As for the Police, the conclusion here is equally clear. For as long as the police are employed to administer section 37A, it will enjoy regular use, though perhaps not for the specific purpose envisaged by the draftsman. Section 37A has potential for abuse in the hands of a force not altogether impressed by its more altruistic intentions. Moreover, there is no incentive for the police to use section 37A for its idealistic purpose of caring for the drunk in our society. The police have enough to do without providing a social welfare-cum-taxi service. The corollary of this, then, is that section 37A would be better enforced by more appropriate bodies: Social Welfare, Health authorities or voluntary organisations.

Drunkenness has, over the years, gone from being a sin and a crime, to a crime, and now, under the Summary Offences Act, to neither sin nor crime. This decriminalisation is by no means to be criticised, but it is a move which does not allow for half-steps. The retention of a police interest in health legislation constitutes such a half-step.

Before legislation of the nature of section 37A can succeed, the legislators must first determine who is to take responsibility for the drunk. Until then, section 37A will not be given the chance to show its full potential, and eight years of work on the Act will not have achieved the desired end.

Fair dealing with copyright material in Australia and New Zealand

K. K. Puri*

I. RANGE AND AIMS OF COPYRIGHT

Notice of copyright

All rights reserved. No part of this publication may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, or stored in any retrieval system of any nature, without the written permission of the copyright holder and the publisher, application for which shall be made to the publisher.

Many publishers and copyright owners nowadays insert, after the copyright notice, statements in substance as above.[1] This claim raises questions, such as: Why buy a book if it cannot be utilised? What is the use if one is not allowed to read it and commit what one has read to that most wonderful of all means of storing and retrieving information, the human brain? Many people after seeing this or similar notices are cowed into the belief that a reasonable use of copyrighted materials is not allowed without prior permission, and if they are lucky enough to obtain permission, they ought to make elaborate acknowledgements. One of the possible harmful effects of these notices is that reasonable access to materials, in the interest of progress of ideas, is hampered.

Rights of users of copyrighted materials. This is indeed a weird extension of copyright. The essence of copyright is to confer on the copyright owner certain

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This paper was delivered before the Interest Group on Intellectual Property of the Australasian Universities Law Schools Association (AULSA), at its annual conference held in Hobart between 11 and 14 August 1982. The paper in its original form concerned exclusively Australian law on fair dealing and took account of the relevant amendments in the copyright law of that country (the Copyright Act 1968) brought about by the enactment of the Copyright Amendment Act 1980. The exposition of Australian law relating to fair dealing in this paper applies generally to New Zealand except that changes introduced by the 1980 Amendment Act (Aust.) have not been introduced in New Zealand. Throughout this paper, "the Australian Act" means the Copyright Act 1968 (Cth.), No. 63, 1968 as amended by No. 216, 1973; No. 91, 1976; No. 160, 1977; No. 19, 1979; No. 154, 1980; No. 42, 1981; No. 61, 1981 and No. 113, 1981. "New Zealand Act" means the Copyright Act 1962, No. 33, 1962 as amended by No. 65, 1967 and No. 91, 1971.

1 There are no copyright notice requirements under the Australian and New Zealand copyright statutes. Errors or omissions of copyright notices or claims do not therefore result in a loss of copyright. Nor is any registration requirement made a prerequisite to obtain copyright protection. Note that in the United States, a notice of copyright must be placed on all copyrighted materials — see ss. 401-406, Copyright Act 1976 (U.S.).

exclusive rights to deal with the work. But copyright does not extend to all dealings. The Australian and New Zealand Copyright Acts spell out the dealings which owners are given exclusive rights to, and impose certain limits on those rights. Dealings other than those specified in the Acts are not subject to copyright. When an individual buys a book, he or she owns it. All the rights and privileges of ownership vest in him or her. He or she can lend the book, sell it, abandon it or destroy it. More sensibly, he or she may read it and use the information gained from it. Such use includes not only intellectual and aesthetic appreciation of the material, but more concrete utilisation as well.

Copyright protection does not extend to ideas. It is a basic concept of copyright that the knowledge or ideas imparted by a work are freely available to everyone to deal with, even if the author is disclosing a discovery or novel thought of his or her own. For the advancement of knowledge writers, scholars, and researchers must gather information and ideas from the works of their predecessors. What copyright protects is the particular form of expression by which the author has conveyed his or her ideas and thoughts. Anyone else is free to write about the same subject matter or theme, or to express the same thoughts or convey the same information in a work of his or her own creation. So copyright is concerned only with the copying of physical material and not with the reproduction of ideas.[2]

Copyrightability limits: fair dealing. Copyright does not give a monopoly to any particular form of words or design. It is thus to be distinguished from rights conferred by the patent law. Unlike the monopoly conferred by a patent, copyright is not absolute. A patent gives its owner an exclusive right to a product or a process. He or she may use it himself or herself; he or she may license others to use it, free or at a price; or he or she may prevent its use by anyone. Thus a patent controls the substance of a new invention. Copyright, on the contrary, is subject to the right of all persons into whose possession the work comes, to make "fair dealing" of it. The concept of "fair dealing" has been applied from times immemorial. It has existed before statute. It is perhaps as old as copyright protection itself. The modern statutes merely codify the concept which has evolved through a large and wide-ranging body of case law. The issue of fair dealing is the most troublesome in the whole law of copyright. It is the goal of this paper to explore fair dealing provisions of the Australian Copyright Act 1968 (which have recently been amended by the Copyright Amendment Act 1980) and the New Zealand Copyright Act 1962. But before we turn to certain specific recent developments in this belletristic field, let us first look at the meaning and rationale of the law of copyright.

Definition of copyright. To attempt to define simply, it may be stated that copyright denotes conferring of a legal exclusive right to do certain things (e.g. to print, reprint, publish, copy, perform, broadcast, make an adaptation and vend)[3] in regard to certain types of works (e.g. literary, dramatic, musical,

2 *Donoghue* v. *Allied Newspapers Ltd.* [1938] Ch. 106, 110. For a full account see Copinger and Skone James *Copyright* (12 ed., Sweet & Maxwell, London, 1980) paras. 1-2. (Hereinafter referred to as "Copinger").

3 Section 31, Copyright Act 1968 (Aust.); s. 7, Copyright Act 1962 (N.Z.).

artistic)[4] and other subject-matter (e.g. sound recordings, cinematograph films, television and sound broadcasts, published editions of works)[5] for a certain period,[6] on an author, publisher, employer, etc. It is a twofold right involving both the exclusive right to publish and the exclusive right of multiplying copies of a work. It is a species of incorporeal property.[7] Copyright only prohibits copying. The moral basis for copyright protection is said to be found in the Eighth Commandment: "Thou shall not steal".[8] Copyright requires only a minimal degree of originality for subject matter to qualify for protection. The entitlement to copyright is not dependent on quality of the work, e.g., "literary work" does not imply the requirement of high literary standard, it includes anything written and not copied. The originality required relates to the author's expression of his or her ideas and thoughts.[9] Again, the size of a literary work is immaterial. Considerable reliance is often placed on the maxim, "What is worth copying, is worth protecting".

