excerpts “did not affect Plaintiffs’ actual or potential sales of books” (p.32) but “may be at the cost of Plaintiffs’ licensing revenues” (p.32). The Court considered factor four weighed in the publishers’ favour when permissions “are readily available from CCC or the publisher” (p.32) and in GSU’s favour when they are not. The Court noted however that “academic permissions income does not represent a significant portion of Plaintiffs’ overall revenue” (p. 34) and that the percentage of revenues received for electronic licenses only for the 2009 year was just “five one-hundredths of one percent” (p.28).

The Court of Appeals examines the issue of licensing in some detail, noting that “the goal of copyright is to stimulate the creation of new works, not to furnish copyright holders with control over all markets. Accordingly, the ability to license does not demand a finding against fair use” (p.95). This said, it reasoned that the District Court “performed a sufficiently nuanced review of the evidence regarding license availability” (p.99). The Court of Appeals also affirmed that the District Court’s fourth factor analysis “was correct, and that the District Court properly took license availability into account in determining whether the fourth factor weighted for or against fair use” (p.101).

The Court of Appeals does conclude though that “because Defendants’ copying was nontransformative and the threat of market substitution was therefore serious, the District Court erred by not affording the fourth factor additional weight in its overall fair use calculus” (p.107). This would only apply to those instances where a license was available from CCC for the works.

The District Court therefore needs to re-assess each case of copying, with attention to the nature of the works and amount and substantiality, and weigh all the results bearing in mind the purpose of copyright. This may or may not alter the findings of fair use.

Education

The significance of this case is that, there was “no precedent on all fours for how the factors should be applied where excerpts of copyrighted works are copied by a non-profit college or university for a non-profit educational purpose” (p.25). The case is important for establishing fair use parameters for course material distribution for educational institutions in the US, and other fair use jurisdictions.

As well as affirming the important place of education in the copyright equation in promoting the ‘progress of science,’ as per the Constitution, the ruling specifically articulates the important place of educational use of copyrighted works. The Court of Appeals declares:

The text of the fair use statute highlights the importance Congress placed on educational use. The preamble to the statute provides that fair uses may include “teaching (including multiple copies for classroom use), scholarship, or research” and the first factor singles out “nonprofit educational purposes.” 17 U.S.C. §107. The legislative history of §107 further demonstrates that Congress singled out educational purposes for special consideration. In the years leading up to passage of the Copyright Act of 1976... Congress devoted considerable attention to working out the proper scope of the fair use defense as applied to copying for educational and classroom purposes. (73)

The Court places considerable weight on the importance of education in its ruling, as shown particularly in its assessment of the first factor. That copying of excerpts is being done in a university for educational purposes considered instrumental in determining if such copying is fair.

International Context

The judgement relies solely on citations from US case history. This is understandable given it is a fair use case. Overseas jurisdictions have only recently begun to adopt fair use, whereas the US has many cases from which points of relevance can be drawn.

Summary

Balance, and the utilitarian principle of limiting authors' rights for the greater good, is addressed by the Court of Appeals. Education is awarded prominence as a factor contributing to the public good purpose of copyright. Fair use is seen as a user's right and integral to the copyright act. The ruling clearly establishes how the fair use factors should be applied in a course material distribution context, providing precedent in the US which will also be of value in other jurisdictions. The outcome of the case is to date positive for tertiary institutions.

6.0 Discussion

6.1 The reviews, reforms and court cases

The findings show that in all jurisdictions the law reviews and reforms recognise that the concept of balance in copyright law is a critical consideration and, further, that reforms aim to address imbalance. The digital environment is viewed as a central factor contributing to this imbalance, as titles such as “Copyright and the Digital Economy” (ALRC Report) indicate. As noted in the Introduction to this research, the digital era has posed challenges which have heightened interest in exceptions, and the reforms reflect this, as is explicit in the Summary to the CMA, for example. It is clear that new ‘opportunities’ are seen as requiring new balance, in order for the purpose of copyright to be equitably maintained. This utilitarian purpose is shown as important and education as a key part of advancing the public good. Exceptions are affirmed as the main way of ‘fixing’, as the Hargreaves Report (2011, p. 42) puts it, imbalances in the copyright system.

The analysed court cases likewise attest to the importance of considering balance when deliberating on copyright disputes. In *Cambridge* (pp.3-4) the influence of the digital technology, the utilitarian goals of copyright and place of fair use are all particularly neatly expressed in relation to balance and education. Not only are exceptions recognised as important but, as stated in *CCH* (48) and reflected in *Alberta*, for proper balance to be maintained fair dealing “must not be interpreted restrictively.”

Exceptions are explicitly articulated as being both integral to copyright and, significantly, as users’ rights, in *CCH*, *Alberta* and *Cambridge*. Users’ rights to utilise copyright works are advanced in the Canadian fair dealing and US fair use cases examined. The Canadian cases promote education users’ rights through their liberal interpretation of the pre-CMA legislation, and the US case through stressing the ‘ultimate aim’ of copyright of ensuring the public good be remembered while considering fair use (pp.47-49). The rulings demonstrate that unremunerated use of extracts for research/education is in keeping with the intent of the respective legislation and utilitarian purpose of copyright. The *Alberta* case is interesting in that the fair dealing exception utilised was research not education, with use seen from the end users’ perspective deemed the correct analysis and copying therefore permitted on students’ behalf by teachers without prior request.

