SCRIPT-ed

Volume 4, Issue 1, March 2007

The Future Of Fair Dealing In Australia: Protecting Freedom Of Communication

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Abstract

This article considers the role of the concept of freedom of communication within the law of copyright in Australia. It concludes that the judicially articulated implied Constitutional guarantee of freedom of political communication is too narrow to act as a control upon the contours or nature of copyright law. However the doctrine of fair dealing encompasses elements of freedom of communication and provides some scope for the recognition of such rights under Australian law.

DOI: 10.2966/scrip.040107.95

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The law of copyright is concerned with balancing the public interest in economic and cultural development against the interests of individuals in securing a fair and equitable return for their intellectual efforts.[1]

1. Introduction

This study developed from a consideration of the continuing role of copyright in a digital context. What role (if any) did copyright continue to play if most transactions regarding content could effectively be governed by contract? The major point of conflict between copyright and contract is the continued relevance and application of rights arising under fair dealing (in the UK and Australia) and fair use (in the US), leaving aside the issue of legal protection of technological protection measures, which is a relevant and related issue, though beyond the scope of this paper.[2] In order to determine if fair dealing adds anything to nurturing and protection of the creative processes, which is not replicated by contract, it was necessary to consider the fundamental rationale of fair dealing. This proved more elusive than illuminating. The statutory history tells us very little about the reasons guiding its introduction into legislation, in Australia, the UK or the US.[3] The various Government reports on copyright similarly simply assume its existence and move on.[4]

It was therefore necessary to look to the various justifications for copyright itself, including theories of property, personality and market failure.[5] The market failure theory has acquired a significant hold on copyright law in recent years. Springing from Wendy Gordon's 1982 article, 'Fair Use As Market Failure'[6], it seeks to

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[1] *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140 at p 185, (per Kirby J).

[2] For a discussion of the relationship between technological protection measures and fair dealing, see M de Zwart, "Technological enclosure of copyright: The end of fair dealing?" (2007) 18 *Australian Intellectual Property Journal* 7.

[3] See R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, Cambridge, 2005) at pp 256-258.

[4] See, in particular, the Attorney-General's Department, *Fair Use and Other Copyright Exceptions Issues Paper*, May 2005, which promised it would explore the rationale for fair dealing and other exceptions and then failed to do so.

[5] For a discussion of various (competing) theories, see Copyright Law Review Committee, Commonwealth of Australia, *Copyright Reform: A Consideration of the Rationales, Interests and Objectives* (1996); P Drahos, *A Philosophy of Intellectual Property* (Dartmouth, Aldershot, 1996); J Hughes "The Philosophy of Intellectual Property" (1988) 77 *The Georgetown Law Journal* 287, pp 325-329; and C Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002) 28 *Queen's Law Journal* 1.

[6] "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 *Columbia Law Review* 1600. Professor Gordon has since stated that the recommendations contained in that article have sometimes been misapplied. See W Gordon, "Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives" in N Netanel and N Elkin-Koren, (ed.) *The Commodification of Information: Social, Political and Cultural*

establish that fair dealing essentially operates in situations where it is too costly and therefore inefficient to licence uses of copyright material. In these circumstances fair dealing may step in to facilitate the use. Where that market failure can be cured, through low cost marketing and small automated transactions, such as those made possible by digital technology, there may be no continued need for fair dealing. [7]

This paper seeks to provide an alternative explanation for fair dealing, as protecting the interests of freedom of communication, which otherwise receive very little protection under Australian law.[8]

Australian commonwealth law provides no explicit protection to the right of freedom of speech or freedom of expression.[9] This is in stark contrast to the position in the US, where it is enshrined in the First Amendment to the Constitution,[10] and Europe, where it is protected by Article 10 of the European Convention on Human Rights.[11] Freedom of expression is declared to be a fundamental human right in the Universal

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Ramifications (Kluwer Law International, The Hague and London, 2002) and W Gordon, "Market Failure and Intellectual Property: A Response to Professor Lunney" (2002) 82 *Boston University Law Review* 1031.

[7] T Bell "Escape from Copyright: Market Success versus Statutory Failure in the Protection of Expressive Works" (2001) 69 *University of Cincinnati Law Review* 741; T Bell, "Fair Use versus Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine" (1998) 76 *North Carolina Law Review* 557 at pp 582-583; N Elkin-Koren, "Cyberlaw and Social Change: A Democratic Approach to Copyright in Cyberspace" (1996)14 *Cardozo Arts & Entertainment Law Journa*l 215; Gordon, above n 6, at pp 1610-1614; D McGowan, "Free Contracting, Fair Competition Policy, Information Transactions, and 'Aggressive Neutrality'" (1998) 13 *Berkeley Technology Law Journal* 1173, pp 1228-1234; W Landes and R Posner, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325; W Gordon, "Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property" (1992) 17 *University of Dayton Law Review* 853; W Fisher, "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1659; and M Anderson and P Brown, "The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law" (1993) 24 *Loyola University of Chicago Law Journal* 143.

[8] The State of Victoria has recently enacted the *Charter of Human Rights and Responsibilities Act* 2006 (Vic). This includes a provision dealing with freedom of expression, s 15. However, as a State Act, it is limited in its application to Victorian laws, courts and public authorities. See also the *Human Rights Act* 2004 (ACT) applicable in the Australian Capital Territory.

[9] Cf the New Zealand position. New Zealand enacted a Bill of Rights in 1990. Section 14 of that Act provides: 'Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.' See further, J Oliver, "Copyright, Fair Dealing, and Freedom of Expression" (2000) 19 *New Zealand Universities Law Review* 89. See also *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91.

[10] 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.'

[11] '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Declaration of Human Rights. It is embodied in Article 19 of the International Covenant on Civil and Political Rights.[12]

However, despite being a signatory to the ICCPR, Australia has not enacted legislation giving effect to obligations arising under the Convention in domestic law.

Writing extra-judicially, former Chief Justice of the High Court of Australia, Sir Anthony Mason, has suggested that despite the fact that such conventions have not been implemented in legislation in Australia the 'existence of obligations imposed on Australia by these provisions may operate as an obstacle to extending copyright protection to the point where it contravenes the two provisions.'[13] Australia has however recently significantly expanded its copyright law, with over two hundred pages of amendments enacted by the Copyright Amendment Act 2006.[14] These amendments were justified on the basis of obligations arising under the Australia-United States Free Trade Agreement.[15] They included amendments to extend the term of copyright, increase the scope of and enforcement provisions relating to technological protection measures, increase criminal penalties and to alter the fair dealing provisions to introduce a new parody and satire defence and a flexible dealing defence. General arguments regarding the influence of freedom of communication upon the contours and general scope of copyright law would seem to have had as little impact on the nature of these changes as they did in the US with respect to the enactment of the Digital Millennium Copyright Act ('DMCA'). Some closer analysis of the relevance of the doctrine to copyright law in Australia would therefore appear to be appropriate.