Absence of formalities. In order that copyright might subsist in a work or other subject matter under the Copyright Act 1968 (Aust.) and the Copyright Act 1962 (N.Z.), it is not necessary for any copyright registration to be effected. The Acts do not provide for any system whereby searching will disclose whether copyright subsists under them. In other words, the Acts do not require any formalities to be fulfilled as a pre-requisite for copyright protection, not even the marking of the works with the word "Copyright" or the symbol © (C in a circle),[10] which, as noted earlier, is required under the United States Copyright Act of 1976.[11]

Copyright duration. Copyright protection is not perpetual, it is limited in time. The general rule is that copyright subsists in a work from the time it is published, and continues to subsist until the expiration of 50 years after the end of the calendar year in which the author died.[12] At the expiration of the statutory period of protection, the work falls into the public domain.

4 Part III, Copyright Act 1968 (Aust.); Part I, Copyright Act 1962 (N.Z.).
5 Part IV, Copyright Act 1968 (Aust.); Part II, Copyright Act 1962 (N.Z.).
6 Generally, fifty years after the death of the author: s. 33, Copyright Act 1968 (Aust.); s. 8, Copyright Act 1962 (N.Z.). See also ss. 34, 93-96 of the Australian Act and ss. 13-15, 17 of the New Zealand Act.
7 See *Pacific Film Laboratories Pty Ltd.* v. *Commissioner of Taxation of the Commonwealth* (1970) 121 C.L.R. 154, 169. See also Lahore *Intellectual Property in Australia —Copyright* (Butterworths, Sydney, 1977) para. 113 (hereinafter referred to as "Lahore").
8 *Macmillan & Co. Ltd.* v. *K. & J. Cooper* (1923) 40 T.L.R. 186.
9 *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch. 601. See also Copinger, supra n. 2, para. 102.
10 A copyright in a sound recording is usually indicated by the symbol (P) (P for phonorecords).
11 Supra n. 1. It must however be pointed out that in order to obtain copyright protection in some countries (such as the United States and also, as regards sound recordings, the United Kingdom), it is necessary that an appropriate copyright notice be placed on the work. See also Universal Copyright Convention, Article III (1) and Rome Convention 1961, Article II.
12 Supra n. 6.

Delivery requirement. The Australian and New Zealand copyright Acts however do contain provisions requiring delivery of copyrighted materials to a central library. Thus in Australia every publisher of a literary library material published domestically is required to deposit in the National Library a copy of the material within one month after the publication.[13] But the failure to comply with this requirement does not in any way affect the rights of the copyright owner, except that the publisher in default can be asked to pay a penalty of $100.[14] In New Zealand too, publishers are under similar delivery obligations to the Chief Librarian of the General Assembly.[15]

II. NATURE OF THE RIGHTS PROTECTED BY COPYRIGHT

Rights of copyright are intangible. Copyright is used generally to cover all the property rights which exist in intellectual property. By intellectual property is meant those property rights which result from the physical manifestation of original thought. Copyright is intellectual property, for its subject matter is child of the brain. It is an intangible property right, for in a legal sense property consists of nothing more than a series of rights the law will protect. The copyright in a certain copyrighted material has no physical form, but it is property because the law gives the owner the right to control the disposition and use of the contents of the material. He or she may, for example, reproduce the material for sale, translate it, or dramatise it, which the purchaser-owner of the material as a physical object may not do. It is this control over the use and content of the material that constitutes the monopoly of copyright.

Exclusive rights of copyright. The exclusive rights of a copyright owner extend to the re-creation of his or her work in a different version, such as a translation of his or her original text, a dramatisation of his or her novel, or an adaptation of his or her musical composition.[16] Of the uses to which the copyright owner is given the exclusive property interest, the most basic are the making and distribution of copies of the work. As to books, periodicals, and other works that are disseminated by the distribution of copies, the main source of income for authors and publishers is the sale of copies; and in a broad sense, the copyright law is designed to safeguard the copyright owner against the unauthorised making by others of copies that might otherwise have been sold by him or her.

Relation of substantiality to fair dealing. It may be mentioned that the copying that infringes copyright is not confined to exact and complete duplication of the work. Reproduction of an essential portion may be an infringement;[17] as may be also an imitative reproduction of the substance of the work, though disguised by alterations. Again, the infringing act need not be done in relation to the whole of the work or other subject matter; substantial copying will constitute infringement. Section 14 of the Copyright Act 1968 (Aust.) provides

13 Section 201, Copyright Act 1968 (Aust.).
14 Idem.
15 See s. 64, Copyright Act 1962 (N.Z.).
16 Section 31, Copyright Act 1968 (Aust.); s. 7, Copyright Act 1962 (N.Z.).
17 *Hawkes and Sons (London) Ltd.* v. *Paramount Film Services Ltd.* [1934] 1 Ch. 593, 606.

that a reference to the doing of an act in relation to a work or other subject matter includes a reference to the doing of that act in relation to a substantial part of the work or other subject matter.[18] The major factor in determining the question of substantiality is the quality or value of what is taken in relation to the work as a whole rather than the quantity.[19]

Copyright legislation in Australia and New Zealand. The source of copyright legislation in Australia is the constitutional provision which authorises the Commonwealth Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to (among other matters): "Copyrights, patents of inventions and designs, and trade marks" (section 51 (xviii)). This provision enables the Commonwealth Parliament to pass legislation to protect the writer after production of his or her work. Copyright is a statutory right in Australia and exists by virtue of the Copyright Act 1968.[20] The Act gives protection to both unpublished and published works. The first legislation on the subject of literary property in New Zealand appeared in 1913. In 1957 the New Zealand Government appointed a committee under the chairmanship of Professor F. J. Dalglish to suggest improvements in the law relating to copyright.[21] Pursuant to the recommendations of the Dalglish Committee, the Copyright Act of 1962 was enacted. The Act is entitled "An Act to consolidate and amend the law relating to copyright". The Act provides that no copyright shall subsist otherwise than by virtue of that Act or some other enactment in that behalf.[22]

III. RATIONALE FOR COPYRIGHT PROTECTION

Recognition and reward. There are two justifications for copyright protection. The first, which may be called the ethical justification, asserts that an author is entitled to the fruits of his or her labours and the copyright law merely recognises this and protects the author from unauthorised interference with the enjoyment of this natural right. The second, the so-called economic justification, maintains that copyright protection, by granting an exclusive right to commercially exploit a particular literary work for a limited time free from the fear of copying, encourages (and hence rewards) authors to write and publishers to publish. Other means of supporting authorship and publication — including private patronage, institutional grants, and government subsidies — have been known and are still used in special situations, particularly for esoteric works that have no substantial commercial market. But they have serious shortcomings and narrowly limited areas of usefulness. Reliance upon the market place, where those who receive the benefit of using a work are called upon to pay for it, has been the underlying norm of copyright, and has stood the test of time to

