

PART V — EXCEPTIONS TO INFRINGEMENT

I Introduction

A Contextualisation

1 Rationale and purpose of exceptions

Australian copyright law mediates the interests of copyright owners with those of copyright users and the broader public by providing for a series of specific exceptions to copyright infringement. These exceptions are designed to ensure that copyright does not impede efficient and culturally desirable uses of copyright materials by the public. They reflect a position that is thought to represent a fair and reasonable balance between the rights of property owners and those of consumers and society more generally.

As Phillips and Firth have observed, the each exception to infringement

may be seen as serving one or more of four laudable objectives[:] ... the administration of justice, the advancement of education, the protection of the public's right to be informed and fixing the limits beyond which it is unreasonable to assert a proprietary right in one's own or another's work.¹

Although the exceptions may be viewed as defences to copyright infringement, in that their successful pleading will result in the failure of an action for copyright infringement, or a related action, they are more accurately described as exceptions. Certainly, the language of 'defence' is not used in the *Copyright Act*.

2 Statutory exceptions

In addition to the fair dealing statutory exceptions, a number of specific exemptions exist in relation to specific uses of works. These exceptions are delimited by reference to the:

- Type of the work being used; and
- The identity of the party using it; or
- The context or purpose in which or for which it is being used.

Finally, there may exist certain non-statutory defences to infringement, such as a public interest defence. However, their provenance and scope is of some uncertainty.

3 Other limitations on copyright

Existing in parallel to these exceptions and defences are the *Copyright Act* provisions relating to compulsory licensing. This is another way in which the Act seeks to limit the rights of copyright owners. Compulsory licensing entitles the copyright owner to royalties for authorised exercise of certain copyrights, but not to maintain infringement proceedings. The compulsory licensing regime was discussed in Chapter III with particular reference to the Copyright Tribunal's role in fixing royalties and adjudicating disputes.

A balance is also sought to be achieved through two other mechanisms. First, remedies for copyright infringement are limited to prevent damages for innocent infringement: see above

¹ Jeremy Phillips, Alison Firth, *Introduction to Intellectual Property Law* (2001) [14.17].

Chapter III. Finally, specific immunities, such as those that protect carriage service providers under pt V div 2AA, are created by the Act.

4 *Analysing the impact of these limitations*

The combined effect of these provisions is to offer some level of concession to the cultural and institutional needs of copyright users. However, the balance is far from perfect. If nothing else, the exceptions leave a significant divergence between what copyright law requires of citizens and the actual practices of those citizens.

The situation is as Lord Templeman observed in *CBS Songs Ltd v Amstrad Consumer Electronics plc* (at 1060):

From the point of view of society the present situation is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly — lavish expenses, extravagant earnings and exorbitant profits — and that the blank tape is the only restraint on further increase in the price of records. Whatever the reasons for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.

Indeed, whether the ‘millions’ of breaches is the result of ignorance or malicious copyright users or the result of unrealistic and oppressive copyright laws is at least open to question. Regardless of the causes of such infringements, however, the manifest lack of respect for copyright laws suggests that they must be brought into line with modern practices, behavioural standards and technical norms if they are to retain (or, perhaps, acquire) any semblance of moral authority.

B *The Statutory Exceptions*

The statutory exceptions created by the *Copyright Act* permit a user of copyright material to engage in conduct that would otherwise fall within the scope of the exclusive rights allotted to the copyright owner.

1 *Fair dealing*

It will be seen that the *Copyright Act* creates, in pt III div 3, three fair dealing exceptions with respect to works, and that these are replicated with respect to other subject matter in pt IV div 6 of the Act.

To fall within these exceptions, the dealing made with the copyright material must actually be a ‘fair’ one. These exceptions are also confined to certain purposes, for which the dealing must be made if it is to fall within their scope:

- Research or study: *Copyright Act* ss 40, 103C;
- Criticism or review: *Copyright Act* ss 41, 103A; or
- Reporting news: *Copyright Act* ss 42, 103B.

Note that fair dealing does not apply to published editions of works. For simplicity, however, it is referred to below as applying to works and subject matter.

2 Educational uses

- Extracts from a collection of works for educational use: *Copyright Act* s 44;
- A single reproduction by a student or teacher in class or for an examination question or answer: *Copyright Act* s 200(1);
- Sound recordings or broadcasts by an educational institution for educational purposes: *Copyright Act* s 200(2), 200(2A); or
- Performance by a teacher or student in class for the purpose of educational instruction: *Copyright Act* s 28.

3 Artistic works

- Painting, drawing, engraving, photographing or including in a film or television broadcast:
 - A work of artistic craftsmanship or sculpture permanently situated in public space: *Copyright Act* s 65;
 - A building or model of a building: *Copyright Act* s 66;
- Incidentally including an artistic work in a film or television broadcast: *Copyright Act* s 67;
- Publication of any of the preceding materials: *Copyright Act* s 68;
- Use of an artistic work by an author in a later work, providing that the main design of the earlier work is not repeated or imitated: *Copyright Act* s 72;
- Reconstructing a building from a building or building plans: *Copyright Act* s 73; or
- Reproducing an artistic work by applying it or its corresponding to an article industrially produced: ss 74–77 (see below Chapter VI).

4 Films

- Exhibiting news footage in public more than 50 calendar years after the events depicted occurred: *Copyright Act* s 110(1);
- Exhibiting a work incorporated within a film after copyright has expired in the film: *Copyright Act* s 110(2); or
- Using a sound recording associated with a film but in a non-derived sound recording: *Copyright Act* s 110(3).

5 Performances

- Reading or reciting in public an extract of reasonable length from a published literary or dramatic work, with sufficient acknowledgement: s 45;
- Operating reception equipment such as a television or radio at residential premises as part of amenities: *Copyright Act* s 46; or
- Causing a sound recording to be heard in public in residential premises as part of amenities provided exclusively to residents or guests as part of charitable activities of a club or society: *Copyright Act* s 106.

6 Communication and broadcasting

- Making a film or sound recording of a television or sound broadcast for private and domestic use: *Copyright Act* s 111;
 - However, this does not exclude the possibility of infringing the underlying works in the broadcast;

- Causing to be heard in public or broadcasting a sound recording not made in Australia: *Copyright Act* s 105;
- Making a film or sound recording of a work or sound recording made by the same maker for the purpose of making a broadcast: *Copyright Act* ss 47(1), 70(1), 107; or
- Making a film or sound recording of a broadcast of a literary, dramatic or literary work, sound recording or a film, for the purpose of a simulcast: *Copyright Act* ss 47AA, 110C.

7 *Temporary copying*

- Making a temporary copy of a work or other subject matter as part of a technical process or sending or receiving authorised communications: *Copyright Act* ss 43A, 111A; or
- Reproducing a work or subject matter as an incidental part of a technical process: *Copyright Act* s 43B, 111B.

