

**REPRODUCTION OF COPYRIGHTED  
MATERIAL FOR EDUCATIONAL  
PURPOSES**

by

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## SUMMARY

The main objective of this work is to examine the respective problems surrounding the reproduction of copyrighted material for educational purposes. The particular problem at hand will be discussed against the background of the fair dealing doctrine.

A comparative study of the relevant principles of the copyright laws of the United Kingdom, United States of America and New Zealand, is aimed at providing a reliable sounding board, which may serve as a guideline in formulating a South African approach to the vexed question of fair dealing. The primary aim of this work, however, is to provide an analysis of the various issues pertaining to the educational use of copyrighted material. 100

I declare that,

**REPRODUCTION OF COPYRIGHTED MATERIAL FOR  
EDUCATIONAL PURPOSES**

Is my own work and acknowledged by means of complete references.

A handwritten signature in black ink, appearing to read 'Karina Malan', written over a horizontal line.

**KARINA MALAN**

**KEY WORDS:**

1. **COPYRIGHT**
2. **EXEMPTIONS**
3. **EDUCATION**
4. **EFFECT OF USE**
5. **FAIR DEALING**
6. **INFRINGEMENT**
7. **NATURE OF WORK**
8. **REPRODUCTION**
9. **REPROGRAPHIC PROCESS**
10. **SUBSTANTIALITY**

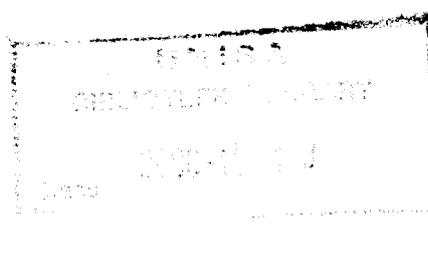
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## 1 INTRODUCTION

Copyright can be described as the fundamental right which vests in a qualified author, (or a person having acquired rights from or through him) of an original work, recognized by the Copyright Act<sup>1</sup> and which enables him to prevent unauthorised copying of that work. Generally speaking, a copyrighted work may not be duplicated, or appropriated, by others without the copyright owner's permission.<sup>2</sup> In broad terms, copyright law may be described as the exclusive right in relation to a work embodying intellectual content, to do or to authorise others to do certain acts, in relation to that work, which acts represents in the case of each type of work, the manners in which that work can be exploited, for personal gain or profit.<sup>3</sup>

The unauthorised copying of copyrighted works will evidently result in copyright infringement. The most notable limitation on the exclusive rights of the copyright owner, is the fair dealing doctrine. Fair dealing is both a privilege and source of confusion. It is an ambiguous concept that provides no exact parameters. Therefore, each case will have to be evaluated, based on its own merits and facts. The effectiveness of higher education depends upon the right to make creative and balanced use of copyrighted material. Copyright has become a central issue that will increasingly affect the future of higher education. Universities, amongst other educational institutions, should therefore secure a thorough understanding of the law of copyright and more specifically, the doctrine of fair dealing. Patry<sup>4</sup> authoritatively notes that educational reprography has in various countries been the single most contentious issue in attempts to codify the doctrine of fair dealing. Fair dealing is a flexible doctrine in respect of which the law provides no clear and direct answers. Fair dealing is an important doctrine which is essential to fulfilling educational objectives. Section 12(4) of the Copyright Act expressly acknowledges the importance of educational uses. Publishers and authors will have to become more sensitive to the academic needs and "educational uses" of copyrighted material. On the other hand, university communities will have to take great care not

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<sup>1</sup> 98 of 1978, as amended (hereinafter referred to as the "Copyright Act").

<sup>2</sup> Copinger & Skone James 1991 2-3.

<sup>3</sup> Dean 1998 1-1.

<sup>4</sup> Patry 1995 203.

to abuse the fair dealing privilege, by engaging in unlawful, or excessive photocopying of copyrighted works. In cases of such abuse, both the individual and the particular educational institution will be at risk.