18 See s. 3 (1), Copyright Act 1962 (N.Z.).
19 *Ladbroke (Football) Ltd.* v. *William Hill (Football) Ltd.* [1964] 1 W.L.R. 273, 276 [H.L.].
20 Section 8, Copyright Act 1968 (Aust).
21 This committee reported in 1959 suggesting various reforms in the law: see *Report of the Copyright Committee* New Zealand Parliament, House of Representatives. Appendix to the journals, vol. 4, 1959, H. 46 (hereinafter "Dalglish Committee Report").
22 Section 5, Copyright Act 1962 (N.Z.).

achieve the purpose of stimulating the creation and publication of a wide range and volume of authorial works.

Public benefit. The philosophy behind copyright is to further the development of literary and artistic works by conferring on the author an exclusive property interest in the creations of his or her brain, and by providing such protection to this interest as will provide its owner a fair dividend. The benefits which accrue from the interest thus conferred are considered to be ample justification for its inherently monopolistic character. The "benefits" just noted are in fact those which arise out of the placing before the society, through publication, of the author's intellectual creation. If it is a writing in the sphere of prose or poetry, it may be so beautiful as to uplift the soul of man; or it may be a writing so learned and thought-provoking as to stimulate the reader's mind; or in turn it may be a writing in the scientific or technological field of such great importance and utility as to advance the condition of mankind.[23] The objective of copyright protection is not primarily to benefit the author, but primarily to benefit the public. The granting of such exclusive rights confers a benefit upon the public which neutralises the evils of the temporary monopoly.[24]

Not a true monopoly. Perhaps it is a misnomer to refer to the interest granted by the copyright law as a "monopoly". It is no more monopoly than is the ordinary ownership of a car or a house. A "monopoly" takes away from the public the enjoyment of something which the public before possessed. But clearly copyright does not do this. The author produces something *new* to be entitled to copyright and does not therefore dispossess the public of anything which it before possessed.

IV. RECENT DEVELOPMENTS IN AUSTRALIA

Franki Committee of 1974. The Copyright Law Committee on Reprographic Reproduction (Chairman Mr Justice Franki) was appointed by the Commonwealth Government on 20 June 1974, less than four weeks after the Supreme Court of New South Wales handed down its judgment in the *Moorhouse* case.[25] The Com-

23 It should be noted here that copyright entitlement is not dependent on quality of the work, and the work would still be protected even if it is completely devoid of intellectual creation: *University of London Press Ltd.* v. *University Tutorial Press Ltd.*, supra n. 9, approved in *Ladbroke (Football) Ltd.* v. *William Hill (Football) Ltd.*, supra n. 19. See also, Laddie, Prescott and Vitoria *The Modern Law of Copyright* (Butterworths, London, 1980) at para. 210, where the authors have listed works which have been held to fall under the umbrella of copyright protection.

24 In *Mazer* v. *Stein* 347 U.S. 201, 219 (1934), the United States Supreme Court declared: "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." Similarly, in *Berlin* v. *E.C. Publications Inc.* 329 F. 2d 541, 544 (1964), the United States Court of Appeals observed, " . . . courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry".

25 *Moorhouse and Angus & Robertson (Publishers) Pty. Ltd.* v. *University of New South Wales* (1974) 3 A.L.R. 1 (S.C., N.S.W.). The Australian High Court judgment was reported in (1975) 6 A.L.R. 193.

mittee submitted its report on 9 December 1976.[26] Its principal features include a quantification of fair dealing, extension of library copying privileges and a statutory licence for multiple copying in non-profit educational establishments, subject to recording and to payment in response to the owner's claim.

Copyright Amendment Act 1980 (Aust.). The Commonwealth Government did not take any action on the comprehensive recommendations of the Franki Committee until recently when the Copyright Amendment Act 1980 (Aust.) was enacted.[27] This amending Act implements most of the recommendations of the Franki Committee. The amendments have added certain new provisions relating to fair dealing with copyright material which will be studied and commented upon in the next few pages. In addition, the Act now provides a system of photocopying for users generally, for libraries, for schools, universities and other educational institutions and for handicapped readers. At the same time, the new provisions intend to give a fair payment to the copyright owner.

V. FAIR DEALING PROVISIONS OF THE NEW ZEALAND COPYRIGHT ACT 1962

General. As has been mentioned, the current New Zealand copyright legislation is contained in the Copyright Act 1962. The Act has its roots in the Copyright Act 1956 of the United Kingdom. Although an analysis and discussion of the fair dealing doctrine is made throughout this paper, we may here briefly refer to the specific provisions in the Act of 1962 for the purpose of comparison with the altered Australian provisions.

Scope of Part III provisions: sections 19-23. The provisions contained in Part III of the New Zealand Copyright Act include the statutory recognition of fair dealing together with an indication of the purposes for which a limited use of copyrighted works may be made without causing infringement. Thus, sections 19 and 20 of the Act seek to remove certain types of dealings with copyrighted works and other subject matter from the purview of infringement. In addition, special exemptions are provided for libraries, universities and schools as well as for records of musical works.[28] It should, however, be noted in this connection that the New Zealand Act, unlike its Australian counterpart, does not give any indication of the criteria for determining application of the fair dealing exemptions.[29]

Research or private study: sections 19(1) and 20(1). Sections 19 and 20 of the Act limit copyright owner's rights where a literary, dramatic, musical or an artistic work is dealt with for purposes of research or private study. As will be noted, the dealing must not only be for research or private study, it must also be fair. Unfortunately, the Act contains no definition of either "research" or "private

26 *Report of the Copyright Law Committee on Reprographic Reproduction* (AGPS, Canberra, 1976) (hereinafter "Franki Committee Report").
27 No. 154 of 1980 (Aust).
28 Section 21 and 22, Copyright Act 1962 (N.Z.).
29 See s. 40 (2), Copyright Act 1968 (Aust.).

study". As has been stated elsewhere in this paper, the exemption seems to cover only such dealings where scholars are making copies of a copyrighted material for their personal perusal and not where copies are made, say, by a teacher, for the purpose of imparting instructions in the classroom.[30] In recent times, the enormous increase in the use of photocopying machines and changes in teaching techniques which rely heavily on a regular supply of hand-outs to students, have led to reappraisal and reforms of similar provisions in other jurisdictions to cope with the threats posed by such innovations.[31] However, in New Zealand, the situation has remained unchanged since the enactment of the 1962 Act.

