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**FOUR QUESTIONS ABOUT THE AUSTRALIAN APPROACH TO FAIR DEALING DEFENSES TO COPYRIGHT INFRINGEMENT**

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### I. INTRODUCTION

Discussion of differences between “fair dealing” and “fair use” often focuses on the relative merits of flexibility and predictability.<sup>1</sup> Leading experts on the Commonwealth approach to copyright defenses and exceptions,<sup>2</sup> Professors Robert Burrell and Allison Coleman, explain: “It is

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<sup>1</sup> See, e.g., AUSTRALIAN ATTORNEY-GENERAL’S DEPARTMENT, FAIR USE AND OTHER COPYRIGHT EXCEPTIONS: AN EXAMINATION OF FAIR USE, FAIR DEALING AND OTHER EXCEPTIONS IN THE DIGITAL AGE, ISSUES PAPER 20 (2005), [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf) (“[t]he flexibility of the fair use exception has allowed the courts to play an active role in adapting United States copyright law to major changes in technology”); see also Geoff McLay, *Being Fair to Users: The Welcome Arrival of a New, More Liberal Approach to Fair Dealing*, 2 N.Z. INTELL. PROP. J. 135, 135 (1999) (noting that the exceptions in the New Zealand Copyright Act “are narrowly drawn and often arbitrary — a situation not helped by judicial interpretation that often emphasises that the rights of the users to derogate from copyright owners’ interests are to be limited, rather than the rights of the copyright owners. This approach contrasts with [§ 107 of the U.S. Copyright Act of 1976] which provides a ‘general rule of reason’ against which all uses are measured. Rather than requiring the minutiae of particular statutory privileges to be satisfied § 107 instructs United States Courts to directly consider whether a particular use would derogate too much from rights given to a copyright owner to exploit his or her work”); ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 249 (2005); Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back From Australia’s Recent Copyright Reforms*, 31 MELB. U.L. REV. 967 (2007).

<sup>2</sup> In this Article, I characterize as the “Commonwealth approach” the approach to copyright defenses that was inaugurated by the 1911 Imperial Copyright Act. Copyright Act 1911 (U.K.) (1 & 2 Geo. 5, c. 46 (1911)). A number of Commonwealth jurisdictions, including Australia, Canada, India, New Zealand, and Singapore, adopted the 1911 statute directly or as a model for their own laws. BURRELL & COLEMAN, *supra* note 1, at 249. Australia incorporated fair dealing into its domestic law when it adopted the 1911 U.K. statute under the Copyright Act 1912 (Austl.). For the relevant legislative

often said that the principal advantage of the fair use defense is that it remains a highly flexible instrument. In contrast, defenders of the Commonwealth fair dealing approach insist that the current approach offers certainty, whereas the fair use defense is dogged by pervasive unpredictability.”<sup>3</sup>

Commonwealth statutes lack the U.S. Copyright Act’s “fair use” defense.<sup>4</sup> While the Commonwealth system of “fair dealing” defenses is the analogue to U.S. copyright law’s “fair use” defense, Commonwealth statutes require defendants to fit their “fair dealings” within a number of specified purposes.<sup>5</sup> Courts in the United States can find a defendant’s use to be “fair,” and, therefore, non-infringing, even when the use falls outside any specifically-delineated defense.<sup>6</sup>

Focusing principally on the copyright law of Australia — a Commonwealth jurisdiction that hews to the “fair dealing” approach — my aim in this brief Article is to provide some further context to the fair dealing/fair use discussion. I do not come down on any side of the debate about the relative merits of fair use and fair dealing.<sup>7</sup> Among other things, rigorous analysis of the relative virtues of each system would implicate a much more complex series of questions about the merits of rules versus standards,<sup>8</sup> a topic that is beyond the modest compass of this Article. Instead, my aim is to explore the terrain over which the debate takes place. To do so, I raise four questions about the differences between the Australian and U.S. approaches. They concern: the implications of the differences in the legislative drafting technique; the significance of the relative paucity of fair dealing cases, as compared with U.S. fair use cases; the possible relevance of the many other defenses that are available under Australian law; and the recent adoption in Australia in 2006<sup>9</sup> of new fair dealing defenses “for the purposes of parody or satire.”<sup>10</sup> I conclude by noting some of the

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and constitutional history, see *Gramophone Co. v. Leo Feist, Inc.*, (1928) 41 C.L.R. 1.

<sup>3</sup> BURRELL & COLEMAN, *supra* note 1, at 249-50.

<sup>4</sup> Pub. L. No. 94-553, 90 Stat. 2541, 2546 (1976) (codified as amended at 17 U.S.C. § 107 (2006)).