The law of copyright is at a critical juncture and educational institutions have an extraordinary opportunity to influence the development of the law and related practices with regard to their affect on education. Internationally, the latest developments in the law of copyright have been brought about as a direct response to the changing educational needs and innovative technologies. It is important that the educational community take the initiative in an effort to achieve the appropriate balance in matters related to the evolving interpretation of the fair dealing doctrine. The most meaningful resolution of copyright issues surrounding the use of copyrighted material for educational purposes, will most certainly result from a co-ordinated effort.

The courts will evidently play an important role in balancing the conflicting rights of the copyright owners against the legitimate demands of the educational sector.

## **2 SYNOPSIS**

The main objective of this work is to examine the respective problems surrounding the reproduction of copyrighted material for educational purposes. The particular problem at hand will be discussed against the background of the fair dealing doctrine.

A brief comparative survey of the relevant principles of the copyright laws of the United Kingdom, United States of America and New Zealand, is aimed at providing a reliable sounding board, which may serve as a guideline in formulating a South African approach to the vexed question of fair dealing. The primary aim of this work, however, is to provide an analysis of the various issues pertaining to the educational use of copyrighted material.

## **3 SOUTH AFRICAN COPYRIGHT LAW**

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The meaning of the word "author" in respect of a copyrighted work is of critical importance. Section 1(1) of the Copyright Act provides that, in relation to a literary, musical or artistic work, the word "author" bears its ordinary meaning, namely that of the maker or creator of the work. Copyright applies to original works of authorship that are fixed in a tangible medium of expression. In essence, the work must be original in character, which means that the work must be created as a result of the skill and labour of the creator and thus not merely copied from another source.<sup>5</sup>

Copyright, unlike patent, design and trade mark rights, is not protected by way of registration in a central registry. No formalities are prescribed for the acquisition of copyright in works and provided that the works meet certain requirements, copyright exists automatically. The law of copyright currently protects the following categories of works: literary, musical and artistic works, sound recordings, cinematograph films, broadcasts (television and sound), program carrying signals, published editions and computer programs.<sup>6</sup>

### **3.1 Copyright Infringement**

Copyright infringement can be classified as either direct or indirect. Direct infringement occurs when a person, without the authority of the copyright owner, does or causes someone else to do any of the acts, which are exclusively reserved for the copyright owner. Infringement is indirect when the infringer, although not actually committing any of the acts, so reserved for the copyright owner, none the less knowingly does something in the furtherance thereof. For example, one of the acts, with regard to a literary work, in respect of which the doing or authorization is restricted by copyright to the copyright owner or licensee, is reproducing the work in any manner or form. If, therefore, a person, without the consent of the copyright owner makes a copy of the work, he commits an act of direct infringement. However, if, instead of making a copy of the work himself, he knowingly and without the consent of the copyright owner, imports into the

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<sup>5</sup> Copinger & Skone James 1991 3; see, further in this regard, Dean 1998 1-15; 1-17.

<sup>6</sup> Dean 1998 1-4; see also section 2(1) of the Copyright Act 1978.

Republic, other than for his private or domestic use, an infringing copy, already in existence, he commits an act of indirect infringement.<sup>7</sup>

Copyright is not only infringed by misusing or misappropriating the whole of the copyrighted work, but also by misusing or misappropriating a substantial part of the work.<sup>8</sup> In other words copyright prohibits, in relation to a work, or any substantial part thereof, the unauthorised reproduction in any manner or form, the publication, or the making of an adaptation of the work. The term "reproduction", however, has a wider meaning than mere "copying" and includes recording or filming of a literary work, and an adaptation includes a translation of the work.<sup>9</sup>

The exclusive rights of the copyright owner of literary and musical works, as contained in sections 6 and 7 of the Copyright Act, are subject to certain limitations and exceptions, the most pertinent being the fair dealing doctrine.<sup>10</sup>

The fair dealing doctrine reduces the scope of the exclusive rights granted to the copyright owner by allowing the public to make limited use of copyrighted materials, particularly if the use has a social benefit. The doctrine ensures that the

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<sup>7</sup> Copinger 1978 24; see also section 23(1) and 23(2) of the Copyright Act of 1978.