8 *Computer programs*

- Reproducing as part of the normal running of the program for the purpose of understanding the program's operation: *Copyright Act* s 47B;
- Reproducing a computer program for the purpose of making a backup copy: *Copyright Act* s 47C;
- Reproducing or adapting a computer program for the purpose of making an interoperable program or article: *Copyright Act* s 47D;
- Reproducing or adapting a program in order to correct programming errors: *Copyright Act* s 47E;
- Reproducing a program for the purpose of security testing: *Copyright Act* s 47F
 - These defences cannot be excluded or limited by agreement; for example, in an end user licence agreement

9 *Importing*

- Parallel importation of books and published editions only: *Copyright Act* ss 44A, 112A;
 - Does not include books of musical works, computer manuals or periodical publications;
- Parallel importation of certain sound recordings in defined circumstances: *Copyright Act* ss 44D, 112D;
- Importing an accessory that embodies a literary, dramatic or musical work along with the article sound recording itself: *Copyright Act* ss 44C, 44D(4);
- Parallel importation of non-infringing copies of computer programs: *Copyright Act* s 44E; or
- Parallel importation of electronic, literary and musical articles, and published editions of such articles: *Copyright Act* ss 44F, 112DA.

10 *Libraries and archives*

- Dealings with material by a librarian in a Parliamentary library for the sole use of a Member of Parliament: *Copyright Act* ss 48A, 10A;
- Reproducing an article or published work by a librarian and supplying that work to a person for the purpose of their research or study or to make it available online within library premises: *Copyright Act* s 49;
- Communicating an article or published work to another library for these purposes: *Copyright Act* s 50;

- Reproducing and communicating an unpublished work, sound recording or film for research or study, use by a Member of Parliament or for publication: *Copyright Act* ss 52, 110A;
- Reproducing and communicating a work by an archive: s 51AA;
- Reproducing or communicating a work by a librarian for the purpose of preservation, replacement, administration or making available online within library premises: ss 51A, 110B; or
- First publishing an unpublished orphan work (identity of copyright owner is unknown) or electronically transmitting, broadcasting or performing in public the publication: *Copyright Act* s 52.

11 *Judicial proceedings and statutes*

- Using a work or subject matter contained in judicial proceedings or reports thereof for legal advice given by a practitioner: *Copyright Act* ss 43, 104; or
- Making one copy by reprographic means of a statute, judgment, reasons or like document: *Copyright Act* s 182A.

C *Summary Table*

The most important statutory exceptions are summarised in the following reference table:

Material	User	Dealing	Purpose	Section
–	–	Fair dealing	Research or study	s 40 (works) s 103C (other)
–	–	Fair dealing	Criticism or review	s 41 (works) s 103A (other)
–	–	Fair dealing	Reporting news	s 42 (works) s 103B (other)
Sculpture or craftsmanship permanently in public space	–	Painting, etc, photographing, film or television broadcast	–	s 65
Artistic work	–	Incidental inclusion in film or television	–	s 66
Soundtrack in a film	–	Using a separate copy of the sound recording	–	s 110(3)
Published literary or dramatic work	–	Reciting in public a reasonable-length extract	–	s 45
–	–	Temporary copying as part of a technical process	–	s 43A (works) s 111A (other)

–	–	Incidental reproductions as part of using	–	s 43B (works) s 111B (other)
Computer program	–	Reproduction	Making a backup copy	s 47C
Article in published work	Librarian	Reproduction	Research or study; making available online	s 49

D Comparative Analysis

The United States approach to exceptions is reflected in *Copyright Act 1976* (US) s 107. This provisions creates an 'omnibus and open-ended' defence of 'fair use'. It is neither particularised nor limited by context, as the Australian exceptions are. The fair use defence encompasses parody, satire and other forms of criticism.

In *Campbell*, for example, rap song version was produced of the musical work entitled 'Pretty Woman'. The derivative work juxtaposed romantic musings with modern hedonism (see, eg, comments about the naivety of the original in light of the street life in modern day America). This was held to be a transformative fair use.

This approach represents an 'elastic' view of fair use; no value judgment is expressed about the quality of the parody. Rather, it must simply be transformative. That is, it must be productive so as to produce some transformation of copyright, whether in the form of criticism, parodic treatment or some other addition. The use cannot simply be *consumptive* (using the treatment as a substitute for the original).

In *Leibovitz*, for example, it was alleged that a photograph of a pregnant actress was reproduced in a movie poster. Although there was a reproduction, it was held to amount to a parodic treatment because it levelled ridicule at the original for its pretentiousness. This case is suggestive of a liberal construction to the exceptions in the United States, largely influenced by first amendment jurisprudence.

Sony Betamax affirmed that time-shifting was fair use, despite it being a consumptive rather than productive use of the original television material. Because of this, there was no contributory (secondary) infringement because the devices were capable of substantial non-infringing uses (those being the time-shifting, which was fair use).

II Fair Dealing

A For the Purpose of Research or Study

In order to fall within this exception, a dealing must be fair and associated with research or study.

1 Definition

The fair dealing for the purpose of research or study exception is defined in ss 40 and 103C of the *Copyright Act*. The provision in relation to works reads as follows:

Copyright Act 1968 (Cth) s 40 — Fair dealing for purpose of research or study:

- (1) A fair dealing with [work], or with an adaptation of [work], for the purpose of research or study does not constitute an infringement of the copyright in the work.
- (1A) A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.
- (1B) In subsection (1A) the expression **lecture notes** means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.
- (2) ... the matters to which regard shall be had, in determining whether a dealing with a [work] or with an adaptation of a [work], being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the work or adaptation;
 - (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
 - (e) in a case where part only of the work or adaptation is reproduced — the amount and substantiality of the part copied taken in relation to the whole work or adaptation.
- (3) Notwithstanding subsection (2), a dealing with a [work], or with an adaptation of such a work, being a dealing by way of the reproducing, for the purposes of research or study:
 - (f) if the work or adaptation comprises an article in a periodical publication — of the whole or a part of that work or adaptation; or
 - (g) in any other case — of not more than a reasonable portion of the work or adaptation;

shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

The s 103C definition is less specific and contains no deeming provisions or allowances for external students:

Copyright Act 1968 (Cth) s 103C — Fair dealing for purpose of research or study:

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

2 *Fair dealing*

(a) *Deemed fairness: works*

The dealing, even if for this purpose, must be 'fair'. In some circumstances, fairness can be deemed. Section 40(3) provides that a dealing will be conclusively fair where:

- *Articles from periodicals*: at most one article on the same subject (s 40(4)) is taken from a single issue of the periodical: *Copyright Act* s 40(3)(a); or
- *Literary, dramatic and musical works, except databases and computer programs*: no more than a reasonable portion (fewer than 10 per cent of the total words, or one chapter, whichever is the greater: s 10(2)) is taken.