<sup>5</sup> See Paula Baron, *The Moebius Strip: Private Right and Public Use in Copyright*, 70 ALB. L. REV. 1227 (2006). I describe the purposes to which the Australian fair dealing defenses apply in Part II.A. *infra*.

<sup>6</sup> BURRELL & COLEMAN, *supra* note 1, at 249.

<sup>7</sup> Some scholars argue, for instance, that fair dealing defenses are too rigidly delineated and are insufficiently solicitous of “user rights.” See *id.* See also Michael Handler & David Rolph, “A Real Pea Souper”: *The Panel Case and the Development of the Fair Dealing Defenses to Copyright Infringement in Australia*, 27 MELB. U. L. REV. 381, 383-84 (2003); Weatherall, *supra* note 1.

<sup>8</sup> See, e.g., Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

<sup>9</sup> Copyright Amendment Act 2006 (Cth) (Austl.).

<sup>10</sup> Copyright Act 1968 (Cth) ss 41A, 103AA (Austl.).

private international law implications of the distinctions between fair dealing and fair use.

## II. FOUR QUESTIONS

### A. Does Legislative Drafting Matter?

Taken together, the provisions in the Australian Copyright Act that set forth the fair dealing defenses certainly look more delineated than § 107 of the U.S. Copyright Act. The Australian Act tethers fair dealing to six specified purposes: research or study,<sup>11</sup> criticism or review,<sup>12</sup> reporting the news,<sup>13</sup> professional advice given by a legal practitioner, patent attorney, or trademarks attorney;<sup>14</sup> and, following the 2006 amendment, “parody or satire.”<sup>15</sup> The drafting of these sections is quite different from § 107. While the U.S. Act lists categories of uses that might fall within the defense — such as for criticism, comment, news reporting or teaching — these are illustrative only.<sup>16</sup> In the United States, any kind of use can potentially be a fair one.<sup>17</sup>

<sup>11</sup> *Id.* §§ 40(1), 103C. Australian copyright law maintains the earlier British distinction between “works” (such as literary and musical works) and “subject matter other than works” (such as sound recordings). This structure requires that each generally applicable defense be duplicated — one section applying to “works,” and another to “subject matter other than works.” As initially enacted in 1911, fair dealing for the purposes of study had to be for “private” study. Following the recommendations of the 1976 Copyright Law Review Committee Report on Reprographic Reproduction (“the Franki Committee Report”), this qualification was removed. See Peter Brudenell, *The Future of Fair Dealing in Australian Copyright Law*, 1997 J. INFO. L. & TECH. 1, ¶ 2.2, [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997\\_1/brudenell](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_1/brudenell)

<sup>12</sup> Copyright Act 1968 (Cth) ss 41, 103A (Austl.).

<sup>13</sup> *Id.* ss 42, 103B.

<sup>14</sup> *Id.* ss 43, 104.

<sup>15</sup> *Id.* ss 41A, 103AA.

<sup>16</sup> See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 n.1 (6th Cir.1996) (rejecting the argument that the illustrative categories of fair uses in 17 U.S.C. § 107 are ipso facto fair uses).

<sup>17</sup> There are some important similarities between the two systems. Just as “fair use” is undefined in the U.S. Act, there is no definition of “fair dealing” in the Australian statute. In Australia, one type of fair dealing — for the purposes of research and study — is accompanied by a specific set of requirements that a court must consider to determine whether the dealing is fair. These are consistent with the familiar list of factors to which U.S. courts must have regard when determining whether a use is fair under § 107. The Australian factors are as follows:

(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

The uncertainty and unpredictability of the U.S. fair use defense is a perennial theme in copyright scholarship and judicial commentary.<sup>18</sup> It has been observed, for example, that the statutory test provides “very little guidance for predicting whether a particular use will be deemed fair,”<sup>19</sup> and that the “facial emptiness of the statutory language means that alone, it is entirely useless analytically, except to the extent that it structures the collection of evidence.”<sup>20</sup> The idea that the statutory test determines resolution of fair use cases has been characterized as “largely a fairy tale.”<sup>21</sup> Charting the dissents and reversals in the marquee fair use cases — *Sony*,<sup>22</sup> *Harper & Row*,<sup>23</sup> and *Campbell*<sup>24</sup> — is an entertaining classroom

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adaptation; and (e) in the case where part only of the work or adaptation is copied — the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

Copyright Act 1968 (Cth) ss 40(1), 103C (Austl.). Unlike the Australian statute, § 107 specifies that the factors are to be considered for all types of fair use. However, some Australian courts have regarded this list as generally applicable to the different fair dealing defenses. See Baron, *supra* note 3, at 1232. In the Australian statute, the fair dealing provision relating to the purpose of research or study also provides a detailed set of quantitative parameters for determining whether a use is fair. Copyright Act 1968 (Cth) ss § 40(3)–(5) (Austl.).

