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Is the Proposed Fair Use Provision Beneficial for South Africa?

A Research Report Presented By:

Lesedi Malatji

Student Number: 562421

Supervisor: Dr. Malebakeng Forere

Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg

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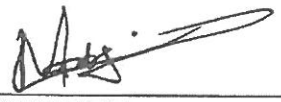
DECLARATION

I, **LESEDI MALATJI,**

declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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SIGNATURE

562421
STUDENT NUMBER

15/02/18
DATE

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ABSTRACT

This paper analyses South Africa's fair dealing provisions contained in the Copyright Act 98 of 1978 along with South Africa's proposed amendment to the fair dealing provisions in the 2017 Copyright Amendment Bill. This paper seeks to ascertain whether South Africa should adopt the fair use doctrine currently proposed in the amendment. Copyright law protects copyright holders from having their work used without their consent. It follows that during the term of protection the general public does not have a right to copy, amend or share the protected work. Because of this limitation on access to knowledge and information, countries make provision for the public to use protected work by creating limitations and exceptions under the auspices of fair dealing or fair use. The purpose of copyright protection is to provide a balance between the interests of the author and the public. Fair dealing and fair use both seek to reach a balance between the private rights of the owner of the copyright protected work and the users to have access to the work and subsequent use thereof. In fact, fair dealing and fair use are the same, as both provide a user access to use copyrighted work without the permission of the copyright owner for purposes that are fair and reasonable. What this paper seeks to further clarify is that these two terms are the same and were never two separate defences. The terminology used is different depending on which side of the world you are in. The only difference between the two is the approaches, one follows a closed list approach and the other follows an open list approach.

The legislative history and case law from the United Kingdom, United States are analysed to establish that it does not matter which term we use the defence is the same, however the approach is different. This information is then applied to the South African context and analysed to confirm that the proposed amendment to the fair dealing provision is indeed beneficial and viable for South Africa.

I. INTRODUCTION

Copyright vests in the author of the work, if the work is original and reduced to material form.[1] The owner of copyright enjoys a limited monopoly in the work, in that no one may use his or her work without first receiving the permission of the author to do so.[2] It follows that during the term of protection the general public does not have a right to copy, amend or share the protected work. Because of this limitation on access to knowledge and information, countries make provision for the public to use protected work by creating limitations and exceptions under the auspices of fair dealing or fair use.[3] South Africa currently uses 'fair dealing' while the United States uses 'fair use'. There is no definition of what these terms mean in the respective copyright laws in South Africa and the United States. However, the High Court in South Africa has held that no one definition can be held to describe fair dealing as 'it is a matter of fact, degree and impression'.[4] These include purposes such as for research or private study, criticism or review, reporting current events, judicial proceedings, quotations, illustrations for teaching.[5] In the United States, the courts have defined it as taking place when someone can reasonably use another's copyrighted material without the consent of the owner of the copyrighted material for purposes such as criticism, comment, news reporting, teaching, scholarship or research.[6] Unlike in the South African copyright legislation, the United States at least stipulates factors that need to be considered in determining whether fair use of a work has taken place.[7] In its 2017 Copyright

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[1] Owen Dean (ed) & Alison Dyer (ed) 'Copyright' in *Introduction to Intellectual Property Law* (2014) at 8.
[2] Ibid at 3.
[3] The first interest would be the interest of the owner/author's right to gain a financial benefit for his/her work and the competing interest would be of those of the public's right to have access to the work and to use the work for the public's good.
[4] *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ) at par [114].
[5] The Copyright Act No. 98 of 1978, s 12. Hereinafter referred to as the Copyright Act.
[6] Dan Thu Thi Phan 'Will Fair Use Function on the Internet?' (1998) 98 *Columbia Law Review* at 181.
[7] The U.S. Copyright Act of 1976, 17. U.S.C, s 107. Hereinafter referred to as the US Copyright Act. Such factors are:

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".

Amendment Bill[8] (the Bill), South Africa also gives guidance on how fair dealing/fair use should be determined. The Bill uses the same factors as found in the United States copyright statute.[9] The purpose of copyright protection is to provide a balance between the interests of the author and the public.[10] This balancing act is the reason for the fair dealing or fair use exceptions to copyright infringement. The two terms fair dealing and fair use, seek to serve the same purpose in copyright law. In fact, they are one and the same, as both provide a user access to use copyrighted work without the permission of the copyright owner for purposes that are fair and reasonable. Fair dealing and fair use both seek to reach a balance between the private rights of the owner of the copyright protected work and the users to have access to the work and use thereof.[11] Both these terms are defences to a claim of copyright infringement.

The approach taken by South Africa, which is the same as that of the United Kingdom, has been criticized as being restrictive due to the specified closed list of fair dealing exceptions. While on the opposite side, the United States' approach to the fair use doctrine is open-ended and allows for the judiciary to apply its discretion on a case by case basis.[12] This further allows the US's courts to respond to the technological developments while the South Africa's approach would require legislative intervention, which is expensive and time-consuming. Aware of negative effects of the closed list, some countries, notably Australia and Singapore, have amended legislations to adopt an open list thus follow the US's approach. South Africa is also following suit by introducing the four-factor test to determine fair use in the Bill,[13] similar to Singapore and Australia which adopted the US's four-factor test. This has brought many debates among the various South African copyright stakeholders. These stakeholders can be divided into two categories; those that are for the four-factor test as it is more flexible and artist friendly in allowing new exceptions to be included on a case by case basis, and those that are not for the amendment as they see the amendment as creating uncertainty and unpredictability to the copyright law. The main question this research seeks to answer is whether South Africa should

[8] The Copyright Amendment Bill B-13 2017. Hereinafter referred to as the Bill.
[9] Ibid s10.
[10] Tobias Schonwetter 'The 'Fair Use Doctrine and the Implications of Digitising for the Doctrine from a South African Perspective' (2006) 7 *The Southern African Journal of Information and Communication* at 32.
[11] Ibid.
[12] RM Shay 'Exclusive Rights in the News and the Application of Fair Dealing' (2014) 26 *SA Merc. LJ* at 592-593.
[13] The Bill see note 8.

adopt an open list with the four-factor determining test to the fair use doctrine as is currently proposed in the Bill.

In part II of this paper I will discuss briefly what constitutes copyright and copyright infringement in South Africa as well as defences or exceptions thereof.

Because the South African intellectual property law closely mirrors that of the United Kingdom, Part III will start off with the discussion of UK fair dealing exception. This is particularly important because the South African courts have not developed fair dealing doctrine as much as the UK courts have; therefore, bringing UK into spotlight will generate a vibrant discussion of fair dealing. Further, part II will discuss the origins of fair dealing in the South African law and how it developed, the advantages and disadvantages of the fair dealing approach in South Africa. In addition, Part III will discuss the fair use doctrine followed in the United States. It examines the origins of the doctrine followed by a discussion on the legislative background to the doctrine as it is the first country to have made copyright exceptions in an open-ended manner as to include unforeseen future developments.
In Part III, I will discuss the proposed amendment to the copyright exception provisions in the South African Copyright Act by closely looking at the wording and assessing whether the fair use approach will be suited for South Africa.

Part IV deals with the international obligations placed on the member states to the relevant international treaties specifically the World Trade Organisation (WTO) treaties and World Intellectual Property Organization (WIPO) treaties. This part of the paper examines how the defence of fair dealing and fair use meet up to these standards if at all.

Part V will finally give recommendations and conclude the paper. With regard to recommendations, I will propose how the new fair use provision should be worded considering all the previous discussions in this paper as well as the proposed amendment Bill. In conclusion, the discussion of the defence of fair dealing and fair use will be finalised. The comparison of the two terms will lead to the conclusion that they are one in the same defence and that the fair use doctrine is beneficial for a developing country such as South Africa and how the proposed amendment is needed to grow South Africa's economy through innovation and creation and possibly other developing countries in Africa.

