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FAIR USE AS AN ADVANCE ON FAIR DEALING? DEPOLARISING THE DEBATE

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Fair Use as an Advance on Fair Dealing? Depolarising the Debate

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I. INTRODUCTION

Over the last dozen or so years, countries with laws based on the Copyright Act 1911 (UK) have prioritised the issue of copyright exceptions in their law reform agendas. In each of these countries, a central question has related to the desirability of injecting greater flexibility into exceptions, most notably through the introduction of a "fair use" provision in addition to, or perhaps replacing much of, the existing closed-list system.[1] The resulting statutory reforms have varied. Sri Lanka and Israel, for example, have both adopted a U.S.-style fair use defence, along with a small number of specific exceptions, in their new copyright laws of 2003 and 2007.[2] Singapore has also enacted an open-ended provision, albeit in the form of extended fair dealing rather than fair use. This was achieved by amending one of the purpose-limited fair dealing exceptions to allow it to apply to (almost) any use, with the many closed-

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[1] As will be discussed in this chapter, the classification of an exception as a "standard" or a "rule" is more complicated than simply reading the statutory text; furthermore, we use the phrases "open" and "closed" somewhat differently to "standard" and "rule." By closed-list system, we mean an exhaustive set of exceptions in which each provision focuses on a specific act or is otherwise limited in scope, especially through being restricted to a particular purpose. Under this nomenclature, we count fair dealing as a "closed" exception, although we recognise that it may operate more broadly than other provisions. In contrast, an open-ended exception could in theory apply to any use by any user, with the key test relating to fairness or an equivalent concept. Fair use in U.S. law and elsewhere is therefore an "open" exception, as is the extended version of fair dealing in Singapore, discussed *infra*, note 3.

[2] In Sri Lanka, see Intellectual Property Act, Act No. 36 of 2003, ss. 11-12. In Israel, see Copyright Act 2007, Arts. 19-32. *See also* Tamir Afori, *Israel's New Fair Use Provision*, *in* INTELLECTUAL PROPERTY LAW AND POLICY VOLUME 11, at 264, 267 (Hugh Hansen, ed., 2010) (on the political background).

list exceptions otherwise retained.[3] In contrast, the reforms of Canada and the UK have – in terms of drafting choices – stayed closer to the existing infrastructure, with the addition of new fair dealing purposes directed to education, parody and (in the UK) caricature, pastiche and quotation, and the introduction of new detailed exceptions to accommodate specific practices such as user-generated content, private copying and data mining.[4] The Australian reform experience has been less fruitful in recent years; after some expansion of exceptions (albeit within the closed-list model) in 2006, an impasse has arisen following strong calls for fair use from two major law reform inquiries. Despite the level of attention already given to copyright exceptions, the Australian government has recently initiated yet another round of consultation in relation to reform options.

In this chapter we seek to explore the reasons for this impasse, and to revitalise the debate around the desirability of alternative options for reform, such as the addition of new fair dealing purposes or the development of other closed provisions that utilise a less prescriptive drafting style. We start from the premise that the exceptions regime in Australia

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[3] *See* Copyright Act 1977, ss. 35(1) and 109(1) (Sing.) (amended by the Copyright (Amendment) Act 2004). We say "almost" any use as dealings for the purposes of criticism, review and reporting current events remain covered by other fair dealing provisions in ss. 36-37 and 110-111. For discussion of the approach in Singapore, see Ng-Loy Wee Loon & Andy Leck, *Protection of Intellectual Property Rights*, *in* DEVELOPMENTS IN SINGAPORE LAW BETWEEN 2001 AND 2005, at 242 (Teo Keang Sood ed., 2006), and SINGAPORE MINISTRY OF LAW AND INTELLECTUAL PROPERTY OFFICE OF SINGAPORE, PUBLIC CONSULTATION ON PROPOSED CHANGES TO SINGAPORE'S COPYRIGHT REGIME 28-29 (2016), available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/Public%20Consultation%20Paper%20on%20Proposed%20Changes%20to%20Copyright%20Regime%20in%20Singapore%20August%202016.pdf. (considering amending the open-ended provision so that it more closely aligns with U.S. law). The existing Singaporean approach has been recommended in Ireland. *See* COPYRIGHT REVIEW COMMITTEE, MODERNISING COPYRIGHT 89-97 (Oct. 2013) (recommending an open-ended "fair use" defence to be added to the closed list of exceptions, and a non-exhaustive list of eight factors to be taken into account in considering "fairness"). For comment, see Mark Hyland, *At a Crossroads: Irish Copyright*, 37 EUR. INTELL. PROP. REV. 773 (2015).

[4] In Canada, see Copyright Modernization Act, S.C. 2012, c 20 (expanding the key "fair dealing" exception in the Copyright Act, R.S.C. 1985, c C-42, s. 29 to cover education, parody and satire, and adding complex new exceptions for non-commercial user-generated content, private copying, time shifting and the making of back-up copies). In the UK, a series of reforms to the Copyright, Designs and Patents Act 1988, c. 48 were introduced in 2014, expanding the "fair dealing" defences to cover quotation, parody, pastiche, caricature and illustration for instruction, and adding new defences covering computational analysis, assisting people with disabilities and library copying. In 2015, the new s. 29B, covering private copying, was quashed. *See* British Academy of Songwriters, Composers and Authors v. Secretary of State for Business, Innovation and Skills [2015] EWHC 1723 (Admin). For consideration of the new exceptions, see LIONEL BENTLY, ET AL., INTELLECTUAL PROPERTY LAW (5th ed. 2018). For the background, see GOWERS REVIEW OF INTELLECTUAL PROPERTY (2006) (recommending new, specific exceptions but also that the EU Information Society Directive be amended to permit domestic exceptions for transformative use), and IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (2011) (expressing concerns as to whether "fair use" would be consistent with EU law, and instead recommending the adoption of new, specific exceptions).

has fundamental problems and is in need of reform.[5] Our aim is to assess the value of a model that maintains but expands and improves upon a closed-list system, compared to one based around an open-ended "fairness" exception. We are therefore interested in exploring the relative merits of a country like Australia adopting the approach of Canada and the UK (that have expanded fair dealing); or joining the U.S., Israel or Sri Lanka (fair use) or Singapore (extended fair dealing); or moving somewhere between these groups.

We start this task in Part II by observing how exceptions debates in Australia and elsewhere have come to be characterised by two camps, one arguing forcefully in favour of fair use and the other decrying the problems of such an approach and defending the structure of the existing system. We note that this focus on fair use, while it is to be welcomed for challenging the status quo and highlighting inadequacies of the closed-list system, has led to the ousting of any meaningful consideration of alternative approaches. In Part III we turn to consider substantive arguments in favour of fair use and the status quo, noting how those arguments tend to converge into debates over "certainty versus flexibility." Here we see the repetition of certain tropes, for instance that closed exceptions provide greater certainty in outcomes and practice but are unresponsive to changing conditions, whilst fair use affords a greater degree of flexibility and adaptability but is unpredictable. As we explain, although these observations bring to mind some of the literature on standards and rules, they are based on an oversimplified set of assumptions regarding the desirability and effect of different forms of legal drafting.[6] We seek to depolarise this aspect of the debate by providing a fuller account of what "increasing flexibility" actually entails, including by reference to recent experiences in Canada and the UK that demonstrate how closed systems may exhibit benefits usually associated with a fair use approach.