- <sup>18</sup> See generally Barton Beebe, *An Empirical Study of the U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 552 (2008) (gathering sources). But cf. William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 667–68 (1993) (arguing that difficulties with the fair use defense are inherent in the common law nature of the doctrine, rather than the statutory wording). Recently, Professor Pamela Samuelson has advanced the case that fair use is actually much more predictable than it is often thought. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).
- <sup>19</sup> Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007).
- <sup>20</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1564 (2004).
- <sup>21</sup> David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 282 (2003).
- <sup>22</sup> *Sony v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (Supreme Court: five Justices in favor of fair use and four against; court of appeals: three judges against fair use; district court in favor of fair use).
- <sup>23</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (Supreme Court: 6–3 against fair use; court of appeals: court of appeals: 2–1 in favor of fair use; district court against fair use).
- <sup>24</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (nine Justices generally in favor of fair use (including concurrence by Justice Kennedy) but case remanded for further evidence as to application of fourth fair use “factor;” court of appeals: 2–1 judges against fair use; district court in favor of fair use).

pastime, graphically bolstering judicial laments as to the extraordinary difficulties<sup>25</sup> that apparently accompany application of § 107.

Despite the more delineated drafting of the fair dealing defenses, Australian case law provides an opportunity for similar classroom entertainment, as is illustrated by Australia's leading fair dealing case, *TCN Channel Nine v. Network Ten*.<sup>26</sup> Popularly known as "the Panel case," this was a decision of the Full Federal Court of Australia involving a copyright infringement action brought by one Australian television network, "Channel Nine," against its rival, "Channel Ten." At issue was the proper application of two of the fair dealing defenses — fair dealing for criticism or review, and fair dealing for the reporting of news.<sup>27</sup> Channel Nine alleged that Channel Ten had infringed its copyrights by using a number of excerpts from Nine's programs on Ten's *The Panel*, an hour-long weekly television program that has been broadcast throughout Australia since 1998. Each episode features a regular team of three to five panelists and several invited guests who engage in humorous and largely unscripted discussion about items of topical interest and popular culture.<sup>28</sup> *The Panel* screens short excerpts from television programs that have been broadcast on other networks to which the panelists refer as they poke fun at these programs or more generally expose personal foibles of Australian media or political personalities.

Channel Nine objected to this use of extracts from its programs. Two examples give a flavor of the dispute. One was from one of Channel Nine's popular daytime programs, during which that program's host (herself an Australian media celebrity) persuaded the then Australian Prime Minister, John Howard, to sing "Happy Birthday" to retired Australian cricketing great, Sir Donald Bradman. After the extract was shown on Ten's program, the panelists made lengthy comments about the appearance of the Prime Minister and of the (apparently quite persuasive) host of Channel Nine's show. Another involved a clip from Nine's long-running U.S. soap opera, *Days of Our Lives*, depicting one of its characters standing on a balcony in what appeared to be a state of demonic possession; this

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<sup>25</sup> The "fair use issue" has been described "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir.1939). See also *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y.1968) (describing fair use as "so flexible as virtually to defy definition").

<sup>26</sup> (2002) 118 FCR 417.

<sup>27</sup> The new defense for fair dealing for the purposes of parody and satire had not been enacted by the date of this case.

<sup>28</sup> This characterization of *The Panel*, which the present author has never seen, draws on the description by Australian copyright scholars, Michael Handler and David Rolph. See Handler & Rolph, *supra* note 7, at 383-84.

prompted the panelists to comment on the hackneyed plot devices being employed to prolong the life of some of Nine's programs.<sup>29</sup>

Channel Nine objected to nineteen broadly similar uses of extracts from its programs. In respect of twelve of the extracts, the trial judge found the fair dealing defense to have been made out.<sup>30</sup> Channel Nine did not appeal four of these findings. Channel Ten cross-appealed the findings against fair dealing in respect of two extracts. This left ten extracts for which the fair dealing issue remained live. The Full Court upheld the lower court's decision in respect of six extracts. But the decisions in respect of four of the extracts were over dissents by one of the judges of the Full Court. Accordingly, there was unanimity in respect of just under half of the contested extracts.<sup>31</sup>

Perhaps fair dealing is as muddy as fair use after all.<sup>32</sup> A leading Australian copyright scholar observes that the Panel case "highlights yet again

<sup>29</sup> *Id.* at 384.