In particular, the question of the importance and influence of principles of freedom of communication appear relevant in the context of digital delivery of content. Digital delivery provides for rapid and cheap access to copyright material. It also provides extensive scope for unremunerated and unauthorised copying. Does it also provide a unique context for consideration of freedom of communication issues? The Internet promises to be the great facilitator of freedom of communication–free immediate

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[12] '1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.'

[13] A Mason, "Public-Interest Objectives and the Law of Copyright" (1998) 9(1) *Journal of Law and Information Science* 7, p 11. See also *Lange v Australian Broadcasting Commission* (1997) 145 ALR 96 and P Brudenall, "Fair Dealing in Australian Copyright Law: Rights of Access under the Microscope" (1997) 20 *University of New South Wales Law Journal* 443, p 462.

[14] The Copyright Amendment Act 2006 (Cth) was passed in December 2006, with most of the provisions coming into force on 1 January 2007.

[15] The Australia-United States Free Trade Agreement ('AUSFTA') was concluded in 2004 and entered into force on 1 January 2005. Article 17.12 AUSFTA obliged Australia to amend its technological protection measures provisions by 1 January 2007.

access to information without regard to borders. What basis then does recognition of the right of freedom of communication provide for the maintenance and defence of a right of fair dealing in the electronic age?

The relationship between copyright and freedom of speech has been most extensively analysed in the US.[16] It is useful to review this analysis to determine if it provides any guidance to the Australian context.[17]

2. Freedom of speech and fair use: The US position

2.1 No conflict: the traditional US analysis of the relationship between fair use and the First Amendment

The traditional US position reconciling First Amendment and copyright interests states that they are entirely compatible.[18]

In his article 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' published in 1970, Professor Melville Nimmer first questioned whether copyright and freedom of expression under the First Amendment may represent contradictory interests.[19] Traditionally, the balance between the two concepts has been found to exist within the idea/expression dichotomy. Provided that later users were free to express the same ideas in different words there was said to be no clash between the concepts. Further, where it was necessary to reproduce the exact words of the original author, the fair use doctrine would allow such reproduction. Nimmer examined the rationales for copyright protection and for freedom of speech, and ultimately endorsed this view:

> *[T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the*

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[16] The reference to freedom of speech in this context is deliberate, to reflect the US approach to First Amendment jurisprudence. For an overview of the 'official narrative' in this area, see M Birnhack, "The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up" (2003) 43(2) *IDEA: Journal of Law and Technology* 233 and M Birnhack, "Copyright Law and Free Speech after Eldred v Ashcroft" (2003) 76 *Southern California Law Review* 1275.

[17] For a review of the UK law see R Burrell and J Stellios "Fair dealing and freedom of expression in the United Kingdom" (2003) 14 *AIPJ* 45.

[18] See for example: free speech concerns 'are protected by and co–extensive with the fair use doctrine.' *Nihon Keizai Shimbum Inc v Comline Business Data, Inc* 166 F. 3d 65 at 74 (US Court of Appeals 2d Cir. 1999); *A&M Records v Napster* 114 F. Supp. 2d 896 (2000) at 922; *Twin Peaks Productions, Inc v Publications International Ltd* 996 F. 2d 1366 (1993) at 1378; *Eldred v Ashcroft* 123 S. Ct. 769 (2003) at 789: 'The First Amendment securely protects the freedom to make - or decline to make - one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built in free speech safeguards are generally adequate to address them.' See also W Patry, *The Fair Use Privilege in Copyright Law* (2nd ed, The Bureau of National Affairs, Inc, Washington, 1995), p 534.

[19] (1970) 17 *UCLA Law Review* 1180.

> *right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue.*[20]

However, Nimmer also identified specific cases in which the balance struck by the idea/expression dichotomy appeared inappropriate. One such case is graphic works 'where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue.'[21] The example used by Nimmer is the photograph of the My Lai massacre (very topical at that time in the context of public debate over US involvement in the Vietnam War), which is so important to public understanding of the events it depicts that the copyright owner should not be able to stifle debate by preventing distribution of the picture. In this instance, Nimmer concluded, the free speech interest outweighed the copyright interest.[22] Nimmer was careful to point out that this consideration did not apply to all graphic works, but only to graphic works in which the content is essential to conveying the message. Nimmer was prepared to limit this to news photography.[23]

Recognising the disincentive effect on creativity that may be caused by promoting the free speech interests in these circumstances, rather than permitting a blanket right of use, Nimmer suggested a compulsory licence approach to the use of such photographs, requiring payment of a royalty to the copyright owner.[24]

It is notable that Nimmer was also at pains to distinguish between fair use and rights arising under the First Amendment. Nimmer asserted:

> *Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The first amendment privilege, when appropriate,*

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[20] Nimmer, above n 19, pp 1192-1193 (footnote omitted).

[21] Nimmer, above n 19, p 1197.

[22] Nimmer, above n 19, p 1198. See also the discussion of the Zapruder film of the Kennedy assassination in *Time, Inc v Bernard Geis Associates* 293 F. Supp. 130 (1968) (SDNY). See also M de Zwart "Copyright in Television Broadcasts: Network Ten v TCN Channel Nine- 'A Case which can excite emotions" (2004) 9.4 *Media & Arts Law Review* 277 at p 293, for a discussion of some more recent examples, such as footage of the plane crashing into the World Trade Center on 9/11.

[23] Nimmer, above n 19, p 1199. Nimmer suggested a pragmatic definition for news photography: 'a photograph is a news photograph only if the event depicted in the photograph, as distinguished from the fact that the photograph was made, is the subject of news stories appearing in newspapers throughout the country.'

[24] Nimmer also suggested that use should only be permitted if the photograph has not appeared in the relevant publication area within one month of original publication. Due to the overall increase in speed of communication technologies and the need for the image to be recognised as 'newsworthy', this author would suggest that one month would today be considered too long a length of time.