We remain of the view that fair use is the best reform option for a country such as Australia. However, taking a pragmatic perspective, we are also aware of the political challenges in implementing fair use, and that other reform options have the potential to improve greatly on the existing suite of exceptions. We therefore argue that it is important not

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[5] We have made our case in detail in Robert Burrell, et al., *Submission 278 to Australian Law Reform Commission: Discussion Paper 79*, at 10-35 (Dec. 14, 2012). Similar arguments may also apply to the exceptions regimes in other countries.

[6] Such a critique has also been made in ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 270-71 (2005), and Emily Hudson, *Implementing Fair Use in Copyright Law: Lessons from Australia*, 25 INTELL. PROP. J. 201 (2013).

to overestimate the merits of fair use in comparison with a substantially rehabilitated closed-list model. Expanded fair dealing, coupled with a range of specific exceptions, remains a viable option and is worthy of careful consideration. It ought not to be marginalised or repudiated in the rush to make a case that a country's system of exceptions should be liberalised.

II. THE POLARISED DEBATE OVER EXCEPTIONS REFORM

A. The recent Australian experience

Copyright exceptions have been considered in Australia in three major government inquiries since 2005. The first led to a reform statute whose amendments took place largely within the existing environment of detailed, closed exceptions. The other two – both of which recommended more far-reaching reform – have not been acted on.[7] We start by providing an overview of each inquiry and of the increasingly polarised viewpoints that have been presented by stakeholders; in Part II.B we explore the change in status of expanded fair dealing from one limb of the 2006 reforms to a "second best" alternative to fair use.

In the first inquiry of 2005, the Commonwealth Attorney-General's Department, operating under a conservative government, concluded that Australia should retain its closed-list model but introduce a range of new exceptions. The proximate cause for this review was the United States-Australia Free Trade Agreement,[8] and in particular the concern that whilst the copyright aspects of that Agreement had required Australia to strengthen rights and expand enforcement mechanisms, there was no mention of balancing aspects of U.S. law such as fair use.[9] Rather than allow these concerns to slow down parliamentary approval of the

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[7] Without making any reference to any of these inquiries, the Australian government has recently undertaken relatively minor exceptions reform, notably by providing new exceptions for use of copyright material by people with disabilities or those assisting such people, and new preservation copying provisions for libraries and archives. *See* Copyright Amendment (Disabilities and Other Measures) Act 2017 (Austl.).

[8] Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248.

[9] 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 ¶¶ 6.9-6.15 (May 2005) ("Fair Use Issues Paper") (describing recommendations from the Parliamentary Joint Standing Committee on Treaties and the Senate Selection Committee on the United States-Australia Free Trade Agreement in relation to fair use or equivalent amendments). The Fair Use Issues Paper also noted earlier calls for expanded fair dealing: *id*. ¶¶ 6.3-6.8 (referring to COPYRIGHT LAW REVIEW COMMITTEE, SIMPLIFICATION OF THE COPYRIGHT ACT 1968: PART 1: EXCEPTIONS TO THE EXCLUSIVE RIGHTS OF COPYRIGHT OWNERS (1998)). For further discussion, see Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259.

Agreement, the government promised, as part of its re-election policies for the imminent federal election, to hold an inquiry in relation to fair use.[10] The government was re-elected in October 2004 and the review commenced the following May. Respondents were invited to address two key questions: whether existing exceptions were adequate in the digital age,[11] and how any new exceptions should be drafted, including whether Australia should introduce an open-ended provision similar to fair use.[12]

Amongst those representing user constituencies, there were recurring complaints that Australia's existing exceptions were inflexible, out-dated and not up to the job.[13] However, it is fair to say that amongst these respondents, there was also a lack of clarity and consensus regarding the form any amendments should take. Some opposed fair use,[14] whilst others did so as part of a scattergun approach that seemed to countenance more of everything – that is, new specific exceptions, new fair dealing purposes and a new fair use provision.[15] A number of submissions referred to a "hybrid" approach that seemed to be based on the expansion of fair dealing, although the precise suggestion was not particularised.[16] All these positions seemed to be underpinned by a concern that certainty should not be sacrificed in a shift towards flexibility.

In 2006, and in the absence of any final report, the government passed legislation that reformed some exceptions, notably by adding parody and satire as fair dealing purposes, and accommodating specific practices within new and amended closed exceptions.[17] This

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[10] LIBERAL PARTY OF AUSTRALIA, STRENGTHENING AUSTRALIAN ARTS 22 (2004).

[11] Fair Use Issues Paper, *supra* note 9, ¶¶ 11.1-11.21.

[12] *Id.* ¶¶ 1.1-1.7, 14.1-14.14.

[13] *See, e.g.*, the submissions to the Fair Use Issues Paper made by the Australian Broadcasting Corporation, Australian Digital Alliance, Australian Vice-Chancellors' Committee, Internet Industry Association, Electronic Frontiers Australia, Copyright in Cultural Institutions Group and Australian Film Commission (copies on file with the authors).

[14] *See, e.g.*, the Australian Film Commission's submission (copy on file with the authors).

[15] *See, e.g.*, submissions by the Australian Broadcasting Corporation, Australian Vice-Chancellors' Committee, Copyright in Cultural Institutions Group (copies on file with the authors).

[16] A key protagonist for this was the Australian Digital Alliance, which recognised that within the timeframe of the review it was not in a position to provide a draft of its proposed model. Others to endorse a hybrid approach included the Australian Society of Archivists and the National Archives of Australia (copies on file with the authors).

[17] *See* Copyright Amendment Act 2006, sched. 6 (Austl.). For general discussion, see Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms*, 31 MELB. U. L. REV. 967 (2007).

legislation also added an autochthonous exception for educational institutions, libraries and archives and users with a disability.[18] Overall, it can be said that the government agreed that reform was necessary but drafted amendments that accorded with existing drafting approaches. One might speculate whether this was partly in response to – or at least not helped by – the inconsistent and unenthusiastic reception given to fair use by those who would conceivably be its strongest supporters.

The second inquiry was the product of the new Labor government's reference to the Australian Law Reform Commission (ALRC) in 2012 to examine whether Australia's exceptions were "adequate and appropriate in the digital environment."[19] In announcing receipt of the final terms of reference, the President of the ALRC stated that whilst recent amendments to the Copyright Act had sought to respond to digital developments, "these changes occurred before the digital economy took off. The ALRC will need to find reforms that are responsive to this new environment, and to future scenarios that are still in the realm of the imagination."[20] The ALRC was therefore tasked with revisiting many of the issues considered just seven years earlier in relation to the scope of copyright exceptions. In contrast with the legislative outcome of the 2005 review, which implicitly rejected fair use, the primary recommendation made in the ALRC's 2013 *Copyright and the Digital Economy* report was that Australia should adopt a fair use defence closely resembling s. 107 of the U.S. Copyright Act of 1976 but with a longer list of illustrative purposes.[21] The ALRC's secondary recommendation was that if fair use were not adopted, Australia should significantly expand its fair dealing defences to cover a range of purposes expressed at a high level of abstraction, such as "criticism or review," "quotation," "non-commercial private use," "incidental or technical use," "library or archive use" and "education," without any further qualifications.[22] In either case, the ALRC recommended the repeal of the nine existing fair dealing provisions and over twenty specific exceptions covering format and time shifting, temporary uses, library

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[18] *See* Copyright Amendment Act 2006, sched. 6, item 10 (Austl.) (adding a new s. 200AB to the Copyright Act 1968). For discussion, see Emily Hudson, *The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions*, 14 AUSTL. L. LIBRARIAN 25 (2006).

[19] *See* AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 122, COPYRIGHT IN THE DIGITAL ECONOMY 7 (Nov. 2013) ("ALRC Final Report").