Criticism or review: sections 19(2) and 20(2). Under these provisions a fair dealing with a literary, dramatic, musical or artistic work for the purposes of criticism or review is not an infringement of copyright. Nevertheless, this defence is available only if a sufficient acknowledgement accompanies the criticism or review.[32] It is interesting to note that it will be fair dealing even though the defendant has criticised the doctrines or ideas expounded in the plaintiff's work.[33] However, the defence is unlikely to succeed if the subject-matter which has been criticised or reviewed is unpublished,[34] or contains confidential information leaked by a third party.[35]

Reporting current events: sections 19(3) and 20(3). Under section 19 it is provided that a fair dealing with a literary, dramatic, or musical work does not constitute an infringement of copyright in the work if the purpose of dealing is to report current events in a newspaper, magazine, or similar periodical, provided the report carries with it a sufficient acknowledgement.[36] In addition, reporting of current events by means of broadcasting or in a cinematograph film is protected by this provision and no acknowledgement needs to accompany it. Thus, a news broadcast of a public function in which a copyrighted musical work has been played does not constitute an infringement of the copyright in the musical work. Further, under section 20(3) the copyright in an artistic work is not infringed by the inclusion of the work in a photograph, cinematograph film, or television broadcast, if its inclusion therein is only by way of background,

30 The same view seems to have been held by Lahore, para. 1203, in interpreting the corresponding Australian provision in its unamended form. As will be noted, the Australian Act no longer contains the word "private" which was deleted from s. 40 by the Copyright Amendment Act 1980 (Aust.). It is submitted that a similar move by the New Zealand legislature would be worthy of support.

31 E.g. the Copyright Amendment Act 1980 (Aust.); the Copyright Act of 1976 (U.S.).

32 Section 2 of the Copyright Act 1962 (N.Z.) defines sufficient acknowledgement as "an acknowledgement of the work or other subject-matter in question by its title or other description and, unless the work is anonymous or the author or maker has previously agreed that no acknowledgement of his name should be made, also identifying the author or maker". It should be noted that a mere acknowledgement of the source will not make the dealing fair — "confession does not diminish the previous theft" (*Scott* v. *Stanford* (1867) L.R. 3 Eq. 718) — but failure to acknowledge may weigh heavily against the defendant.

33 *Hubbard* v. *Vosper* [1972] 2 Q.B. 84.

34 *British Oxygen Co. Ltd.* v. *Liquid Air Ltd.* [1925] Ch. 383.

35 *Beloff* v. *Pressdram Ltd.* [1973] R.P.C. 765.

36 Supra n. 32.

or is otherwise incidental to the principal matters represented, or is for the purpose of reporting current events. Thus, copyright, say, in a painting displayed in an art gallery incidentally televised during an interview with the director of the gallery, will fall within the scope of this provision.

Judicial proceedings: sections 19(4) and 20(7). Under these provisions, there is a blanket permission which provides that the copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purpose of a judicial proceeding or of a report of a judicial proceeding. No question of fair dealing arises at all under these provisions: protection is available as long as the reproduction is proved to be for the purpose of judicial proceedings. In *Auckland Medical Aid Trust* v *Commissioner of Police*,[37] it was held that this defence only applied to specific proceedings existing at the time the reproduction was made. Thus, lawyers arguing a case in a court of law may reproduce copyrighted documents to support their arguments while judges may quote from copyrighted works in the course of their judgments. It should however be noted that the provisions under reference do not protect reporters covering judicial proceedings: their reports will have to fall under the fair dealing provisions, referred to above,[38] so as not to constitute infringement.

Fair dealing with subject-matter other than works: sections 19(5) and 20(11). The exceptions stated above covering dealings with original works also apply to sound recordings, cinematograph films, television broadcasts, sound broadcasts and published editions. Further, the provisions provide that where a work is broadcast or telecast for one of the specified purposes under sections 19 and 20, the transmission of the work to subscribers to a diffusion service is not an infringement of copyright. Thus the New Zealand Broadcasting Corporation does not infringe copyright in a musical work if it, say, broadcasts or telecasts a newsreel containing the work in the course of reporting current events.

Other general exceptions. Apart from the four main purposes discussed above, the Act makes a few other general exceptions to which a brief reference may be made now.

(i) A newspaper report of a public lecture[39] does not infringe copyright in a literary, dramatic or musical work, unless there is an express prohibition by a conspicuous notice (written or printed) at or about the main entrance of the building where the lecture is given.[40] It should however be noted that the presence of notice does not affect the provisions of section 19(3) as to reporting current events.

(ii) It is not an infringement of copyright in a published literary or dramatic work if there is a public reading or recitation or broadcasting of the work by a person, if accompanied by a sufficient acknowledgement.[41]

37 [1976] 1 N.Z.L.R. 485.
38 Refer to text accompanying n. 36 supra.
39 "Lecture" is defined under s. 2 of the Copyright Act 1962 (N.Z.).
40 Section 19(7), Copyright Act 1962 (N.Z.).
41 Section 19(8), Copyright Act 1962 (N.Z.).

(iii) The copyright in a published literary, dramatic, or musical work, or in a published edition of such a work, is not infringed by the inclusion of a short passage therefrom in a collection designed to be used in schools, provided certain conditions are satisfied.[42]

(iv) The making of a painting, drawing, engraving or photograph of a work of architecture or the inclusion of an architectural work in a cinematograph film or television broadcast does not constitute infringement.[43].

(v) Where a sculpture or a work of artistic craftsmanship is situated, otherwise than temporarily, in a public place, or in premises open to the public, the copyright therein is not infringed by the making of a painting, drawing, engraving or photograph of the work or by its inclusion in a cinematograph film or in a television broadcast.[44] In essence, this permits the making of two-dimensional representations of three-dimensional artistic works and, as such, represents a major inroad in the rights of owners of copyright in such works. Thus, whereas an unauthorised photograph of a painting in a public art gallery is an infringement, a photograph of a sculpture taken in similar circumstances is not.

(vi) More important is the exception from infringement of copyright in an artistic work if an object of any description is made in three dimensions from a two-dimentional artistic work, provided the object does not appear to be a reproduction of the artistic work to persons who are not experts in relation to objects of that description.[45]

Special exceptions for libraries, universities and schools: Supply of copies: section 21(1). The exceptions in the New Zealand Act covering the use of copyright works for educational and library purposes are fairly limited and are to be found in section 21. Thus, copies of literary and other works may be made or supplied by or on behalf of a teacher or librarian at any of the above-mentioned institutions. However, the following conditions must be complied with to obtain protection: (i) the copies may only be supplied to persons who satisfy the teacher or librarian that they require them for research and private study; (ii) no copy is to extend to more than a reasonable proportion of the work in question or to more than one article in a periodical unless two or more articles in the same publication relate to the same subject-matter;[46] (iii) no person is to be given more than one copy of the same piece of work; and (iv) no payment apart from the actual expense is to be taken for supplying the copies.