> *may be invoked despite the fact that the marketability of the copied work is thereby impaired.*[25]

Referring to the *Rosemont* and *Bernard Geis*[26] cases, Nimmer argued that these cases would have been easier to decide on First Amendment principles.[27] Each of these cases arose from incidents involving well known public figures: *Rosemont* concerned attempts by interests acting on behalf of Howard Hughes (the well-known but reclusive aviator, millionaire and movie mogul) to prevent the publication of a biography of Hughes by the defendant. A company formed by Hughes' attorney and two close associates acquired the copyright in three articles concerning Hughes which had been published in *Look* magazine in 1954, and commenced an infringement action against the defendant on the basis that the biography infringed the three magazine articles. The Court of Appeals for the Second Circuit found that whilst the book discussed common events with the articles and contained at least two direct quotations from the articles, they were adequately attributed to the source. At most, such material formed an insubstantial part of the book, which was over three hundred pages in length. The Court therefore granted the defendant's appeal against a preliminary injunction. *Bernard Geis* concerned the film made by Abraham Zapruder, on his home movie camera, of the assassination of John F. Kennedy on 22 November 1963. Zapruder sold the film to *Life* Magazine, which carefully controlled all use of and access to the film, including use of the images by the Warren Commission.[28] The defendant Thompson wrote a book about the assassination and subsequent events, such as the findings of the Warren Commission, which contained a number of sketches of the assassination. Those sketches were copies of frames from the Zapruder film. The sketches were prepared from copies of the film made by Thompson without permission. *Life* established that it had consistently denied all requests for permission to use the Zapruder film, including requests from the defendant who at one time had been employed by *Life* and working on an article about the assassination. The court permitted use of the sketches on the basis of fair use. Nimmer argued that in *Bernard Geis* the court distorted the application of the fair use defence with respect to the question of injury to the plaintiff's market for the original work. The same result would have made more sense on First Amendment grounds, which would recognise that some harm did occur to the plaintiff's market, but that this could be justified on the basis of the public interest in freedom of speech. On the other hand, the *Rosemont* case was wrongly decided, because the same information could have been conveyed using different expression. In Nimmer's opinion: 'There can be no first amendment justification for the copying of expression

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[25] Nimmer, above n 19, pp 1200-1201 (footnote omitted). Note that this article was written pre-codification of fair use in the *Copyright Act* 1976 (US).

[26] *Rosemont Enterprises, Inc v Random House, Inc* 366 F. 2d 303 (1966) (2d. Cir.) (concerning the proposed biography of Howard Hughes) and *Time, Inc v Bernard Geis Associates* 293 F. Supp. 130 (1968) (SDNY) (concerning the Zapruder film of the assassination of John F Kennedy).

[27] See also L Sobel, "Copyright and the First Amendment: A Gathering Storm?" (1971) 19 *Copyright Law Symposium (ASCAP)* 43.

[28] The Warren Commission was the official investigation into the death of President Kennedy, and concluded, somewhat controversially, that Lee Harvey Oswald was acting alone.

along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression.'[29]

Professor Goldstein also undertook an extensive examination of the relationship between copyright and the First Amendment in 1970.[30] He stated:

> *Reconciliation of copyright with the first amendment requires the striking of a …balance between the property interest of the copyright holder and the public interest.*[31]

Goldstein argued that the limitations imposed on statutory copyright in terms of length, scope and nature of protection demonstrate compliance with First Amendment principles. Goldstein outlined two principles to be applied in assessing the accommodation of First Amendment values by copyright limitations. The first principle, based on an analysis of libel and privacy doctrines, requires that copyright infringement be excused where (1) the copyright material used is relevant to the public interest in cultural, social and political advancement and (2) the use of such material advances the public interest. The second principle, drawn from cases related to misappropriation, requires that (1) copyright protection be elastic and conforming to the originality of the work and contributions of the parties and (2) in order to be actionable, economic harm must be suffered by the owner and that, in such cases, damages should be preferred to an injunctive remedy.[32]

Writing before the codification of fair use in section 107 by the 1976 *Copyright Act* (US), Goldstein examined fair use in the context of his theory and concluded that the cases (and the proposed codification in section 107) supported the requirements of his first principle: that infringement should be excused where it served the public interest. Any consideration of economic harm caused to the plaintiff by the defendant's use of the original work in such cases should therefore take account of the public interest in the proposed use of the copyright work.

Goldstein highlighted the fact that in fair use cases the infringer is not only required to justify use of the pre-existing work on the basis of his or her own interests, but in order to escape liability, is also appointed to the role of defender of the public interest. There is no other interest group capable of representing the public interest. For this reason, courts should not be too quick to impute notions of wrongdoing to all cases of infringement:

> *The complete exoneration of otherwise infringing uses is an explicit objective of the law and rests upon a thoroughly principled basis.*[33]

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[29] Nimmer, above n 19, p 1203.

[30] P Goldstein, "Copyright and the First Amendment" (1970) 70(6) *Columbia Law Review* 983.

[31] Goldstein, above n 30, p 991.

[32] Goldstein, above n 30, p 1009.

[33] Goldstein, above n 30, p 1056.

After these articles had been written a number of cases explicitly raised the question of the relationship between copyright and the First Amendment.[34] This prompted a re-examination of the relationship between copyright and free speech by Professor Denicola, published in 1979.[35] Denicola confirmed that copyright law, through the idea/expression dichotomy and the doctrine of fair use, accommodated First Amendment values in most circumstances. However, like Nimmer, he believed that there remained some instances where free speech interests were inadequately protected.[36] He claimed that if significant market harm would result from permitting use under the fair use doctrine, then separate consideration should be made of the facts on First Amendment grounds.

Denicola asserted that the question of economic harm has become incorrectly central to consideration of fair use, disturbing the nature of the doctrine. This misapprehension may be traced back to the erroneous statement in the classic US copyright text *Nimmer on Copyright* that: 'The fourth factor listed in Section 107 is "the effect of the use upon the potential market for or value of the copyrighted work." If one looks to the fair use cases, if not always to their stated rationale, this emerges as the most important, and indeed, central fair use factor.'[37] There is in fact no direction in s 107 that this factor be given pre-eminence.[38]

Like Nimmer,[39] Denicola questioned whether the *Bernard Geis* case was rightly decided:

> *In order to allow the fair use defense in Bernard Geis, the court essentially was obliged to hold that the potential impact of defendant's use on the future exploitation of the film by the plaintiff was merely speculative. If this holding indicates that a plaintiff must prove actual damage in order to rebut a fair use defense, it severely undermines the economic incentive rationale of copyright law.*[40]

The First Amendment on the other hand, is not concerned with the economic encouragement of new creations. Denicola therefore argued for the recognition of separate First Amendment grounds for the use of copyright material. This would apply where 'no amount of creativity or exertion on the part of the speaker can substitute for the duplication of the particular expression of another.'[41] Denicola

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[34] See, for example, *Meeropol v Nizer* 560 F. 2d 1061(1977) (2d. Cir.) cert. denied 434 U.S. 1013 (1978); *Triangle Publications, Inc v Knight-Ridder Newspapers, Inc* 445 F. Supp 875 (1978) (S.D. Fla.); *Sid & Marty Krofft Television Prods. Inc. v Mc Donald's Corp* 562 F. 2d 1157(1977) (9th. Cir.).