II. COPYRIGHT LAW IN SOUTH AFRICA

What is Copyright?

For copyright to vest in an author/owner it must be classified as a work under copyright law. Section 2(1) - (2) of the Copyright Act states the classes of work that can be protected.[14]
Dean and Dyer[15] emphasise that it is very important to classify the type of work in the correct category. This is important in determining the level of protection afforded to the author/owner of the work. To determine whether an alleged work is indeed a work that is copyrightable, an objective test is used by referring to the definitions set out in section 1 of the Act.[16] Furthermore, for a work to be protected under copyright law three requirements must be met: firstly, it must be a work capable of being protected under the Act; secondly, it must be an original work, and lastly, the work must be reduced to some material form.[17] There is no administrative requirement for copyright protection. It automatically comes into operation provided that the three requirements listed above have been met.

There is no definition for originality in the South African Copyright Act but the courts have defined it as:

> 'To be original a work need not be the vehicle for new or inventive thought... "Originality", for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution... It is perfectly possible for an author to make use of existing material and still achieve originality in respect of the work which he produces. In that

[14] Copyright Act see note 5 above s2(1).
a. Literary Works:
b. Musical Works;
c. Artistic Works;
d. Cinematograph Films;
e. Sound Recordings;
f. Broadcasts;
g. Programme-Carrying Signals;
h. Published Editions;
i. Computer Programs.'

[15] Dean & Dyer see note 1 at 15.
[16] *Waylite Diary CC v First National Bank Ltd* 1995 1 SA 645 (A) p 9.
[17] Dean & Dyer note 1 at 16.

> event, the work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill or labour'.[18]

In the most recent case *Moneyweb v Media 24*[19] the court had to decide on whether the news articles that were subject of infringement were original, and if so, whether a substantial part of them were reproduced. The court analysed each article separately, regarding the first article the court found that *Moneyweb* could not prove that the work was the author's own work as they did not provide any evidence of the author's own independent skill and expertise as the article was written from a press conference and the article could have simply been a repetition of the press conference.[20] The same conclusion was reached for the second and third article.[21] In regard to the fourth article the author had since passed away and no proof of direct evidence could be adduced by *Moneyweb,* however, the court found that the article was a mere repetition of the press release and could not be found to be original either.[22] The fifth, sixth and seventh article found that these were original in that the authors of the articles were able to apply their minds to the final product of the work.[23] This case will be dealt with in more detailed in the section below dealing with fair dealing case law in South Africa.

The material form requirement means that the work needs to be reduced into material form such as on paper or digitally.[24] This is due to the basic principle that there is no copyright in ideas, thoughts or facts. The author of a work must be a qualified person who created the work,[25] however, if the author of the work, in this case, the article is commissioned by an employer to do the work then the owner of the work will be the employer as in the case of articles in news publications.[26]

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[18] *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 27-28.
[19] *Moneyweb* supra note 15.
[20] Supra at par [24-25].
[21] Supra at par [29] and [35].
[22] Supra at par [38-39].
[23] Supra at par [48] and [53].
[24] Dean & Dyer see note 1 at 18.
[25] Ibid at 19.
[26] *Klep* supra note 20 above at 25-26.

Copyright Infringement and defences

Copyright infringement can either be direct infringement or indirect infringement.[27] Direct infringement takes place when a person who does not have the permission of the owner of the work uses the work to do what the owner of the work has an exclusive right to do.[28] Indirect infringement takes place when a person without the permission of the owner of the work takes the work and uses it for trade or when a person allows for a performance in a public space to use a work that is protected without the knowledge of the owner.[29] For indirect infringement to take place the infringer needs to be aware that he is infringing on someone else's copyright, if not, then there will be no infringement on his part.[30] In *Galago Publishers*[31] the leading case for copyright infringement in South Africa, the appellate court held that:

> 'Consequently, it is not necessary for a plaintiff in copyright infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. To "reproduce" within the meaning of the Act means to copy and in order for that to have been an infringement of the copyright in an original work it must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged infringing work was derived, i.e. that there is a causal connection between the original work and the alleged infringing work, the question to be asked being: has the defendant copied the plaintiff's work, or is it an independent work of its own?'.[32]

In *Moneyweb* the court held that in determining a substantial part has been taken from a work, 'the court must make a value judgment based on the work as a whole, focusing more on the quality of what has been taken than on the quantity'.[33] Where a case of infringement has been brought, a defendant can raise the defence of fair dealing or fair use. This defence will be discussed in the following section of this paper.

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[27] Copyright Act see note 5 s23.
[28] Ibid note 1 at 33.
[29] Ibid note 1 at 38.
[30] Ibid.
[31] *Galago Publishers (Pty) Ltd and Another v Erasmus* 1989 (1) SA 276 (AD).
[32] Supra at 280 par [B-D].
[33] *Moneyweb* supra note 15 at par [85].

III. FAIR DEALING AND FAIR USE

Fair dealing in the United Kingdom

The Origins of the Defence

To understand the current legal interpretations of fair dealing it is important to understand the historical background of where it all started. The first copyright statute was the Copyright Act 1710 also known as the Statute of Anne which was enacted in the United Kingdom.[34] The statute was enacted to provide authors and book publisher's copyright protection from free riders, the statue allowed them exclusive monopoly over the work for 14 years.[35] Various statutes were enacted in the 17th century in the United Kingdom after the Statute of Anne to include other forms of work.[36] This eventually led to the enactment of the Copyright Act of 1911, which repealed all other copyright statutes and combined them into one statute.[37] The Copyright Act of 1911 was the first statute to introduce 'fair dealing' as a defence for copyright infringement into legislation. Prior to this in the 17th century English case law referred to fair dealing as fair abridgment.[38] Abridgment is defined as the shortening of a longer version of a written work.[39] The first case to deal with whether an abridgment constituted copyright infringement is in 1740 *Gyles v Wilcox.*[40] This case was instituted by Gyles against Wilcox alleging that Wilcox had infringed his rights under the Statute of Anne.[41] Wilcox had paid a writer Barrow to abridge the book 'Pleas of the Crown', the writer made minor changes to the wording of the book.[42] Wilcox argued that only a small amount of the book was the same as the first book and the rest of the work was their own work.[43] The court here held that the abridgment was to be considered a new book and not a copy of the first book.[44] Therefore, fair abridgment was thus a defence for an

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[34] Martine Courant Rife 'The fair use doctrine: History, application, and implications for (new media) writing teachers' (2007) 24 *Computers and Composition* at 165.
[35] Louise Groenewald *Legal Analysis of Fair Dealing Relating to Music Works in the Digital Environment* (unpublished LLM thesis, University of South Africa, November 2011) at 31.
[36] Ibid. These would include musical works, artistic works, dramatic works and engravings.
[37] Ibid.
[38] Matthew Sag 'The Pre-History of Fair Use' (2011) 76 *Brook.Law Rev.* at 1373.
[39] Ibid.
[40] *Gyles v Wilcox* (1740) 25 ER 489.
[41] Gyles v. Wilcox (Barnardiston's Report) London (1741) at 368, available at https://web.archive.org/web/20110725200056/http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showScreen/%22uk_1741b_im_001_0001.jpg%22, accessed on 28 October 2017.
[42] Ibid at 369.
[43] Ibid.
[44] Groenewald see note 36 at 2.

alleged copyright infringement claim. This court case set a precedent in copyright law that would last for decades to come and evolve to keep up with the ever-changing ways in how people interact with one another in society.