<sup>30</sup> TCN Channel Nine v. Network Ten, [2001] FCA 108 (Conti, J.). The trial judge carefully delineated the following principles on the meaning of fair dealing which he derived from leading Commonwealth cases:

(i) 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.

(ii) 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, because fair dealing (*sic.*) truth of purpose;

(iii) Criticism and review are words of wide and infinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment; criticism and review may be strongly expressed;

(iv) Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;

(v) 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";

(vi) criticism and review extends to thought underlying the expression of the copyright works or subject matter;

(vii) "News" is not restricted to current events; and

(viii) "News" may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.

*Id.* ¶ 66. As other commentators have noted, this exegesis is hardly a model of clarity, arguably adding to the incoherence of the fair dealing approach. See generally Handler & Rolph, *supra* note 7.

<sup>31</sup> This discussion draws from a chart that accompanies Handler and Rolph's discussion. See Handler & Rolph, *supra* note 7, at 421-22.

<sup>32</sup> See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1987) (exploring the interplay between hard-edged, clearly-defined legal rules (crystals) and unclear rules (mud)).

the malleable and uncertain nature of fair dealing.”<sup>33</sup> Indeed, fair dealing might be even muddier than fair use. Australian law requires courts and litigants to contend with two issues: First, is the dealing “fair”? Secondly, is the dealing within the statutory categories? Part of the disagreement between the Australian judges that decided the Panel case was about whether Ten’s dealing was “fair,” but there were also differences of opinion as to whether some of the uses actually constituted “criticism or review” or “news reporting.”<sup>34</sup> There was also extensive discussion as to whether it was possible for a program both to entertain and to report news. And there was some sharp disagreement between the judges as to whether the aim of poking fun defeated Channel Ten’s assertion that its use of the extracts was for the reporting of news.<sup>35</sup>

The choice between fair use or fair dealing, then, is not necessarily a choice between mud and crystals. In the United States, courts are not required to “fit” the defendant’s actions into any delineated category of use. The only issue is whether the use is fair. The enumeration of categories, however, does not necessarily mean that greater predictability accompanies the Australian system. Defining the categories itself — as well as evaluating the “fairness” of a use under Australian law — can raise muddy and unpredictable legal questions.

On the other hand, the U.S. fair use defense may involve greater uncertainty overall it because applies to a greater *range* of conduct. In Australia, there are presumably many more questions about the legitimacy of uses that do not need to be asked (at least, not in the context of the fair dealing provisions), because no colorable claim can be made that they fall within the six statutory categories.<sup>36</sup> Accordingly, the *ex ante* rule — get a license or don’t use — seems more likely to apply in a broader range of contexts.<sup>37</sup> The effect of legislative drafting may thus depend on one’s frame of reference. Because the permitted fair dealings are confined to particular purposes, there is greater room for dispute over whether a de-

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<sup>33</sup> Melissa de Zwart, *Seriously Entertaining: The Panel and the Future of Fair Dealing*, 8 MEDIA & ARTS L. REV. 1, 2 (2003) (“The recent decision of the Full Court [in the Panel Case] illustrates the uncertainty involved in the application of the concept of fair dealing.”).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> According to Burrell and Coleman, many of the other specific (non-fair dealing) defenses that exist in Commonwealth copyright systems are themselves highly uncertain. See BURRELL & COLEMAN, *supra* note 1, at 7.

<sup>37</sup> Cf. Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 580-81 (1998) (exploring the relative costs to consumers of relying on fair use or accepting a license).

endant's use falls within the statutory categories.<sup>38</sup> But from systemic perspective, the U.S. approach renders any uncertainties associated with the application of fair use relevant to a much greater range of conduct.

### B. *Does Legal Ecology Matter?*

Over recent years, a number of proposals have been advanced to bring Australian defenses more into line with the U.S. approach by adopting a U.S.-style fair use defense into Australian copyright law.<sup>39</sup> This proposal had the general support of a number of leading Australian commentators.<sup>40</sup> It also received detailed governmental attention in the 2005 "Fair Use Review"<sup>41</sup> published by the Australian Attorney-General's Department. This review followed the enactment in 2004 of a series of amendments to the Australian Copyright Act that arguably expanded the scope of copyright. Most of the changes were required by the Australia — United States Free Trade Agreement ("AUSFTA"), which entered into force in 2004.<sup>42</sup> The Fair Use Inquiry was partly animated by the belief that if Australian copyright protection was to be strengthened in line with developments in U.S. copyright law, true symmetry should be pursued by adopting a U.S.-style fair use defense. It was also thought that the United States could hardly complain about more permissive "user rights," if the new defense copied U.S. law — nor would it likely complain that a defense that mimicked U.S. law was inconsistent with international obligations.