42 Section 19(6), Copyright Act 1962 (N.Z.).
43 Section 20(4), Copyright Act 1962 (N.Z.).
44 Section 20(5), Copyright Act 1962 (N.Z.).
45 Section 20(8), Copyright Act 1962 (N.Z.). For a good discussion, see Lahore, paras. 1150, 1151.
46 There is no indication in the New Zealand Act of what constitutes a "reasonable proportion" of the relevant work. For the definition of "reasonable portion" in the Australian Act, see s. 10(2), Copyright Act 1968 (Aust.). The New Zealand Act does enact provisions to cover situations where one librarian supplies a copy of the copyrighted work, or part of it, to another librarian, see s. 21(2) and (3), Copyright Act 1962 (N.Z.).

Use in the course of instruction and examination: section 21(4). Under this provision, the copyright in a literary, dramatic, musical or artistic work is not infringed by reason only that it is reproduced, or an adaptation thereof is made: (i) in the course of educational instruction by a teacher or student; or (ii) as part of a question to be answered in an examination or in answer to such a question. It is interesting to note that the first part of this exception relating to reproduction appears very broad as it does not seem to place any limit on the amount of the work or adaptation which may be copied or, indeed, on the number which may be made. But it is doubtful whether the absence of any limitations in this provision, unlike the cognate United Kingdom[47] and Australian[48] provisions, should be taken to imply that no restrictions regarding production of multiple copies are intended to be imposed. In the writer's view the New Zealand courts, in an effort to safeguard the economic interests of the copyright owner, are most likely to interpret the provision strictly and require each and every reproduction or adaptation made in the course of instruction to pass the test of "fair dealing". It is important to remind ourselves of the fact that while the relevant provision in both the United Kingdom and Australian Acts is enacted in the Part dealing with "Miscellaneous" provisions, the New Zealand provision under reference is placed in Part III of the Act entitled "FAIR DEALING WITH COPYRIGHT MATERIAL".[49]

In view of the potential breadth of the problem of fair dealing, the scope of this presentation has been consciously limited. In particular, discussion of the peculiar problems relating to photocopying, in libraries as well as in educational institutions, has been minimised. Let us now turn to the concept of fair dealing.

VI. PERMITTED USE OF COPYRIGHT MATERIAL WITHOUT REMUNERATION

A. The Concept of Fair Dealing

Limitations on exclusive rights. In an old English case of *Wilkins* v. *Aikin*[50]

47 Note that s. 41(1) (a) of the Copyright Act 1956 (U.K.) is not without any limitations as it provides that the copyright shall not be taken to be infringed by reason only that the work is reproduced, — "(a) in the course of instruction, whether at a school or elsewhere, where the reproduction or adaptation is made by a teacher or pupil *otherwise than by the use of a duplication process*" (emphasis supplied).

48 The Australian Act places a very considerable practical limitation by providing in s. 200(1)(a), Copyright Act 1968 that the copyright in a work is not infringed by reason only that the work is reproduced — "(a) in the course of educational instruction, where the work is reproduced or the adaptation is made or reproduced by a teacher or student *otherwise than by the use of an appliance adapted for the production of multiple copies or an appliance capable of producing a copy or copies by a process of reprographic reproduction*" (emphasis supplied).

49 The second part of the exception relating to examination questions and answers (s. 21(4)(b)) is self-explanatory and needs no comment. For other exceptions in the Act covering the use of copyright works for educational purposes, see s. 21(5) which protects performance of works in the course of educational instruction and s. 21(6) which protects sound recordings, cinematograph films and television broadcasts in the course of educational instruction. The provisions in s. 22, covering the making of recordings of musical works, are simple and clear and are therefore not commented upon in the text of this paper.

50 (1810) 17 Ves. 422.

the plaintiff, as a result of his travels to Sicily and Greece, had produced a book entitled *The Antiquities of Magna Graecia,* with prints from drawings made by him. The defendant published a book called *An Essay on the Doric Order of Architecture,* in which he copied several plates and prints of the plaintiff's book. To the contention that the defendant's work was not an infringement, the Chancellor, Lord Eldon, said:[51]

> There is no Doubt, that a man cannot under the Pretence of Quotation, publish either the whole or part of another's work; though he may use, what it is in all Cases very difficult to define, fair Quotation. . . . The Question upon the whole is, whether this is a legitimate Use of the Plaintiff's publication in the fair Exercise of a mental operation, deserving the character of an original work. The Effect, I have no doubt, is prejudicial.

General test of fair dealing. Fair dealing is not defined in the Australian and New Zealand copyright statutes.[52] The writers have offered various definitions, but as in most legal definitions, they help us little in understanding the concept of fair dealing. Some writers have thought that fair dealing is a dealing technically forbidden by the law, but allowed as reasonable and customary, on the basis that the copyright owner must have foreseen it and tacitly consented to it. Others have defined fair dealing as copying the theme or ideas rather than their expression. Again, fair dealing has been considered to be the taking of an insubstantial portion of the copyrighted material, but as we shall see later, whether or not a taking is substantial is only one factor in the determination of whether a dealing is fair. If a simple definition must be attempted, one can say that the concept of fair dealing permits the reproduction, for legitimate purposes, of material taken from a copyrighted work to a limited extent that will not cut into the copyright owner's potential market for the sale of copies.

Preliminary questions. It is only when the preliminary questions: is the material copyrightable? was it copied? and was enough copied to satisfy the "substantial appropriation" doctrine and to make the de minimis doctrine inapplicable? have been answered in the affirmative, that the question whether there has been a fair dealing arises. One way to phrase it is to say that the court must first determine whether there has been an infringement; and if there has, then, whether it is privileged under the fair dealing concept.

Is fair dealing an exception to infringement? But is fair dealing an infringement of copyright which is privileged or does it mean there is no infringement at all? Treating it as a privilege makes for some convenience in discussion as one can first treat the elements of infringement, and then, if they are present, apply the tests determining whether the dealing was a fair dealing and so one giving no actionable right to the copyright owner. On the other hand, it seems incorrect somehow to say that a fair dealing is an infringement which the law permits; if it is permitted, it is not an infringement. And in some contexts it is more convenient to discuss it as a non-infringing dealing. Be this as it may, the difference in views seems to have no practical significance.

51 Ibid. 424.
52 See Franki Committee Report, supra n. 26, para. 2.54 et seq.

Serves as a safety valve. It is not easy to decide what is and what is not a fair dealing. The difficulty is compounded by the fact that every case depends on its own facts.[53] The use of a certain amount of an author's material may be perfectly fair and legitimate in one case, while the use of a similar amount in another case might be prohibited. But if there is anything certain about fair dealing, it is this that it leans in favour of the users of copyrighted materials and not the owners. It restricts the rights of the latter. It serves as a reasonable safety valve to the almost paralytic effect that copyright would otherwise place on the sensible use and exploitation of published materials. In other words, the doctrine of fair dealing is a further limitation in the public interest upon the limited monopoly of the copyright owner.