Neither the CMA nor the Canadian Copyright Act stipulate fairness factors, leaving this to the Canadian courts to determine. They did so in *CCH* and these factors were then applied, beneficially for education users, in *Alberta*. The standing of the *CCH* factors is recognised by the Canadian government, as explained in the Summary to the CMA (1.1 para.10). The ALRC recommends a fair dealing exception should “explicitly state the fairness factors” (2013, 6.29), with a definition in keeping with those used by the Supreme Court of Canada, UK courts and to the legislated US fair use factors. This shows a harmonious approach to determining fairness among these countries. NZ’s current legislation articulates very similar factors for research and private study and would presumably continue to do so if education were added as a fair dealing or fair use exception. In both Canada and the US, industry guidelines have been developed to enumerate what users could expect to be able to copy, and the ALRC recommends this approach in Australia.

The ALRC strongly favours fair use be adopted over fair dealing, with a particular benefit being the flexibility of fair use to adapt to new digital technologies. This could be appealing to universities and ITPs given their high use of such technologies. The same fairness factors would apply. How fairness factors can be applied to course material distribution has been demonstrated in *Cambridge*. While transformative use has been seen in past fair use cases in the US as a key determining factor in favour of fair use, *Cambridge* establishes that a non-profit educational use trumps this. This is significant, bearing in mind Beebe’s 2007 fair use research. The ALRC also asserts transformative use is important, but also observes “educational purpose will weigh in favour of fair use” (2013, 14.23). The US court case confirms that the education sector has good reason to avail itself of the fair use provision and establishes parameters around which institutions can do so.

Education’s contribution to the utilitarian principles underpinning Anglo-American copyright law is highlighted in the documents, particularly ALRC Report (which cites the Statute of Anne), and *Cambridge* (which cites the Constitution). Education’s centrality to the public good purpose of copyright is the fundamental reason education users’ rights have been expanded and court cases ruled in favour of it in the studied countries. The ALRC Report notes the part cultural benefits play in the digital economy and states education shouldn’t be hampered by “overly prescriptive and confined exceptions” (2013, 14.3). Hargreaves Report recognises exceptions “bring important cultural as well as economic benefits” (p.4). The importance of exceptions, including education exceptions, to enabling cultural participation enters the arena of human rights. While human rights are only explicitly mentioned in the ALRC Report (2.43) the role education plays in

promoting access to culture and freedom of expression inextricably links human rights to education exceptions.

Other factors beyond educational use which can be seen categorically in the documents to weigh in favour of fairness and are positive for educational users' rights are non-commercial use and the factual or informational nature of the works (this would not apply if there was high analytical content or to fiction). This aligns with Beebe's 2007 research. The length and quality of the extract is also important and it is clear course material extracts need to be kept within reasonable limits, which is not problematic. Of significance to education users is that in all court cases copying extracts was not deemed harmful to the market for book sales in the education context. The ALRC likewise contends introducing legislated education exceptions is not going to displace the sale of educational materials.

The situation with regard to license impact is less straightforward, as seen in *Cambridge* where such harm did need consideration, though proportion of total revenue was tiny. In Australia, Canada and NZ however, a licence does not need to be obtained for "use of copyright material that is permitted under an unremunerated exception" (ALRC, 2013, 8.54). Thus in Canada universities are free not to renew licenses with Access Copyright since the introduction of the education exception. The UK government also expressed the same view on licenses in Modernising Copyright. The UK was unable to introduce a fair dealing education exception but are changing their licensing system in a manner intended to benefit education users.

The international reach of copyright is clear in the documents. The reforms take care to comply with and/or implement international agreements or directives. Neither an education fair dealing exception nor fair use is considered to breach Berne or TRIPs, though the wording of the applicable articles makes the precise meaning uncertain and invites discussion (ALRC, 2013, p.117). Countries are cognisant of global issues and the ALRC takes particular note of copyright reviews previously undertaken elsewhere and how fair use and fair dealing are treated in the US and Canada. The court cases also reveal that judges, plaintiffs and defendants find germane cases and other documents in support of their copyright arguments from other countries.

In summary, the findings reveal that in Australia, Canada and the UK expanded education exceptions in copyright law have either been recommended or implemented. This has been part of a broader recognition of and an increase in users' rights, rebalancing copyright in a manner appropriate in the digital environment. Expanded education exceptions are seen as particularly deserved given education's role in advancing the public good, and the economic and cultural benefits of an educated populace. The extent of expansion has been greater in Canada and Australia than the UK. The court cases support users' rights to utilise the copyright exceptions that exist in law, including education users in Canada prior to the education fair dealing exception. Geist's assertion (2013, p.iv) that as global attention to balance and users' rights grows Canadian copyright law is the "paradigm example for emphasising both creator and user rights" appears justified. A significant concurrence of opinion is observable among those reviewing, legislating and interpreting copyright law in regard education exceptions and education users' rights.