The proposal to adopt a broad fair use defense was never realized. In the course of the Fair Use Review and the discussion that followed, it was pointed out to the government that the U.S. approach to fair use relies upon the particular ecology of the U.S. legal system. Two differences in legal culture were seen as especially important. First, Australia is rare amongst Western democracies in that it lacks constitutionally entrenched

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<sup>38</sup> In the news reporting context, it is possible that the scope for dispute will increase as the line between news reporting and entertainment becomes increasingly blurred. See, e.g., Lynn Spigel, *Entertainment Wars: Television Culture After 9/11*, 56 AM. Q. 235 (2004).

<sup>39</sup> This analysis of reform proposals in Australia draws from discussion with Professor David Brennan of the Melbourne Law School and from an unpublished paper Professor Brennan presented at a seminar at the Intellectual Property Research Institute of Australia.

<sup>40</sup> See generally de Zwart, *supra* note 33 (surveying arguments).

<sup>41</sup> Attorney-General's Department, *Australia, Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, *supra* note 1.

<sup>42</sup> Opened for signature May 18, 2004, [2005] A.T.S. 1 (entered into force Jan. 1, 2005).

free speech rights.<sup>43</sup> While there are many structural similarities between the Australian and U.S. federal constitutions, Australia never adopted a bill of rights at the federal level. Accordingly, the system of checks and balances associated with the U.S. First Amendment does not have the same ubiquity in the Australian constitutional scene. In U.S. constitutional analysis, fair use is understood to be a “First Amendment safeguard,”<sup>44</sup> a conception that would be absent in Australia, at least at the federal level, even if it were to adopt a U.S.-style fair use defense. Secondly, Australia lacks the high volume of cases exploring the contours of the fair use defenses. This would likely continue even if, following the adoption of a fair use defense, Australian defenses were given a broader compass.

The importance of a significant volume of case law to understanding the nature of fair use has been underscored by recent empirical research undertaken by Professor Barton Beebe into the operation of the fair use defense in lower courts. Beebe’s path-breaking study teaches that focusing on appellate cases can tell us only so much about the scope of the defense. It identifies a number of significant trends that can be discerned from study of the conglomeration of U.S. fair use case law, not just the leading cases. For example, contrary to conventional wisdom,<sup>45</sup> and for all the facial vagaries of § 107, rates of reversal, dissent, and appeal in the fair use context are not especially high, as compared with other areas of the law.<sup>46</sup> Whereas the leading Supreme Court cases evince a significant divergence of judicial opinion as to how the fair use test is to be applied,<sup>47</sup> among lower courts the position appears to be considerably more stable.<sup>48</sup> Beebe also identifies a number of trends in the application of the fair use factors. For example, non-commercial uses appear strongly to favor a finding of fair use,<sup>49</sup> as do transformative uses.<sup>50</sup> A fair use finding is also favored where the plaintiff’s work is factual in character, an approach that is sensitive to the public’s need for the dissemination of information;<sup>51</sup> and

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<sup>43</sup> The framers of the Australian federal constitution believed that citizens’ rights were “best left to the protection of the common law in association with the doctrine of parliamentary supremacy.” *Australian Capital Television v. Commonwealth*, (1972) 177 CLR 106, 135-36 (*per Mason, C.J.*).

<sup>44</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2002) (characterizing the fair use defense and the idea/expression dichotomy as “built-in First Amendment accommodations.”).

<sup>45</sup> *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990).

<sup>46</sup> Beebe, *supra* note 18, at 574-75.

<sup>47</sup> *Id.* at 574.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 603.

<sup>50</sup> *Id.* at 606.

<sup>51</sup> *Id.* at 612.

courts also tend to conclude that a work's published status favors fair use.<sup>52</sup> On the other side, weighing heavily against fair use is the defendant's taking of the "heart" of the work.<sup>53</sup> One of Beebe's key observations is that where lower courts declined to follow the leading cases, "they repeatedly — and systematically — did so in ways that expanded the scope of the fair use defense."<sup>54</sup>

Professor Beebe's nuanced and elegant study adds another perspective on the predictability/uncertainty issue that arises in discussion of the relative merits of fair dealing and fair use. Analysis of a critical mass of cases may be needed before it is possible to determine how the defenses actually operate. In Australia, there just isn't a significant body of case law on fair dealing.<sup>55</sup> One message from Beebe's work is that, in the fair use context, there is more "there there" than the leading precedents reveal. But this conclusion could perhaps not be so easy to reach in the Australian context where this kind of data is largely absent.<sup>56</sup> Through its analysis of a conglomeration of decisions Professor Beebe's study makes fair use more knowable than it was before. Without a critical mass of cases, Australian fair dealing cannot be known in quite the same way. The Australian fair dealing provisions may be textually more delineated than their fair use counterpart, but in their context, their application is perhaps less easily tied down.