Copyright Act 1968 (Cth) s 10:

- (2) ... where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, ... a copy of part of that work ... shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:
 - (a) do not exceed ... 10% of the number of pages in that edition; or
 - (b) in a case where the work is divided into chapters ... contain only the whole or part of a single chapter of the work.

If the deeming provisions do not apply, the normal fairness criteria must be considered. This deeming does not narrow the definition of fairness; it merely provides certainty in a small number of contexts. The deeming only applies to works, not other subject matter, and only the specified kinds of works.

(b) *Factual assessment*

Where fairness cannot be deemed as a matter of law, the Court must assess the circumstances to determine whether the dealing was fair. Fair dealing is 'impossible to define' conclusively, so that it 'must be a question of degree' dependant upon the facts of each case (*Hubbard v Vosper* per Lord Denning).

Section 40(2) sets out five criteria which must be taken into account when assessing the 'fairness' of a fair dealing claimed to fall within the exception. These factors include:

- **The nature of the dealing**
Consider the type of dealing, including its purpose, and the amount and substantiality of the part copied;
- **The nature of the work**
Consider the type of the work in question, including its commercial availability; and
- **The effect of the dealing**
Consider how the dealing would effect the work's value.

Essentially, the factors are directed at assessing whether the dealing would have harmful effects for the exploitation of the work by its author, having regard to its nature and context.

Note that these express factors only apply to the research and study purpose exception, and not to fair dealing for any *other* purpose. Fair dealing in other contexts falls to be assessed on its terms, as Lord Denning articulated in *Hubbard v Vosper*:

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

The factors pointed to by his Lordship appear to include:

- The number and size of extracts;
- Whether they are used as a basis for any further comment;
- Whether the dealing is for a competitive purpose;
- The extent to which the information presented is the same;
- The relationship between the length of the extracts and that of the comments; and
- The general impression formed of the dealing.

In *De Garis v Neville Jeffress Pidler Pty Ltd*, Beaumont J stated that the question of fair dealing falls to be assessed 'after a detailed consideration of all the circumstances of the case'. Further analysis of this decision occurs below in relation to each of the fair dealing exceptions.

3 For the purpose of research or study

Research or study means a private (as distinct from commercial) purpose. Research is a

diligent and systematic enquiry or investigation into a subject in order to discover facts or principles:
research in nuclear physics

These definitions are those of the *Macquarie Dictionary*, as applied by Beaumont J in *De Garis v Neville Jeffress Pidler Pty Ltd*. Study is defined as an

application of the mind to the acquisition of knowledge, as by reading, investigation or reflection; ... the cultivation of a particular branch of knowledge: *The study of law*. ... a particular course of effort to acquire knowledge: *to pursue special medical studies*. ... a thorough examination and analysis of a particular subject

The purpose of the dealing may, by the terms of the sections, be either of these matters, or both. It does not need to be the sole purpose (*TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*). However, a commercial purpose or dealing is generally indicative of being something other than for the purpose of research or study.

The relevant purpose is to be assessed on the part of the person who has exercised the exclusive right of the copyright owner, and not that of a third party. The purpose for accessing material by a third party is irrelevant, and will not excuse the primary dealer if their purpose was not one of research or study (*De Garis v Neville Jeffress Pidler Pty Ltd*).

De Garis v Neville Jeffress Pidler Pty Ltd (1990) FCA:

Facts

- This case concerns software made by De Garis called Media Monitor, which indexes and aggregates news clippings from public news agencies
- The respondent argues that the software's aggregation amounts to unauthorised reproduction of the newspaper articles
- De Garis argues that, although there may be reproduction, its conduct amounts to 'research and study', since anyone who uses Media Monitor is using it to learn something

Issues

- Does the dealing fall within the scope of the research or study exception to infringement?
- That is, is the dealing 'fair', and is it for the purpose of 'research or study'?

Reasoning (Beaumont J)

- The dealing is not for the purpose of research or study:
 - According to the *Macquarie Dictionary*, 'research' and 'study' indicate a private purpose on the part of the user of the material, and not the supply of such material to a customer
 - The relevant purpose is that of the person who exercises the right
 - Here, the person exercising the exclusive right to reproduce is De Garis, through the Media Monitor — not its customers
 - The hypothetical person who subsequently uses the software is unknown and their purpose can only be hypothecated; theirs is irrelevant to the exception
 - Media Monitor is not simply an agent for its customers
- In any case, the dealing is unfair:
 - The Media Monitor software aggregates the whole of each article
 - The amount taken is therefore not a 'reasonable portion' so as to be deemed

'fair'

Decision

- No, the dealing does not fall within the fair use for the purpose of research or study exception to copyright infringement

The words of s 40, and the reasoning in *De Garis*, both leave open the possibility of a serial taking over a period of time. That is, the dealer with copyright material could extract that material progressively in segments. Of course, this would mean waiting for the limitation period to expire between each taking, which is somewhat impracticable. Shorter intervals may still be unfair.

B *For the Purpose of Criticism or Review*

1 *Definition*

The second fair dealing creates an exception for fair dealings that are for the purpose of criticism or review. Section 41 sets out the exception in the following terms:

Copyright Act 1968 (Cth) s 41 — Fair dealing for purpose of criticism or review:

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

An equivalent provision exists in relation to films, sound recordings and television and sound broadcasts ('audio-visual items'):

Copyright Act 1968 (Cth) s 103A — Fair dealing for purpose of criticism or review:

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

It will be seen immediately that several requirements must be satisfied before either provision will apply:

- **Not a published work**
The dealing must not relate to a published edition: s 103 does not extend beyond ‘audio-visual item[s]’;
- **Dealing is fair**
The dealing with respect to the work or audio-visual item must be a fair one;
- **Purpose is criticism or review**
The dealing must be for the purpose of criticism or review, whether of the subject of the dealing or something else; and
- **Sufficient acknowledgement**
The dealer must make a ‘sufficient acknowledgement’ of the subject of the dealing.

These requirements being satisfied, fair dealing for this nature and for such a purpose will not be an infringement of copyright.

2 Fair dealing

The issues raised by the determination of whether the dealing is a ‘fair’ one are substantially the same as those that must be considered in relation to the purpose of research or study. The reader is directed to refer to the preceding discussion of this issue under that heading.

3 Purpose of criticism or review

‘Criticism’ means

the act or art of analysing and judging the quality of a literary or artistic work, etc: *literary criticism*. The act of passing judgement as to the merit of something. ... A critical comment, article or essay; a critique.