6.2 Implications for NZ university and ITP libraries

The Copyright Act 1994 is due for review and it can be expected from what has occurred in overseas jurisdictions that copyright balance will be considered, with attention paid to users' rights and whether the utilitarian purpose of copyright is being properly upheld. Since exceptions are the key balancing mechanism, whether they are currently appropriate should be examined. Canada, Australia and the UK found that they were not. It is at least possible NZ would come to the same conclusion. Certainly it can be anticipated that the NZ government will be as informed about international developments as the Australian government, and therefore aware of the trend in influential jurisdictions of expanding exceptions.

Some issues relating to the digital environment were addressed by the 2008 Act, however a complete review of our law was not done at that time. In relation to course material distribution in NZ university and ITPs, digital technology has seen a significant increase in the proportion of copying that is not covered by the CLL license but by separately licensed electronic resources, and the majority of readings being delivered electronically rather than in print format. A high cost is being paid in NZ for what the documents show is a use now deemed to be for a fair unremunerated purpose in copyright law in Canada and by the ALRC in Australia, and in all likelihood in many instances by the Supreme Court under the US fair use provision.

Given the connections between NZ and these countries it is reasonable for tertiary education institutions to expect the same user rights as their overseas counterparts enjoy, particularly given the competitive global education market. However they will have to make their case for this here during the review process. The grounds for lobbying for fair use, with education as an illustrative purpose, or for an education fair dealing exception are strong. Both would benefit universities and ITPs, with fair use potentially enabling greater flexibility regards future technological developments. This means university and ITP libraries will need to comprehend the importance of copyright reform and proactively contribute to such lobbying.

There will also be implications should a law amendment eventuate. Universities and ITPs would have the opportunity to cease using a CLL license, as Canadian universities are doing, which would be of significant financial benefit. Libraries would however need to ensure sound copyright management policies, processes and understanding exists in their institutions. The requirements of the pilot CLL license with the Universities may be beneficial in this regard as it includes e-reporting of copying (CLL, 2015, p.7). Universities must therefore implement electronic course page systems which enable e-reporting, and some include copyright management

functions. The University of Auckland, for example, is adopting Talis Aspire (Talis, 2015, blog19 Feb). A collective approach could be taken to developing post education exception guidelines on what is fair, as the documents reflect has been done elsewhere. In overseas jurisdictions these correlate to current allowances in NZ under the CLL license.

The government could potentially opt to expand specific exceptions and amend the licensing regulations in a manner more aligned with what has occurred in the UK, even though we are not restricted by EU regulations. Since licensing itself has not been under investigation, comments on the implications of this are not appropriate. Without a fair dealing or fair use exception, there could still be a future possibility not to have a CLL license but to rely on a limited exception, particularly if this is expanded. The e-reporting systems will enable an accurate picture of the amounts of copying done from print materials, which would help inform this decision and the impact it would have on students.

How liberally a fair dealing exception, or for that matter fair use, would be interpreted by the courts should litigation ensue is difficult to predict, although the analysed cases give reason for optimism for education users. They would certainly serve as useful cases for NZ universities or ITPs to cite in support of course material copying disputes and do testify to the importance of users' rights. It is probably unlikely, however, that a university or ITP in NZ would test the Supreme Court of Canada precedent that the users' perspective is paramount, the teacher/student relationship symbiotic and that lecturers or librarians can therefore proactively copy materials on their behalf under the current private study or research fair dealing exception. The court cases lend weight to the arguments for change that need to be voiced by NZ universities and ITPs libraries advocating for their user communities.

7.0 Conclusion

NZ university and ITP libraries operate within a difficult copyright environment, where education users' rights are very restricted under the Act. The goal of this research was to investigate what significance copyright developments in overseas jurisdictions may have in relation to educational copying for course material distribution in NZ. The research questions were:

- What copyright reform or reviews have occurred in the past five years in the UK, Canada and Australia in relation to education exceptions?
- What do the recent landmark copyright court cases in the US and Canada mean for education users' rights?
- What is the significance of these international developments to NZ university and ITP libraries?

These questions were explored using a qualitative research design. Qualitative content analysis of a purposefully selected sample of documents, chosen for their relevance in addressing the research questions, was conducted. Some historical research was also undertaken to place NZ within the wider international copyright arena and establish the applicability of examining international developments. This showed that a range of factors link NZ and the countries from which the documents were drawn, including international copyright treaties and trade agreements, and their laws have developed with close correlations, dating back to the Statute of Anne.

The findings reveal that copyright reviews have recommended, and reforms enacted, expanded education exceptions to address imbalance in copyright law. The UK, limited by EU law, has expanded specific education exceptions. Canada has introduced a fair dealing exception for education and Australia has recommended fair use with education as an illustrated purpose, both of which would enable unremunerated copying of extracts for course material distribution. The court cases in Canada and the US have strongly endorsed that fair dealing and fair use exceptions are a user's right, emphasising copyright's utilitarian goal of benefiting the greater public good. Education's centrality to copyright's utilitarian purpose is the fundamental reason for the expansion of education users' rights, and favourable court rulings, in the countries studied.