Fair dealing is a statutory defence. The Copright Act 1968 (Aust.) guarantees the copyright owner a limited monopoly with express recognition of certain rights in others to legally copy the protected material to the extent that the owner of copyright is not injured. The defence of fair dealing is statutory. It excuses otherwise infringing uses on the ground of their overriding public importance. The combined effect of sections 13, 14, 31, 36 and 40 of the Act may be summarised as follows: the copyright in a literary work is not infringed by anyone who, not being the owner of the copyright and without licence, reproduces or authorises the reproduction of the work, or of a substantial part of the work, in a material form if the reproduction is a "fair dealing" with the work "for the purpose of research or study".[54]

Potential for infrigements increased. Copying of another's work by the scholar or educator to further his or her purposes in research or study or teaching did not give rise to much problem until recently, because all copying was done by hand and was no threat to the economic interests of the copyright owners. It is not absolutely certain that a handwritten copy is not an infringement because the courts have never ruled directly on this question, but it has generally been considered as fair dealing because (i) there is little or no personal economic gain involved and (ii) the hand-copying method has such inherent limitations that there can scarcely be injury to the copyright owner.[55] However, photocopying machines have increased the potential for copying to astronomical proportions as compared with earlier slow and expensive methods. Anything can be copied now, and at a very low cost. Also, there is a recent development in the teaching techniques in educational institutions — multiple copying of copyrighted materials for distribution to students, and in most cases free of cost. This type of copying has little similarity to the handwritten copy made by the individual researcher performing the task of reproduction for himself or herself. These developments have obviously increased the potential for infringements and it is therefore very important to draw a line where fair dealing ends and infringement begins. With these thoughts firmly in mind, let us now turn to the policy behind fair dealing.[56]

53 Copinger, supra n. 2, para. 514.

54 See ss. 3, 6, 7, 19-22, Copyright Act 1962 (N.Z.). Attention has already been called to the provisions in the New Zealand Copyright Act 1962 in Part V of this paper.

55 See generally, *Dalglish Committee Report* supra n. 21, para. 88.

56 For a good discussion see Nimmer *Copyright* (Matthew Bender, 1982) Vol. 3, 13.80.

B. Policy Behind Fair Dealing

The underlying principle. As stated above, the concept of fair dealing is perhaps as old as copyright protection itself. It is a judge-made exception which now finds place in the statute. It can scarcely be argued that it does not make sense. In the first place, if no copying were allowed the very objective of copyright would be thwarted because the advancement of learning would be slowed rather than accelerated. Since the fundamental justification for the copyright grant is to promote the progress of knowledge, the rights of the copyright owner to financial rewards must occasionally be subordinated to the greater public interest of developing art, science and industry. Second, some copying actually helps stimulate the market for the authors work. Third, each author builds his or her work on the existing knowledge; he or she does not invent anything new, but merely searches through (hence the word "research") the existing ideas and materials. Why should then others be totally excluded from using his or her work and thus discouraged from making further improvements? As it was once said, "a dwarf standing on the shoulders of a giant can see farther than the giant himself". There is thus a strong social interest in advancing the frontiers of knowledge and encouraging further research in all fields. As that great English judge, Lord Mansfield, said in *Sayre* v. *Moore*:[57]

> . . . we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

The balancing of values. The core problem which the fair dealing provisions are supposed to tackle is that of balancing what the author must dedicate to society in return for his or her statutory copyright against undue appropriation of what society has promised the author in terms of protection of his or her exclusive right to make merchandise of his or her intellectual work. The Copyright Act 1968 (Aust.), with its recent amendments, attempts to implement the various policy considerations stated above by enumerating certain broad ground rules for the determination of fair dealing. These include general statements of the permissible purposes for which copyrighted material can be used, conditioned with respect to the amount of such material and the effect of the use on the original work.

C. Analysis of the Criteria of Fair Dealing

Purpose of dealing. Let us first look at the fair dealing provisions of the Copyright Act 1968 (Aust.), as amended by the Copyright Amendment Act 1980 (Aust.). Section 40 is the heart of fair dealing. That section statutorily establishes a fair dealing defence for those whose purpose is research or study[58] and lists the

57 (1785) 1 East 361, n. 102 E.R. 139, 140.

58 In 1980, following Franki Committee Report, supra n. 26, the adjective "private" in the phrase "private study" was deleted in s. 40. While the true scope of the phrase was a bit unclear, it appears to have been intended to distinguish use of copyrighted works for private use from use for classroom instruction. Nevertheless, this is a difficult distinction to maintain as the photocopying of works is clearly of great help in enabling

factors by which fair dealing is to be determined. Sections 41, 42 and 43 list certain other purposes, namely criticism or review, reporting news, and the giving of professional advice, for which doing of certain acts shall not constitute an infringement of copyright. Parenthetically, we should note that copying under these provisions can be done by individuals for specified purposes, without complying with any formalities and without making any payment to the owner of the copyrighted material. Furthermore, it is apprehended that the criteria set down by section 40(2) for determining whether the dealing made of a material in any particular situation is a fair dealing will not only apply for the purpose of research or study, but also for the purposes of criticism or review, reporting news and giving of professional advice.

Reproduction and distribution by libraries and archives. Sections 49, 50, 51 and 51A are greatly expanded from the original 1968 version (before amendment) and provide considerable latitude for copying copyrighted works by libraries and archives. Broadly stated, these sections permit libraries and archives to make no more than one copy of a copyrighted work, so long as no commercial advantage is sought and the person making the request states that he or she requires the copy for the purpose of research or study. If the work to be copied is more than a reasonable portion of the work,[59] then the officer in charge of the library or archives, as the case may be, must make a declaration, after reasonable investigation, stating that he or she is satisfied that an un-used copy cannot be obtained within reasonable time and at a normal price. The Franki Committee recommended that the installation and use of self-service photocopying machines in libraries should not impose any liability for infringement upon library staff, provided notices in a form prescribed by regulations were displayed drawing the attention of users to the relevant provisions of the Act.[60] Section 39A, which was enacted in 1980, gives effect to this recommendation.[61]

Relevant factors for determining fair dealing.[62] What are the relevant factors in the determination by a court of whether a particular dealing is fair? Section 40(2) of the Australian Act indicates that there are five elements which would

teachers and students to prepare materials for classroom use. The Franki Committee was of the view that that sort of photocopying for general educational use was acceptable, as long as it was qualified for the purposes of s. 40, by the requirement of "fair dealing", and that copyright owners would not suffer economic loss by the removal of the limitation to private study, ibid. paras. 2.54-2.68.