[20] *See* Australian Law Reform Commission, *Terms of Reference Received for the ALRC Copyright Inquiry* (June 29, 2012), available at http://www.alrc.gov.au/news-media/media-release/terms-reference-received-alrc-copyright-inquiry.

[21] *See* ALRC Final Report, *supra* note 19, at 14 (Recommendations 4-1, 5-1, 5-2 and 5-3).

[22] *Id*. at 14 (Recommendation 6-1).

preservation copying and educational use, leaving only a small number of subject-matter-specific exceptions in place.[23] The ALRC's Final Report was met with near silence by a changed, conservative government.

Immediately before the ALRC's Final Report was publicly released, the government announced an independent, comprehensive review of Australia's competition policy. One of the concerns expressed in the final report of this review, published in 2015, was that "there is no overarching IP policy framework or objective guiding changes to IP protection," and that there was a "need for an overarching review of IP."[24] In response, the government asked the Productivity Commission, its independent research and advisory body on economic matters, to conduct a review of all of Australia's intellectual property laws within a year. The Productivity Commission handed down its *Intellectual Property Arrangements* report in late 2016. It agreed with the substance of the ALRC's primary recommendation as to fair use,[25] but did not consider whether existing exceptions ought to be repealed or retained, or the relative merits of expanding the scope of the current closed list of exceptions. At the same time the government made the Productivity Commission's report publicly available, it released a commissioned cost-benefit analysis of the ALRC's primary and secondary recommendations, undertaken by Ernst & Young. This analysis concluded that both fair use and expanded fair dealing would generate net benefits compared with the status quo, with fair use generating the larger benefits.[26] In 2017, the government responded to Productivity Commission's fair use recommendation by stating that it "will publicly consult on more flexible copyright exceptions"; this consultation was opened in March 2018.[27] It did not make comments on the Ernst & Young analysis.

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[23] *See id.* at 14-16 (Recommendations 5-4, 10-1, 11-1, 12-1 and 14-1).

[24] COMPETITION POLICY REVIEW, FINAL REPORT 104 (Mar. 2015).

[25] *See* PRODUCTIVITY COMMISSION, REPORT NO. 78, INTELLECTUAL PROPERTY ARRANGEMENTS ch. 6 (Sept. 2016).

[26] *See* ERNST & YOUNG, COST BENEFIT ANALYSIS OF CHANGES TO THE *COPYRIGHT ACT 1968* (2016), available at https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968.

[27] *See* AUSTRALIAN GOVERNMENT RESPONSE TO THE PRODUCTIVITY COMMISSION INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS 7 (Aug. 2017), available at https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf; AUSTRALIAN GOVERNMENT, DEPARTMENT OF COMMUNICATIONS AND THE ARTS, COPYRIGHT MODERNISATION CONSULTATION PAPER (Mar. 2018), available at https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation.

One of the most notable features of these Australian reviews, albeit something that has come to characterise debates about the scope of copyright more generally,[28] has been the increasingly polarised positions adopted by different copyright stakeholders.[29] As noted above, numerous respondents argued in 2005 that Australia's existing exceptions were in need of reform, but no clear consensus emerged amongst those respondents as to what changes should be made. By the time of the ALRC and Productivity Commission inquiries, this group – which consisted of a loose coalition of internet intermediaries, telecommunications companies, consumer associations and advocacy groups, cultural institution representatives, government organisations, peak education bodies, universities and IP academics – had come to advocate consistently for a shift to fair use. These organisations and individuals focused their attention on the benefits of fair use, portraying it as a flexible, adaptable and workable doctrine that would facilitate socially beneficial conduct and provide broad economic benefits for Australia, as well as overcoming many of the problems with the existing closed-list system. Arguing in favour of the status quo was a second camp whose underlying position remained largely unaltered from the 2005 review. This group – which comprised content producers, most broadcasters, sports rightsholders, collecting societies, and publisher/author associations and advocacy groups – resisted any departure from the existing closed system and supported only minor technical reforms. In their formal submissions and public statements, they painted fair use in almost exclusively negative terms, as an alien, uncertain and risky concept whose implementation would reduce incentives to create and would generate substantial costs.[30]

This polarisation is, to some extent, unsurprising, given the forum in which these views have been ventilated. Public consultation processes encourage stakeholders to advocate for the strongest version of whatever position they support, in the hope of convincing the reform body to recommend that particular course of action.[31] Consistency of position is also

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[28] *See generally* Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 71 (2002).

[29] *See* Patricia Aufderheide & Dorian Hunter Davis, *Stakeholders and Arguments in Australian Policy Debates on Fair Use and Copyright*, 11 INT'L J. COMM. 522 (2017) (mapping stakeholder participation in the two inquiries). *See also* Gary Lea, *Fair Use Not Fair? Australian "Copyright and the Digital Economy" Report Receives a Cool Response*, 19 COMM. LAWS 51, 53 (2014).

[30] For a more detailed analysis of the stakeholders and their arguments, see Aufderheide & Davis, *supra* note 29.

[31] Or, at least, they encourage parties to put forward ambit claims, in the expectation that the reform body will settle on a compromise position once all stakeholder views have been considered.

important if disagreement between those in the reform camp – even if it relates only to the mechanics in which change is to be effected – may be used to weaken the case for a new paradigm. Given this backdrop, and with the second camp barely acknowledging the limitations of the existing state of the law, those pushing for reform could hardly have been expected to take a cautious approach, engaging critically with a range of reform options and pointing out their potential strengths and weakness, as this might have given ammunition to those on the other side or have led to a diluted set of recommendations. Indeed, from the time the ALRC first expressed its preference for a shift to fair use in its 2013 Discussion Paper, it is possible to see the pro-reform first camp as "doubling down" on its advocacy for fair use in subsequent submissions to the ALRC and Productivity Commission, recognising that this option was gaining some traction[32] – an approach that, in turn, only served to mobilise the second camp in increasing its public opposition to fair use.

Nonetheless, it remains striking that the exceptions debate in Australia has become reduced to the binary question of whether or not fair use should be adopted. Few of the contributors to the recent Australian inquiries argued for reform *within* the existing closed list framework, for instance by downplaying the purported differences between fair use and an expanded fair dealing regime, or devising broadly-worded, forward-looking exceptions to cover uses that ought to be permissible. This is notwithstanding: (i) the scope of the matters addressed in the ALRC's initial Issues Paper, which included 55 questions of which only two pertained specifically to fair use;[33] (ii) the political challenges in making the case for fair use; and (iii) the recent experiences of Canada and the UK, where there has been expansion of exceptions through a fair dealing paradigm. The handful of contributors to the ALRC inquiry that sought to engage with the desirability of staying within a fair dealing framework

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[32] This, to some extent, characterises our own shift as contributors to these inquiries. *Compare* Burrell, et al., *Submission 278*, *supra* note 5, *with* Robert Burrell, et al., *Submission 716 to Australian Law Reform Commission: Discussion Paper 79* (July 31, 2013), and Isabella Alexander, et al., *Submission 505 to Productivity Commission, Intellectual Property Arrangements: Draft Report* (June 3, 2016), available at http://www.pc.gov.au/__data/assets/pdf_file/0010/201520/subdr505-intellectual-property.pdf.