Legislative Provisions

The United Kingdom's fair dealing provisions were first incorporated into their legislation in the Copyright Act, 1911.[45] The fair dealing provision in section 2 dealt with infringement of copyright and read as follows:

> (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute the infringement of a copyright:
>
> (i) any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary'.[46]

Fair dealing as a defence for years has been deemed by many commentators as the less flexible approach to copyright exceptions in that they use a set list of exceptions.[47] The current copyright act lists the exceptions in Part I Chapter III of the Copyright, Designs and Patents Act 1988.[48] The list includes but not limited to exceptions for making temporary copies in literary, dramatic, musical and artistic works;[49] the making of personal copies for private use;[50] research and private study;[51] text and data mining;[52] criticism, review, quotation and news reporting;[53] and incidental inclusion of copyright material;[54] to name a few. For news reporting purposes, the limitation applies to current events and acknowledgement of the source is necessary for the exception to succeed as a defence.[55]

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[45] The Copyright Act 1911.
[46] Ibid s2(1)(i).
[47] Lorna Caddy, Niri Shan and Valerie Aumage 'The European Approach to Fair Dealing – Harmony or Discord?' (2009-2010) 57 *Journal of the Copyright Society of the U.S.A* at 573.
[48] The Copyright, Designs and Patents Act 1988 (c 48). Hereon referred to as CDPA.
[49] Ibid s28A.
[50] CDPA see note 50, s28B.
[51] Ibid s29(1)
[52] Ibid s29A.
[53] Ibid s30.
[54] Ibid s31.
[55] Ibid s30(1).

The CDPA covers many exceptions which apply to specific circumstances and activities. The purpose of copyright exceptions is to foster creativity and encourage access to work and the reproduction thereof by the public. Without these limitations to copyright protection, access to protected works would be difficult to obtain due to expensive license fee agreements.[56]

The fair dealing provisions in the CDPA clearly define which purposes an exception will apply and to which type of work. The clear distinctive nature of fair dealing as a defence in the UK legislation is that it provides certainty for the judiciary when having to determine whether use of a work is to be considered fair dealing.[57] One of the downsides seems by scholars such as Martin Brenncke to the UK provisions is the lack of flexibility. He holds that "this inflexibility does not keep in line with technological changes using an example of how using format shifting would still amount to copyright infringement".[58] Format shifting takes place when a person purchases a CD of their favorite musician and after the purchase he or she downloads the entire CD onto his computer then transfers the music onto another device usually an MP3 compatible CD or flash drive.[59] The CDPA does however provide for time shifting.[60] Time shifting is when a copyrighted works such as a movie can be recorded on a device and be available to be watched later.[61] There is no reason as to why format shifting with today's various technology devices should not be provided for in copyright limitations and exceptions.

Case Law

(i) Hubbard v Vosper

There is no definition of what fair dealing is in the CDPA; however, the courts have established some factors to determine whether the dealing was fair. 'The courts will look at:

- whether the dealing competes with the copyright owner's own use of the work commercially;
- whether the work is available publicly; and
- the amount of work that was taken and the importance of the work taken'.[62]

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[56] Duke 'Copyright – Should Fair Dealing be replaced by Fair Use?'at 3 available at https://legalpiracy.wordpress.com/tag/fair-dealing/, accessed on 20 April 2017.
[57] R M Shay 'Fair deuce: an uneasy fair dealing-fair use duality' 2016 *De Jure* at 106.
[58] Martin Brenncke *Is "Fair Use" an option for U.K. Copyright Legislation?* (2007) at 9-10.
[59] Ibid.
[60] CDPA see note 50 s70.
[61] Ibid.
[62] Duke see note 57 at 5.

The court decision in *Hubbard v Vosper*[63] defined fair dealing as: "it must be considered as a question of degree and proportionality against the original work".[64] This case dealt with a book about the Church of Scientology written by Mr. Vosper an ex-member of the scientology cult.[65] Mr. Hubbard sought to stop any publications of the book alleging copyright infringement as most of the extracts in the book came from books written by Mr. Hubbard.[66] Mr. Vosper claimed that the book did not constitute copyright infringement as it was an exception in copyright law under fair dealing for the purposes of criticism and review.[67] This case established criteria to consider when determining fairness as:

1. What amount of work taken from the origin work – are the extracts many and long to be considered fair.[68]
2. What was the purpose of the use of the work – is the work used for the same purpose as the original work such as if the two works were from rival companies. If so, then this could constitute copyright infringement.[69]
3. Was the amount of work taken substantial – where the extracts of such a proportion that nothing was added to them. If so this would constitute copyright infringement.[70]
4. Was the original work made available to the public - the court held that even if a work is not published to the public at large but is widely circulated to constitute a fair dealing then it would not constitute a copyright infringement.[71]

The fair dealing provision will still only succeed in a defence when a user can prove that the purpose for which the work was used for was listed as an exception in the CDPA and that the use was fair.[72] This case has set precedents and has been cited by many other courts in deciding whether use of a work would be fair dealing.

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[63] *Hubbard and Another v. Vosper and Another 1972* 2 Q.B. 84.
[64] Supra at 94.
[65] Supra at 91.
[66] Supra at 92.
[67] Supra at 93.
[68] Supra at 94.
[69] Supra.
[70] Supra.
[71] Supra at 95.
[72] Calum Docherty 'Standing on the Shoulders of Giants: Reforming Fair Dealing in English Copyright Law' at 3, available at https://www.barcouncil.org.uk/media/61898/calum_docherty_54_.pdf, accessed on 15 May 2017.

(ii) Fraser-Woodward Limited v British Broadcasting Corporation

This case dealt with a claim of copyright infringement in the use of fourteen photographs belonging to Fraser of the Beckham family in a television programme made by the BBC.[73] The BBC raised the defence of fair dealing under s30(1) of the CDPA stating that the use of the photographs were fair dealing for purposes of criticism and review for the TV programme.[74] The court set out the steps in determining whether the defence of fair dealing applies to the use of the fourteen photographs in the television programme.[75] The first step would be to identify what the work alleged to be an infringement of copyright is.[76] This should be followed by determining whether the work fell under one of the listed purposes.[77] In this regard the court held that the work had to be looked at as a whole and not separated into parts.[78] The court went into a lengthy discussion on what constitutes a criticism or review of a work citing other previous case law dealing with the same.[79] Guidelines in determining whether the use of a work amounted to fair dealing were outlined as: the motive of the user;[80] the purpose behind the use must be considered;[81] the amount used from the original work;[82] and did the use of the work unreasonably prejudice the copyright holder's legitimate interests of his or her normal exploitation of the work.[83] These guidelines were also taken into consideration in *Hyde Park*[84] case in 2000. The court concluded by holding that the thirteen out of the fourteen photographs were used for the purposes of criticism and review, therefore the defence of fair dealing in s30(1) of the CDPA applied.[85] In cases following this judgment in the UK courts have considered fairness factors such as the ones listed in *Harper* as well as whether the copyright holder alleging

[73] *Fraser-Woodward Limited v British Broadcasting Corporation* [2005] EWHC 472 (Ch) at [2].
[74] Supra at [5].
[75] Supra at [32].
[76] Supra at [32].
[77] Supra.
[78] Supra.
[79] Supra at [34] – [44].
[80] Supra at [55(i)].
[81] Supra at [55(ii) and (iv)].
[82] Supra at [55(iii) and (v)].
[83] Supra at [55(vii)].
[84] *Hyde Park Residence Ltd v News Group Newspapers Limited* [2000] EWCA Civ 37 [2001] (Ch 143).
[85] Supra at [45] – [50].

the infringement has been unfairly prejudiced in the commercial exploitation of his or her work.[86]

Copyright Exceptions Reform in the United Kingdom

In 2010 the Prime Minister at the time David Cameron commissioned the Digital Opportunity: The Hargreaves Review of Intellectual Property and Growth.[87] The report was released 2011, the purpose of the report was to determine whether the UK's intellectual property framework was adequately equipped to deal with innovation and growth in the economy.[88] The report held that the intellectual property framework of the UK needed to keep up to date with the technological advancements and must be adapted to provide for such change.[89] The report further recommended that copyright exceptions need to be amended to encourage the creation of new businesses in the digital environment.[90] The report holds that the lack of change in copyright exceptions has led to growth and development in the economy to be stagnating as the current exceptions were not flexible enough to adapt to what is happening in the real world.[91] The inclusion of exceptions for non-commercial research, format shifting, parody and pastiche, private copying was recommended.[92] These changes would lead to a stronger growth and innovation for the UK economy.[93] The two concerns on the fair dealing provisions in the CPDA are: (1) on the one hand, its closed list approach is limiting when it comes to new technological developments; and (2) on the other hand, the restrictive nature of the exceptions, no new exceptions may be added to the list when a new case comes to litigation.[94] The concerns over the inflexibility of the fair dealing provisions over the years have led to discussions amongst commentators on whether the UK should adopt a fair use approach in its CDPA. This was also looked at in the Hargreaves report and it was concluded that the UK should not adopt the fair use

[86] *The Newspaper Licensing Agency Limited v Associated Newspaper Limited* [2010] EWHC 3099 (Ch). *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others* [2011] EWCA Civ 890.