This research attests to the global impact and influence of copyright law. NZ university and ITP libraries can expect that the NZ government will consider international developments during the pending review of the Copyright Act 1994, including the expansion of education exceptions. Tertiary institutions have grounds to lobby for the same user rights as their overseas counterparts. This research project adds to the body of knowledge universities and ITPs can draw on when making submissions to the pending copyright law review.

Should an education exception be enacted universities and ITPs would have the opportunity not to renew their CLL licenses. Libraries would need to ensure robust copyright management practices were in place in their institutions should this eventuate. If any fair dealing or fair use litigation ensued the research shows that international precedents provide optimism for education users in defending their rights.

7.1 Opportunities for further research

Copyright licensing has been touched on in the research and is an area where further research would be of particular benefit. For example, an examination of the various licensing models in use in the studied countries, how they relate to copyright exceptions and their impact on tertiary education institutions would be of value and add meaning to the findings of this research project. This could also include exploring the role of collecting societies, the types of educational licenses they offer and the bodies that regulate their activities.

There is also the opportunity to research how copyright restrictions impact on universities and ITPs beyond course material distribution, such as the development of Massive Online Open Courses (MOOCs) and the broader use of digital technologies in teaching and learning. This would widen the range of copyright works studied to include library multimedia resources.

Finally, research into Māori views on protecting and providing access to their cultural expressions, which may not fit into the Anglo-American copyright paradigm and could need unique accommodation in law, would be useful in the NZ context and have implications for university and ITP libraries.

8.0 References

- Atkinson, B. (2011). Australia's copyright history. In B. Fitzgerald, & B. Atkinson (Eds.), *Copyright future, copyright freedom: Marking the 40th anniversary of the commencement of Australia's Copyright Act 1968* (pp. 29-45). Sydney, Australia: Sydney University Press.
- Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (2012). SCC 37, 2 SCR 345, Retrieved from <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do>
- Atkinson, B. A. C., & Fitzgerald, B. (2014). *A short history of copyright: The genie of information* Springer ebook. doi:10.1007/978-3-319-02075-4_11
- Austin, G. W. (2010). Four questions about the Australian approach to fair dealing defences to copyright infringement: Part I. *Journal of the Copyright Society of the U.S.A.*, 57, 611-630.
- Austin, G. W. (2012). The two faces of fair use. *New Zealand Universities Law Review*, 25(2), 286-317.
- Australian Law Reform Commission. (2013). *Copyright and the digital economy: Final report* (No. 122). Retrieved from <http://www.alrc.gov.au/publications/copyright-report-122>
- Baldwin, P. (2014). *The copyright wars: Three centuries of trans-atlantic battle*. Princeton, NJ: Princeton University Press.
- Bannerman, S. (2011). "We are all developing countries": Canada and international copyright history: Fault lines in the map of international copyright. In B. Fitzgerald, & B. Atkinson (Eds.), *Copyright future, copyright freedom: Marking the 40th anniversary of the commencement of Australia's Copyright Act 1968* (pp. 79-96). Sydney, Australia: Sydney University Press.
- Beebe, B. (2007). Empirical study of U.S. copyright fair use opinions, 1978-2005. *University of Pennsylvania Law Review*, 156, 549-624.
- Bently, L. (2010). Introduction to Part I: The history of copyright. In L. Bently, U. Suthersanen & P. Torremans (Eds.), *Global copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (pp. 7-13). Cheltenham, England: Edward Elgar.
- Bowen, G. A. (2009). Document analysis as a qualitative research method. *Qualitative Research Journal*, 9(2), 27-40. doi:10.3316/QRJ0902017
- Branthwaite, J. S. (1999). *Libraries and copyright: A comparative study*. (Unpublished Research Project). Victoria University of Wellington, Wellington, New Zealand.
- Bryman, A. (2012). *Social research methods* (4th ed.). Oxford, England: Oxford University Press.
- Burrell, R., & Coleman, A. (2005). *Copyright exceptions: The digital impact*. Cambridge, England: Cambridge University Press.
- Cambridge University Press v. Patton* (2014). No 12-14676 & 12-15147, F (11th Cir). Retrieved from <http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf>