[35] R Denicola, "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression" (1979) 67 *California Law Review* 283.

[36] Denicola, above n 35, p 299.

[37] M Nimmer, *Nimmer on Copyright*, 1978, § 13.05 [A], cited in Denicola, above n 35, at n. 89, p 301.

[38] Note however, the emphasis given to this factor by the US Supreme Court in *Harper & Row Publishers, Inc v Nation Enterprises* 471 U.S. 539; 105 S Ct 2218 (1985) at 2233. This approach was rejected by the US Supreme Court in the later decision in *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994) at 577.

[39] Nimmer, above n 19, p 1201.

[40] Denicola, above n 35, pp 302-303.

[41] Denicola, above n 35, p 307.

believed that the Zapruder film, the subject of the *Bernard Geis* decision, represents such a situation. In such cases a First Amendment based defence would be a more accurate tool than fair use to determine rights of use.

In 1985 the US Supreme Court handed down its decision in *Harper & Row Publishing, Inc v Nation Enterprises*.[42] This case concerned the unauthorised publication of three hundred words from the unpublished autobiography of former US President Gerald Ford, explaining his decision to pardon Richard Nixon. The Court affirmed the Nimmer view that copyright accommodates and promotes First Amendment values and thus there is no need for a separate consideration of the facts on First Amendment grounds. The Court stated: '[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'[43]

With this statement, the question of the relationship between fair use and freedom of speech appeared to have been settled.[44]

2.2 Increased enclosure: the 'no conflict' conclusion re-examined

In 1987 Professor Patterson weighed into this apparently settled debate with his article 'Free Speech, Copyright, and Fair Use'.[45] In that article, Patterson argued that the codification of fair use in section 107 had resulted in the enlargement of the 'copyright monopoly by giving copyright owners a basis for increasing their control of access to copyrighted works.'[46] Patterson argued that the Copyright Clause itself should be interpreted as embodying consideration of free speech concerns, with the doctrine of fair use being the most important device for protecting those interests. Patterson argued that the original doctrine of fair use was intended to apply only to fair *competitive* uses of a work, with use by consumers being outside its ambit and therefore permitted.[47] However, the expansion of the rights granted by the Copyright Act and the codification of the doctrine of fair use, with its emphasis on economic harm to the original work, had eviscerated fair use of all meaning as a tool for protecting free speech. Patterson therefore argued for the recognition of the free speech principles embodied in the Copyright Clause of the US Constitution to ensure that copyright is not expanded beyond the boundaries originally intended by the Framers of that clause.

Professor Benkler has similarly argued that the increased use of contracts and technological protection measures has shifted the focus from the internal balance of copyright to the external issue of the relationship between copyright and contract. He argues that allowing increased 'enclosure' pursuant to contractual rules is unlikely to

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[42] 471 U.S. 539 (1985).

[43] *Harper & Row v Nation*, above n 42, at 558.

[44] See also, W Van Alstyne, "Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review" (2003) 66 *Law and Contemporary Problems* 225.

[45] L R Patterson, "Free Speech, Copyright, and Fair Use" (1987) 40 (1) *Vanderbilt Law Review* 1.

[46] Patterson, above n 45, p 3.

[47] L R Patterson "Understanding Fair Use" (1992) 55(2) *Law and Contemporary Problems* 249.

replicate copyright's goal of providing incentives for production and distribution of works to the public.[48]

Benkler therefore argued that First Amendment considerations should not stop with an assessment of copyright law itself. Technological protection measures and other contractual and legal enforcement measures that operate alongside copyright should also be subject to scrutiny on First Amendment grounds. Increased cost of source material and diminished access, except on commercial terms, will actually reduce production of new works particularly by small non-profit entities and also decrease diversity leading to concentration of production into fewer and fewer hands. Benkler argued that both the Digital Millennium Copyright Act ('DMCA') and the proposed UCITA compromise First Amendment concerns, facilitating greater control over the dissemination of copyright material, and thus creating a commercial, rather than an open, 'marketplace of ideas.' [49]

The shift from default rules operating under copyright law to the rules of private bargaining by contract, effectively sidesteps the built-in limitations of copyright law. In this context Benkler asserts that it is important to ascertain the 'background of law' against which parties negotiate. If certain uses are excluded from the contract by law, eg., fair use, then they cannot be bargained away.[50] If they can be bargained away, the use of mass market agreements is likely to see the balance shift in favour of the rights owner and the avoidance of any need to consider any First Amendment concerns.

Professor Netanel also challenges the conclusion that copyright does not give rise to any First Amendment issues on the basis that: '[a]s copyright law has evolved over recent decades, copyright owner prerogatives have steadily become more bloated.'[51] He argues that it is now time to revise the conclusion that copyright is immune from First Amendment scrutiny. Citing a number of examples,[52] Netanel explains that in

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[48] Y Benkler, "Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain" (1999) 74 *New York University Law Review* 354, p 410. Professor Benkler identifies three major components of further enclosure of the public domain. They are: the anti-circumvention measures of the DMCA, the entrenchment of standard form agreements under proposed UCC 2B (now Uniform Computer Information Transactions Act ('UCITA')) and the protection of information databases by the *Collections of Information Anti-Piracy Act* 1998 (US). He argues that all three directly raise First Amendment concerns.

[49] Benkler, above n 48, pp 413-414. The UCITA was a model law proposed to regulate enforcement of computer transactions. It is regarded as a 'failed' law, having been enacted in only two states: Maryland and Virginia.

[50] Benkler, above n 48, p 433.

[51] N Netanel, "Locating Copyright Within the First Amendment Skein" (2001) 54 *Stanford Law Review* 1, p 4. See also N Netanel, "Copyright and Democracy" (1996) 106 *Yale Law Journal* 283.