[87] Professor Ian Hargreaves 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) at 1 available at https://www.gov.uk.government/uploads/system/uploads/attachment_data/file32563/ipreview-finalreport.pdf, accessed on 20 November 2017.

[88] Ibid.

[89] Ibid at 3.

[90] Ibid at 7.

[91] Ibid at 43.

[92] Ibid 48 -49.

[93] Ibid at 7.

[94] Duke see note 57 at 6.

open ended approach as it would not suit the UK context as they have obligations they need to meet as members of the European Union.[95] Therefore, any major copyright exception change would have to be in line with the EU directives and according to Hargreaves fair use does not meet the EU's obligations.[96]

In June 2014, the response to the Hargreaves report from the UK government was the amendment to copyright exceptions in the CDPA which included new exceptions such as: caricature, parody or pastiche; the use of quotations was extended to include all works as long as the use is fair and reasonable; research and private studying purposes for non-commercial uses; text and data mining for non-commercial uses; better archiving and preservation of collections by libraries and museums; accessible formats for disabled people.[97]

Fair use in the United States law

The Origins of the Defence

The fair use doctrine is known for being a United States doctrine. However, it did not originate from the US. The doctrine was adopted from the English courts. In England the term was known as fair abridgment which was later adopted by the US and termed fair use.[98] The first case to make use of the term 'fair use' in the US was in the case of *Lawrence v Dana*[99] in 1869. However, the first case to use the English principle of fair abridgment was the *Folsom v Marsh*[100] case in 1841. In this case the defendant wrote a book on George Washington but used extracts from the plaintiff's numerous volumes of books.[101] The defendant used the defence of fair abridgement as to why copyright infringement had not taken place. The court in this case had to answer whether the substantial amount of work used by the defendant amounted to fair use.[102] The court in conclusion held that the three hundred and fifty-three pages used by the defendant

[95] Ibid note 89 at 46-47.
[96] Ibid at 47-48.
[97] CDPA, s28A – 76.
[98] Rife see note 35 above at 165.
[99] *Lawrence v Dana* (1869) 15 F. Cas. 26, 40 (C.C.D. Mass. 1869) (No. 8136).
[100] *Folsom v Marsh* 9 F. Cas. 342 (C.C.D> Mass. 1841).
[101] William W. Story 'Folsom v Marsh' last updated June 2 2015 available at https://h2o.law.havard.edu/cases/5238, accessed on 3 October 2017.
[102] Ibid.

from the plaintiff's books were substantial and amounted to copyright infringement.[103] The fair use doctrine was used and applied in court cases and later enacted into legislation by the United States Congress.[104] The doctrine is a limitation placed on copyright holder's exclusive right to the use, reproduction or economic exploitation of their work.

Legislative Provisions

The limitation was enacted by Congress to advance creators and inventors in the fields of science and art.[105]. By the enactment of the doctrine into the U.S. legislation in section 107 of the Copyright Act,[106] four factors need to be considered by the courts in determining when a work is fair use or not.[107] These four factors are in no way closed, courts may look at other relevant factors based on the circumstances of each case.[108] This distinctive character of the doctrine, that it is open, flexible and adaptable to any new technological advancement. The defence of fair use is used by a copyright user in cases where a copyright holder alleges that there has been an infringement of their copyright. The Act does not define fair use in section 107 or any other provision in the Act. The Act sets out that 'criticism, comment, news reporting, teaching, scholarship or research a copyrighted work will not be infringed if it is used for purposes of fair use'.[109] The rationale behind the fair use doctrine is to be found in the United States' Constitution where Congress is authorised to promote science and art within the US[110]. This, at first glance, seems like the copyright exceptions found in UK. However, it goes a step further in that it sets out four factors that courts need to consider when determining a work used constitutes fair use. These four factors are to be considered by the courts in balancing the rights of a

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[103] Ibid.

[104] Maud-Pia Hill 'A comparative study of the concepts "fair use" and "fair dealing" in Copyright Law in South Africa, the United States of America and the United Kingdom' (unpublished LLM thesis, University of Johannesburg, November 2015) at 6.

[105] The United States Constitution, Article I Section 8, Clause 8.

[106] The U.S. Copyright Act, 17 U.S.C. s107.

[107] The Copyright Act of 1976, 17 U.S.C, s 107. Such factors are:

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".

[108] Ibid.

[109] Ibid.

[110] Ibid note 107 above.

copyright holder against the public interest argument that access to information should be readily available to the public to benefit the society.

These factors are guidelines to the courts rather than hard fast rules that must be follow in all cases considered under the fair use defence[111].

Section 107 reads as follows:[112]

'Notwithstanding the provisions of sections 106 and 106A, the fair use of a 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 non-profit 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'.

The fair use approach can easily be adaptable to any circumstance and facts of a particular case because of its open-ended approach.[113] The broad approach to fair use fosters new creation of works especially in technological advancements.[114] In the US the fair use doctrine did not need to be amended to apply to format shifting when the MP3 Player became a popular mainstream consumer device. Music on CDs could be copied onto MP3 Players without the getting permission from the CDs copyright holder. This form of shifting music from one device onto another was not initially welcomed by musicians and music labels as they saw this as a threat to their copyright and royalties. The shift from physical CD copies to digital copies on phones and

[111] Thi Phan see note 6 at 181.
[112] Ibid note 108 above.
[113] Patricia Aufderheide 'Journalists, Social Media and Copyright: Demystifying Fair Use in the Emergent Digital Environment' (2014) 9 *Journal of Business & Technology Law* at 61.
[114] Thi Phan ibid note 113.

laptops and any other storage device was capable of being applied by the courts in litigation because of the fair use doctrine. Due to its inclusive nature to new exceptions to copyright there hasn't been a need for s107 to be amended to keep up with the times unlike in the UK. Steven O'Heany has alluded to the fact that the US courts are more concerned with the concept of fairness rather than whether the copyrighted work fell into the category set out in the section.[115] This approach fits in perfectly with a broad interpretation as it enhances the judicial discretion given to the courts when it comes to copyright limitations in the US.