- Canadian Association of University Teachers (2013). *CAUT Guidelines for the use of copyrighted material*. Retrieved from <http://www.caut.ca/docs/default-source/copyright/revised-caut-guidelines-for-the-use-of-copyrighted-material-%28feb-2013%29.pdf>
- CCH Canadian Ltd v. Law Society of Upper Canada* (2004). SCC 13, 1 SCR 339. Retrieved from <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do>
- Copyright Act 1976, United States. Retrieved from <http://copyright.gov/title17/>
- Copyright Act 1994, New Zealand. Retrieved from <http://legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html?src=qs>
- Copyright Board of Canada (2012). *Access Copyright – Education Institutions (2005-2009), September 19 2012 Ruling of the board*. Retrieved from <http://www.cb-cda.gc.ca/avis-notice/index-e.html#access3-19092012>
- Copyright, Designs and Patents Act 1988, United Kingdom. Retrieved from <http://www.legislation.gov.uk/ukpga/1988/48/contents>
- Copyright Licensing Ltd (2012). *Copyright Licensing New Zealand Annual Report 2012*. Retrieved from <http://www.copyright.co.nz/downloads/assets/2371/CLNZ-Annual-Report-2012.pdf>
- Copyright Licensing Ltd (2015). *Our story: 2014 Annual Report*. Retrieved from <http://www.copyright.co.nz/2014-Annual-Report/>
- Copyright Licensing Ltd v. University of Auckland and Others* (2013). NZCOP 18. Retrieved from <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-18-cll-v-universities-of-nz-24-december-2013/view>
- Council of Ministers of Education, Canada. (n.d.). *Fair Dealing Guidelines*. Retrieved from http://cmec.ca/docs/copyright/Fair_Dealing_Guidelines_EN.pdf
- Copyright Modernisation Act 2012, Canada. Retrieved from http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/FullText.html#h-1
- Copyright (New Technologies) Amendment Act 2008, New Zealand. Retrieved from [http://legislation.govt.nz/act/public/2008/0027/latest/DLM1122543.html?search=qs_act%40bill%40regulation%40deemedreg_copyright+\(new+technologies\)_resel_25_h&p=1](http://legislation.govt.nz/act/public/2008/0027/latest/DLM1122543.html?search=qs_act%40bill%40regulation%40deemedreg_copyright+(new+technologies)_resel_25_h&p=1)
- Craig, C. J. (2002). Locke, labour and limiting the author's right: A warning against a Lockean approach to copyright law. *Queen's Law Journal*, 28, 1-60.
- Craig, C. J. (2011). *Copyright, communication and culture: Towards a relational theory of copyright law*. Cheltenham, England: Edward Elgar Publisher.
- Daniel, D. M. (2006). *Briefly: Mill's Utilitarianism*. London, England: SCM Press.
- Daniels, T. P. (2001). *Is digital different? The debate over fair dealing, copyright laws and how they apply in the digital environment*. (Unpublished Research Project). Victoria University of Wellington, Wellington, New Zealand.

- Davies, G. (2002). *Copyright and the public interest* (2nd ed.). London, England: Sweet & Maxwell.
- Davison, M. J., Monotti, A. L., & Wiseman, L. (2012). *Australian intellectual property law* (2nd ed.). Port Melbourne, Australia: Cambridge University Press.
- Deazley, R. (2006). *Rethinking copyright: History, theory, language*. Cheltenham, England: Edward Elgar.
- Denscombe, M. (2014). *The good research guide for small-scale social research projects* (5th ed.). Maidenhead, England: McGraw-Hill/Open University Press.
- Fair, P., & Tidmarsh, E. (2014). The ALRC recommends fair use. *Intellectual Property Forum: Journal of the Intellectual and Industrial Property Society of Australia and New Zealand*, 97, 28-34.
- Findley, J. (2013). Liberating the library: Fair use mostly upheld for university e-reserves in *Cambridge University Press v. Becker*. *Mercer Law Review*, 64(2), 611-631.
- Fisher, W. (2001). Theories of intellectual property. In S. R. Munzer (Ed.), *New essays in the legal and political theory of property: Cambridge studies in philosophy and law* (pp. 168-199). Cambridge, England: Cambridge University Press.
- Fitzpatrick, J. R. (2006). *John Stuart Mill's political philosophy: Balancing freedom and the collective good*. London, England: Continuum.
- Frankel, S. (2011a). *Intellectual property in New Zealand* (2nd ed.). Wellington, New Zealand: LexisNexis.
- Frankel, S. (2011b). A brief perspective: The history of copyright in New Zealand. In B. Fitzgerald, & B. Atkinson (Eds.), *Copyright future, copyright freedom: Marking the 40th anniversary of the commencement of Australia's Copyright Act 1968* (pp. 72-78). Sydney, Australia: Sydney University Press.
- Geist, M. (2013). Fairness found: How Canada quietly shifted from fair dealing to fair use. In M. Geist (Ed.), *The copyright pentology: How the Supreme Court of Canada shook the foundations of Canadian copyright law* (pp. 157-186). Ottawa, Canada: University of Ottawa Press.
- Gervais, D. (2010). Fair use, fair dealing, fair principles: Efforts to conceptualize exceptions and limitations to copyright. *Journal of the Copyright Society of the U.S.A.*, 57(3), 499-520.
- Ginsburg, J. (1998). A tale of two copyrights: Literary property in revolutionary France and America. In B. Sherman, & A. Strowel (Eds.), *Of authors and origins: Essays on copyright law* (pp. 131-158). Oxford, England: Oxford University Press.
- Goldstein, P., & Hugenholtz, P. B. (2013). *International copyright: Principles, law, and practice* (3rd ed.). Oxford, England: Oxford University Press.
- Gordon, W. J. (1992-1993). Property right in self-expression: Equality and individualism in the natural law of intellectual property. *Yale Law Journal*, 102, 1533-1610.