[52] *Houghton Mifflin Co v Noram Publishing Co,* 28 F. Supp. 676 (1939) (SDNY): a college student translated substantial portions of Adolf Hitler's *Mein Kampf*, to demonstrate that the official English translation had been heavily edited and did not accurately reflect the views of Adolf Hitler, as contained in the original version of that book; *Belmore v City Pages Inc* 880 F. Supp. 673 (1995)(D. Minn): a newspaper reprinted a racist story, which had originally appeared in the Minneapolis police department newsletter, to demonstrate the racist views held by some members of the police department; *Religious Technology Center v Netcom* 923 F. Supp. 1231 (1995) (N. D. Ca.): a critic (and former member) of the Church of Scientology published extracts from the official Church texts on a bulletin board critical of the beliefs and practices of the Church; *Hustler Magazine Inc v Moral Majority Inc* 796 F. 2d 1148 (1986) (9th Cir): Reverend Jerry Falwell sent copies of a parody advertisement featuring him, which had been published in Hustler Magazine, to his supporters in order to generate

many instances direct quotation of the words being discussed is far more effective than paraphrasing:

> *[I]n each of these instances, the defendant's speech would have been far less effective, far less believable, and of far less value to the intended audience, without reproducing (or translating) verbatim substantial portions of the author's work. As these examples illustrate, particular combinations of words, like graphics, are at times sufficiently central to conveying a message that to suppress them raises serious First Amendment concerns. In instances in which those combinations of words or graphics are another's copyrighted expression, copyright law's idea/expression dichotomy provides inadequate protection for First Amendment interests.*[53]

Netanel noted that the expansion of the nature of rights granted to copyright owners by the 1976 *Copyright Act* has narrowed the ability for others to create derivative works without the permission of the copyright owner. Further, in relation to the fair use doctrine, he stated that its protection of First Amendment values has been weakened, particularly by the market harm approach adopted by the Supreme Court in *Harper & Row Publishers, Inc v Nation Enterprises*.[54] Netanel also discussed the threats posed to First Amendment values by the extended term of copyright[55] and the use of anti-circumvention technology and contract.[56] He concluded:

> *In sum, copyright might actually operate to diminish speaker and content diversity. It both helps to fuel ongoing media consolidation and erects entry barriers before would-be speakers who wish to incorporate or reformulate media conglomerates' existing expression. To the extent that copyright serves as "the engine of free expression", it does so in a highly partial manner. Copyright's benefits inure disproportionately to large media firms that already own vast inventories of copyrighted expression. Copyright's*

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campaign funds to further his fight against Hustler and pornography generally; *Salinger v Random House Inc* 811 F. 2d 90(1987) (2d Cir.): a biographer used quotations from the unpublished letters of the reclusive author J.D. Salinger in a biography of Salinger; *Worldwide Church of God v Philadelphia Church of God Inc* 227 F. 3d 1110 (2000)(9th Cir.): use of an 'official' Church tract, no longer supported by the Church, by an offshoot group of the Church claiming to adhere to the original teachings of the founder of the Church.

[53] Netanel, "Locating Copyright within the First Amendment Skein," above n 51, p 16.

[54] See above n 42 and Netanel, above n 51, p 21.

[55] Netanel, above n 51, pp 23-24.

[56] Netanel, above n 51, pp 24-26.

> *burdens fall most heavily on individuals, nonprofits, and small independents that do not.*[57]

Netanel argues that, rather than accepting an oversimplified and now outdated conclusion that copyright does not entail any First Amendment considerations, judicial scrutiny should be applied to determine whether the provisions of the *Copyright Act* burden more speech than is necessary to further the Constitutional purposes of copyright and ensure that the enforcement of copyright allows more diverse forms of expression and public debate.[58]

Thus the gradual legislative expansion of copyright owner's rights, combined with new models of digital distribution, appears to have re-opened the question of the role of the First Amendment in the copyright context.

2.3 Eldred v Ashcroft: Fair use as the 'built-in' accommodation of free speech

When confronted directly with the question of whether the copyright term extension under the DMCA violated the Constitutional grant of power, a majority of the United States Supreme Court in *Eldred v Ashcroft* stated that the fair use defence represents part of copyright's 'built-in First Amendment accommodations.'[59] So confident was the majority of this point that it did not trouble itself to consider or explain this proposition any further, relying on implicit conclusions drawn in earlier cases.[60]

Whilst this does not address Netanel's suggestion that the *content* or actual nature and scope of the law required further scrutiny, it would appear to foreclose the matter of the relationship between copyright and the First Amendment. It does, however, suggest that contractual erosion of the fair use defence may be open to scrutiny on First Amendment grounds.[61] In other words, it provides some justification to prevent further alteration of the copyright bargain such as the subjugation of the defence of fair use (and hence by analogy, fair dealing) to technological protection measures and contractual enclosure.[62] It can be argued, on the basis of *Eldred v Ashcroft*, that fair use is a key balancing device built into copyright law to protect the constitutionally

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[57] Netanel, above n 51, p 28. On the other hand, Netanel acknowledges that by creating a strong and financially independent media, copyright does play a role in promoting First Amendment values.

[58] Netanel, above n 51, p 86. See also Birnhack, "The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up," above n 16.

[59] *Eldred v Ashcroft* 537 U.S. 186 (2003) at 219.

[60] See, for example, *Harper & Row Publishers, Inc v Nation Enterprises* 471 U.S. 560 (1985) (US SC); *Campbell v Acuff-Rose* 510 U.S. 569 (1994) (US SC); *LA News Service v Tullo* 973 F. 2d 791 (1992) (9th Cir.); *Dr Seuss Enterprises v Penguin Books* 109 F. 3d 1394 (1996) (9th Cir.) at p 1399; see *Eldred v Ashcroft,* above n 59. See also Whyte DJ in *United States v Elcom Ltd* 203 F. Supp 2d 1111 (2002) at 1143 (Citing *Corley* 273 F.3d 429 (2001) at 458): 'There is no direct authority for the proposition that the doctrine of fair use is co-extensive with the First Amendment, such that "fair use" is a First Amendment right. As noted by the Second Circuit, "the Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for such a requirement."'

[61] See N Netanel "Copyright and the First Amendment: What Eldred Misses and Portends" in J Griffiths and U Suthersanen (eds.) *Copyright and Free Speech: Comparative and International Analysis,* (Oxford University Press, 2005) at p 151.

[62] See further, Birnhack, "Copyright Law and Free Speech after Eldred v Ashcroft", above n 16.

prescribed public interest in freedom of speech. However, it is not clear how this could be translated to the Australian context. This will be discussed further below.