59 The phrase "reasonable portion" is now defined in s. 10(2) of the Copyright Act 1968 (Aust) and applies only to published editions of works of not less than 10 pages. It is a reasonable portion if the pages that are copied —
(a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
(b) in a case where the work is divided into chapters — exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

60 Supra n. 26, para. 2.53.

61 For details of the notice which the libraries (and archives) are required to affix to, or place in close proximity to, the photocopying machines, see Copyright Regulations, S.R. 1981 No. 148, Schedule 3 (Aust.).

62 As noted elsewhere in this paper, there is no such provision in the New Zealand Copyright Act 1962.

be relevant; any one of the five may, in a particular case, be decisive. Note that the list is inclusive; other factors which may be considered, if one pays heed to the judicial thinking on the subject, are the amount of the user's labour involved, the benefits gained by him or her and the intent with which dealing was made.[63] Let us consider these factors one by one.

(a) *The purpose and character of the dealing*[64]

As stated earlier, a copyrighted work may be made physical use of in any manner its possessor e.g. the buyer of a book, may choose. But here we are concerned with the type of dealing involved, i.e. the purpose for which the excerpt has been used. The most clearly recognised fair dealing is the right to quote from a copyrighted work for purposes of criticism, review, or reporting.[65] The scarcity of litigation on this point, when such dealing is quite common, is perhaps the best evidence of the propriety of such use. Ordinarily, writers want to have their works reviewed and so brought to the attention of the public. A reviewer may thus extensively cite from the original work for the purpose of fair and reasonable criticism. But the citation must be genuinely for the purpose of criticism, and not a subterfuge for presenting the cited material.[66]

Use of prior work. Another legitimate type of use is the use by writers of earlier works in the preparation of their own. The courts, in the interest of learning and science, have always recognised the right of subsequent authors, compilers, and publishers to deal with the works of others to a certain extent. There are several ways in which a scholar may make use of an earlier work. He or she may actually quote from it to illustrate a particular point or to give a representative phrasing of some viewpoint. He or she may sometimes use it as a guide to source material.

When dealing is for a commercial purpose. The purpose for which the copyrighted material is dealt with may be the decisive element where a commercial purpose is involved.[67] Thus in a United States case of *Conde Nast Publications* v. *Vogue School of Fashion Modelling*,[68] a modelling school was prohibited from reproducing covers of *Vogue* and *Glamour* magazines in a brochure advertising

63 It is to be noted that by and large, these factors are similar to the types of factors which the courts have taken account of when deciding cases involving fair dealing defences prior to this amendment, see e.g. *Bramwell* v. *Halcomb* (1836) 3 Mv. & Cr. 737, 40 E.R. 1110; *Johnstone* v. *Bernard Jones Publications Ltd.* [1938] Ch. 599; *Beloff* v. *Pressdram Ltd.* [1973] R.P.C. 765; *Hubbard* v. *Vosper* [1972] 2 W.L.R. 389.

64 See generally, Nimmer, supra n. 56, 13.58.

65 See s. 19(2) and (3), Copyright Act 1962 (N.Z.). See generally, *Chatterton* v. *Cave* (1878) 3 App. Cas. 483, 492.

66 *Campbell* v. *Scott* (1842) 11 Sim. 31, 59 E.R. 784. Note also that presence of any oblique motive, for example, an underlying desire to damage the copyright owner or get an unfair advantage is not permissible: *Johnstone* v. *Bernard Jones Publications Ltd.* [1938] Ch. 599, 607.

67 The defence of fair use (as it is called in the U.S.) will more readily be recognised where defendant's work is used for educational, scientific or historical purposes: Nimmer, supra n. 56, 13.61.

68 105 F. Supp. 325 (1952) (S.D.N.Y.).

the school. The court said that the purpose of the copying was to promote their business with the aid of an attractive catalogue and the prestige of plaintiff's magazines.

(b) *The nature of the work or adaptation*

This factor overlaps the factor discussed above. The privilege of fair dealing will be greater in a scholarly work than in a commercial publication, all other things being equal. The fact that the infringing work is purely commercial, e.g. an advertising pamphlet, may be decisive. Whether the use of one publication in preparing another has been fair or not, depends to a substantial extent on the nature of the two publications and the likelihood of their entering into competition with each other.[69] It should however, be pointed out that merely because a work is designed for sale to a wide audience, is not, taken by itself, a conclusive point against the possibility of fair dealing within the work.

(c) *Availability of the work*

A third factor which will be taken into consideration in determining whether a dealing is a fair dealing is the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price. This element is capable of measurement and can easily be applied.[70]

(d) *The effect of the dealing on the copyrighted work*

There can be no fair dealing if there is substantial injury to the copyright owner by virtue of the dealing. If so much is taken, that the value of the work or adaptation, as the case may be, is adversely hit, or the labours of the original author are substantially appropriated by the defendant, that will remove the dealing out of the umbrella of fair dealing.[71] In other words, the following points will be relevant — the degree in which the dealing may prejudice the sale, or diminish the profits,[72] or supersede the objects of the original work, or whether the defendant's publication would serve as a substitute for the original. Another important factor which would seem to be ordinarily decisive is whether or not

69 *Bradbury* v. *Hotten* (1872) L.R. 8 Ex. 1. See also *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.* [1910] 2 Ch. 297, 305 where the court observed: " . . . the nature of the two publications and the likelihood and unlikelihood of their entering into competition with each other is not only a relevant but may be even the determining factor of the case".

70 This factor attempts to deal with problems arising out of works that are "out of print" and are unavailable for purchase through normal channels. Back issues of some periodicals are also sometimes difficult to obtain, even a few months after their publication. This factor is particularly relevant to Australia, where vast distances between cities can cause problems in the distribution and availability of a work.

71 *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.* [1910] 2 Ch. 297, 305; *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, 93, 94.

72 See e.g. *Bradbury* v. *Hotten* (1872) L.R. 8 Ex. 1 (a publication illustrating the career of Napoleon III by caricatures copied from *Punch* was held to have infringed copyright on the ground that *Punch* might wish to republish a similar collection later).

so much as has been copied which will materially reduce the demand for the original.[73]

Extracts for other purposes than criticism. It will not be fair dealing if the demand for the plaintiff's work is materially reduced by reproductions in the defendant's review or comment, not by reason of adverse criticism but because the defendant's publication so fully discloses the contents of the book. This principle also applies to other writings, not properly reviews, which duplicate the copyrighted work and diminish the demand for it. Thus, in *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*,[74] three sentences from the plaintiff's scientific treatise were used in an advertising pamphlet to advance the sale of the defendant's cigarettes. The court held that the copying was not excused by acknowledgement of the source or fair dealing, as the pamphlet was written to advance the sale of cigarettes and was not a treatise to advance human knowledge. It also became clear from this decision that the courts are likely to give the concept of fair dealing a broader scope in the fields of learning and a narrower scope where commercial gain is the primary purpose.