Case Law

(i) Campbell v Acuff-Rose Music

Throughout US cases there is an emphasis on the notion that the new work needs to be transformative. Meaning that the new work must be clearly differentiable from the original work for it to be fair; it cannot be mere copying of the work.[116] This was considered under the first factor the purpose and character of the use in Supreme Court case *Campbell v Acuff-Rose Music.*[117] This case dealt with a parody song made by a rap group 2 Live Crew based on an original rock song called Oh Pretty Woman owned by Acuff-Rose Music who claimed copyright infringement. 2 Live Crew relied on the defense of fair use under criticism and comment. The court also found that even if a work is used for commercial purposes it does not mean that fair use could not apply to the use. In this regard the court held that 'whether the work was used for commercial purposes or for private use, if it is for private use it is likely to be found to be fair use; however just because there was a commercial purpose does not guarantee that it was unfair'.[118] The second factor being the nature of the copyrighted work was not considered in depth as the court found that this was not particularly relevant in this case.[119] However, the court did state that if the nature of the work is closely connected to the purpose of the copyright protection then the fair use would be less likely to succeed than when the connection is remote. With regard to the third factor, the amount and substantiality of the portion used, it was held to deal with not only the quality of the work taken from the original but also the quantity of the

[115] Steven O'Heany 'Fair is Fair: Fair Dealing, Derivative Rights and the Internet' (2012) 12 *Asper Review of International Business and Trade Law* at 80.
[116] O'Heany see note 117.
[117] *Campbell v Acuff-Rose Music* (92-1292), 510 U.S> 569 (1994).
[118] Ibid note 117 at 81.
[119] *Campbell* supra at [586].

work taken.[120] This factor applies to the fourth factor regarding the degree of which the new work could serve as a market substitute for the original work.[121] The fourth factor was held to include an analysis into whether the use of the new work would adversely affect the potential market for the original work.[122] Therefore, not only the actual harm that has been caused by the new work is considered, but the potential future harm would also be taken into account. If the new use was transformative in nature, then the likelihood for adverse market harm on the original work would be less not to say that the harm cannot be substantial in different cases. Eventually the court did not decide whether the use of the parody was fair use or not, it referred the matter back to the trial court to determine this.

Copyright Reform in the United States

In March 2013 Maria A. Pallante made a statement in the House Subcommittee on Courts, Intellectual Property and Internet Committee on the Judiciary.[123] In this statement she stated that the time for greater reform to the US copyright law has come which ought to be 'more forward thinking and flexible'.[124] She set out the issues that need to be addressed in the negotiations of the reform to be: clarifying the scope of exclusive rights; revising exceptions and limitations for libraries and archives; addressing orphan works; accommodating persons who have print disabilities; providing guidance to educational institutions; exempting incidental copies in appropriate instance; updating enforcement provisions; providing guidance on statutory damages; reviewing the efficacy of the DMCA; assisting with small copyright claims; reforming the music marketplace; updating the framework for cable and satellite transmissions; encouraging new licensing regimes; and improving the systems of copyright registration and recordation.[125] She further stated that Congress would need to take some time to review the amendment process as they did with the current Copyright Act.[126] Although none of the issues listed by Maria specifically deal with the fair use doctrine it would be interesting to see how they

[120] Supra at [587].
[121] Supra at [586].
[122] Supra at [590].
[123] United States House of Representatives 'Statement of Maria A. Pallante Register of Copyrights United States Copyright Office before the Subcommittee on Courts, Intellectual Property and the Internet Committee on the Judiciary' 113th Congress, 1st Session March 20 2013 available on https://www.copyright.gov/regstat/2013/egstat03202013.html accessed on 1 November 2017.
[124] Ibid.
[125] Ibid.
[126] Ibid.

amend their exceptions to libraries and archives for the digital age. Four years into the 'next great copyright act' review process, studies and discussions have been happening within the Congress. However, no tangible recommendation for reform has been released yet. It remains to be seen what the US Congress will do in future to stay ahead of the times regarding copyright law.

Fair dealing in South Africa

The Origins of Defence

The South African copyright law system was adopted from the British due to its colonial past.[127] The first copyright statute in South Africa was the Patents, Trade Marks, Designs and Copyright Act 9 of 1916[128] which incorporated the British Imperial Copyright Act of 1911. The 1911 statute introduced the fair dealing provision into South African law for the first time.[129] Once South Africa became an independent republic in 1961, Parliament enacted the Copyright Act 63 of 1965,[130] which resembled the UK copyright law. South Africa's copyright law was later amended to the Copyright Act 98 of 1978 which also resembled the UK copyright law and remains the copyright statute to this day with minor amendments made throughout the years.[131]

Legislative Provisions

The fair dealing provision in South Africa can be found in section 12 of the Copyright Act.[132] Fair dealing in South Africa is considered to follow the same approach taken in the UK as discussed above. The section 12 provisions further only apply to literary and musical works[133].Fair dealing is a defence that a copyright user may rely on to a copyright infringement claim against him/her.[134] In any case regarding copyright infringement the court will first have to examine whether there has been an infringement followed by an examination of whether the defence of fair dealing would apply to the claim or not. In short, if the court finds that there is no

[127] Denise Rosemary Nicholson 'The South African Copyright Law: a historical overview and challenges to address access to knowledge issues in a country in transformation' (2015) IFLA WLIC Cape Town at 3 available at library.ifla.org/1248/1/138-nicholson-en.pdf, accessed on 9 October 2017.
[128] Patents, Trade Marks, Designs and Copyright Act No. 9 of 1916. This statute dealt with the different spheres of intellectual property adopted from the British.
[129] The Copyright Act of 1911 s2(1)(i).
[130] The Copyright Act 63 of 1965.
[131] Nicholson ibid note 135 above.
[132] Copyright Act see note 5.
[133] Copyright Act s12.
[134] Groenewald ibid note 36 at 18

case for copyright infringement then there would be no need to dive into the examination of whether the use of the work falls under a copyright exception in terms of section 12.

Case Law

(i) *Moneyweb v Media 24*

There has not been a case decided by the South African courts on the fair dealing exceptions until 2016.[135] The *Moneyweb (Pty) Ltd v Media 24 (Pty) Ltd and Fadia Sallie*[136] case dealt with copyright infringement by Media24 which was a sub-branch of Fin24 an online news media platform. Moneyweb claimed that Media24 committed copyright infringement by quoting and paraphrasing 7 of their articles that were published on the Moneyweb website or alternatively that the conduct by Media24 amounted to unlawful competition.[137] Media24 claimed that there was no copyright infringement because the articles did not pass the test of originality; therefore, they could not be protected under copyright law.[138] Media24 further claimed that even if the articles were original, they could raise a s12(1)(c)(i) and s 12(8)(a) defence found in the Copyright Act.[139] The court had to decide on these three key issues:

1. whether Moneyweb's articles were original;
2. if the first question was answered in the affirmative, did Media24 infringe on their copyright;
3. lastly, whether Media24 could rely on s 12(1)(c)(i) and s 12(8)(a) as defences.[140]

(a) Originality

The court analysed all seven articles separately. The court first dealt with the substantive aspect of copyright law by outlining that the articles in question all qualify as literary work in terms of copyright law.[141] It then followed with a statement that for a work to be protected it would have to pass the originality test.[142] The court remarked that for a work to be original in South Africa it does not need to be creative but must encompass some degree of skill, judgment and labour by

[135] Ibid note 144.
[136] *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ).
[137] Supra at [3].
[138] Supra at [57].
[139] Supra at [57] and [103].
[140] Supra at [6].
[141] Supra at [7].
[142] Supra at [7].

the author.[143] This is understood to mean that the work to be qualify as original does not need to be from a completely new and innovative thought from the author but may be borrowed from another person's work as long as the author has put in his or her individual intellectual input as to create an almost new work. The first article analysed was found not to be original. This was due to Moneyweb not adducing enough evidence to prove that the work was the author's own work. The author's own independent skill and expertise was not proved as the article was written from a press conference and it could have simply been a repetition of the press conference.[144] The court further found that the second and third articles were also not original due to the same reasons as in the first article.[145] With the fourth article the author had since passed away, therefore, Moneyweb failed to produce direct evidence of its originality. However, they did present more evidence than the first three articles. The court found that the unoriginal articles were mere repetition of the press releases.[146] Articles five, six and seven were found to be original in that the authors of the articles were able to apply their minds to the creation of the articles.[147] Professor Pamela Andanda criticizes this decision stating that evidence produced for the rejected non-original articles were similar to the evidence produced for the accepted original articles, holding that the findings were contradictory.[148] For instance, the seventh article was based on an interview transcript, which was edited by omitting certain words and sentences. And by that the court found that it amounted to the author applying his skill and knowledge.