<sup>8</sup> section 1(2A) of the Copyright Act of 1978; see also p 11-12 below for a comprehensive analysis of the term "substantial"

<sup>9</sup> Copinger & Skone James 1991 166-167; see also the definitions of the terms "adaptation", "copy" and "reproduction" in section 1 of the Copyright Act of 1978.

<sup>10</sup> The provisions of section 6 of the Copyright Act of 1978, as amended stipulate clearly that copyright in literary and musical works vests the exclusive right to do, or to authorise the doing of any of the following acts, in the Republic:

- a) Reproducing the work in any manner or form;
- b) Publishing the work if it was hitherto unpublished;
- c) Performing the work in public
- d) Broadcasting the work;
- e) Causing the work to be transmitted in a diffusion service; unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
- f) Doing in relation to the adaptation of the work, any of the acts specified in relation to the works in paragraphs a) – e) above.

According to section 7 of the Act, copyright in artistic works vests the exclusive right to do or authorise the doing of the following acts in the Republic

- a) Reproducing the work in any manner or form;
- b) Publishing the work if it was hitherto unpublished;
- c) Including the work in a cinematographic film or a television broadcast;
- d) Causing a television or other program, which includes the work to be transmitted in a diffusion service, unless such a service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;
- e) Making an adaptation of the work;
- f) Doing, in relation to an adaptation of the work, any of the acts specified in paragraph a) – d) inclusive.

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copyright owners' exclusive rights do not overwhelm the constitutional objective of promoting learning. The fair dealing doctrine also sanctions limited copying of printed works and analogous uses of videotapes, software, databases and other copyrighted materials. In the educational context, however, the concept of fair dealing is intrinsically aligned with the notion that education deserves preferential treatment and should therefore not be unduly inhibited. Although fair dealing undoubtedly gives special deference to academic needs, it has been made clear that copying for a non-profit educational purpose is no free license to appropriate protected works. Many common uses of copyrighted material at educational institutions can serve the objective of promoting progress, without jeopardizing the creator's incentive.<sup>11</sup>

A sophisticated insight into the fair dealing doctrine can also better serve the multifold objectives of universities. It is suggested that the doctrine be utilized as a useful yardstick for responding to the devastating financial dilemma which higher education now faces. A balanced and lawful approach to the fair dealing doctrine should prevent both costly litigation, as well as unnecessary payments of royalty fees for copies which are already sanctioned. According to American author Kenneth Crews, the concept of fair dealing can be interpreted to serve academic needs and to avoid potential infringements.<sup>12</sup>

### 3.2 Exceptions to Copyright Infringement

In terms of section 12(1) of the Copyright Act, it must be determined whether the unauthorised actions in question constitute fair dealing. In addition to the aforesaid, it must also be determined whether the purpose of the infringement is research or private study, or personal or private use, by the person, or persons, actually using the work.

In terms of section 12(4) of the Copyright Act it must furthermore be determined whether the infringement is to the "*extent justified by the purpose, by way of*

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<sup>11</sup> Crews 1993 23–24; also see Van der Merwe 1998 243.

<sup>12</sup> Crews 1993 129.

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*illustration in any publication, which is part of a visual record for teaching, which is also compatible with fair practice".*<sup>13</sup>

For the purpose of this analysis, it is essential to elaborate on the provisions contained in section 12(4) of the Copyright Act. The aforementioned section is of vital importance to persons in the educational sector, who are engaging in the reproduction of copyrighted material.