Judicial culture is likely to be another relevant variable. Professors Burrell and Coleman argue that the adoption in Australia of a U.S.-styled fair use doctrine will not necessarily be the panacea it appears to promise to those concerned about the rigidity of the fair dealing approach. They describe a long tradition in Commonwealth jurisprudence of courts closing

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<sup>52</sup> *Id.* at 615.

<sup>53</sup> *Id.* at 616. Professor Beebe explains that this factor is more important than whether the defendant took the entirety of the plaintiff's work. *Id.*

<sup>54</sup> *Id.* at 622.

<sup>55</sup> Handler & Rolph, *supra* note 7, at 382 ("Copyright cases in which fair dealing defenses are raised are rare in Australia.")

<sup>56</sup> This observation might be relevant to debates over the propriety of *delegating* to the judicial branch the kinds of important policy questions that are raised by the fair use defense. Where there is less legislative guidance, judicial decisions over fair use have the scope to take on greater policy significance. *See generally* Weatherall, *supra* note 1. In the Australian context, because there is less appellate case law, trial judges have much less guidance. Professor Beebe's study, which suggests that leading cases are of limited relevance in any event, might suggest that the absence of appellate guidance is not so much of a problem — but, in Australia, legal actors are also denied the lessons that can be derived from study of a significant conglomeration of decisions by lower courts. More detailed analysis would be needed to predict if a greater body of case law would result from a broadening of the defense in the Australian context beyond the six fair dealing categories.

off avenues for interpreting existing law in a manner that is more receptive to the interests of users of copyright-protected material. One of the examples they explore in detail is the approach to uses of copyright-protected works for the purpose of parody. A few English cases appeared to countenance the idea that parodies were entitled to more permissive treatment,<sup>57</sup> but more recent cases closed the door on this development, and, as will be discussed in more detail below, Commonwealth courts eventually adopted the view that parodies were not to be accorded special treatment for the purposes of copyright infringement analysis.<sup>58</sup> Burrell and Coleman conclude: “[U]nless the introduction of a fair use exception were accompanied by a transformation in judicial attitudes . . . it would be unlikely to do much good.”<sup>59</sup>

### C. *Do Other Defenses Matter?*

Absent a broad fair use defense, it falls on the legislative branch to anticipate the kinds of uses to which exceptions apply. In the United States, § 107 delegates to the judicial branch the task of dealing with questions that do not fall within the more specifically-delineated defenses contained in the U.S. statute.<sup>60</sup> In this sense, fair dealing may be less flexible and “future-proof.” But analysis of the extent to which this aspect of the U.S. approach offers advantages over the Australian approach should also take account of the array of specific defenses already available under Australian law. A flurry of copyright law reforms occurred in Australia between 2000 and 2006,<sup>61</sup> the result of which was the addition of a number of new defenses to the Australian statute. A persistent, if somewhat incoherent, theme during this period was that reforms to the Copyright Act would be “fairer for users and tougher on pirates,”<sup>62</sup> a theme that was reiterated in a number of speeches by the Australian Attorney-General, the Minister responsible for copyright law.<sup>63</sup> It was in the course of this review that the

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<sup>57</sup> *Id.* at 264-65 (citing *Glyn v. Weston Feature Film Co.*, [1916] 1 Ch. 261; and *Joy Music v. Sunday Pictorial Newspaper* (1920), [1960] 2 Q.B. 60).

<sup>58</sup> BURRELL & COLEMAN, *supra* note 1, at 265 (citing *Schweppes v. Wellingtons*, [1984] F.S.R. 210 (Ch.)).

<sup>59</sup> *Id.* at 253. See also Melissa de Zwart, *Fair Use? Fair Dealing?*, 24 COPYRIGHT REP. 20, 32 (2002).

<sup>60</sup> The U.S. Copyright Act of 1976 contains a number of detailed and delineated defenses in addition to the fair use defense.

<sup>61</sup> The leading discussion of the legislative history is by Professor Kimberlee Weatherall of the University of Queensland School of Law. See Weatherall, *supra* note 1.

<sup>62</sup> The statement begged the question at stake: Putting aside the normative stakes accompanying the “pirate” appellation, positively enacted copyright law itself delineates the distinction between lawful and unlawful “users.”

<sup>63</sup> See Weatherall, *supra* note 1, at 978, n.72 (collecting sources).