(b) Infringement

The court here held that it needed to reach a decision based on a value judgment on the work as a whole and not in parts.[149] The quality of the reproduction had to be assessed over the quantity used in the reproduced work.[150] The court applied the test for determining infringement as discussed in part I of this paper. It then held that Media24 reproduced a substantial part in one out of the three articles that were found to be original.[151] The fifth article was reproduced 'word

[143] Supra at [8].
[144] Supra at [24] – [25].
[145] Supra at [29] and [35].
[146] Supra at [38] – [39].
[147] Supra at [48] and [53].
[148] Professor Pamela Andanda 'Copyright law and online journalism: a South African Perspective on fair use and reasonable media practice' (2016) 6 *Queen Mary Journal of Intellectual Property* at 418.
[149] *Moneyweb* supra note 148 at [84].
[150] Supra at [85].
[151] Supra at [88].

for word' thereby committing copyright infringement.[152] The other two articles were not considered to be an infringement of Moneyweb's copyright as they did not reproduce a substantial amount of their articles.[153]

(c) Fair Dealing

On the issue of fair dealing the court pointed out that the test for fair dealing was an objective one that needed to be assessed based on value judgment and the facts at the time of the dealing.[154] The court in the judgment made a remark that: '-foreign authorities are referred to for guidance only. I also accept that I must be cautious in considering foreign law because each jurisdiction has its own particular history'.[155] The court with this statement understood the implications of looking at other jurisdictions that have different contextual backgrounds than South Africa. The court was aware of the consequences of following judicial decisions from other jurisdictions without the consideration of the background of the South African Constitution.[156] The Constitution is the supreme law of the state and every law is to be interpreted in a manner that is consistent with it.[157] The court followed by going into the analyses of the test for fairness, which includes:

1. 'The nature of the medium in which the works have been published;
2. Whether the original work has been published;
3. The time lapse between the publication of the works;
4. The amount of the work that has been taken; and
5. The extent of the acknowledgement given to the original work'.[158]

In reporting current events, the court held that if an event happens within a time that is close to the reporting it will meet the ordinary meaning of reporting current events found under the Copyright Act.[159] In terms of acknowledgement of the original source of the article, the court held that a hyperlink meets the requirements and given the fact that the articles were made

[152] Supra.
[153] Supra at [92] and [99].
[154] Supra at [114].
[155] Supra at [103].
[156] The Constitution ibid note 146 above.
[157] *Moneyweb* supra note 148 at [106].
[158] Supra at [113]
[159] Supra at [123].

available online to readers it was the most effective way to acknowledge the sources. This is because the reader if they wanted to know more about the article they would click on the hyperlink to the original article to get more information.[160]

After its analysis into fair dealing with regards to national and international legislation, the court concluded that Media 24 did not prove fair dealing. Media24 infringed the fifth article as they had substantially reproduced the copyright protected work held by Moneyweb.[161] This case settled the matter that the fair dealings provision in the Copyright Act[162] was too restrictive and could not be factually/practically applied in the technological online era.

Law Reform in South Africa: Copyright Amendment Bill 2017(i) Introduction

The Department of Trade and Industry in 2015 released the Copyright Amendment Bill 2015 which included the term fair use for the first time in the South African copyright law context. The Bill was later revised and released again as the Copyright Amendment Bill 2017. The Copyright Amendment Bill[163] proposes to amend the above-mentioned section 12 in the Copyright Act.[164] The Bill seeks to introduce new exceptions such as scholarship or research. It also introduces factors in determining the fairness, which has been taken from the US fair use doctrine. These factors are:

1. 'the nature of the work in question;
2. the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
3. the purpose and character of the use, including whether:
    a. such use serves a purpose different from that of the work affected; and
    b. it is of a commercial nature or for non-profit research, library or educational purposes; and
4. the substitution effect of the act upon the potential market for the work in question'.[165]

[160] Supra at [124].
[161] Supra at [103].
[162] Copyright Act see note 5.
[163] The Bill see note 8.
[164] Copyright Act see note 5.
[165] The Bill s10 to be amended to s12(1)(b).

This new inclusion would mean that exceptions that are not specifically listed could be included by using the factors listed above. Critics of the amendment have stated that the drafters of the statute have failed to take notice that the two approaches are not one in the same.[166] These critics fail to understand the purpose and reason behind fair dealing and fair use. The purpose and reason for having copyright exceptions whether it be fair dealing or fair use is to provide a balance between the interests of copyright holders and the interests of the public in having access to knowledge and information. For some time, literature writes on copyright have considered whether fair use should be included or even replace fair dealing in South Africa.[167] This has been mainly due to not knowing whether the South African copyright exceptions could accommodate technological advancements that have been taking place in the preceding decades. South African Parliament has been delayed in amending copyright law to include works created in the digital age. With this proposed amendment copyright users would gain access to information and knowledge that would otherwise would have been locked away under the jest of copyright protection

(ii) Fair Dealing

Section 12(1)(a) reads as:

'In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:

(i) Research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device;
(ii) Criticisim or review of that work or of another work;
(iii) Reporting current events;
(iv) Scholarship, teaching and education;
(v) Comment, illustration, parody, satire, caricature or pastiche;
(vi) Preservation of an access to the collections of libraries, archives and museums;
(vii) Expanding access for underserved populations; and

[166] These views were voiced by various stakeholders mostly big corporations at the public hearing held in the South African Parliament for the discussion of the Copyright Amendment Bill 2017 held in August of 2017. These two terms are not the same to the extent that one is a closed list whilst the other is an open list. Other than that the two are one in the same thing.

[167] One of these writers has been R M Shay in his article 'Fair deuce: an uneasy fair dealing-fair use duality' (2016) *De Jure* where he assesses the Copyright Amendment Bill 2015 in regards to the new amendment to section 12 that includes for the first time in South Africa the term fair use and whether this amendment is appropriate for the South African context.

(viii) Ensuring proper performance of public administration'.[168]

The current section 12 of the Copyright Act[169] specifically, makes an exception to literary and musical works.[170] The Bill seeks to delete those words and refers to 'a work or the performance of that work', which implies that any work that qualifies to be protected under copyright law will not amount to copyright infringement if it meets the criteria set out in section 12. This approach is highly welcomed as artistic work, cinematograph films and sound recording users can now use the defence of fair use in copyright infringement claims. This provides users more room to create freely without the fear of being litigated against with no defence.

The wording of section 12(1)(a) makes little sense as it reads 'in addition to uses specifically authorised'.[171]. This wording is redundant since if the copyright holder has authorised the use of his or her exclusive right in the work, the need for the work to be included as a copyright exception is entirely unnecessary.[172] In the same sentence, the term fair use is used for the first time in South Africa's copyright legislation.[173] This is a departure from the current Copyright Act which uses the term fair dealing. The other problematic words are: 'including the use of a lawfully possessed work at a different time or with a different device' found in section 12(1)(a)(i) should be taken out altogether.[174] It is unnecessary and makes no sense as to why it would be important to specify that a work is lawfully possessed in copyright infringement case.