(e) *The amount of the work copied*

Servile copying, despite the absence of any injury, will often lead to the result that the dealing was not fair. This last factor, "in a 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",[75] is relevant for two reasons. First, it is important in determining whether or not there has been an infringement. It may be noted here that according to section 14 of the Copyright Act 1968 (Aust.), acts done in relation to substantial part of a work or other subject matter are deemed to be done in relation to the whole.[76] Second, if so, it then becomes relevant as a factor in determining whether or not there has been a fair dealing of the extracted material.

Quantity taken only slight test. The importance of quantity as a factor is largely dependent on the other factors, referred to above. It is not only quantity but value that is also looked to. Value depends in part on the relative size of the two works.[77] It would be relatively easy to justify copying two pages from a

73 See *Folsom* v. *Marsh* 9 Fed. Cas. 342, 348 (1841). In *Scott* v. *Stanford* (1867) L.R. 3 Eq. 718, the court granted an injunction to the plaintiff because the defendant had copied one-third of plaintiff's statistical returns (though accompanied by an acknowledgement) prejudicing plaintiff's work having been superseded by the republication. See also *Kelly* v. *Morris* (1866) L.R. 1 Eq. 697.

74 23 F. Supp. 302 (1938) (E.D. Pa.).

75 Section 40(2)(e), Copyright Act 1968 (Aust).

76 See s. 3(1), Copyright Act 1962 (N.Z.) where the notion of substantiality is introduced. At this point, it is important to remind ourselves of the fact that the courts have always related the concept of fair dealing to the notion of substantiality: see e.g. *Whittingham* v. *Wooler* (1818) 2 Swans. 428; *Campbell* v. *Scott* supra n. 66; *Jarrold* v. *Houlstone* (1857) 3 K. & J. 708. See also Copinger, supra n. 2, para. 513.

77 For a good discussion see *Ravenscroft* v. *Herbert* [1980] R.P.C. 193, 203, 205 and 207. See generally, Copinger, supra n. 2, para. 467 et seq.

100 page book (except, perhaps, where those two pages were the entire summary and conclusion, and therefore the very core of the book), but relatively difficult to justify copying fifty of the 100 pages, especially where copies were available for purchase. The general principle guiding the courts in cases of this description could hardly be found better stated than in the words used by Story J. in *Folsom* v. *Marsh*:[78]

> In short, we must often in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be indistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy.

Striking a balance. In sum, the tests are pragmatic. They strike a scrupulous balance between the rights of the author to the product of his or her creative intellect and his or her imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts which is the fundamental objective of the copyright legislation.

D. *Dealing Must be for Research or Study*

Deletion of the word "private". The dealing with the work must not only be fair but also for the purpose of research or study. Both requirements must be fulfilled. It should be recalled that the 1980 Amendment Act (Aust.) has broadened the fair dealing exception by omitting "private" from "research or private study".[79]

Multiple copies for classroom use. It is now argued that the omission of "private" makes it possible for a teacher to copy material for the "study" of each student in a class of students as the agent of each of those students.[80] It is submitted that this view cannot be supported on the basis of recent authority.[81] Moreover, it is respectfully submitted that the general scheme of the relevant provisions of the Act of 1968, which seek to regulate the role of libraries and archives in supplying copies to scholars and impose restrictions on multiple copying by educational institutions, does not give any indication that the (amended) fair dealing provisions are intended to provide free multiple copying, notwithstanding the omission of the word "private" in section 40.

78 9 Fed. Cas. 342, 348 (1841) (cited with approval in *Scott* v. *Stanford* (1867) L.R. 3 Eq. 718).

79 Attention has already been called to this matter, see n. 30 and accompanying text supra. See also *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch. 601.

80 Lahore *Photocopying: A Guide to the 1980 amendments to the Copyright Act* (Butterworths, Sydney, 1980) 6.

81 See *Copyright Agency Ltd.* v. *Haines* (unreported) S.C. of N.S.W. Eq. Div. 9 March 1982 (McLelland J.).

E. Library Reproductions[82]

Protection of libraries. The new provisions introduced by the Copyright Amendment Act 1980 (Aust.) carefully define the right of replication by libraries.[83] These provisions are aimed to protect the library in the reprographic field. The library is now saved harmless in any fight between the copyright owner and the ultimate user, in the absence of an illegal act on the library's part. The library is the middle-person in such a suit. If the user makes proper use of the replication the library gives him or her under the new provisions, then the user will be protected under the statutory defence. But the fair dealing will be that made by the user; it is not the replication made by the library. If the user does not make fair dealing of that replication which the library makes available to him or her under the new law, then he or she is liable to the copyright owner for infringement.

Relationship with fair dealing. It is pertinent to mention here that the reprography problem is not one of fair dealing. The justification for the library reproductions of copyrighted materials is not founded on the concept of fair dealing. The tests for determining fair dealing are therefore not relevant to library photocopying. The new provisions therefore rightly hold the library blameless, in the absence of an illegal act on its part. Furthermore, no remuneration is payable to copyright owners on copying by libraries and archives. For this reason the provisions for retention and arrangement of records are simpler than those which apply to multiple copying under the statutory licence. It should however, be noted here that the Australian law does provide for a lending royalty, entitling authors to an equitable remuneration when copies of their copyrighted works are loaned to users by public libraries.[84]

Two aspects of library photocopying. Library uses of copyrighted works involve the intricate problem of balancing the needs of libraries and their users against the claims of copyright owners for remuneration for various uses of their works. Two aspects of library photocopying which require consideration are: (a) the liability of libraries whose users photocopy for themselves, and (ii) the liability of libraries that photocopy for their own purposes or for their users.

82 The position in New Zealand in this regard has already been explained, supra Part V of this paper.

83 Sections 39A, 49, 50, 51A and 53, Copyright Act 1968 (Aust); in New Zealand, s. 21, Copyright Act 1962.

84 For a brief description of the way the public lending royalty system operates, see Lahore, supra n. 7, para. 2102; Sterling and Hart *Copyright Law in Australia* (Legal Books, Sydney, 1981) 4. In New Zealand, no legislation has been passed as yet in this regard. But there does exist an elaborate system called the "New Zealand Authors' Fund" which makes annual payments to New Zealand "qualified" authors to compensate for the use of their work in public libraries in New Zealand. An advisory committee keeps the scheme under constant review and makes its recommendations to the minister. The committee also functions as an appeal tribunal to determine disputes arising from decisions of the Department as to the eligibility of individual authors and books. At present, the committee is chaired by Professor K. Sinclair. The scheme is administered by the Department of Internal Affairs.