‘Review’ is defined as a

critical article or report, as in a periodical, on some literary work, commonly some form of recent appearance; a critique

Applying these definitions in *De Garis*, Beaumont J held that there could be no criticism or review by the press clipping service, since it simply reproduced the documents in their original form without any additional commentary, analysis or judgement:

De Garis v Neville Jeffress Pidler Pty Ltd (1990) FCA:

Issues

- Does the dealing fall within the scope of the criticism or review exception?
- That is, is the dealing ‘fair’, and is it for the purpose of ‘criticism or review’?

Reasoning (Beaumont J)

- The dealing is not for the purpose of criticism or review:
 - Like the research or study exception, the relevant purpose is that of the dealer, and not of a third party user
 - Here, the documents were simply reproduced verbatim
 - The purpose was commercial in nature, and not critical

- This is so notwithstanding that some users may have relied on the clippings for such purposes
- [Thus, a research assistant who collates documents for a reviewer, who makes no criticism or review of the documents herself, may fall outside the exception]

Decision

- No, the dealing does not fall within the fair use for the purpose of criticism or review exception to copyright infringement

Although the dealing must be fair, the criticism itself need not be. The reason why this is so relates to the rationale underlying the criticism or review exception. The exception is said 'to prevent copyright owners of works which they have put into the public domain from picking and choosing as to who may review their works, when they may do so, and what clips they may use' (*Time Warner v Channel 4 Corp* per Henry LJ). Similarly, the extracts taken need not be representative of the work or audio-visual item that is the subject of criticism or review. As Walker LJ remarked in *Pro Sieben Media AG v Carlton UK Television Ltd*:

If the fair dealing is for the purpose of criticism that criticism may be strongly expressed and unbalanced without forfeiting the fair dealing defence; an author's remedy for malicious and unjustified criticism lies ... in the law of defamation, not copyright.

In assessing the purpose of a dealing, regard is to be had only to the objective purpose, and not the subjective intent of the dealer (*Pro Sieben*). Even if the subjective intention is not to criticise, it can still fall within the exception if the actual use amounts to use for a relevant purpose.

Pro Sieben Media AG v Carlton UK Television Ltd (1998) UK CA:

Facts

- Pro Sieben, a German television station, conducts a television interview with a man whose partner is pregnant with octuplets; the tone is uncritical and broadly sentimental
- Carlton, an British television station, then broadcasts a current affairs programme about chequebook journalism in England
- This programme contains an extract from the Pro Sieben interview, accompanied by its logo and the name of the show on which it first appeared
- Pro Sieben argues that the Carlton has infringed copyright in its interview
- Carlton responds that the copying of the broadcast was for the purpose of criticism or review, and hence not an infringement

Issues

- Is the extraction of the Carlton interview in order to highlight the issue of chequebook journalism a relevant purpose of criticism or review?
- If so, is the dealing a fair one?
- If it is, then is there sufficient acknowledgement?

Reasoning (Walker LJ (Henry and Nourse LJJ agreeing))

- The use of the extract by Carlton falls within the meaning of criticism or review
 - The degree to which the challenged use competes with exploitation of copyright by its owner is a very important factor, but not the only one: *Hubbard v Vosper*
 - Lord Aitkin: 'The path of criticism is a public way: The wrongheaded are permitted to err therein...'
 - The words 'in the context of' or 'as part of an exercise in' could be substituted for

- ‘for the purpose of’ without any significant alteration of meaning
 - The subjective intention of the dealer is not relevant to the issue of whether a dealing is ‘for the purpose of’ criticism or review
 - This assessment is objective
 - **[614]** This court should not in my view give any encouragement to the notion that all that is required is for the user to have the sincere belief, however misguided, that he or she is criticising a work or reporting current affairs. To do so would provide an undesirable incentive for journalists, for whom facts should be sacred, to give implausible evidence as to their intentions.’
 - ‘Criticism or review’ is an expression of ‘wide and indefinite scope’
 - ‘Any attempt to plot [its] precise boundaries is doomed to failure’, and should be ‘interpreted liberally’
 - ‘Criticism of a work need not be limited to criticism of style. It may also extend to the ideas to be found in a work and its social or moral implications.’
 - The question to be asked is whether the final product of Carlton appears to be for the purposes of criticism or review
 - Importantly, the idea of criticism extends beyond merely criticising the subject matter as a subject matter, and includes taking material in order to make a broader comment about the underlying ideas, or related works or themes
 - Here, the purpose is to illustrate a broader claim about chequebook journalism, and not the narrower purpose of critiquing the German programme itself
 - However, this is still a valid form of criticism of review
 - **[617]** The Carlton programme as a whole was, in my judgment, made for the purpose of criticism of works of chequebook journalism in general, and in particular the (then very recent) treatment by the media of the story of Ms Allwood’s multiple pregnancy.’
 - ‘[T]he criticism was not ... limited to what the judge called the “throw away” comment: “After ten days of muckraking, a sanitised version of the truth, tightly controlled by Max Clifford.’
 - The issue had generated such controversy in England that it would be a legitimate dealing to extract a portion for a relevant purpose
- The use of the extract by Carlton is a fair dealing
 - The extract shown was ‘quite short’
 - It did not include any words spoken by the expectant mother
 - ‘It did not in any realistic sense represent unfair competition with Pro Sieben’s exploitation of the rights which it had acquired’
 - It was not ‘an attempt to dress up infringement of another’s copyright in the guise of criticism’ (*Time Warner Entertainments Co v Channel Four Television Corporation plc* per Henry LJ)
 - There was sufficient acknowledgement of the use of the broadcast
 - The television transmission of a logo can constitute sufficient identification
 - Here, Carlton broadcast the logo (a stylist ‘7’) as part of the extract, which is enough
 - Pro Sieben also claims that, although the extract that was broadcast was only 30 seconds, Carlton also made a copy that comprised the entire Pro Sieben programme, which it used internally
 - There is no evidence about the circumstances in which this separate copy was made or possessed
 - However, it seems more probable than not that the report was copied ‘simply in order to ... consider using an extract from it’
 - ‘It was therefore copied for the same ultimate purposes as those for which the Carlton programme was made and broadcast.’

- Consequently, it too falls within the scope of the fair dealing exception
- [Arguably, and respectfully, Walker LJ is ignoring the issue of whether this dealing is fair; though it may have been made for the same purpose, it was not necessarily a fair dealing; however, on the facts it probably was]

Decision

- Yes, the fair dealing for the purpose of criticism or review exception is established

As was noted in *Pro Sieben*, the criticism may also relate to ideas underlying the work:

- Criticism of the philosophy and practices of the Church of Scientology (*Hubbard v Vosper*);
- Criticism of a decision not to allow *A Clockwork Orange* to be exhibited in the United Kingdom (*Time Warner v Channel 4 Corp*); and
- On the facts in *Pro Sieben*, the ideas were chequebook journalism, the ‘haves’ and ‘have nots’ in popular news coverage, and the particular involvement of the public relations manager in distorting the facts of the story.