The drafters of the 2017 Bill deleted section 12(1)(c)(i)-(ii) from the current Copyright Act which states that 'there is no copyright infringement for purposes of reporting current events in newspapers, magazines, similar periodical or by means of broadcasting or in a cinematograph film'.[175] This seems to acknowledge that there are different avenues in which current news reporting can be presented due to technological advancements in media news reporting. Therefore, the reporting of current events on social media such as Facebook and Twitter are now

[168] The Bill, s10 to be amended to 12(1)(a).
[169] Copyright Act see note 5 s12.
[170] Ibid.
[171] The Bill, s10 to amended to s12(1)(a).
[172] The Bill, s10 to be amended to s12(1)(a).
[173] Ibid.
[174] The Bill, s10 to be amended to s12(1)(a)(i).
[175] Copyright Act s12(1)(c)(i)-(ii).

protected from copyright infringement provided that the source is mentioned, and the author is acknowledged. A further problem is with regard to sections 12(1)(a)(iv), 12(1)(a)(vii) and 12(1)(a)(viii), which are highly problematic as it seems that the drafters are giving government a 'free pass' from having to acquire licensing rights from right holders, in the name of providing an education and access to the 'underserved population'.[176] This will have major implications for copyright owners as they will be deprived of a right they lawfully possess, instead of the government paying for the licence to gain access to the work, they will have a free pass in expropriating other people's hard work just to save a few pennies.

This proposed amendment is welcomed. In developing countries, such as South Africa, the free flow of information and knowledge is the corner stone of how these countries are hoping to advance themselves economically to be part of the world economic trade. Transformation of laws is much slower and difficult to attain in developing countries[177]. Public interest exceptions for purposes of education and research are necessary in developing countries to encourage a spread of knowledge to the underprivileged. Requiring payments under licensing agreements for access to knowledge would be a great disadvantage to the development of the country's economy[178]. This barrier on access to copyrighted work would go against one of the most important reasons for copyright protection which is to foster innovation and creation to enhance the public's knowledge[179].

[176] The Bill, s10 to be amended to s12(1)(a)(vii).
[177] Nicholson see note 135 above at 2.
[178] T Pistorius 'Developing Countries and Copyright in the Information Age: The Functional Equivalent Implementation of the WCT' (2006) 9 *PER/PELJ* at158.
[179] Ibid.

IV. INTERNATIONAL TREATIES ON COPYRIGHT LIMITATIONS AND EXCEPTIONS

Introduction

The US, UK and South Africa are all members of numerous multilateral international treaties, however, the most important and vital that must be considered in relation to this paper are the Berne Convention for the Protection of Literary and Artistic works[180] (Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights[181] (TRIPS Agreement). The Berne Convention was created to regulate international copyright protection by member states.[182] It states in Article 9(2) that:

> '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'.[183]

The above is known as the three-step test and can be summarised as:

1. Limited to certain special cases;
2. Must not conflict with normal exploitation of the work; and
3. Must not unreasonably prejudice the legitimate interests of the author.

This test has been included in other multilateral and bilateral treaties with slight changes to the wording, one of them being Article 13 of TRIPS Agreement which states that:

> 'Members shall confine limitation 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'.[184]

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[180] The Berne Convention for the Protection of Literary and Artistic Works 1886, September 9, 1886. Hereinafter referred to as the Berne Convention.
[181] The Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, April 15, 1994. Hereinafter referred to as the TRIPS Agreement.
[182] Pamela Samuelson 'Possible Futures of Fair Use' (2015) 90 *Washington Law Review* at 850.
[183] Berne Convention article 9(2).
[184] TRIPS Agreement article 13.

Both international treaties specify that member states should make provisions for copyright limitations and exceptions in their national laws. The difference between the two treaty provisions is in the wording. The Berne Convention refers to interests of the author while TRIPS Agreement refers to interests of the right holder, which indicates the acknowledgment that there can be third parties who acquire rights to the work whom have a legitimate interest in the work.[185] Another difference between the two is that the Berne Convention was criticised for its lack of compliance from member countries, therefore, the TRIPS Agreement was enacted so that trade sanctions could be imposed on countries that did not provide adequate intellectual property laws for foreign copyright holders.[186] In short, the Berne Convention set non-binding rules and TRIPS Agreement set a mandatory minimum standard for member states.[187] Because TRIPS only sets a minimum standard, member states may set standards that are of a higher threshold. The debate that has dominated the international intellectual property sphere is whether the United States' fair use doctrine, the UK fair dealing and the South Africa's current and proposed doctrines meet the three-step test set out in the Berne Convention and the TRIPS Agreement.

(i) Interpretation of the Three-Step Test

(a) Certain Special Cases

The World Trade Organisation's dispute-settlement panel in 2000 interpreted the three-step test.[188] The panel held that the first step meant that a limitation or exception had to be clearly defined hence the word certain special cases.[189] This meant that the first step was to be applied restrictively by each country when enacting national copyright exception laws.

(b)Normal Exploitation

The second step was interpreted as meaning that normal exploitation involved an analysis of what the right holder would currently get if he or she exploited his or her work by way of income as well as foreseeable future income.[190] This interpretation is problematic since one cannot

[185] Edward L Carter 'Harmonization of Copyright Law In Response To Technological Change: Lessons From Europe About Fair Use and Free Expression' (2009) 30 *University of LA Verne Law Review* at 329.
[186] Ibid note 196 above at 315.
[187] Ibid at 314.
[188] World Trade Organization Report of the Panel, United States – Section 110(5) Of The US Copyright Act, 15 June 2000, WT/DS160/R.
[189] Christophe Geiger, Daniel J. Gervais and Martin Senftleben 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 *American University International Law Review* at 593.
[190] Ibid at 594.

possibly predict future exploitation of the work with the how rapidly changing today's economic environment is.

(c) Legitimate Interests of the Copyright Holder

The third step was interpreted as a proportionality analysis between what is justifiable use of the work and the legitimate lawful interest by the author or right holder of the work.[191] The final step seems to be the most flexible of all the steps due to the balancing test between the justification of the use and the copyright owner's exploitation of his or her work.

Even with this interpretation there remains uncertainty and lack of clarification on how the three-step test should be interpreted. Some scholars suggested and released a Declaration[192] seeking to clarify the interpretation of the test by stating that the three-step test is to be interpreted in a way that the conflicting interests of copyright owners and the public are fairly balanced. The scholars held that just because a certain limitation or exception fails to meet one of the tests required steps it should not be considered to have failed the test; rather that the step-by-step approach is not to be followed blindly but an overall analysis of the steps is a better approach to its application based on the purpose and nature of the limitation and exception in question.[193] This can be understood as that the test should not be interpreted restrictively by legislators when dealing with limitations and exceptions in trying to adhere to the provisions of the Berne Convention and TRIPS Agreement. Indeed, Christophe, Daniel and Martin agree with the writers of the Declaration in that he states, 'while the steps can be considered sequentially it should not be overlooked that the test constitutes a single analytical whole and serves the ultimate goal to strike an appropriate balance'.[194]

The United Kingdom

The UK is a member of the European Union, therefore, must comply with the European Commission's legislation such as the Directive 2001/29/EC[195] 22 May 2001 which lists a

[191] Ibid at 595.
[192] Christophe Geiger, Jonathan Griffiths and Uma Suthersanen 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2010) 1 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 119.
[193] Ibid at 119-120.
[194] Ibid note 199 at 585.
[195] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

comprehensive list of copyright exceptions and states that member states may not include any other exceptions into their national legislation that is not in the Directive.[196] The Directive further incorporated the Berne Conventions three-step test in Article 5(5) which states that:[197]

> 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

The UK in all its exceptions and limitations to copyright protected works needs to meet the three requirements of the three-step test. The list of exceptions in the CDPA are extensive due to the first requirement that exceptions in national laws must be limited by applying them to specific cases. This first requirement seems to be important to the UK legislature. The legislature remains within the bounds of its international obligations by specifically listing what uses may fall under the defence of fair dealing. The amendment to the CDPA's section 28A – 76 arose from the Directive's provisions on exceptions and limitations. The UK is set on sticking strictly to the three-step test requirements whenever it introduces any new copyright exceptions into its national statute.