The emphasis with regard to the phrase "*...to the extent justified by the purpose...*", should for all relevant purposes, fall on the particular purpose, for which the material is being reproduced. In order to rely on the provisions of section 12(4), a party would have to prove that the particular use in question was exclusively for educational purposes. The abovementioned phrase may be read in conjunction with a further provision, also contained in section 12(4), namely that the use should be "*compatible with fair practice*".

These two provisions seem to be ancillary to one another and should therefore be interpreted as such. In this regard, reference should be made to the view of Copeling and Pienaar,<sup>14</sup> who are of the opinion that the phrase "*to the extent justified by the purpose*", are superfluous, since compliance with the requirement that the use should be "*compatible with fair practice*", would automatically result in compliance with the aforementioned provision as well.

The primary provision of section 12(4) is most certainly included in the words "*...by way of illustration...*". It appears as if it was the legislature's intention to limit the unauthorised use of copyrighted material, for educational purposes, to only those instances where the particular use is not the only, or primary source of the instruction.<sup>15</sup> It is therefore justified to conclude that the material which is used, would have to be complementary to the main source on which the instruction is based.

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<sup>13</sup> my emphasis; Section 12(4) of the Copyright Act of 1978 provides that: "The copyright in a literary or musical work shall not be infringed by using such a work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author of it appears on the work."

<sup>14</sup> Copeling & Pienaar 1980 49; see also Van der Merwe 1998 244.

<sup>15</sup> *ibid.*

According to the provisions of section 12(4) of the Copyright Act, copyright in a literary or musical work shall not be infringed, if such a work is used "*for the purpose of teaching*". Emphasis is clearly placed on the fact that the unauthorised use of the relevant copyrighted material, should be exclusively for teaching purposes. Copeling and Pienaar<sup>16</sup> point out that the word "*teaching*" is not defined in the Copyright Act, thus resulting in a wide interpretation of the specific term. Both the Copyright Act and the Copyright Regulations<sup>17</sup> thereto fail to define the terms, "*teaching*" and "*educational institution*". Regulation 1(iv) of the Copyright Regulations<sup>18</sup> does, however, define the term "*teacher*". The scope of the definition of the term "*teacher*", is wide enough to include any person, giving instruction, for educational purposes at any given educational institution.

In order to assist with the interpretation of section 12(4) of the Copyright Act, it may be of some assistance to briefly refer to the definition of the term "*educational institution*", as defined in Regulation 1 of the proposed amendments to the Regulations of the Copyright Act of 1978.<sup>19</sup>

For all relevant purposes, the definition of "*educational institution*", referred to above, should be read in conjunction with the definition of the term "*education institution*", as contained in section 1 of the National Education Policy Act 27 of 1996.<sup>20</sup> It is abundantly clear from the definition of "*educational institution*" that the legislature intended to define the term as wide as possible, in order to include all possible spheres of education and thus not merely limiting the scope of the definition to higher educational facilities only.

A further condition, contained in section 12(4) of the Copyright Act, is that the particular use of the work should be "*compatible with fair practice*". The term "*fair*

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<sup>16</sup> Copeling & Pienaar 1980 49.

<sup>17</sup> Government Gazette No 6252 of 22 December 1978.

<sup>18</sup> Regulation 1(iv), Copyright Regulations, 1978, published in Government Gazette No 6252 of 22 December 1978: "*teacher*", means any person giving instruction or doing research at any school, university or any other educational institution, by whatever name he may be called.

<sup>19</sup> Government Gazette No 6254 vol 398, 7 August 1998, No 19112: '*educational institution*', means an educational institution as defined in section 1 of the National Education Policy Act 27 of 1996, and includes any university, technikon, or other institution providing tertiary education."

<sup>20</sup> Education institution is defined as: "... any institution, providing education, whether early childhood education, primary, secondary, further or higher education, other than a university or technikon, and also an institution providing specialized, vocational, adult, distance or community education".