[33] *See* AUSTRALIAN LAW REFORM COMMISSION, ISSUES PAPER 42, COPYRIGHT AND THE DIGITAL ECONOMY 5-10 (Aug. 2012), covering questions in relation to, e.g., the guiding principles for reform, internet use and digitisation, data mining, private use, transformative use, use by educational and cultural institutions, the statutory licences and the current fair dealing exceptions. The central question asked in the Attorney-General's Terms of Reference to the ALRC was "whether the exceptions and statutory licences in the Copyright Act 1968 are adequate and appropriate in the digital environment." ALRC Final Report, *supra* note 19, at 7. The Terms of Reference also stated that the ALRC should consider, amongst other things, "whether further exceptions should recognise fair use of copyright material; allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes": *id*.

expressed only faint support for the idea, classifying it as a "poor alternative"[34] to fair use or a "second best reform option."[35] This accords with the broader Australian literature on copyright exceptions, which reveals few contemporary attempts to make the case that an expanded fair dealing model might offer similar benefits to, or even have some advantages over, fair use.[36]

B. Fair dealing: a second best reform option?

A key matter with which we wish to engage in this chapter is whether it concedes too much to accept that expanded fair dealing is inferior to fair use.[37] In answering this question, we start by describing the ALRC's approach to its secondary recommendation in relation to fair dealing. This recommendation has received next to no attention in the scholarship or in subsequent debates, a matter that is not surprising given its presentation by the ALRC. Whilst fair use was front and centre in the ALRC's Final Report and the focus of sustained analysis, its defence of fair dealing was shorter and much less emphatic. The ALRC did not, therefore, attempt to prosecute the case that its expanded fair dealing model might have advantages over fair use, instead describing this proposal as "a pragmatic second-best option"[38] and a potential gateway to fair use.[39] In contrast, the ALRC identified a number of reasons why fair use would be superior to expanded fair dealing.[40]

As noted in Part II.A, the ALRC's secondary recommendation was to consolidate fair dealing into a single provision. This new provision would include the existing purposes of research or study, criticism or review, parody or satire, reporting news and giving professional

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[34] Intellectual Property Committee, Business Law Section, Law Council of Australia, *Submission 765 to Australian Law Reform Commission: Discussion Paper 79*, at 5 (Aug. 8, 2013).

[35] Universities Australia, *Submission 754 to Australian Law Reform Commission: Discussion Paper 79*, at 16 (July 2013).

[36] *Cf.* Melissa de Zwart, *Fairness and Balance: Lessons from Canada for the Proposed Australian Law of Fair Use*, 24 AUSTL. INTELL. PROP. J. 129, 143-44 (2014) (touching on this issue).

[37] As noted earlier, our chapter starts from the premise that reform is required, a position that is clearly contested by some stakeholders.

[38] ALRC Final Report, *supra* note 19, ¶ 6.40.

[39] *See id*. ¶ 6.41 (stating that "[a] new fair dealing exception could be a step towards fair use. The Australian Government could introduce the exception recommended in this chapter, and then later consider whether to remove the limitation to the listed purposes, so that the exception became an open-ended fair use exception."). In a footnote to this text, the ALRC identified issues with such a two-stage approach, including the need for two reform processes, and the potential time wasted in seeking to demarcate the limits of the prescribed purposes.

[40] *See id*. ¶¶ 6.18-6.28.

advice, along with six new purposes: quotation, non-commercial private use, incidental or technical use, library or archive use, education, and access for people with a disability.[41] The provision would also contain guidance in relation to fairness, these factors being the same as those recommended for fair use (namely, language closely tracking s. 107 of the U.S. Copyright Act).[42] The case for expanded fair dealing was made in a very short chapter[43] that followed two extensive ones that argued for fair use.[44]

Despite its clear preference for fair use, the ALRC identified some common benefits between fair use and expanded fair dealing. First, it noted the similar operational character of both provisions, namely that they are "flexible standards, rather than prescriptive rules," they revolve around an assessment of fairness, and (on its proposed model) they utilise the same fairness factors.[45] As discussed in further detail below, whilst there is nuance in the characterisation of a provision as a standard or rule, it is fair to say that both fair use and expanded fair dealing exception have standard-like features, although it could be argued that fair use sits further along the spectrum towards a pure standard due to its non-exhaustive list of purposes.

Secondly, the ALRC claimed that expanded fair dealing and fair use would each produce incentive effects, in terms of encouraging socially productive and transformative uses, and discouraging harmful unlicensed uses.[46] The subsequent Ernst & Young analysis attempted to quantify the economic benefit conferred by each model, concluding that both would be superior to the status quo, but that fair use would yield greater net benefits than expanded fair dealing.[47] There are serious challenges for such a project, as much is dependent on the framing questions, available evidence and underlying assumptions. Some questions may be imponderable or unlikely to elicit any meaningful answers.[48] However, we can, at

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[41] *See id*. at 14 (Recommendation 6-1) and ¶ 6.6.

[42] *See id*. ¶ 6.29.

[43] *See id*. at ch. 6 (pp. 161-69).

[44] *See id*. at chs. 4-5 (pp. 87-160).

[45] *See id.* ¶ 6.14.

[46] *See id*. ¶ 6.15.

[47] *See* ERNST & YOUNG, *supra* note 26, at 98-99.

[48] For a similar critique of a UK Consultation Paper that called for evidence about the potential economic effect of a parody exception, described as consisting "mainly of statements of the blindingly obvious or questions which cannot possibly be answered either at all or quantitatively," see Sir Robin Jacob, *Parody and IP Claims: A*

least, take from this analysis the proposition that both expanded fair dealing and fair use would generate net benefits through their encouragement (or at least facilitation) of the circulation and re-use of existing works.

Finally, the ALRC noted that fair use and expanded fair dealing would each enjoy greater in-built responsiveness to new conditions when compared with prescriptive exceptions.[49] The essence of this argument, as it relates to fair dealing, is that if the prescribed purposes are described at a sufficiently high level of generality, they will be able to apply to new technology and uses without the need for legislative intervention. In addition to reducing the need for ongoing rounds of law reform, this would also prevent the legislature from having to predict, in advance, the precise uses that ought to come within the scope of an unremunerated exception.[50]

Some suggestion of fair use and expanded fair dealing yielding similar benefits was also made implicitly in the Final Report, most notably through the ALRC's lack of differentiation between the two approaches in chapters dealing with specific uses and stakeholder constituencies. These chapters included discussion of the new purposes to which fair use and expanded fair dealing might apply, but with fairly cursory examination of the difference in outcome between each model. To illustrate, in chapter 12, the ALRC stated that further consultation may be necessary to consider the scope of fair dealing for "library or archive use" if the government adopted expanded fair dealing, but that given the same fairness factors were proposed for that and fair use, "[a]pplying the fair use or amended fair dealing to library or archive uses should . . . produce the same result."[51] In chapter 14, in relation to education, the ALRC likewise discussed fair dealing only briefly, repeating its earlier point that this would be "a second best option, but it is more likely to enable educational institutions to make

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Defence? – a Right to Parody?, *in* INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP, 427, 433-34 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg, eds., 2014).

[49] The ALRC included as an illustration the failure of time-shifting exceptions to apply to cloud-based services. *See* ALRC Final Report, *supra* note 19, ¶ 6.16. Although the Final Report does not cite this case, this would seem to countenance the decision of the Full Court of the Federal Court in *National Rugby League Invs. Pty. Ltd. v. Singtel Optus Pty. Ltd.* (2012) 201 F.C.R. 147 (Austl.). For a critique of that decision, see Rebecca Giblin, *Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in NRL v Optus*, 34 EUR. INTELL. PROP. REV. 632 (2012).

[50] *See* ALRC Final Report , *supra* note 19, ¶ 6.17.