- Haggart, B. (2014). *Copyright: The global politics of digital copyright reform*. Toronto, Canada: University of Toronto Press.
- Handa, S. (2002). *Copyright law in Canada*. Markham, ON: Butterworths.
- Hargreaves, I. (2011). *Digital opportunity: A review of intellectual property and growth*. Retrieved from <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>
- HM Government. (2011). *The government response to the Hargreaves review of intellectual property and growth*. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32448/11-1199-government-response-to-hargreaves-review.pdf
- HM Government. (2012). *Modernising copyright: A modern, robust and flexible framework. Government response to consultation on copyright exceptions and clarifying copyright law*. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32448/11-1199-government-response-to-hargreaves-review.pdf
- Hudson, E. (2013). Implementing fair use in copyright law: Lessons from Australia. *Intellectual Property Journal*, 25(3), 201-229.
- International Federation of Library Associations. (2012). *IFLA code of ethics for librarians and other information workers (full version)*. Retrieved from <http://www.ifla.org/news/ifla-code-of-ethics-for-librarians-and-other-information-workers-full-version>
- Introduction to the Copyright Act 1994. (2015). In *Intellectual Property Law* (LexisNexis). Retrieved from http://www.lexisnexus.com.helicon.vuw.ac.nz/nz/legal/results/enhPubTreeViewDoc.do?nodeId=TAADAAB&backKey=20_T22126113621&refPt=&pubTreeWidth=376
- Jupp, V. (Ed.). (2006). *The Sage dictionary of social research methods*. London, England: Sage.
- Kingsbury, A. (2005). Finding the copyright balance: Originality, authorisation and fair dealing in Canadian and New Zealand law. *New Zealand Intellectual Property Journal*, 4, 68-76.
- Krippendorff, K. (2013). *Content analysis: An introduction to its methodology* (3rd ed.). Los Angeles, CA: Sage.
- Leedy, P. D., & Ormrod, J. E. (2013). *Practical research: Planning and design* (10th ed.). Boston, MA: Pearson.
- Library and Information Association of New Zealand Aotearoa. (2014). *Questions for Political Parties*. Retrieved from <http://www.lianza.org.nz/sites/default/files/National%20Party.pdf>
- Lithwick, D., & Thibodeau, M. (2011). *Legislative summary of Bill C-11: An Act to amend the Copyright Act*. Retrieved from http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c11&Parl=41&Ses=1#a1
- Locke, J. (1690). *Second treatise of government*. Retrieved from <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>

- Marshall, C., & Rossman, G. B. (2011). *Designing qualitative research* (5th ed.). Thousand Oaks, CA: Sage.
- Maxwell, J. A. (1992). Understanding and validity in qualitative research. *Harvard Educational Review*, 62(3), 279-300.
- Maxwell, J. A. (2013). *Qualitative research design: An interactive approach* (3rd ed.). Thousand Oaks, CA: Sage.
- Meese, J. M. (2010). Resistance or negotiation: An Australian perspective on copyright law's cultural agenda. *Computers and Composition*, 27(3), 167-178.
- Mill, J. S. (1859). *On liberty*. Retrieved from <http://www.gutenberg.org/files/34901/34901-h/34901-h.htm>
- Mill, J. S. (1861). *Utilitarianism*. Retrieved from <http://www.gutenberg.org/files/11224/11224-h/11224-h.htm>
- Ministry of Foreign Affairs and Trade. (2013). *Trans-Pacific Partnership (TPP) negotiations*. Retrieved from <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php>
- Morrow, S. L. (2005). Quality and trustworthiness in qualitative research in counseling psychology. *Journal of Counseling Psychology*, 52(2), 250-260. doi:10.1037/0022-1067.52.2.250
- Moyse, P. (2010). Colonial copyright redux: 1709 v. 1832. In L. Bently, U. Suthersanen & Torremans. (Eds.), *Global copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (pp. 144-165). Cheltenham, England: Edward Elgar.
- New Zealand Qualifications Authority. (n.d.) *ITPs in New Zealand*. Retrieved from <http://www.nzqa.govt.nz/providers-partners/about-education-organisations/itps-in-new-zealand/>
- O'Leary, Z. (2014). *The essential guide to doing your research project* (2nd ed.). London, England: Sage.
- Patry, W. F. (2009). *Patry on fair use 2009 edition*. Eagan, MN: Thomson Reuters/West.
- Patton, M. Q. (2002). *Qualitative research and evaluation methods* (3rd ed.). Thousand Oaks, CA: Sage Publications.
- Phillips, J., Durie, R., & Karet, I. (1997). *Whale on copyright* (5th ed.). London, England: Sweet and Maxwell.
- Pojman, L. P., & Vaughn, L. (2014). *Philosophy: The quest for truth* (9th ed.). Oxford, England: Oxford University Press.
- Ricketson, S. (1987). *The Berne Convention for the Protection of Literary and Artistic Works: 1886 – 1986*. London, England: Kluwer
- Ricketson, S., & Ginsburg, J. C. (2006). *International copyright and neighbouring rights: The Berne Convention and beyond, volume 1* (2nd ed.). Oxford, England: Oxford University Press.