In Australia, the most recent example of an application of the criticism or review exception occurred in *The Panel Case [No 1]*. Although this decision was the subject of an appeal to the High Court of Australia, the grounds of appeal did not relate to fair dealing, and those findings remain unchallenged. In particular, first Full Court decision is authoritative on fair dealing.

The Panel Case [No 1] (2001) FCA:

Issue

- Are any of the extracts fair dealings for the purpose of criticism or review?

Reasoning (Conti J)

- Principles applicable to fair dealing generally:
 - ‘Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;
 - Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose ...;
 - Criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment. Criticism and review may be strongly expressed;
 - Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
 - An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; “the path of criticism is a public way”;
 - Criticism and review extends to thoughts underlying the expression of the copyright works or subject matter’
- *Midday*
 - Footage: John Howard singing happy birthday to Sir Donald Bradman
 - Ten’s argument: criticism or review of the program and of the presenter’s role
 - Decision:

- Purpose was to satirise the presenter's performance and 'certain supposed personality traits and political allegiances'
 - On balance, not criticism or review
- *A Current Affair*
 - Footage: member of the public who unwittingly visited a brothel thinking that it was an introduction agency; receptionist at same
 - Ten's argument: criticism or review; derogation of a business rival's practices; showing how the disguises use to shield privacy were insufficient to mask the identity of the people shown in the footage
 - Relevant principles:
 - 'It is legitimate to criticise a rival telecast for inadequately protecting the anonymity of its interviewees, even if the criticism takes advantage of humorous incidents to the rival's inadequacy'
 - Decision:
 - Is for purpose of criticism or review
- *Australia's Most Wanted*
 - Footage: dramatisation of a crime under investigation
 - Ten's argument: criticism or review of another work (the dramatic work being the staging of the ARIA awards, owned by Ten)
 - Nine's response: no connection between the two works
 - Relevant principles: Nine is correct in its contention
 - Decision:
 - Ten merely used the footage for the purpose of humour
- *Pick Your Face*
 - Footage: child failing to identify celebrity's face on a children's game show
 - Ten's argument: criticism or review of 'a character of some colourfulness from one television program[me]'
 - Decision: not criticism; used for the purposes of entertainment
- *Days of Our Lives*
 - Footage: a character is on a balcony, possessed by the devil
 - Ten's argument: criticism of the 'desperate and pathetic measures to prolong the life of an already protracted and attenuated day-time television program[me]'
 - Decision:
 - The visual images and accompanying commentary imply a purpose of criticism and review
 - The criticism relates to loss of originality and novelty of theme
 - This was fair, despite emanating from a rival television station
- *The 72nd Academy Awards*
 - Footage: malfunctioning smoke machine at an awards ceremony dousing singers in fog
 - Ten's argument: criticism or review
 - Relevant principles:
 - '[C]riticism or review do not necessarily exclude notions of comedy or satire, even though expressed lightly' (*Vosper*)
 - It is a matter of impression
 - Decision:
 - 'Because of the humorous, if not hilarious, treatment by *The Panel* of this footage, an initial reaction may well be that the purpose of this re-broadcast was light satire in the nature of entertainment proffered by a

- rival station, and did not involve the passing of judgment on the merit's of Nine's television presentation'
- However, 'my impression on a somewhat precarious balance is in favour of a justifiable Ten purpose here involved of criticism and review'
- *Sale of the New Century*
 - Footage: losing contestants on a game show are put into a dark shadow so as no longer to be recognisable
 - Ten's argument: criticism and review of the manner in which Nine's long-running game show is conducted
 - Decision:
 - 'The purpose was to lightly and humorously criticise [sic] or review Nine's technical programming procedure recently introduced to this long running program'
 - *Newsbreak*
 - Footage: a technical glitch involving the appearance of a news presenter being accidentally 'shrunk or abbreviated' to a very small size
 - Ten's argument: criticism or review demonstrating that 'live television can result in embarrassing circumstances for a broadcaster, here of course Channel 9'
 - Decision: for the purpose of criticism or review
 - *The Today Show*
 - Footage: a child yawning during an interview
 - Ten's argument: criticism or review showing how precarious live television can be
 - Nine's response: 'There are no words of criticism. There is no discussion about the particular questions asked or the style of the interview. There was no genuine criticism.'
 - Relevant principles:
 - Review must involve a critique of some kind; here, even if the footage demonstrates precariousness, this does not give the dealing any attribute of 'review'
 - Decision:
 - Nine's submission correct
 - Not for the purpose of criticism or review

The issues were reconsidered upon appeal to the Full Court of the Federal Court of Australia. That Court appears to have been strongly influenced by *Pro Sieben* in its approach to the issues.

The Panel Case [No 1] (2001) FCA:

Issue

- Are any of the extracts fair dealings for the purpose of criticism or review?

Reasoning (Hely J)

- *A Current Affair*
 - The discussion of this extract did not involve a criticism of Nine's selection of disguises, but rather disguises chosen by the interviewees themselves
 - *The Panel* was not criticising Nine's 'failure to protect people who wished to remain anonymous, which might have amounted to a criticism of the television

- broadcast. Rather, the *Panel* were simply poking fun at the disguises which the people had chosen, and using the *Panel* segment for the purposes of entertainment.’
- Trial judge’s finding overturned: no fair dealing defence can be made out with respect to this extract
- *Days of Our Lives*
 - Agrees with the trial judge that these extracts ‘would have attracted the defence of fair dealing for the purposes of criticism or review on the footing of an innuendo of loss of originality and novelty of theme’
 - *Simply the Best*
 - The so-called criticism or review in relation to the set was not recognisable as criticism
 - Finding upheld
 - *The Today Show* (Prasad interview)
 - Ten spliced several parts of the original broadcast to distort them with humorous effect
 - Ten argues that this editing did not make the dealing unfair, but rather ‘more plainly conveyed the criticism being made’
 - Nine argues that ‘the nature and content of the so-called criticism was [*sic*] never clearly identified.’
 - ‘With respect, I do not agree with that conclusion’
 - The purpose of the segment was humour and entertainment, rather than shown as part of an exercise of criticism or review
 - Fair dealing not made out

The distinction between these circumstances can be difficult to explain. It is difficult to identify with precision any concrete indicia which might serve as predictors of how such issues are likely to be decided. Uncertainty must therefore be said to characterise the law in this area. Note in particular Finkelstein J’s comments that there is room for ‘legitimate differences of opinion’ about these issues. Interestingly, although both Nine and Ten won and lost some aspects of the fair dealing arguments, neither sought leave to appeal the findings. If decided today, some pundits have speculated that the High Court would find all excerpts to be for purposes of criticism or review, given current trends. As a result of the present uncertainty, however, one cannot doubt that potentially fair dealings for recognised purposes will go undealt for fear of being wrong, or even simply the costly appellate litigation that seems to be required to resolve the issue.