[51] *Id*. ¶ 12.47.

use of new digital technologies and opportunities than the existing or amended specific exceptions."[52]

There were two main points where the ALRC's analysis of fair use and expanded fair dealing diverged. One was in relation to the ability of individuals to "contract out" of exceptions, where it was recommended that fair use *not* be subject to a limitation on contracting out, but that such a restriction should apply to expanded fair dealing.[53] This conclusion was based on concerns that restricting freedom of contract may have unintended consequences for fair use,[54] and that fair use – as an open-ended defence – would not inevitably be applied to uses "which serve important public interests."[55] In contrast, the ALRC was of the view that the existing fair dealing exceptions *did* cover important interests, and that a restriction on contracting out should also apply to the new recommended purposes, thus producing a consistent approach across the various categories.[56] The other point of divergence was in the analysis of quotation in chapter 9. Here, the ALRC included a relatively sustained analysis of quotation as a fair dealing purpose, this being addressed primarily to the impact, if any, of Art. 10 of the Berne Convention on the wording of this aspect of the proposed exception. It was concluded that Art. 10 did not render it necessary to spell out any further qualifying limbs, either because the Berne requirements were dealt with via the fairness factors, or were a minimum standard that could be exceeded.[57] No such analysis was included for fair use, plus there was some suggestion that the boundaries of quotation may be more significant under fair dealing than fair use:

> The [fair dealing] exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the two exceptions to instances of quotation should, therefore, produce the same

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[52] *Id*. ¶ 14.82.

[53] *See id*. at 18 (Recommendation 20-2).

[54] *See id*. ¶ 20.92.

[55] *Id*. ¶ 20.94.

[56] *Id*. ¶¶ 20.97-20.99.

[57] *Id*. ¶¶ 9.53-9.80. Article 10(1) states: "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries." Article 10(3) states: "Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon."

> result. However, there will be some transformative uses of copyright materials that are not quotation, in that there is no attempt to reference the original work. These may be protected by the fair use exception, but not by a fair dealing quotation exception.[58]

Overall, the structure and emphasis of the Final Report suggests that expanded fair dealing was included if not as an afterthought then at least as a second best option. The bulk of the ALRC's intellectual energies went into making the case for fair use, with expanded fair dealing being seen as a way to capture some of these benefits, but not to the same degree. It seems that the ALRC was of the view that even a generous closed list of purposes would result in expanded fair dealing being "less flexible and less suited to the digital age than an open-ended fair use exception" and would lead to the situation where "many uses that may well be fair . . . continue to infringe copyright, because the use does not fall into one of the listed categories of use."[59] The ALRC also noted the argument that fair dealing may be seen as more certain than fair use because of the exhaustive purposes, but cited the submission (admittedly made by us) that "Australia's current system of exceptions only provides 'certainty' in the sense that we can be confident that a whole raft of socially desirable re-uses of copyright material are prohibited."[60] It attempted a short rehabilitation of fair dealing in response to criticisms of "confined exceptions," emphasising that fair dealing did not necessarily require a narrow construction and could be made more similar to fair use by adding more purposes.[61] In sum, however, the attitude of the ALRC towards fair dealing seemed to reflect the approach of those calling for reform: the key question was whether Australia should adopt fair use, with fair dealing being presented as the very much next-best option if fair use were thought to be a bridge too far.

III. DEPOLARISING THE FAIR USE DEBATE

In Part III we seek to rehabilitate expanded fair dealing as a reform option by analysing it as a worthwhile model in its own right rather than as a variant of fair use. We start by considering how fair use morphed from an unattractive option that in 2005 failed to garner significant support to the preferred option in 2012-13 of those favouring the

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[58] ALRC Final Report, *supra* note 19, ¶ 9.83.

[59] *Id*. ¶ 6.19.

[60] *Id*. ¶ 6.22, citing Robert Burrell, et al., *Submission 716*, *supra* note 32, at 4.

[61] *See* ALRC Final Report, *supra* note 19, ¶¶ 6.24-6.28.

liberalisation of exceptions in Australia. We suggest that this shift was in part due to the rejection of an over-simplified account that emphasised the unpredictability of fair use when compared to the certainty offered by specific exceptions. In Part III.B we build the case for expanded fair dealing as a model that also enjoys predictability and responsiveness. We use the standards and rules literature along with experiences in Canada and the UK to make this out, before concluding with some remarks about what a viable expanded fair dealing exception might look like.

We preface these observations by again noting that we remain of the view that Australia should enact a fair use provision, as argued in our submissions to the ALRC Review and the Productivity Commission.[62] However, we are motivated to reconsider expanded fair dealing for a number of reasons. As noted above, there are many political impediments to adopting fair use, and the signals from the current Australian government are that it is still not minded to introduce such a reform. Although fair use is our preferred position for Australia, we are cognisant of the warning that one should not let the perfect be the enemy of the good. But furthermore, we are keen to explore the differences between fair use and expanded fair dealing for this reason: might supporters of fair use have overstated, even if inadvertently, the superiorities of a fully open-ended model?

A. How we got here

As seen in Part II, those supporting the status quo have retained a consistent position over the years, with the key movement occurring amongst those who believe that Australia's suite of exceptions is in need of fundamental reform. We believe that a number of factors have led to the improved reception of fair use. One factor is organisational, and relates to better communication and co-operation between different user representatives. This has resulted in greater sophistication and consistency in the viewpoints of those calling for change. A second factor relates to the makeup of this group, and in particular the involvement of internet intermediaries and telecommunications companies such as Google, Yahoo!, Optus and Telstra.[63] This has been significant politically as it demonstrates that reform to exceptions is not just the preserve of educators, librarians and other "fringe" groups but is supported by

[62] *See* Burrell, et al., *Submission 278*, *supra* note 5; Burrell, et al., *Submission 716*, *supra* note 32; Alexander, et al., *supra* note 32.

[63] ALRC Final Report, *supra* note 19, ¶ 4.40. Telstra and Optus are Australia's two largest telecommunications providers.

economically significant players and those involved in digital innovation. Thirdly, we suspect that a "Groundhog Day" effect has arisen: the sense that a closed-list system of copyright exceptions will require the attention of repeated law reform inquiries, followed by endless rounds of statutory amendment to update provisions. It is understandable that in such an environment, stakeholders might become increasingly amenable to the view that an entirely new paradigm is required.

A fourth reason why fair use has become far more palatable is growing acceptance that fair use can embody both flexibility *and* certainty. As noted above, debates regarding the drafting of exceptions often feature well-worn tropes regarding the characteristics said to be associated with general and specific provisions, for example, that the application of detailed, closed exceptions is more predictable but that such provisions lack responsiveness to changed conditions, whilst open-ended drafting permits flexibility and fact-specific determinations but at the expense of *ex ante* certainty. Important scholarship over the last ten to fifteen years has been breaking down this dichotomy in a number of ways.[64] For instance, scholars in the U.S. have undertaken systematic analysis of fair use case law to identify patterns in decision-making,[65] thus pushing back against concerns that fair use is merely the "right to hire a lawyer."[66] This chimes with interview-based fieldwork at U.S. cultural institutions, where participants repeatedly reported a comfort in relying on fair use as part of their copyright management strategies, with those describing new applications of fair use reasoning (for instance, to cover low resolution images in online collection databases) able to argue from the case law and first principles to explain their viewpoints.[67] In contrast, for areas mediated by closed libraries and archives provisions, reported experiences amongst interviewees in Australia, Canada and the U.S. cast doubt on whether those exceptions inevitably deliver certainty, given drafting problems, the use of ambiguous language, the pace of technological

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[64] For one of the leading contributions, see BURRELL & COLEMAN, *supra* note 6.