The United States

Due to its open-ended approach to copyright exceptions, the fair use doctrine has for years come under scrutiny as to whether it meets the three-step test. Some commentators on the debate on whether fair use meets Article 9(2) or 13 standards hold that the fair use doctrine does not and will never comply with the test. This is due to the phrase 'such as' which implies that the uses which could constitute fair use are non-exhaustive. Therefore, the specificity aspect of the exceptions is not defined well enough for them. However, when one breaks down the fair use doctrine as well as the test it becomes evident that the purpose and character of the use, the amount and substantiality of the work used and the effect of the use on the potential market meet the second and third step of the three-step test. With the wording of fair use in section 107 as a catch all provision with no specific use in mind by Congress. It allows for future unforeseen developments that may have an impact in copyright law, such as a change in technology. The real problem when it comes to whether fair use complies with international agreements lies with

[196] Ibid article 5.
[197] Ibid article 5(5).

the first test. It has not been settled with what degree do national laws need to specify certain copyright exceptions and limitations. As stated above the WTO panel interpreted this to mean that this step was to be applied only to clearly defined cases. The WTO panel decision could be a guideline that member states may use but in no way, is it a hard and fast set decision that ought to be followed by all member states. In the same Declaration mentioned above the scholars recommended that a broader interpretation of the three-step test be used, similar to the fair use doctrine found in the US since no one factor in section 107 is decisive. They therefore recommended any interpretation of the three-step test should not look at one of the tests as a decisive factor.[198] Rather all factors must be looked at separately to determine whether the exception meets all the requirements. This can mean that just because the fair use doctrine does not list a certain exception such as format shitting it does not mean that format shifting cannot fall under copyright exceptions and limitations. Each countries judiciary would have to consider on a case-to-case basis whether new uses of copyright protected work meet the three-step test. If this interpretation is to be adopted by any country, it would indicate that the fair use doctrine does indeed fall within the ambit of the Berne Convention and the TRIPS Agreement. The underlying problem with the Berne Convention and the TRIPS Agreement is that they were enacted way before the technological developments of today. Perhaps the question is not whether the fair use doctrine meets the three-step test but rather whether the three-step test caters for advancements in copyright law. This is a matter that far beyond this paper but hopefully in the future the WTO will address these unanswered questions about copyright exceptions and limitations.

South Africa

Countries around the world with different economic aspects seem to be either leaning towards a fair use doctrine approach or have amendment their copyright laws to include an open list to copyright exceptions and limitations. Some of these countries are Australia and Singapore. Canada and possibly South Africa in the near future. The current Copyright Act in South Africa is based on the UK copyright law. Section 12 of the Copyright Act currently specifically lists certain and determinable uses of a copyright protected work that may be used as a defence in

[198] Ibid note 199 at 612-613.

infringement cases. Uses such as for research and private study;[199] criticism or review;[200] reporting current events'[201] judicial proceedings[202] to name a few. The rest of the exceptions are in section 12(3) – (13) of the Copyright Act. All these exceptions are ascertainable from the wording of the sections. Therefore, they would currently meet the international obligation of the three-step test. With the looming amended of section 12 to include the fair use determining factors and the inclusion of the wording 'such as' to the defence to copyright infringement. The question of whether such an amendment meets the international obligation South Africa has as a member of the WTO comes to the forefront. As discussed above regarding the US fair use, I do not see why the amendment to section 12 would not meet the requirements of the three-step test. With the same reasoning copyright exceptions can still meet the requirements without specifically stating each use possible that could be considered fair use. The courts will be the deciders of whether a new use can be a fair use by taking into consideration the four factors and any other factor relevant to the case in question. The courts will also use the guidelines and develop new guidelines for what fairness is on a case-to-case basis. This would not be a burden onto the judiciary as they already take other factors and considerations from other jurisdictions into consideration as allowed and obliged to do so by the South African Constitution. This amendment should with other considerations show that the world is leaning towards an open approach to limitations and exceptions to accommodate the developments brought by technology advancements because the legislative process of amending nation legislations is a slow process and cannot and will not be able to keep up with the developments fast enough.

[199] Copyright Act s12(1)(a).
[200] Ibid s12(1)(b).
[201] Ibid s12(1)(c).
[202] Ibid s12(2).

V. RECOMMENDATIONS FOR SOUTH AFRICA

Fair dealing and fair use are the in essence the same defences shown in parts III. They both seek to protect and strike a fair balance between users and holders of copyrights. The underlying goal for copyright limitations and exceptions are to protect the copyright holder's rights against the public's access to use of such protected work. However, the approach taken by many critics of the 2017 Amendment Bill, is an either-or approach. It must be fair dealing or fair use, but both cannot be used interchangeably as has been proposed. In this Part, I will suggest a viable proposal of how the wording of the amended to section 12 ought to be. Remedying the confusion caused by the current proposed amendment. This will encompass a flexible approach that can provide adequate access to information and knowledge for future copyright holders and users.

The "Such As" Approach

The South African Copyright Amendment Bill 2017[203] has proposed a wider application of copyright limitations and exceptions to protected works. This is immensely welcomed as the Constitutional right to have access to information and knowledge in a developing country such as South Africa should be a priority for the government. This amendment will enhance economic growth in various sectors such as education, research and entertainment industries. However, the current amendment does not fully encompass an open and wide approach.

I propose an open-ended list of fair dealing by inserting the words 'such as' to section 12 of the Amendment Bill to read as follows:

> '(1)(a) Fair use with regards to copyrighted work, for purposes <u>such as</u> research, private study or personal use, criticism or review, reporting current news, education, comment, illustration, parody, satire, historical preservation, and such, does not infringe copyright in that work'.

The advantage of this proposal is in its flexibility to allow for new and unmentioned copyright exceptions to be decided by the courts. The words 'fair dealing' have been removed to deal with one term instead of two that may lead to confusion in interpretations by those who view the two as separate concepts. This proposal further addressing the argument in copyright law that the current fair dealing approach used in South Africa is limited when it comes to dealing with technological advances. The current Act does not make provision for reverse engineering and

[203] The Bill see note 8.

format shifting, which in this information age is used by copyright users daily. This proposal also includes the notion that the continuous legislative process of amending copyright limitations and exceptions to keep up with technological advancements in the future will not be needed. Countries that have been utilising the specific purposes only approach have had to amend their laws to deal with this issue.[204] In this way there would be no need to do so as the courts would be adequately competent enough to deal with new limitations and exceptions in a more timeous manner than the legislature could. Lastly, the proposal seeks to balance the rights of copyright holders and those who may want to benefit through the accessing and sharing of information and knowledge from copyright protected works. Sustaining and providing for the appropriate copyright laws is vital in the growth and development of the economic sector of a developing country such as South Africa. The time is long overdue for the South African government to take a step in focusing on intellectual property as an economic growth enhancing tool.

CONCLUSION

What this paper has shown is that the so called two different approaches to copyright limitations and exceptions are the same and were never different. The only difference between the two is the approaches, one follows a closed list approach and the other follows an open list approach. The terminology used is different depending on which side of the world you are in. It has also shown that the judiciary in each country has its own unique interpretation to fair dealing/fair use. The judiciary plays a vital part when it comes to achieving the balance that copyright law seeks to achieve no matter which country it is. Furthermore, this paper has shown that the current fair dealing provision in South Africa does not address the changes that befall us in today's digital environment. Change in technology and how we use it has shown that the copyright limitations and exceptions applicable in South Africa need to be reformed for a more flexible and open-ended approach, whilst still striking the proper balance between right holders and right users. The fair use doctrine has been shown to be appropriate and workable in South Africa. As it did in the Canada, Singapore and Kenya previous fair dealing countries that followed the closed list approach. Parliament is heading towards the right direction by amending the fair dealing provision, perhaps with the right wording, as shown above, copyright law in South Africa will

[204] Countries such as Australia, Canada and Singapore have all amended their copyright limitations and exceptions provisions to include the fair use four-factor tests used in the United States.

allow for future creators to be innovative than they ever were able to do so before. The growth of copyright industries might yield a greater turn around for the South African economy in the near future.

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