*practice*", as such, is not defined in the Copyright Act. It also appears that there is no South African case law defining exactly what is meant by the concept of fair dealing. In the absence of both a statutory definition of the concept of fair dealing, as well as clear guidelines in case law, uncertainty seems to prevail.

One must concur with the authors Copeling and Pienaar<sup>21</sup> who are of the opinion that the unauthorised use of copyrighted material, which neither interferes with the normal commercial exploitation of the particular work by the copyright owner, nor threatens to do so, does not result in copyright infringement, and will therefore satisfy the aforementioned condition.<sup>22</sup>

The content of the final provision, contained in section 12(4) of the Copyright Act, namely that "*the source shall be mentioned, as well as the name of the author, if it appears on the work*", speaks for itself and does not require any further discussion.

Regulation 2 only provides an exception to infringement in instances where not more than one copy of a reasonable portion of the work is made.<sup>23</sup> The question which arises in this regard is whether the test for substantiality, in respect of a part of a work, relates primarily to quality or quantity. Thus, the unauthorised copying of a small but essential part of a work constitutes copyright infringement. Section 1(2A) of the Copyright Act provides that any reference to the doing of an act, in relation to a work, means reference to doing that act, in relation to "*any substantial part of such a work*". This provision is consistent with the test for infringement being primarily qualitative and not quantitative in nature. Support for the foregoing contention can be found, for instance in, section 12(3) of the Copyright Act, which postulates that the taking of an ordinary quotation from a work, can constitute copyright infringement.<sup>24</sup>

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<sup>21</sup> Copeling & Pienaar 1980 49.

<sup>22</sup> For a comprehensive discussion of the effect of the exploitation of the work on the potential market of the copyright owner, see p 26 below.

<sup>23</sup> In terms of section 13 of the Copyright Act, regulations have been promulgated in Government Notice R 2530, published in Government Gazette No 652 of 22 December 1978; See also Pienaar 1981 29.

<sup>24</sup> Dean 1998 1-37-1-38; See also Pienaar 1985 85.

The South African courts have adopted a qualitative, rather than a quantitative test, with regard to the substantiality of the portion which was copied. In the case of *Juta & Co Ltd and others v De Koker and others*,<sup>25</sup> it was decided that the reproduction of a substantial part of an original work, in which copyright subsists, denotes a qualitative, rather than a quantitative standard.<sup>26</sup> The Appellate Division, in the case of *Galago Publishers (Pty) Ltd and Another v Erasmus*<sup>27</sup> adopted with approval, the following statement, which was made in the case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*:<sup>28</sup>

*"...the question whether he has copied a substantial part depends much more on the quality than the quantity of what he has taken..."*<sup>29</sup>

Further to the above, it is important, also, not to have excluded the possibility that a single word can be a literary work, and thus the subject of copyright.<sup>30</sup>

Regulation 2(b) furthermore emphasizes the fact that the unauthorised reproduction of copyrighted material is only permitted if the cumulative effect thereof does "*not conflict with the normal exploitation of the work, to the unreasonable prejudice of the copyright owner*". The main objective of this regulation is to protect the copyright owner's legitimate right to exploit his work commercially, for his own benefit, without being hampered therein, by the unauthorised use of this work, by another person.

Regulation 8 permits the reproduction of a single copy, for a teacher, at his or her request, for the purpose of research or teaching, or preparation for teaching in a

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<sup>25</sup> 1994 (3) SA 499 (T).

<sup>26</sup> *ibid* at 504; see also *Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd and Another* 1985 (4) SA 882 (C); *Klep Valvles (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A); *Hallmark Cards Inc & others v Prima Toys (Pty) Ltd* case no 17039/85 TPD unreported.

<sup>27</sup> 1989 (1) SA 276 (A) at 285.

<sup>28</sup> 1964 1 ALL ER 465 HL.