- Samuelson, P. (2008). Unbundling fair uses symposium: When worlds collide: Intellectual property at the interface between systems of knowledge creation. *Fordham Law Review*, 77, 2537-2622.
- Samuelson, P. (2010). The copyright principles project: Directions for reform. *Berkeley Technology Law Journal*, 25(3), 1175-1245.
- Scassa, T. (2005). Interests in the balance. In M. Geist (Ed.), *In the public interest: The future of Canadian copyright law* (pp. 41-65). Ontario, Canada: Irwin Law.
- Schreier, M. (2012). *Qualitative content analysis in practice*. London, England: Sage.
- Scott, J. (1990). *A matter of record: Documentary sources in social research*. Cambridge, England: Basil Blackwall Ltd.
- Seville, C. (2006). *The internationalisation of copyright law: Books, buccaneers and the black flag in the nineteenth century*. Cambridge, England: Cambridge University Press.
- Sims, A. (2007). The handmaiden and the whipping boy: The courts' use of public policy in limiting copyright protection. *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand*, (71), 80-88.
- Sims, A. (2011). Strange bedfellows: Fair dealing and freedom of expression in New Zealand. *European Intellectual Property Review*, 33(8), 490-499.
- Skorupski, J. (2006). *Why read Mill today?* Oxon, England: Routledge.
- Smith, K. (Oct, 2014). *GSU appeal ruling – the more I read, the better it seems*. Retrieved from <http://blogs.library.duke.edu/scholcomm/2014/10/19/gsu-appeal-ruling-read-better-seems/>
- Sumpter, P. (2013). *Intellectual property law* (2nd ed.). Auckland, New Zealand: CHH New Zealand.
- Talis (2015). *The University of Auckland chooses Talis Aspire Reading Lists and Talis Aspire Digital Content*. Retrieved from <http://www.talis.com/2015/02/19/the-university-of-auckland-chooses-talis-aspire-reading-lists-and-talis-aspire-digital-content/>
- Tawfik, M. J. (2013). The Supreme Court of Canada and the “fair dealing trilogy”: Elaborating a doctrine of user rights under Canadian copyright law. *Alberta Law Review*, 51(1), 191-200.
- Teilmann, S. (2005). Justifications for copyright: The evolution of le droit moral. In F. Macmillan (Ed.), *New directions in copyright law, volume 5* (pp. 73-87). Cheltenham, England: Edward Elgar.
- The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (UK). Retrieved from <http://www.legislation.gov.uk/ukxi/2014/1372/contents/made>
- The Statute of Anne (1709). Retrieved from <http://www.gutenberg.org/cache/epub/33333/pg33333.html>

- Trosow, S. E. (2013). Fair dealing practices in the post-secondary education sector after the pentalogy. In M. Geist (Ed.), *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law* (pp. 213-233). Ottawa, Canada: University of Ottawa Press.
- United Nations. (1948). The Universal Declaration of Human Rights. Retrieved from <http://www.un.org/en/documents/udhr/index.shtml#a27>
- Universities Australia. (2013). *Submission in response to the Australian Law Reform Commission discussion paper on copyright and the digital economy July 2013*. Retrieved from http://www.alrc.gov.au/sites/default/files/subs/754._org_universities_australia.pdf
- Universities New Zealand. (2014). *The NZ University system: NZ Universities*. Retrieved from <http://www.universitiesnz.ac.nz/nz-university-system>
- World Intellectual Property Organisation. (n.d.) *Limitations and exceptions*. Retrieved from <http://www.wipo.int/copyright/en/limitations/>
- World Intellectual Property Organisation. (1886). *The Berne Convention for the Protection of Literary and Artistic Works*. Retrieved from http://www.wipo.int/treaties/en/text.jsp?file_id=283698
- World Intellectual Property Organisation. (1996). *The WIPO Copyright Treaty*. Retrieved from http://www.wipo.int/treaties/en/text.jsp?file_id=295166
- World Trade Organisation. (1994). *Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement)*. Retrieved from https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm
- Xalabarder, R. (2010). Digital libraries in the current legal and educational environment: Towards a remunerated compulsory license or limitation? In L. Bently, U. Suthersanen, & P. Torremans (Eds.), *Global copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (pp. 230-251). Cheltenham, England: Edward Elgar.

9.0 Appendices

9.1 Appendix A: New Zealand Universities and ITPs

- Auckland University of Technology
- Lincoln University
- Massey University
- University of Auckland
- University of Canterbury
- University of Otago
- University of Waikato
- Victoria University of Wellington

(Universities New Zealand, 2014, The NZ University system: NZ Universities)

- Aoraki Polytechnic
- Bay of Plenty Polytechnic
- Christchurch Polytechnic Institute of Technology
- Eastern Institute of Technology (Hawkes Bay)
- Manukau Institute of Technology
- Nelson Marlborough Institute of Technology
- Northland Polytechnic
- Otago Polytechnic
- Southern Institute of Technology
- Tai Poutini Polytechnic
- The Open Polytechnic of New Zealand
- Unitec New Zealand
- Universal College of Learning
- Waiariki Institute of Technology
- Waikato Institute of Technology
- Wellington Institute of Technology
- Western Institute of Technology at Taranaki
- Whitireia Community Polytechnic

(New Zealand Qualifications Authority, n.d., ITPs in New Zealand)

9.2 Appendix B: The Berne Convention - Relevant sections

Berne Convention for the Protection of Literary and Artistic Works

of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979. (Refer to reference list for link to full document.)

For full treaty text see: http://www.wipo.int/treaties/en/text.jsp?file_id=283698

ARTICLE 2

Protected Works:

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(see **Article 5** for detail about rights in and out of the author's country of origin.)