Australian Attorney-General also announced that the government was considering the addition of a U.S.-style fair use defense to the Australian Copyright Act.<sup>64</sup>

Following the decision not to enact a broad fair use defense, the Australian Parliament chose to enact a long list of new exceptions, many of which responded to the absence of any private copying exceptions in Australian law. Under Australian law, a person can now make:<sup>65</sup>

- One copy in a different form of a work contained in a book, newspaper or periodical publication;<sup>66</sup>
- One copy of a photograph (from paper to electronic, or vice versa, but not from paper to paper, or electronic to electronic);<sup>67</sup>
- Any number of copies of a legitimately purchased sound recording in any format;<sup>68</sup>
- One copy in electronic form of a film on video tape;<sup>69</sup> and
- Any number of copies of broadcast for purposes of “time shifting,” or perusal at a more convenient time.<sup>70</sup>

The Australian Copyright Act includes a large number of other defenses, in addition to these new accommodations for private copying. For example, there are defenses for copying computer programs to create interoperable programs or products,<sup>71</sup> and defenses that enable other actions with computer programs, such as correcting errors.<sup>72</sup> There are provisions that permit the reading aloud in public of reasonable portions of published literary or dramatic works.<sup>73</sup> There are specific provisions that facilitate Australia’s parallel importation regime.<sup>74</sup> Other exceptions

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<sup>64</sup> *Id.* Simplification of copyright defenses has long been foreshadowed in Australia. In September 1998, the Copyright Law Review Committee (CLRC) made recommendations to simplify and consolidate the then existing defenses, and to expand fair dealing to an open-ended model that referred to the existing fair dealing purposes as illustrative. The result would have been very close to the U.S. model. See COPYRIGHT LAW REVIEW COMMITTEE, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, SIMPLIFICATION OF THE COPYRIGHT ACT: PART 1 – EXCEPTIONS TO THE EXCLUSIVE RIGHTS OF COPYRIGHT OWNERS (1998).

<sup>65</sup> See Weatherall, *supra* note 1, at 995.

<sup>66</sup> Copyright Act 1968 (Cth) s 43C (Austl.).

<sup>67</sup> *Id.* s 43J.

<sup>68</sup> *Id.* s 109A.

<sup>69</sup> *Id.* s 110AA.

<sup>70</sup> *Id.* s 111(1).

<sup>71</sup> *Id.* s 47D.

<sup>72</sup> *Id.* s 47B-47F.

<sup>73</sup> *Id.* s 45.

<sup>74</sup> *Id.* s 44C. This provision ensures that the copyright that might subsist in labels and accessories does not inhibit the parallel importation of certain products.

enable some works to be performed in residential facilities, such as prisons.<sup>75</sup> An additional amendment to the Australian Copyright Act of 1968 allows libraries and archives, educational institutions, and institutions or volunteers that assist people with a disability to make certain non-commercial uses of copyright-protected works.<sup>76</sup> A non-profit educational body may now freely use copyright-protected works for the purpose of giving educational instruction, so long as the use “is not made partly for the purpose of the body obtaining a commercial advantage or profit.”<sup>77</sup>

Some of these more closely-delineated provisions do quite a lot of the work that is asked of the fair use defense under U.S. law. For example, in the United States decompilation of computer programs remains largely a “fair use” matter,<sup>78</sup> whereas in Australia a specific statutory provision covers this kind of use. Time-shifting of television programs is another example. In the Australian Act, a specific section addresses this issue,<sup>79</sup> so the judiciary has no need to agonize over whether such dealings are fair.<sup>80</sup> Moreover, the Australian time-shifting defense excuses a greater range of time-shifting activities. The Supreme Court’s *Sony* holding was arguably

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<sup>75</sup> *Id.* s 46.

<sup>76</sup> On the new exceptions for libraries, see Emily Hudson, *The Copyright Amendment Act 2006 – The Scope and Likely Impact of New Library Exceptions*, 14 AUSTRALIAN L. LIBR. 25 (2006)

<sup>77</sup> Copyright Act 1968 (Austl.), § 200AB. Interestingly, these new provisions also contain a requirement that the uses be consistent with the “three-step test” that is now the international standard for measuring the legitimacy of exceptions. See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 13, 1869 U.N.T.S. 299. Accordingly, under domestic Australian law, the use must be within the statutorily defined categories and must “not conflict with a normal exploitation of the work or other subject-matter or “unreasonably prejudice the legitimate interests of the owner of the copyright.” Copyright Act 1968 § 200AB(1) Austl.). The Australian government appears to be of the view that the disciplines of the three-step test are not merely directed at the executive or legislative branch, and that the application of the test can be delegated to the judiciary. See generally Christophe Geiger, *From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test*, 29 EUR. INTEL. PROP. REV. 486 (2007).