[65] *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012). *See also* PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

[66] This sentiment was expressed by LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 141-42 (2004).

[67] *See* Emily Hudson, Copyright Exceptions: The Experiences of Cultural Institutions in the United States, Canada and Australia 146-73 (2011) (unpublished PhD Thesis, University of Melbourne).

change, and so forth.[68] Overall, copyright debates are becoming grounded in a more nuanced and empirically-informed vision of copyright exceptions that moves beyond an oversimplified choice between flexibility and certainty, instead asking how language and the interpretative practices of judges, lawyers and users bear upon the operation of exceptions in practice.

B. Rehabilitating fair dealing

Despite these shifts in the intellectual underpinnings of copyright debates, it is notable that the positive qualities said to be associated with open-ended drafting have caused the stocks of fair use to rise, but without a noticeable spill-over into fair dealing. This may reflect a doctrinal view that fair use is superior to fair dealing, or a pragmatic view that it is important to agitate for the most far-reaching reform option on the basis that a more limited version is likely to emerge from a contested law reform process. It may also be that support for fair dealing has not actually declined, but that it seems that way due to the high level of attention being paid to fair use. In this sub-part we re-assess the reasons why expanded fair dealing might be attractive as a reform option in its own right: that it may capture many of the same benefits as fair use, and may be superior to a provision modelled on s. 107 of the U.S. Copyright Act or some other fully open-ended exception.

To make out these arguments, it is useful to start by elaborating on some lessons from the literature on standards and rules. This scholarship rests on the proposition that legal drafting can take two overarching forms: it can be specific and rule-like, setting out in advance the legal consequences of a particular behaviour or set of facts; or it can be less prescriptive and more standard-like, providing guidance regarding the appropriate legal response but leaving that determination to a judge or other adjudicator.[69] Although the difference between standards and rules has been described as the "degree of precision,"[70]

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[68] *See id.* at 96-114 (also noting that at times these provisions offer too much certainty, in terms of being under-inclusive as judged by their own policy goals or stated aims). *See also* Emily Hudson & Andrew T. Kenyon, *Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives*, 30 UNSW L.J. 12 (2007); KYLIE PAPPALARDO, ET AL., IMAGINATION FOREGONE: A QUALITATIVE STUDY OF THE REUSE PRACTICES OF AUSTRALIAN CREATORS (Nov. 2017), available at https://eprints.qut.edu.au/115940/2/QUT-print.pdf.

[69] The legal rulemaking literature has also used other categories and nomenclature to describe sources of law, e.g., presumptions, factors, principles, analogies, etc. *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 959-68 (1995).

[70] Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974).

another explanation emphasises the timing of decision-making relative to the occurrence of the relevant behaviour or trigger: for rules the legal consequences have been specified *ex ante*, whilst for standards any legal consequences are determined *ex post*.[71] It has therefore been observed that rules can reflect a preference for legislative decision-making and tend to reduce judicial discretion, whilst standards can reflect a preference for judicial decision-making and tend to increase judicial discretion.[72] To illustrate this model, a rule might render it an offence to drive above 60km/h on a particular stretch of road, whilst a standard might prohibit driving at an "excessive" speed.[73]

Echoes of the standards and rules literature can be seen in copyright debates that highlight the respective merits of certainty versus flexibility in the drafting of exceptions, with the former usually associated with detailed closed-ended provisions and the latter with exceptions that are more general or adopt open-ended drafting. However, standards and rules thinking is far more sophisticated than a mere binary distinction between two forms of drafting, or between certainty and flexibility. For instance, it is clear that standards and rules exist on a spectrum,[74] and that they may be simple or complex, as measured by the number of relevant considerations.[75] To the extent that certainty is associated with rules, it is more accurate to say that the relevant characteristic is *ex ante* certainty. Standards also involve a search for certainty, albeit with this certainty generated via some court process or litigation. This judge-made certainty can be relevant to two audiences. Most obviously it is relevant to the parties to the case, as it describes the precise legal consequences of the facts before the court. But by discussing relevant considerations, it can also provide guidance regarding the application of the standard in other situations, and indeed the accumulation of precedent over time can cause judicial rules to develop beneath an overarching standard. Whilst language provides initial clues as to whether a particular legal command operates as a standard or a

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[71] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

[72] *See, e.g.*, Ehrlich & Posner, *supra* note 70, at 261.

[73] This example recurs in the literature on standards and rules. *See, e.g.*, *id*. at 257; Kaplow, *supra* note 71, at 560; Russell Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000).

[74] *See, e.g.*, Ehrlich & Posner, *supra* note 70, at 258.

[75] Thus, a simple rule might involve a single consideration, such as the law prohibiting driving above 60km/h, whilst a complex rule might use a detailed algorithm to determine the maximum permissible speed. *See* Kaplow, *supra* note 71, at 565.

rule, ultimately this is a matter of interpretative practices.[76] In addition to the interpretations of judges, relevant interpretations can come from lawyers and academics, and from those regulated by the law (who we will call users), both individually in their own practices and collectively via industry codes and agreed policies. When all these interpretative practices are taken into account, gaps can emerge between the textual cues in a provision and how it operates in practice, and between the interpretative preferences of different constituencies.[77] For instance, one of us observed in 2013 that:

> [T]he seemingly rule-like preservation copying exceptions for libraries and archives in Australian and U.S. law have numerous restrictions, including [in some provisions] a three copy limit on the number of reproductions that can be made. Presumably, then, once an institution makes a fourth copy, it must turn to another exception or to licensing. And yet, in interviews conducted with staff at leading Australian and U.S. institutions, it was repeatedly reported that this restriction was ignored, without a second thought. It seems that institution staff, having internalized norms about good preservation and archival practices, recognize that such practices — especially when performed with digital technologies — often require the production of greater than three copies. Many, therefore, read the language of "three copies" as a proxy for "a reasonable number of copies."[78]

The standards and rules literature does not posit that any one form of drafting is preferable to another. Rather, it judges the best form of drafting as dependent on the context, as judged by matters including the frequency and homogeneity of behaviour to be regulated, the knowledge and risk profile of users, the operation of any relevant social norms, and the costs of compliance and enforcement.[79] Applying this to copyright exceptions, it must therefore be emphasised that "[f]air use should not be seen as inevitably superior to specific

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[76] *See* Sunstein, *supra* note 69, at 959-60 (observing that classification of legal regulation "cannot be decided in the abstract. Everything depends on the understandings and practices of the people who interpret the provision. Interpretative practices can convert an apparently rule-like provision into something very unrule-like. . . . The content and nature of a legal provision cannot be read off the provision. It is necessary to see what people take it to be.").

[77] This latter is illustrated by the response to CCH Canadian Ltd. v. Law Soc'y of Upper Canada [2004] 1 S.C.R. 349 (Can.). Whilst the academic reaction was overwhelming positive, the response of cultural institutions was far more muted, despite the strong philosophy underpinning the Canadian Supreme Court's decision and the facts of that case involving a library. *See further* Hudson, Copyright Exceptions, *supra* note 67, at 193-220.

[78] Hudson, *Implementing Fair Use*, *supra* note 6, at 214-15. The three copy limitation that existed in some of the Australian preservation copying provisions was removed in reforms introduced by the Copyright Amendment (Disabilities and Other Measures) Act 2017 (Austl.).