ARTICLE 9

Right of Reproduction:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

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

(See also **Article 10** Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3.

Indication of source and author

Article 10bis Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events)

ARTICLE 20

Special Agreements Among Countries of the Union:

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

9.3 Appendix C: The TRIPs Agreement - Relevant sections

Agreement on Trade-Related Aspects of Intellectual Property Rights

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

For full treaty text see: https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

PREAMBLE

... *Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives...

PART I

ARTICLE 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property...
(see also Article 4, Most-Favoured-Nation treatment)

ARTICLE 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

PART II

ARTICLE 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto...

ARTICLE 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

9.4 Appendix D: The WCT - Relevant sections

The WIPO Copyright Treaty, Adopted in Geneva on December 20, 1996.

For full text of treaty see: http://www.wipo.int/treaties/en/text.jsp?file_id=295166

PREAMBLE

... Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works, ...

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention, ...

ARTICLE 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties...

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

ARTICLE 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

9.5 Appendix E: Copyright Act 1994 (NZ) - Relevant sections

For full text see: <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html>

See sections 45-49 for specific education exceptions additional to 44 and 44(a) below.

43 Research or private study

- (1) Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work...
- (3) In determining... whether copying... constitutes fair dealing... a court shall have regard to—
- (a) the purpose of the copying; and
 - (b) the nature of the work copied; and
 - (c) whether the work could have been obtained within a reasonable time at an ordinary commercial price; and
 - (d) the effect of the copying on the potential market for, or value of, the work; and
 - (e) ... the amount and substantiality of the part copied taken in relation to the whole work.

44 Copying for educational purposes of literary, dramatic, musical or artistic works or typographical arrangements ...

- (3) Copyright in a literary, dramatic, or musical work or the typographical arrangement of a published edition is not infringed by the copying of part of the work or edition if ...
- (f) (ii) on and after 1 January 1998, the copying is of no more than the greater of 3% of the work or edition or 3 pages of the work or edition.
- (4) If the effect of subparagraph ... (ii) of subsection (3)(f) would be that the whole of a work or edition is copied, those subparagraphs shall not apply and the copying that is permitted under subsection (3) shall be of no more than 50% of the whole work or edition.
- (4A)³⁵ A copy of a work made in accordance with subsections (3) and (4) may be communicated to a person who is a student or other person who is to receive, is receiving, or has received, a lesson that relates to the work.
- (6) Where any part of a work or edition is copied under subsection (3) by or on behalf of an educational establishment,—
- (a) that part of that work or edition may not, within 14 days of that copying, be copied again under that subsection by or on behalf of that educational establishment; and
 - (b) no other part of that work or edition may, within 14 days of that copying, be copied under that subsection by or on behalf of that educational establishment.

³⁵ As per the Copyright (New Technologies) Amendment Act 2008 (section 25)

44A³⁶ Storing copies for educational purposes

(1) An educational establishment does not infringe copyright in a work that is made available on a website or other electronic retrieval system by storing a copy of the page or pages in which the work appears if—

- (a) the material is stored for an educational purpose; and
- (b) the material—(i) is displayed under a separate frame or identifier; and (ii) identifies the author (if known) and source of the work; and (iii) states the name of the educational establishment and the date on which the work was stored; and
- (c) the material is restricted to use by authenticated users.

³⁶ Ibid (section 26)

9.6 Appendix F: Copyright and Rights in Performances (Research, Education, Libraries & Archives) Regulations 2014 (UK) – Relevant subsections

For full text see <http://www.legislation.gov.uk/ukxi/2014/1372/contents/made>

4(1) For section 32(1) substitute 32 Illustration for instruction

4(2) For section 35(2) substitute 35 Recording by educational establishments of broadcasts

4(3) For section 36(3) substitute 36 Copying and use of extracts of works by educational establishments

4(4) For paragraph 4 of Schedule 2(9) substitute Illustration for instruction...

4(5) For paragraph 6 of Schedule 2(9) substitute Recording by educational establishments of broadcasts...

4(3) For section 36(3), substitute—

“36 Copying and use of extracts of works by educational establishments

(1) The copying of extracts of a relevant work by or on behalf of an educational establishment does not infringe copyright in the work, provided that—

(a) the copy is made for the purposes of instruction for a non-commercial purpose, and

(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(2) Copyright is not infringed where a copy of an extract made under subsection (1) is communicated by or on behalf of the educational establishment to its pupils or staff for the purposes of instruction for a non-commercial purpose.

(3) Subsection (2) only applies to a communication received outside the premises of the establishment if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff.

(4) In this section “relevant work” means a copyright work other than— (a) a broadcast, or (b) an artistic work which is not incorporated into another work.

(5) Not more than 5% of a work may be copied under this section by or on behalf of an educational establishment in any period of 12 months, and for these purposes a work which incorporates another work is to be treated as a single work.

(6) Acts which would otherwise be permitted by this section are not permitted if, or to the extent that, licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact.

(7) The terms of a licence granted to an educational establishment authorising acts permitted by this section are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted by this section.

9.7 Appendix G: Section 107 of the US Copyright Act

§107 • Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.