3. The Internet: A democratic digital society or a global marketplace?

In considering the need for protection of freedom of communication within the doctrine of fair dealing in the electronic environment, it is necessary to consider any new or unique attributes of that environment. Does the Internet promote or challenge the principle of freedom of communication? Contrary to initial belief that the Internet would provide a forum for limitless points of view, it has been argued that the electronic environment may provide less opportunity for freedom of communication than its offline equivalent.[63]

Despite the early promise of the Internet as an avenue for mass communication with low entry costs, a small number of large media players are now emerging as dominant on the Internet as in other spheres.[64] Successful independent start ups are rapidly acquired by bigger interests.[65] Content is increasingly tailored towards mass markets by a small number of content providers.[66] Specialist content is still available, but in low-tech, low-cost fora, such as individual non-commercial websites that are difficult to find and access and may be less attractive to users. Content providers are increasingly trying to tie television, phone and internet content together to keep users 'tuned in' (and hence paid up) to their content.[67]

Professor Cass Sunstein has also argued that the Internet may not, in fact, fulfill its democratic promise.[68] The increasing commercialisation of the Internet brings with it a consistent approach to the provision of information and services. To the proponents of a commercial Internet the most important commodity is attention – the attention of a percentage of the millions of people online. Merchants compete for attention by purporting to offer a unique service. Many Internet businesses begin by focusing on how to attract consumer attention and only later consider how they can harness that attention to make money. For example, Napster's business plan consisted of attracting

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[63] N Netanel, "Market Hierarchy and Copyright in Our System of Free Expression" (2000) 53(6) *Vanderbilt Law Review* 1879, pp 1886-1887. See also N Netanel, "Copyright and a Democratic Civil Society" (1996) 106 *Yale Law Journal* 283.

[64] Netanel also reminds us that citizens of many countries remain unconnected, see Netanel, above n 63, p 1887.

[65] For example, YouTube was acquired by Google, Inc in November 2006 for US$1.65 billion and MySpace was acquired by News Corporation in July 2005 for US $580 million.

[66] 'If current trends continue, indeed, the communications market will exhibit unprecedented levels of vertical as well as horizontal integration, enabling each telecommunications conglomerate to provide and exercise control over a full component of access, distribution and content.' Netanel, "Market Hierarchy", above n 63, p 1888 (see also fn. 30).

[67]J Adamson, 'Don't just sit there-do something!', *The Age*, 26 February 2007, http://www.theage.com.au/news/web/dont-just-sit-there--do-something/2007/02/25/1172338459196.html?page=fullpage#contentSwap1, accessed 26 February 2007.

[68] C Sunstein, *Republic.com* (Princeton University Press, Princeton and Oxford, 2001). For a rebuttal of Sunstein's thesis, see Y Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain" (2003) 66 *Law and Contemporary Problems* 173. See also Y Benkler, *The Wealth of Networks*, (Yale University Press, 2006).

a 'critical mass' of users through the free provision of music share software and the search engine. Only after the sufficient number of loyal users had been attracted would they then be converted to paying users or subscribers.[69] Similarly, Google has grown from a simple search engine into a US$100 billion business, with attendant complications.[70]

Increasingly, commercial providers are offering to tailor web sites to user needs, the terms of which are prescribed by the provider. 'Push services' such as targeted daily, weekly or monthly emails also operate to ensure that users are constantly reminded of a particular provider without being required to search for content themselves. Sunstein argues that, rather than increasing democracy, such tailoring of content provides a strong threat to it. He argues that by enabling users to filter out or ignore all items that do not interest them and to interact only with other like-minded people, people not only become isolated from other points of view but can also become more extreme in the points of view they already hold.[71]

Essentially, Sunstein's argument suggests that we therefore need to be wary about claims that the market itself will increase democracy and choice by empowering consumers.[72] Therefore, if society values the model of encouraging and rewarding creation traditionally reflected by copyright law and protected by concepts of freedom of expression, it needs to ensure that model is not subverted by contract.

4. Implications for Australia

So what does this suggest regarding the existence within the Australian law of fair dealing of some protection for freedom of communication?

As noted above, the protection of freedom of communication in Australia is very limited. The implied freedom of political communication does not confer an absolute right on individuals, rather it limits legislative or executive measures which attempt to restrict the exercise of the right.[73] The implied freedom will be infringed prima facie

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[69] See *A&M Records, Inc v Napster* 114 F. Supp. 2d 896 (2000) at 902: 'Defendant eventually plans to "monetize" its user base…Potential revenue sources include targeted email; advertising' commissions from links to commercial websites; and direct marketing of CDs, Napster products, and CD burners and rippers.' Despite the fact it did not collect any revenue from users or advertisers, Napster had at the time of the injunction application an estimated value of 60-80 million dollars (US).

[70] See A Ignatius, "Can We Trust Google with Our Secrets?" February 26, 2006, *Time Magazine*, pp 40-49 and D Vise with M Malseed, *The Google Story*, Macmillan, New York, 2005.

[71] '[T]he Internet creates a large risk of group polarization, simply because it makes it so easy for like-minded people to speak with one another-and ultimately to move toward extreme and sometimes even violent positions. All too often, those most in need of hearing something other than echoes of their own voices are least likely to seek out alternative views. Often the result can be cybercascades of a highly undesirable sort, as false information spreads to thousands or even millions.' Sunstein, above n 68, p 199.

[72] See also J Goldsmith and T Wu, *Who Controls the Internet*, (Oxford University Press, Oxford, 2006).

[73] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560: The relevant sections 'do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.' See further, M Richardson, "Freedom of Political Discussion and Intellectual Property Law in Australia" [1997] 11 *European Intellectual Property Review* 631.

if a law operates to 'effectively burden freedom of communication about government or political matters either in its terms, operation or effect.'[74] Chesterman states that 'the prospect of being sued for damages for defamation (or some related tort) constitutes a sufficient "burden" for the purposes of this principle: That is, a law may "burden" freedom of communication without necessarily imposing criminal liability.'[75] However, a restriction imposed pursuant to the terms of a contract, to which the speaker was a party, would not be considered a burden imposed by law.[76] This means that whilst a restriction imposed by the *Copyright Act* might fall foul of the protection, a restriction imposed by contract would not. Further, the implied freedom is subject to certain exceptions. Those exceptions must be:

> *…reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitition").*[77]

Therefore, it would not operate to limit contractual restrictions, such as an end user licence agreement. Chesterman concludes that the doctrine 'applies to only a very limited range of subject matter being matters directly related to the political process, such as voting, representation and the electoral system.'[78]

Therefore most communications would fall outside the scope of its application. It is also wrong to assume that all threats to freedom of communication will come from the public sector. As it is currently understood, the doctrine would not operate to permit an individual to defend an infringement action brought by a non-government entity, yet powerful global media and content corporations may be just as influential as

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[74] *Lange*, above n 73, at 567. See also *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582.

[75] M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, Aldershot, 2000), p 65.

[76] Chesterman, above n 75, p 66.