[79] *See* Hudson, *Implementing Fair Use*, *supra* note 6, at 219-21.

exceptions, or the endpoint of a mature copyright system . . . there will be times when a simple rule is superior; instances when a multi-factor standard is preferable; and still other times when the best approach is a well-drafted complex rule."[80] Nevertheless, if one is amenable to arguments regarding the virtues of fair use, it might be asked whether such benefits – and perhaps even other ones – might be captured in other forms of drafting that, whilst not completely open-ended, would seem to operate on the standard-like end of the spectrum. The answers to these questions will depend on doctrinal and empirical analysis.

Starting with textual cues, we see parallels in the language and structure of fair use and fair dealing: both are judged by reference to fairness and to listed purposes, the latter being exhaustive in the case of fair dealing and non-exhaustive in the case of fair use. This factor, along with the inclusion in fair dealing provisions of additional requirements (e.g., for sufficient acknowledgements), makes fair use look like it involves a higher level of judicial discretion than fair dealing. It is therefore not surprising that in crafting a consolidated and expanded fair dealing provision, the ALRC sought to bolster its standard-like qualities by adding new purposes, eliminating other requirements,[81] and urging a liberal interpretation of the provision.[82]

One of the key lessons from standards and rules, however, is the importance of interpretative practices in classifying and assessing legal regulation. One claim made by those who support fair use is that its randomness has been overstated:[83] that U.S. judges operate in predictable ways, and have created a doctrine that makes principled use of the flexibility that inheres in the statutory language.[84] In contrast, there has been criticism of the interpretative paradigms of judges in countries such as the UK and Australia on the basis that those judges have preferred unduly narrow interpretations of fair dealing and have paid short shrift to user

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[80] *Id*. at 226.

[81] For example, recommendation 6-1 refers to one of the prescribed purposes being "criticism or review," without any mention of the qualifying words currently found in the Australian statute ("whether of that work or of another work, and a sufficient acknowledgement of the work is made"). *See* Copyright Act 1968, s. 41 (Austl.) (and similar in s. 103A). Of course, failure to acknowledge the authorship or source of a work might be relevant to the question of fairness.

[82] ALRC Final Report, *supra* note 19, ¶¶ 6.24-6.28.

[83] For examples of literature that doubts the coherence of fair use, see, e.g., William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263 (2003); Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391 (2005).

[84] *See supra* note 65 and surrounding text.

considerations.[85] One argument that has therefore been made in favour of fair use is that it would mark a clear signal to judges (and others) that these narrow conceptions must be abandoned when applying the new fair use provision.

But is fair use essential for a shift in attitude to occur? The obvious counterpoint is Canada, where fair dealing was given a judicial reboot by the Supreme Court in its 2004 decision in *CCH Canadian Ltd. v. Law Society of Upper Canada.*[86] This decision was underpinned by a strong vision of exceptions operating as users' rights, a philosophy that manifested in a number of ways, including the prescribed purposes being given a large and liberal interpretation. One may question how much *CCH* translated into new user practices, as the interpretation preferred by the Supreme Court departed radically from prevailing understandings of exceptions,[87] resulting in some initial suspicion about its longevity.[88] However, with the Supreme Court confirming in the "pentalogy" of 2012 that it meant what it said about fair dealing,[89] and the Canadian legislature expanding (not contracting) fair dealing in the Copyright Modernization Act of 2012,[90] it is now clear that *CCH* was not an outlier or aberration. Instead, the Canadian experience illustrates that judicial attitudes are not immutable, and that judges can interpret fair dealing in ways that emphasise its breadth and standard-like attributes. Glimpses of similar possibilities can be seen in Australian case law[91]

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[85] For examples of such critiques, see BURRELL & COLEMAN, *supra* note 6; Michael Handler & David Rolph, *"A Real Pea Souper":* The Panel Case *and the Development of the Fair Dealing Defences to Copyright Infringement in Australia*, 27 MELB. U. L. REV. 381 (2003).

[86] [2004] 1 S.C.R. 349.

[87] *See, e.g.*, Cie générale des établissements Michelin–Michelin & Cie v. CAW-Canada (1996) 71 C.P.R. 3d 348 (Can. F.T.C.D.); Boudreau v. Lin (1997) 150 D.L.R. (4th) 324 (Can. Ont. Gen. Div.); Hager v. ECW Press Ltd. [1999] 2 F.C. 287 (Can. F.T.C.D.); CCH Canadian Ltd. v. Law Soc'y of Upper Canada [2000] 2 F.C. 451 (Can. F.T.C.D.).

[88] Thus, even amongst those who agreed with the Supreme Court's approach, there were concerns that *CCH* might operate as a short-lived high water mark in fair dealing jurisprudence, being unwound by later case law or legislative intervention. *See generally* Hudson, Copyright Exceptions, *supra* note 67, at 193-220.

[89] Relevantly, these cases included Soc'y of Composers, Authors & Music Publishers of Canada v. Bell Canada [2012] 2 S.C.R. 326 (Can.), and Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright) [2012] 2 S.C.R. 345 (Can.). *See generally* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW (Michael Geist ed., 2013).

[90] *See supra* note 4.

[91] *See, e.g.*, Fairfax Media Publ'ns Pty. Ltd. v. Reed Int'l Books Australia Pty. Ltd. (2010) 189 F.C.R. 109, ¶¶ 130-144 (Austl.) (defining "reporting of news" to include the activity of a media monitoring service, and observing, in relation to fairness, that the abstracts prepared by the service were a transformative use (citing Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995) (U.S.)). There has not been a great deal of Australian case law on fair dealing, and analysis often goes back to statements in TCN Channel Nine Pty. Ltd. v. Network Ten Pty. Ltd. (2001) 108 F.C.R. 235 (Austl.), *rev'd in part*, (2002) 118 F.C.R. 417 (suggesting a liberal interpretation of the fair dealing purposes should be taken).

and in statements emanating from the Court of Justice of the European Union (albeit in relation to exceptions generally rather than fair dealing).[92] There may also be some judicial impetus to recalibrate exceptions in response to the expansionist tendencies that have characterized the trajectory of copyright law.[93]

The next question is whether, in re-writing fair dealing, it is possible to include textual cues that a robust approach is to be preferred. Again, one argument in favour of fair use is that such signals are in-built (especially if the statute utilises language from s. 107 of the U.S. Copyright Act) and can be bolstered by the legislature in explanatory materials. But once again it is possible to imagine similar cues in a reform environment that expands fair dealing. An obvious starting point would be in the drafting of fair dealing itself: the statute could avoid any unnecessary limitation of statutory language;[94] the permitted purposes could be drafted at a high level of abstraction but nevertheless have meaning; and any definition of "fairness" could reinforce the intention to create a robust and flexible operation. In Canada, for example, fair dealing has been expanded to include education, parody and satire,[95] whilst in the UK, reforms in 2014 included new fair dealing exceptions for quotation,[96] caricature, parody and pastiche,[97] and illustration for instruction.[98] The quotation exception is an obvious candidate for expansive interpretations, with academics identifying room to manoeuvre within

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[92] *See, e.g.*, Cases C-403/08 and C-429/08, Football Ass'n Premier League Ltd. v. QC Leisure, 2011 E.C.R. I-9083 (Grand Chamber) (noting at ¶¶ 162-163 that although the CJEU case law indicates the copyright exceptions should be interpreted strictly, interpretations should also "enable the effectiveness of the exception thereby established to be safeguarded"); Case C-201/13, Deckmyn v. Vandersteen, 2014 E.C.D.R. 21 (Grand Chamber) (emphasising the need for a "fair balance" in the application of the exception for parody permitted under Art. 5(3)(k) of the Information Society Directive).