<sup>29</sup> *Galago Publishers (Pty) Ltd and Another v Erasmus (supra)* at 285.

<sup>30</sup> *Exxon Corporation and others v Exxon Insurance Consultants International Ltd* 1982 RPC 69; see also *Juta & Co Ltd and others v De Koker* 1994 (3) SA 499 (T); see also, Government Gazette No 6254 vol 398, 7 August 1998, No 19112, proposed regulation 1 (j) : "reasonable portion" – means no more than (a) in the aggregate, ten per cent of the work; or (b) in the aggregate ten pages of an edition which comprises or contains a work; or (c) one chapter of a work, in the case where the work is divide into chapters; whichever is the lesser.

classroom.<sup>31</sup> It is to be noted that reproduction in terms of this provision is in respect of teaching in general and is not restricted to teaching at the more obvious educational institutions, viz schools, colleges and universities.<sup>32</sup> It can therefore reasonably be argued that the term "*teaching*" includes, for example, the teaching of an apprentice in the course of his contract of apprenticeship, the teaching of a clerk during his period of articles with a firm of attorneys and the conducting of seminars and workshops for the purpose of higher or further education.

Regulation 9 mainly focuses on the prohibitions in respect of copies intended for classroom use, or for use by teachers specifically. Regulation 9 (c)(i) clearly prohibits the unauthorised reproduction of a work if it will be used as a substitute for the purchase of the original work.<sup>33</sup>

Although courses are adjusted and updated in accordance with the latest developments in the particular field of interest, prescribed study material, will, to a certain extent, overlap from term to term, which will evidently result in the repeated reproduction of the same material, from term to term. A lecturer or teacher may very well in such instances encounter difficulties in providing valid grounds for a defense, based on fair dealing, especially when the provisions of Regulation 9(c)(ii) is borne in mind.

#### **4 MULTILATERAL AND BILATERAL INTERNATIONAL ARRANGEMENTS**

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<sup>31</sup> see section 1 of the National Education Policy Act of 1996: "educator", means any person who teaches, educates or trains other persons at an educational institution, or assists in rendering educational services, or auxiliary or support services, provided by or in an educational department, but does not include any officer or employee, as defined in section 1 of the Public Service Act 103 of 1994".

<sup>32</sup> Copeling 1978 43.

<sup>33</sup> According to Regulation 9, notwithstanding the provisions contained in Regulations 7 and 8, the following copying shall be prohibited:

- a) Copies may not be used to create or replace or substitute anthologies, compilation or collective works;
- b) No copies may be made of or from works intended to be ephemeral, including workbooks, exercises, standardized tests and test booklets and answer sheets and similar ephemeral material;
- c) Copying may not:
  - (i) be used as a substitute for the purchase of books, publisher's reprints or periodicals; and
  - (ii) be reprinted in respect of the same material, by the same teacher, from term to term.

For the purpose of this work it is not deemed necessary to engage in a comprehensive analysis of the various multilateral and bilateral agreements currently in existence. It is, however, important to note that South Africa is a signatory to, amongst others, the Berne Convention<sup>34</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights,<sup>35</sup> which means that the provisions of the Copyright Act extend to member countries of the said agreements. In view of the aforesaid, a brief discussion of the abovementioned agreements will follow below.

#### 4.1 Berne Convention

The Berne Convention originally dates from 1886, but has been revised several times since then. South Africa became a party to the Berne Convention on 3 October 1928. South Africa has also acceded partially to the Paris text on 24 March 1975.<sup>36</sup> The Berne Convention lays down certain minimum standards of protection which must be granted to the works of other member countries, on the same basis and to the same extent of protection, as afforded to that country's own works.<sup>37</sup>

The Berne Convention<sup>38</sup> contains an exception to the exclusive rights of the copyright owner. In accordance with Article 9(2), member countries are allowed to issue national legislation, in order to permit the unauthorised reproduction of works, in certain special cases, provided that such reproduction does not conflict

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<sup>34</sup> Berne Convention for the Protection of Literary and Artistic Works, Paris text, 24 July 1971, as amended on 28 September 1979.