4 *Reform in Australia*

Fair dealing has been the subject of significant reforms in Australia. These reforms were catalysed by the introduction of new copyright protections by virtue of the Australia–United States Free Trade Agreement in January 2006, and the associated imbalance in copyright law that these changes were considered by many to bring. After a period of public consultation, the Attorney–General’s department released an issues paper relating to several proposed defences, including format shifting (CD to MP3) and time-shifting (recording to watch later).

The new exceptions will retain the highly particularised approach relied upon to date, and aim to bring copyright law in line with modern usage. To that end, most of the defences are directed at private uses of copyright. These exceptions are summarised below:

- Private use
 - Time-shifting of broadcast programming
 - Format-shifting (only applies to the extent that no TPMs are circumvented)
 - In practice, this will be of limited utility, since formats are almost always copy-protected; shifting will only be possible with the copyright owner's consent, which is *already* non-infringing
- Flexible dealing
 - A three-step test:
 - Must be confined to a certain special case
 - Must not conflict with normal exploitation
 - Must not unreasonably prejudice the legitimate interests of the rights holder
 - Four exceptions proposed:
 - Non-commercial use by libraries, museums and archives
 - Non-commercial teaching use by educational institutions
 - Non-commercial use for the benefit of people with disabilities
 - Parody and satire

The government appears to be trying to mimic the United States position by creating specific exceptions to capture those permitted fair uses, without embracing open-ended fair use. The three-step test of flexible dealing appears to have been derived from the *Agreement on TRIPS*.

Interesting research topic: Copyright, technological protection and contract: how do they interact? What exceptions should exist across all three? Private fences in place of public law — are they narrower and taller? Eg, Apple FairPlay: coupled with TPM protection, does this go beyond copyright protection? How are these licences to be interpreted? Should they be able to alter, displace or entirely exclude statutory defences and other freedoms?

C *For the Reporting of News*

A fair dealing for the purpose of reporting the news will not infringe copyright in a work or audio-visual item: *Copyright Act* ss 42, 103B.

Copyright Act 1968 (Cth) s 42 — Fair dealing for purpose of reporting news:

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

Under these provisions, 'news' is not restricted to current events and may involve humour. However, the news must be pre-existing and not created by virtue of the dealing, especially where the dealing amplifies the significance of the news by altering the original material in some way (*The Panel Case [No 1]*). The distinction between news and entertainment may also be elusive.

The Panel Case [No 1] (2001) FCA:

Issue

- Are any of the extracts fair dealings for the purpose of criticism or review?

Reasoning (Conti J)

- General principles applicable to fair dealing for the purpose of reporting the news:
 - "News" is not restricted to current events; and
 - "News" may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.'
- *The Today show*
 - Footage: activities of Boris Yeltsin dismissing the Russian Cabinet
 - Ten's argument: reporting news
 - Relevant principles:
 - News is not restricted to current events
 - The rebroadcast need not completely contain the news
 - News can involve the use of humour, but there can be difficulty in distinguishing news from entertainment
 - Decision:
 - This is broadcast for the purpose of entertainment, not news
 - Eg, 'President Yeltsin's disadvantage in holding office was not "an age limit" but a "blood alcohol limit"
- *Midday*
 - Footage: John Howard singing happy birthday to Sir Donald Bradman
 - Ten's argument: reporting news
 - Decision:
 - Not 'news' since the item is not 'newsworthy'
 - Purpose was to satirise the Pimre Minister's 'already well-known admiration for Sir Donald Bradman'
 - However, although it is unnecessary to decide the issue, there was sufficient acknowledgement by virtue of the 'on screen watermark'
 - Indeed, the average viewer would understand that the broadcast came from Nine; this was not, as in *Pro Sieben*, a case where a German television company had been broadcast to United Kingdom viewers
- *The Inaugural Allan Border Medal Dinner*
 - Footage: acceptance of award and Mr Glenn McGrath not noticing the prima Minister's attempt to congratulate him
 - Ten's argument: reporting news; unusual or incongruous moments in an Australian Prime Minister's life are inherently and necessarily news
 - Relevant principles:
 - Ten's submission is on balance correct
 - Can be distinguished from Prime Minister on *Midday* because this was not well known like the Prime Minister's admiration for Bradman
 - Decision: for the purpose of reporting news

These findings were the subject of comment upon an appeal to the Full Court.

The Panel Case [No 1] (2001) FCA:

Issue

- Are any of the extracts fair dealings for the purpose of criticism or review?

Reasoning

- *The Today Show* (Boris Yeltsin)
 - Finkelstein J:
 - The discussion took place in the context of a significant political issue (whether Australia should become a republic)
 - 'The discussion whether there should be an age limit imposed on a president, while considered in a humorous way because of Yeltsin's known drinking and memory problems, was newsworthy. That is all that is required for fair dealing under s 103B(1)(b).'
 - Hely J:
 - Trial judge held that Panel segment was more entertainment than news
 - Conclusion upheld
- *Midday*
 - Finkelstein J:
 - Fair dealing is made out in two respects
 - First, a review of the *Midday Show*, and the presenter's talents
 - Second, 'an incident where the Prime Minister of a country has behaved in a way which some might call "silly" is certainly newsworthy'
 - The 'perceived indiscretions' or other 'unusual actions warrant reporting'
 - 'In a sense, all behaviour of a Prime Minister can be regarded as "political" because it may affect voters' perceptions and is newsworthy for that reason'
 - Hely J:
 - An appraisal of the presenter's role could amount to criticism or review of the television broadcast, but there was no real connection between the segment on *The Panel* and the discussion of the presenter's role
 - The segment was shown for its own sake, either as 'something worth seeing again' or 'for the benefit of those who had missed it'
 - The segment was simply shown for entertainment value
 - Upholds trial judge's conclusion
- *The Inaugural Allan Border Medal Dinner*
 - '[W]as it news that Glenn McGrath did not notice the Prime Minister's attempt to congratulate him at the dinner?'
 - 'The only public embarrassment was created by the *Panel's* publicising of a background and unnoticed incident. It was done by showing the footage in slow motion (unlike the original).'
 - To be for the purpose of reporting news, that news must exist independently of the *Panel* segment
 - The segment must have been rebroadcast for the purpose of or in association with the reporting of that news
 - 'Yet here, if there is any news, it arises by reason of the slowing down of the footage so as to display a hitherto unnoticed incident'
 - Appeal upheld; creating the appearance of a public embarrassment is not to broadcast merely the report of a public embarrassment

The case of *De Garis* provides a further example of the operation of this exception. In the abecedarian style that is well-known to regular readers of Mr Justice Beaumont's judgments, his Honour defines 'news' according to the definition given by the learned editors of the *Macquarie Dictionary*, as

a report of any recent event, situation, etc ... the report of events published in a newspaper ... information, events, etc, considered as suitable for reporting: *it's very interesting, but it's not news*; ... information not previously known; *that's news to me* ...