[93] *See, e.g.*, EMI Songs Australia Pty. Ltd. v. Larrikin Music Publ'g Pty. Ltd. (2011) 191 F.C.R. 444 (Austl.). That case centred on the flute riff in the Men at Work song "Down Under," which was held to infringe copyright in the iconic work "Kookaburra Sits in the Old Gum Tree," written in the 1930s by Marion Sinclair. The case raised a number of doctrinal and policy issues, including in relation to the lack of a quotation exception in Australian law. For instance, Emmett J observed at ¶ 100 that "[i]f, as I have concluded, the relevant versions of Down Under involve an infringement of copyright, many years after the death of Ms. Sinclair, and enforceable at the behest of an assignee, then some of the underlying concepts of modern copyright may require rethinking." At ¶ 101 he further wondered "whether the framers of the *Statute of Anne* and its descendants would have regarded the taking of the melody of Kookaburra in the Impugned Recordings as infringement, rather than as a fair use that did not in any way detract from the benefit given to Ms. Sinclair for her intellectual effort in producing Kookaburra."

[94] For instance, "criticism" and "review" should not be limited to criticism or review of the work being copied, or of another work. *Cf.* Copyright Act 1968, s. 41 (Austl.).

[95] *See* Copyright Act, R.S.C. 1985, c C-42, s. 29 (Can.).

[96] *See* Copyright, Designs and Patents Act 1988, s. 30(1ZA) (UK).

[97] *Id.* s. 30A.

[98] *Id.* s. 32(1).

such a provision,[99] and some even arguing that Art. 10 of the Berne Convention mandates a kind of global fair use provision.[100] There is also potential for the much-overlooked pastiche exception to emerge as a broadly-operating exception that enjoys substantial overlaps with what U.S. judges describe as transformative use.[101] In terms of fairness, if one wanted to encourage forward-leaning interpretations through the definition of what is "fair," one possibility might be to import the six fairness factors from Canadian law,[102] although as we discuss below there is one risk with this approach.

Despite all this, the ALRC stated in its Final Report that "a confined fair dealing exception will be less flexible and less suited to the digital age than an open-ended fair use exception" and that "with a confined fair dealing exception, many uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use."[103] However, we wonder whether this statement about the coverage of an expanded fair dealing exception is empirically accurate and, even if it is, whether it reflects remediable issues with the ALRC's proposed list of purposes. As noted earlier, in its chapters focussing on particular uses and constituencies, the ALRC frequently stated that outcomes under fair use and its expanded fair dealing exception would be the same. If right, then the key question is the degree to which fair use reaches beyond fair dealing's prescribed purposes.

This brings us to the question of whether expanded fair dealing might be *superior* to fair use, if one's drafting approach for the former is designed to capture the standard-qualities of the latter. Here we observe that those who support open-ended drafting generally call for fair use as modelled on U.S. law rather than a new, autochthonous exception. The standards and rules literature helps provide a reason for this. By design, standards require case law in order for certainty to emerge. When the U.S. Copyright Act was passed in 1976, s. 107 was a

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[99] *See, e.g.*, Elizabeth Adeney, *Appropriation in the Name of Art: Is a Quotation Exception the Answer?*, 23 AUSTL. INTELL. PROP. J. 142 (2013).

[100] As discussed by Tanya Aplin and Lionel Bently in this volume.

[101] See Emily Hudson, *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?*, 2017 INTELL. PROP. Q. 346.

[102] See CCH Canadian Ltd. v. Law Soc'y of Upper Canada [2004] 1 S.C.R. 349, ¶¶ 65-72 (the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the work; and the effect of the dealing on the work).

[103] ALRC Final Report, *supra* note 19, ¶6.19.

codification of an existing common law doctrine, meaning that there were already judicial indications regarding its scope and application.[104] To be clear, users can draw from other sources when interpreting standards, including their own intuitive understandings of the policies behind the law, case law from other jurisdictions, statutory indications, and industry guidelines and codes of practice.[105] However, we risk a period of uncertainty if existing understandings are swept away in a "blank canvas" approach to statutory drafting; for instance, the failure of the bespoke Australian s. 200AB exception can in part be attributed to the lack of comprehensibility of its drafting, which "served to oust intuitive understandings and industry norms, and put in their place a series of concepts that neither institutional users nor their professional advisors feel confident to interpret."[106]

One attraction of fair use, therefore, is that a provision modelled on s. 107 may have greater initial clarity, as users (and eventually judges) can point to U.S. case law for indications regarding the operation of the exception. However, this benefit could prove illusory in the longer term if Australian law is tied to that of the U.S., and the latter develops in ways that are objectionable or unsuited to Australian conditions. As such, expanded fair dealing may be attractive as a reform that builds on the existing domestic approach whilst also signalling that a broader, more standard-like approach is intended. To that end, one issue with using the six Canadian fairness factors (as we suggest above) may be to repeat the problem of hitching Australian law to another jurisdiction.[107] If the Canadian factors were to be used, there would need to be a clear statement about the interpretative significance of this choice,[108] and perhaps other language or drafting cues (whether in the prescribed purposes or elsewhere) to give the new provision a local flavour. Applying this analysis to the ALRC's proposed

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[104] For a comprehensive overview of the process leading up to the 1976 Act, see WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995).

[105] *See* Hudson, *Implementing Fair Use*, *supra* note 6, 226-27.

[106] *Id.* at 227. Section 200AB was originally available only to three nominated user groups: bodies administering a library or archives; educational institutions; and users with a disability and those assisting such people. In judging whether a particular use fell within the exception, the relevant matters included factors said to have the "same meaning" as Art. 13 of the TRIPS Agreement. *See* Copyright Act 1968, s. 200AB (Austl.). One of the reforms of the Copyright Amendment (Disabilities and Other Measures) Act 2017 (Austl.) has been to set out a new fair dealing regime to facilitate access to copyright material by persons with a disability. This has replaced that part of s. 200AB dealing with disabled users.

[107] For instance, those who believe that fair dealing can be used by universities for material posted in online learning environments may have some concern about the outcome in Canadian Copyright Licensing Agency (Access Copyright) v. York Univ., 2017 F.C. 669 (Can.).

[108] For example, the extent to which the six Canadian factors differ from those currently contained in the "research or study" exceptions in ss. 40(2) and 103C(2) of the Copyright Act 1968 (Austl.).

model for expanded fair dealing, it would seem to us that the suggested drafting – which would use U.S.-inspired fairness factors – is the least desirable option, due to its capacity to confuse as to the relevance of U.S. law. We would therefore suggest a different set of factors, based either on concepts in Australian law or, with relevant caveats, that of Canada.

IV. CONCLUSION

In this chapter we have sought to respond to the increasingly polarised debate in relation to exceptions reform by revisiting one option that, in Australia at least, seems to have disappeared from the agenda: expanding fair dealing. Whilst we remain of the view that fair use is the best option for Australian law, we recognise that there are political and doctrinal impediments to such a change. In this chapter we have therefore asked whether fair dealing has the ability to capture benefits said to be associated with fair use. We have used standards and rules analysis to argue that expanded fair dealing may not be a lowly second-best to fair use but a decent reform option in its own right, if any such provision has appropriately-drafted fairness factors, sufficiently broad purposes, and makes limited reference to additional requirements. Turning to the secondary recommendations of the ALRC in relation to expanded fair dealing, we note two ways in which the proposed model might be improved: revision of the prescribed purposes, if these leave a significant gap between expanded fair dealing and fair use; and replacing the proposed U.S. fairness factors with others more suited to a fair dealing environment.