<sup>35</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Uruguay Round, 15 April 1994; hereafter referred to as the "TRIPS Agreement".

<sup>36</sup> Dean 1998 1-19.

<sup>37</sup> South Africa entered into a bilateral agreement with the United States of America during 1924, which agreement was necessitated as a result of the fact that South Africa was not a member of the Universal Convention, of which the United States of America was a member, while the United States was not a member of the Berne Convention, to which South Africa was a member. The United States of America, however, became a signatory of the Berne Convention on 1 March 1989. The special bilateral agreement with the United States of America, thus became unnecessary and fell away.

<sup>38</sup> Article 9(2) of the Berne Convention.

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with the normal exploitation of the work and furthermore does not unreasonably prejudice the legitimate interests of the author.

Member states may provide in their respective national legislation, for the utilization of literary or artistic works to the extent justified by the purpose, by way of illustration, in publications, broadcasts, or sound or visual recordings and for teaching, provided that such utilization is compatible with fair practice.<sup>39</sup> Article 10(3) provides that, where use of a work is made in accordance with the provisions of Article 10(2), mention must be made of the source and of the name of the author if it appears thereon. Section 12(4) of the Copyright Act is in line with and adheres to the provisions of Article 10 of the Berne Convention.<sup>40</sup>

#### **4.2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**

The Uruguay round of the General Agreement on Tariff and Trade (GATT), signed in April 1994, includes a specific chapter on intellectual property matters, under the heading of Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). South Africa adhered to the TRIPS Agreement in April 1994. The TRIPS Agreement is intended to achieve consensus on the scope of intellectual property rights which, without creating uniformal rights, gives rise to a worldwide system of protection, based on international standards, which are universally enforceable. One of the shortcomings of the Berne Convention, is that it does not have adequate measures for ensuring that adherents to it give effect to their obligations thereunder and it also does not provide the requisite level of protection to intellectual property.<sup>41</sup>

These shortcomings were the motivation for the adoption of the TRIPS Agreement, which does make provision for adequate means of enforcement by member countries. The TRIPS Agreement provides minimum standards with which member

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<sup>39</sup> Article 10(2) of the Berne Convention.

<sup>40</sup> See the analysis of section 12(4) of the Copyright Act at p 5-8.

<sup>41</sup> Dean 1987 1-93; The TRIPS Agreement constitutes Annex 1C of the Marrakesh Agreement, establishing the World Trade Organization, which was concluded on 15 April 1994. The TRIPS Agreement binds all members of the World Trade Organization (see Article 112 of the WTO Agreement).

countries' intellectual property laws must comply, as well as proper means for enforcement of those intellectual property rights.<sup>42</sup>

The TRIPS Agreement also makes provision for member countries to apply national treatment to the protection of the works of foreigners.<sup>43</sup> In other words, the same protection has to be afforded to works emanating from member countries of the World Trade Organization (WTO), than works which are protected under the South African Copyright Act.<sup>44</sup>

Article 13 of Part II of the TRIPS Agreement, provides for certain limitations on and exceptions to the exclusive rights of the copyright owner. Such limitations and exceptions are confined to special cases, which do not conflict with the normal exploitation of the work and which do not unreasonably prejudice the legitimate interests of the copyright owner. In this regard the TRIPS Agreement operates parallel to Article 9 of the Berne Convention. These provisions are also in tandem with Regulation 2(b) to the South African Copyright Act.<sup>45</sup>

## 5 COMPARATIVE STUDY

In view of the fact that there does not appear to be any South African case law defining exactly what is meant by the concept of fair dealing, it may prove meaningful to refer briefly to the English law, the law of New Zealand and the law of the United States, in order to gain a better understanding of the principles surrounding the unauthorised reproduction and distribution of copyrighted material. The focus will be reproduction and fair use in the educational sphere.