This definition is modified slightly by the inclusion of reports of events that are not 'recent'. In light of this definition, puzzling indeed are certain findings of the Full Court in *The Panel Case [No 1]*. In particular, holding that a dealing cannot be for the purpose of 'reporting news' if it has the effect of creating news that was not already known seems contrary to the spirit of this definition. Indeed, the fourth limb of the definition seems expressly directed at novel reports: 'information not previously known; *that's news to me*'. For this reason, it is respectfully suggested that a report of an hitherto unknown incident that has escaped the attention of other reports ought rightly to be considered news, if indeed its purpose is to draw such omission to the attention of its audience.

Leaving the issue of breaking or created news to one aside, *De Garis* can be stated as authority for the proposition that the mere copying of a newspaper article for supply in the course of a commercial enterprise, without further comment or analysis, will rarely if ever amount to 'the reporting of news'.

De Garis v Neville Jeffress Pidler Pty Ltd (1990) FCA:

Issues

- Is the extract from the published editions by the press clipping service a fair dealing for the purpose of reporting news?

Reasoning (Beaumont J)

- There is no reporting of news here
 - The reporting of news can go beyond a report of current events: *John Fairfax*
 - The commercial nature of the use militates 'quite strongly against a finding of fair use: *Sony Betamax*
 - The reproduction here of the articles was not done for the purpose of the reporting of news, nor was it associated with such a purpose
 - In the example raised in the proceeding, the author of the work was a literary review; its reproduction by Jeffress had nothing to do with the reporting of news
 - Further, the defence is only available where the reporting is in a newspaper, magazine or similar periodical [presumably a television news programme as well]
 - Here, the reproduction was not in such a periodical
- In any event, the dealing here was unfair
 - 'It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of

impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.’ (*Hubbard v Vosper* per Lord Denning)

- **[634]** In the present case, Jeffress took the whole of Mr de Garis’ work and supplied it to its customers for its own reward in the course of a trading activity. Jeffress did not comment on the material or attempt any analysis of its content In the circumstances, th dealing cannot be said to be “fair”.’

Decision

- No, the dealing is not a fair dealing for the purpose of reporting news

The use of humour in the reporting of news raises an issue of whether the primary purpose behind a dealing is indeed the reporting of news or merely for purposes of entertainment. This was an issue grappled with (largely unsuccessfully, it must be said) by the courts in *The Panel [No 1]*.

In *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation*, Channel Nine sought to enjoin a broadcast by the respondent of a fireworks display to celebrate the new millennium. The respondent argued that any broadcast by it of the display would amount to a fair dealing for the purpose of reporting news, so that there was no prima facie case sufficient to justify the grant of an injunction. In deciding in favour of the respondent, Hill J made the following comments:

For my part find the distinction between news and entertainment a very difficult one. It is not one I think which can be resolved by looking at the dictionary definition of the word. In some ways it may well be as difficult as the issue that has dominated the news press over the last few months of some suggestion of difference between commentary and info-tainment or entertainment.

In my view the fact that humour is used does not necessarily negate the fact that what is being broadcast may be news. Hopefully the fact that news coverage is interesting or even to some entertaining likewise does not negate the fact that it could be news. As I have already said, the celebrations of the City of Sydney this New Year’s Eve are of both national and international significance. The reporting and showing of a part of them on TV by Channel Two as national broadcaster could well fall within s 42. (at 340)

Respectfully, this seems an eminently sensible approach to the issue.

III **Miscellaneous Statutory Exceptions**

A *Use of Works*

Division 4 of pt III creates a number of miscellaneous exceptions in relation to literary, dramatic and musical works:

- **Reading or recitation in public**
Section 45 provides that reading ‘an extract of reasonable length’ from a published literary or dramatic work (or an adaptation of such a work), does not infringe copyright if a ‘sufficient acknowledgement’ is made of the work;
- **Performance at residential premises**
Section 46 provides that the performance of a literary, dramatic or musical work (or adaptations) in public but within a residential location (where people sleep) as part of the amenities for residents and guests, will not infringe copyright in the work; and
- **Broadcasting**
Refer to sections 47 through 47A.

B *Computer Programs*

Division 4A of pt III creates further exemptions in relation to the use of computer programs. A ‘computer program’ is defined to include both computer programs, as defined, as well as any literary works that they embody or are essential to their functional operation (presumably in the in the *Autodesk v Dyason [No 2]* sense). This extends the exceptions to the use of data associated with computer programs, such as compression tables, lockout keys, and so forth (which the preceding case law — *Data Access, Dyason*, and so on — suggests are often points of contention between the parties).

The exceptions are as follows:

Copyright Act 1968 (Cth) s 47B — Reproduction for normal use or study of computer programs:

- (1) Subject to subsection (2), the copyright in a literary work that is a computer program is not infringed by the making of a reproduction of the work if:
 - (a) the reproduction is incidentally and automatically made as part of the technical process of running a copy of the program for the purposes for which the program was designed; and
 - (b) the running of the copy is done by, or on behalf of, the owner or licensee of the copy.
- (2) Subsection (1) does not apply to the making of a reproduction of a computer program:
 - (a) from an infringing copy of the computer program; or
 - (b) contrary to an express direction or licence given by, or on behalf of, the owner of the copyright in the computer program to the owner or licensee of the copy from which the reproduction is made when the owner or licensee of that copy acquired it.

- (3) Subject to subsection (4), the copyright in a literary work that is a computer program is not infringed by the making of a reproduction of the work if:
- (a) the reproduction is incidentally and automatically made as part of the technical process of running a copy of the program for the purpose of studying the ideas behind the program and the way in which it functions; and
 - (b) the running of the copy is done by, or on behalf of, the owner or licensee of the copy.
- (4) Subsection (3) does not apply to the making of a reproduction of a computer program from an infringing copy of the computer program.