<sup>78</sup> See, e.g., *Sega v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir.1992) (decompilation in order to study of interface data so as to create and market competing video games held to be fair use).

<sup>79</sup> Copyright Act 1968 (Cth) s 111(1) (Austl.).

<sup>80</sup> On the history of *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), see Jessica Litman, *The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler*, in INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2006).

confined to free-to-air broadcasts, whereas the Australian statute would appear to include programs transmitted on cable services.<sup>81</sup>

In *Sony*, Justice Stevens went to considerable lengths to characterize time-shifting as a potentially productive use of copyright-protected works. Such productive uses included uses by teachers who copy for the purposes of broadening their understanding of their specialist areas; by a legislator who copies in order to broaden her understanding of what her constituents are watching; and by a constituent who copies a news program to help make a decision on how to vote.<sup>82</sup> By not limiting the time-shifting defenses to free-to-air broadcasts, the Australian legislature has greatly increased the range of programs that these earnest teachers, politicians, and constituents can productively use. Assuming *arguendo* that more time-shifting leads to greater productivity, Australia would seem to be ahead. Such observations do not address the relative advantages of delegating new issues to the judicial branch, as compared with leaving things up to the legislature.<sup>83</sup> But recent history suggests that the Australian Parliament is actually quite good at providing users with an acceptably broad suite of defenses and exceptions. The legislative approach, in other words, may provide greater flexibility and adaptability than might first appear. At the very least, comparisons between fair dealing and fair use must take account of differences in political milieu, including the willingness of different legislatures to earnestly engage with copyright initiatives and timely address new issues as they arise.

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<sup>81</sup> See Broadcasting Services Act 1992 (Austl.) § 6 (definition of "broadcasting service").

<sup>82</sup> *Sony*, 464 U.S. 455, n.40.

<sup>83</sup> See generally Weatherall, *supra* note 1 (noting the increasing bureaucratization of Australian copyright law, particularly its approach to defenses and exceptions).

<sup>84</sup> Copyright Act 1968 (Cth) ss 41A, 103AA (Austl.).

<sup>85</sup> See generally de Zwart, *supra* note 32.

<sup>86</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

### III. CONCLUSION

Examined in context, the distinctions between the Australian fair dealing and the U.S. fair use approaches do not seem particularly sharp. While the closed list of fair dealing defenses seems more predictable than the open-ended fair use approach, fair dealing is not as certain in all respects — to the contrary, definitional issues can creep into the analysis as courts struggle to determine whether defendants' uses fall within the particular categories. The legislative drafting technique may matter less than having a high volume of cases from which broad trends as to the application of the defenses can be discerned. And the distinction between fair use and fair dealing may also be less significant in the light of other defenses and exceptions enacted into copyright statutes. Specifically targeted defenses can be broader — as is the case with the Australian time-shifting defense and with the new defense for fair dealing for the purposes of parody or satire. To the extent these defenses concern matters that are conventionally dealt with as “fair use” issues, the distinctions between the two systems seem less important.

One further observation is warranted: the economic significance of any enduring distinctions will partly depend on the kind of market that the downstream user wants for her work. Copyright defenses are territorially confined.<sup>98</sup> Like the substantive rights set forth in domestic copyright statutes, copyright defenses generally have no extraterritorial effect.<sup>99</sup> Assuming, for example, that Australian fair dealing for the purposes of satire is broader than the prevailing U.S. approach to parody, the Australian de-

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<sup>97</sup> Cf. Merges, *supra* note 87, at 307 (advancing the argument that a “parody defense” makes sense where there is a clear failure in the market for parody licenses, and discussing strategies to avoid inter alia the problem of the “knock off” disguised as parody”).

<sup>98</sup> See Jane C. Ginsburg, *The Role of National Copyright in an Era of International Copyright Norms*, 47 J. COPYRIGHT SOC'Y 265 (2000).

<sup>99</sup> See generally, Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575, 604-08 (2000) (exploring the conflict of laws issues that are relevant to the marketing of parodic derivative works). In the Australian context, my appreciation of this point benefited from further discussion with Professor David Brennan.

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fense would excuse the making and marketing of some derivative works that would remain infringing under U.S. law. Thus, Australians would certainly be able to enjoy the satirist's artistry within Australia. Such works could not, however, be released in the United States without infringing the copyright in the underlying works. The same would be true of all markets whose copyright laws would not excuse such uses. Some satirists may be content with reaching only an Australian audience for their works. Others may be more ambitious, however, and create their works with wider audiences — and different national copyright laws — in mind.