[77] *Lange v Australia Broadcasting Corporation* (1997) 189 CLR 520 at 567. See further *Levy v State of Victoria* (1997) 198 CLR 579 and *Kruger v Commonwealth* (1997) 190 CLR 1 which provide further consideration of this test.

[78] Chesterman suggests that the concept of political communication is limited in the following manner:

'(a) It does not extend to "public affairs" or "matters of public interest" generally.

(b) It is skewed towards public sector matters, thereby excluding private sector issues which may be of great importance to the public as a whole or to sections of the public.

(c) It does not extend to "discrete State matters".

(d) It possibly may not extend to matters solely concerning the judicial arm of government.

(e) It is determined judicially, not according to the intentions of individual speakers who seek to influence the agenda of public debate.' Chesterman, above n 75, p 74.

government and exert their own level of censorship.[79] Therefore, can it be argued that there is any protection found in the broader right of freedom of communication within the fair dealing doctrine?

Professor Chesterman has argued that the decision of the High Court in *Commonwealth v John Fairfax & Sons* implements free speech values without describing them as such.[80] The case concerned the proposed publication of a book containing lengthy extracts from documents prepared by the Australian government relating to foreign and defence policy in the period 1968-1975. The Commonwealth sought to restrain publication of the book on copyright and breach of confidence grounds. Mason J recognised that in considering the question of whether to restrain the publication of government information, the Court will determine that claim 'by reference to the public interest' (at p 52). Therefore, he refused to grant an injunction on the basis of breach of confidence. He did, however, grant an injunction on the basis of breach of copyright on the grounds that the extracts themselves were too long to be justified on the basis of a fair dealing. Although the decision was based largely on breach of confidence, the Commonwealth succeeded in part on the copyright argument. Therefore, Chesterman argues that there is some implicit recognition of free speech values existing within the broader laws of copyright. [81] The Copyright Law Review Committee in its *Copyright and Contract* report endorsed the view that the case provides some scope for consideration of freedom of expression issues within the parameters of copyright.[82]

Whilst this is a tenuous argument, it does accord with the fundamental notion that copyright is granted partially to reward investment in creations and partially to protect the public interest. That public interest consists of the need to use copyright materials for the purposes of education, research, access to information and cultural development, in other words the aspects of copyright reflected in the cultural need for freedom of communication. In Australia, fair dealing is the only 'safety-zone', outside the specific political communications exception, for freedom of communication.[83] Therefore there is a need to preserve the fair dealing exceptions, and indeed, to interpret them with this purpose in mind.[84] This view is also given support by the observations of Kirby J in *Stevens v Sony*, a case considering the interpretation of the provisions of the Copyright Act relating to the protection of technological protection measures. Kirby J stated that in altering the laws of copyright, Parliament needs to be

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[79] P B Hugenholtz, "Copyright and freedom of expression" in N Netanel and N Elkin-Koren,(ed) *The Commodification of Information*, above n 6, at 247.

[80](1980) 147 CLR 39.

[81] Chesterman, above n 75, p 7.

[82] Copyright Law Review Committee, Commonwealth of Australia, *Copyright and Contract* (2002), para. 5.92- 5.93.

[83] The fair dealing provisions are: research and study (ss 40 (works) and 103C (audio-visual items)), criticism or review (ss 41 (works) and 103A (audiovisual items)), reporting of news (ss 42 (works) and 103B (audio-visual items)) and parody or satire (ss 41 A (works) and 103AA (audio-visual items)).

[84] See R Burrell and J Stellios "Copyright and Freedom of Political Communication in Australia" in Griffiths and Suthersanen (ed), above n 61.

aware of its Constitutional limitations.[85] With respect to fair dealing, he argued that allowing contract to displace the role of fair dealing would alter the balance struck by copyright law in Australia and this position should not be accepted lightly.[86]

The recent introduction of a specific parody and satire defence within the fair dealing provisions of the Copyright Act represents a significant enhancement to the rights of freedom of communication in Australia.[87] New section 41A provides:

> *A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purposes of parody or satire.*[88]

This amendment appears to have sprung from the responses to the Fair Use *Issues Paper*,[89] and has been subject to harsh criticism from some groups and enthusiastic approval by others. Whilst the origins of the defence seem to have been in the US protection of parody under the doctrine of fair use, the addition of satire is a uniquely Australian development. The Attorney-General, Mr Philip Ruddock, appeared to adopt the changes as his contribution to the Australian way of life, claiming in a note published in *The Daily Telegraph*, that:

> *Australians have always had an irreverent streak. Our cartoonists ensure sacred cows don't stay sacred for very long and comedians are merciless on those in public life. An integral part of their armoury is parody and satire- or, if you prefer, "taking the micky" out of someone. However, our copyright laws have until now done very little to protect the way people use others works or images to parody and satirise others in the name of entertainment. I have a bill currently before the Senate which will ensure Australia's fine tradition of satire is safe. There will be a parody and satire exception for what the law calls "fair dealing".*[90]

This enhancement is countered by the failure to take the opportunity to enact corresponding exceptions to the technological protection measures enforcement provisions or provisions preventing contracting out of such exceptions. The TPM *Exceptions Review* had recommended that there should be exceptions to liability for TPM circumvention for fair dealing with copyright material for criticism, review, news reporting, judicial proceedings, and professional advice.[91] This recommendation

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[85] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (6 October 2005) ('Stevens v Sony') at para 215-216. These conclusions related primarily to interfering with the property rights of the owner of the copyright product.

[86] *Stevens v Son*y, above n 84, at para 209-210.

[87] Introduced by the Copyright Amendment Act 2006.

[88] See also s 103AA which applies to audio-visual items.

[89] Above n 4.

[90] Philip Ruddock 'Protecting precious parody' *The Daily Telegraph*, 30 November 2006, http://www.news.com.au/dailytelegraph/story/0,22049,20842345-5001031,00.html.

[91] Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions*, February 2006

reflected the conclusions of the Copyright Law Review Committee report on *Copyright and Contract*, which, following its review of the interaction between copyright and contract in the digital environment, had concluded that fair dealing is 'fundamental to defining the copyright interest.'[92] On the basis of its finding that agreements were being used to exclude or modify the exceptions, including fair dealing, it therefore recommended that the Copyright Act be amended to provide that any agreement or provision of an agreement which sought to exclude or modify fair dealing would be of no effect.[93] No response has been made by the Government to the *Copyright and Contract* report, and the CLRC was disbanded in 2005. However, recent comments from the Attorney-General's Department[94] and the Government indicate that a response may yet be forthcoming.[95]

A new 'flexible dealing' exception was also enacted by the Copyright Amendment Act 2006. Sub-section 200AB(1) provides:

> *(1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:*
>
> *(a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;*
>
> *(b) the use is covered by subsection (2), (3) or (4);*
>
> *(c) the use does not conflict with a normal exploitation of the work or other subject-matter;*

('TPM Exceptions Review'). The terms of reference of the Committee were to review whether Australia should include any specific exceptions to the liability scheme in addition to those specified in Art 17.4.7(e) (i) to (vii).