Copyright Act 1968 (Cth) s 47C — Back-up copy of computer programs:

- (1) Subject to subsection (4), the copyright in a literary work that is a computer program is not infringed by the making of a reproduction of the work if:
- (a) the reproduction is made by, or on behalf of, the owner or licensee of the copy (the **original copy**) from which the reproduction is made; and
 - (b) the reproduction is made for use only by, or on behalf of, the owner or licensee of the original copy; and
 - (c) the reproduction is made for any of the following purposes:
 - (i) to enable the owner or licensee of the original copy to use the reproduction in lieu of the original copy and to store the original copy;
 - (ii) to enable the owner or licensee of the original copy to store the reproduction for use in lieu of the original copy if the original copy is lost, destroyed or rendered unusable;
 - (iii) to enable the owner or licensee of the original copy to use the reproduction in lieu of the original copy, or of another reproduction made under this subsection, if the original copy, or the other reproduction, is lost, destroyed or rendered unusable.
- (2) Subject to subsection (4), the copyright in a literary work that is a computer program, and in any work or other subject-matter held together with the program on the same computer system, is not infringed by the making of a reproduction of the program, or of such a work or other subject-matter if:
- (a) the reproduction is made by, or on behalf of, the owner or licensee of the copy (the **original copy**) from which the reproduction is made; and
 - (b) the making of the reproduction is part of the normal back-up copying of data for security purposes.
- ...

Copyright Act 1968 (Cth) s 47D Reproducing computer programs to make interoperable products:

- (1) Subject to this Division, the copyright in a literary work that is a computer program is not

infringed by the making of a reproduction or adaptation of the work if:

- (a) the reproduction or adaptation is made by, or on behalf of, the owner or licensee of the copy of the program (the **original program**) used for making the reproduction or adaptation; and
 - (b) the reproduction or adaptation is made for the purpose of obtaining information necessary to enable the owner or licensee, or a person acting on behalf of the owner or licensee, to make independently another program (the **new program**), or an article, to connect to and be used together with, or otherwise to interoperate with, the original program or any other program; and
 - (c) the reproduction or adaptation is made only to the extent reasonably necessary to obtain the information referred to in paragraph (b); and
 - (d) to the extent that the new program reproduces or adapts the original program, it does so only to the extent necessary to enable the new program to connect to and be used together with, or otherwise to interoperate with, the original program
 - (e) or the other program; and
 - (f) the information referred to in paragraph (b) is not readily available to the owner or licensee from another source when the reproduction or adaptation is made.
- (2) Subsection (1) does not apply to the making of a reproduction or adaptation of a computer program from an infringing copy of the computer program.

Section 47E deals with the correction of programming errors (bugs) in computer software. It provides that it will not be infringement to reproduce or adapt a program in circumstances where a functioning copy is not available at a reasonable price. The exception is only to the extent reasonably necessary to correct the error. The purpose of the adaptation or reproduction must be to correct the programming error.

Section 47E likewise provides for a limited exception in the case of security testing. The testing must be 'in good faith' and relate to the 'security' of the original copy, or a 'computer system or network' of which the copy forms a part. The reproduction or adaptation must be for the purpose of investigating or correcting either a 'security flaw' or a 'vulnerability to unauthorised access' in the program, or a computer or network of which the program is a part.

C Temporary Copying

Copyright Act 1968 (Cth) s 43A — Temporary reproductions made in the course of communication:

- (1) The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication.
- (2) Subsection (1) does not apply in relation to the making of a temporary reproduction of a work, or an adaptation of a work, as part of the technical process of making a communication if the making of the communication is an infringement of copyright.

Copyright Act 1968 (Cth) s 43B — Temporary reproductions of works as part of a technical process of use:

- (1) Subject to subsection (2), the copyright in a work is not infringed by the making of a temporary reproduction of the work if the reproduction is incidentally made as a necessary part of a technical process of using a copy of the work.
- (2) Subsection (1) does not apply to:
 - (a) the making of a temporary reproduction of a work if the reproduction is made from:
 - (i) an infringing copy of the work; or
 - (ii) a copy of the work where the copy is made in another country and would be an infringing copy of the work if the person who made the copy had done so in Australia; or
 - (b) the making of a temporary reproduction of a work as a necessary part of a technical process of using a copy of the work if that use constitutes an infringement of the copyright in the work.
- (3) Subsection (1) does not apply to any subsequent use of a temporary reproduction of a work other than as a part of the technical process in which the temporary reproduction was made.

D Professional Advice and Judicial Proceedings

Copyright Act 1968 (Cth) s 43 — Reproduction for purpose of judicial proceedings or professional advice:

- (1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.
- (2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by:
 - (a) a legal practitioner; ...

IV Non-Statutory Exceptions

A Public Interest Defence

Judicial consideration of the statutory exceptions to copyright infringement have often involved references to ‘the public interest’ as a freestanding principle. Various *obiter dicta* comments suggest that a separate ‘public interest’ defence may be available in some circumstances (see, eg, *Attorney-General v Guardian Newspapers Ltd [No 2]*). However, no cases have yet been decided on this basis.

In *A-One Accessory Imports Pty Ltd v Off Road Imports Pty Ltd [No 2]*, Drummond J described the current state of the law in Australia to be as follows:

Where it is against public policy to enforce copyright because, eg, the copyright work is libellous, obscene or otherwise involves a publication contrary to the public interest, the courts will not give any remedy. See *Glyn v Western Feature Film Company* Even if copyright can exist in a compilation consisting entirely of parts pirated from other works, Copinger and Skone James ... suggests [*sic*] that public policy might well justify the court, in such a case, refusing all relief for infringement of that copyright.

However, where, as here, the work in question consists of a compilation of pirated and original work, there is no reason, on grounds of public policy, that I can see to deny all relief to the owner of copyright in the compilation: it is the entire compilation which has copyright and there is nothing in the *Copyright Act* ... which operates to make that entity an illegal work. The cases I referred to in my reasons ... show that there is good reason for holding that the owner of copyright in such a mixed work is entitled to a remedy for an infringement of that copyright. ...

Copyright is essentially a private proprietary right. Because there is no significant element of public interest involved in that statutory right or in its enforcement, it is appropriate, in my opinion, to have close regard to equitable rules governing the grant of injunctions and accounts of profit in deciding whether or not a particular copyright owner is entitled to any of those statutory forms of relief provided for by s 115. ... I think that [here] the dirt on the applicants' hands, constituted by their extensive copying of the works of others, is so closely related to the equity claimed in the form of an injunction to restrain [the respondent's] use of its own infringing catalogue as to justify denying the applicants relief under s 115(2) ... analogous to discretionary equitable relief, by way of an injunction ... (at 561–2)

If there is a role to play for a public interest defence, therefore, it appears to be limited to equitable doctrines of conscience, viz, that the applicant seeking an equitable remedy must come to the Court with clean hands and must not seek to perpetrate a fraud. There does not appear to be any sound basis for importing such considerations into purely proprietary, common law remedies, or *sui generis* statutory remedies. However, of those equitable remedies brought within the Court's discretion under s 115, it seems reasonable to curtail their grant by reference to equitable principles. If such might be done in a case of public interest, so be it. However, the defence, if it is to be called that, is probably better labelled a discretionary factor to be considered when granting relief.