[92] Copyright Law Review Committee, Commonwealth of Australia, *Copyright and Contract* (2002). para. [2.01].

[93] CLRC, above n 92, para. [7.49]. This conclusion is also supported by others, such as the Intellectual Property and Competition Review Committee. See Intellectual Property and Competition Review Committee, Commonwealth of Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement, Final Report,* (2000), at 13: 'The Committee is broadly satisfied that the Government's approach to the issues associated with technological protection measures preserves a reasonable balance between competing interests. However, we would be concerned if the use of technological locks, perhaps accompanied by greater reliance on contract, were to displace or in any way limit the effectiveness of fair dealing provisions. As a result, we urge that the review of the provisions of the Digital Agenda Act encompass a careful consideration of the evolving role of technological measures in the copyright system.'

[94] See testimony of Ms Helen Daniels, Hansard, Senate, Standing Committee on Legal and Constitutional Affairs, 7 November 2006, *L&CA* 46.

[95] See Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", undated, available at http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP7B3B6A5CD28F19B5CA25704C001A5627 at 26 October 2006, p 17

> *(d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.*

Paragraphs (a), (c) and (d) echo the formulation of the 'three-step test'.

The exception is limited not only by the purpose for which the use is being made, but also by the person making the use: sub-section (2) applies to use made by or on behalf of a body administering a library or archives for the purpose of maintaining or operating the library or archives; sub-section (3) applies to a use made by or on behalf of a body administering an educational institution for the purpose of giving educational instruction, and sub-section (4) applies to a use made by or on behalf of a person with a disability that causes difficulty in reading, viewing or hearing the work (or other subject matter) in a particular form for the purpose of the person with the disability obtaining a reproduction or copy of the work (or other subject matter) in another form or with a feature that reduces the difficulty. Each of these uses is subject to it not being made partly for the purposes of obtaining a commercial advantage or profit. [96] In creating such an exception, Australia has introduced a unique hybrid exception, unlike fair dealing, fair use or the specifically enumerated exceptions in the EU Information Society Directive.[97]

Thus Australia has recently expanded the scope of exceptions granted to copyright users, whilst tightening the application of technological protection measures provisions and other enforcement provisions.[98]

5. Conclusions

The above discussion reveals that although Australian law recognises an implied right of communication with respect to political matters, that right does not extend far enough to protect communications relating to general matters of public interest. A general right of freedom of communication is however protected within copyright law, reflected in the balance of owners' and users' rights, which ensures the continuity of the creative process. The recent amendments to the Copyright Act protecting parody and satire also reflect an attempt to balance economic and non-economic interests. This represents a shift away from the economic/market failure approach to copyright. However, the introduction of these defences does not address the potential to contract out of the defences or to avoid them by use of a technological protection measure. If such defences have been introduced to protect the public interest in freedom of communication, the ease of transacting in the electronic marketplace does not itself provide any justification for rendering the interest irrelevant.

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[96] Sub-section (6) provides that cost recovery does not constitute a commercial advantage.

[97] 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, Art 5.

[98] This article does not consider the new personal use exceptions as they relate to consumptive rather than transformative uses, see for example, s 111 (time shifting of broadcasts) and s 109A (format shifting of sound recordings).

These interests remain just as important in the online environment as they do in the offline world. A contractual model of distribution and use, made possible by the existence of easy low-cost transactions, will not necessarily replicate the public/ private interest balance of copyright law.[99] As Professor Cohen notes, contractual control changes both the amount and nature of access granted to users. Notably, many uses which do not currently require licences, such as fair use or the use of uncopyrightable ideas, may be subject to contract. Further, contractual arrangements exclude the public interest element built into copyright: 'licensing decisions designed to maximize individual or private welfare may not maximize society's.'[100]

This paper advocates a consideration of freedom of communication in the context of both copyright and copyright-related transactions, accommodating the rights of both owners and users. The US Supreme Court has recently affirmed that fair use represents an inbuilt accommodation of First Amendment values within copyright law.[101] Australian copyright law similarly should recognize the importance of the protection of its more fragile rights of freedom of communication through its law of fair dealing.

In Australia, there is no statutory or common law protection of the public interest. The only explicit recognition granted to freedom of communication is in the limited context of freedom of political communication. Therefore, the protection of a more general public interest in freedom of communication, encompassing education, research and access to information, criticism, review and parody and satire, must lie within the doctrine of fair dealing as part of the copyright balance.

The rights granted to users by the provisions of the *Copyright Act* relating to research and study, criticism and review, parody and satire, and news reporting are a vital means of ensuring continued public access to and use of copyright material.[102] Therefore, owners should not be permitted to contract out of the copyright balance. Having introduced a measure of protection of freedom of communication within the

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[99] J Cohen, "Copyright and the Perfect Curve" (2000) 53 *Vanderbilt Law Review* 1799. See also: D Burk, "Muddy Rules for Cyberspace" (1999) 21 *Cardozo Law Review* 119; D Zimmerman, "Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water" (1999) *Annual Survey of American Law* 403 and G Evans, "Opportunity Costs of Globalizing Information Licenses: Embedding Consumer Rights Within the Legislative Framework for Information Contracts" (1999) 10 *Fordham Intellectual Property, Media and Entertainment Journal* 267.

[100] Cohen, above n 99, p 1809. (footnote omitted). See also J Cohen, "Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management'" (1998) 97 *Michigan Law Review* 462; M Lemley, "The Economics of Improvement in Intellectual Property Law" (1997) 75 *Texas Law Review* 989; L Pallas Loren, "Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems" (1997) 5 *Journal of Intellectual Property Law* 1 and Netanel, "Copyright and a Democratic Civil Society", above n 63.

[101] See *Eldred v Ashcroft*, discussed above at n 59.

[102] The Supreme Court of Canada has recently stated that fair dealing is a 'user's right.' See *CCH Canadian Ltd v Law Society of Upper Canada* (2004) 2004 SCC 13 (File NO: 29320) at para. [48] per. McLachlin CJ. See further, para. [70]: 'The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyrights Act's* balance between the owner's rights and user's interests.'

fair dealing laws, this protection should be extended to copyright dependent transactions.