### 5.1 United Kingdom

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<sup>42</sup> *ibid.*

<sup>43</sup> See TRIPS Agreement Part I Article 3.

<sup>44</sup> Dean 1998 1-93.

<sup>45</sup> Regulation 2(b) of the Copyright Act reads as follows: "The reproduction of a work in terms of section 13 of the Act shall be permitted – (b) if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author".

In the English Copyright, Designs and Patents Act of 1988<sup>46</sup> a whole chapter is devoted to acts permitted in relation to copyrighted works. The English Copyright Act contains three forms of fair dealing, two of general application and the other of specific application. Fair dealing with a literary, dramatic, musical or artistic work, for the purposes of research or private study, does not infringe copyright in the work.<sup>47</sup> This, however, clearly applies only to those forms of work which are specifically mentioned. The fair dealing provisions of general application relate to criticism, review and news reporting, which provisions are not relevant for the purpose of this discussion.<sup>48</sup>

Fair dealing with a literary, dramatic, musical or artistic work, for the purpose of research or private study infringes neither the copyright in the work, nor its typographical arrangement.

When the provisions of section 29(1) of the English Copyright Act is relied upon, no acknowledgement of the copyright or its owner is required. The word "*dealing*" does not imply any transaction between two people, but merely use by an individual for a particular purpose.<sup>49</sup> According to Laddy, Prescott and Vitoria,<sup>50</sup> the scope of the fair dealing doctrine is confined in terms to activities performed by the researcher, or student himself and it therefore does not justify the making of multiple copies by a third party for use by a plurality of persons. In the United States of America, the equivalent exception is known as "*fair use*" and was given express statutory recognition in section 107 of the United States Copyright Act of 1976.<sup>51</sup>

In accordance with the provisions of section 32(1) of the English Copyright Act, copyright in a literary, dramatic, musical or artistic work is not infringed by copying in the course of instruction, or in the course of preparation for instruction, provided

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<sup>46</sup> Act 48 of 1988 (hereinafter referred to as the "English Copyright Act").

<sup>47</sup> section 29(1) of the English Copyright Act; also see Skone James & Mummery 1991 252.

<sup>48</sup> section 30 of the English Copyright Act; see also Barrow 1992 18.

<sup>49</sup> Prime 1992 117.

<sup>50</sup> Laddy, Prescott & Vitoria 1995 27.

<sup>51</sup> USA Copyright Act, Title 17 of 1976 (hereinafter referred to as the "United States Act"); see also Barrow 1992 18.

that the copying is done by a person giving or receiving instruction. Furthermore, such copying may not be done by means of a reprographic process.<sup>52</sup>

Section 36 of the English Copyright Act deals specifically with the reprographic copying by educational establishments.<sup>53</sup>

The exceptions contained in section 32 of the English Copyright Act covers both pupil and teacher, but expressly does not cover the use of a reprographic process, which would be the most obvious and common form to provide copies for instruction. A teacher may thus write out the entire extract of the copyrighted work on a blackboard and the pupil may laboriously make a copy of it. The teacher, however, cannot in terms of section 32, make photocopies of the copyrighted work and distribute them amongst the pupils in order to use his time more constructively. Similarly, a slide or transparency can be prepared by a teacher from a copyrighted work for display to pupils.

Section 32(3) of the English Copyright Act clearly states that copyright is not infringed by anything done for the purposes of an examination, by way of setting questions, communicating the questions to candidates or answering the questions. It is important to note that this provision does not extend to the making of a reprographic copy of a musical work, for use by a candidate in performing the work during an examination.<sup>54</sup>

Section 33 of the English Copyright Act authorises the inclusion of copyrighted passages, in anthologies for educational use. The inclusion of a short passage from a published literary or dramatic work in a collection, satisfying certain conditions, does not infringe the copyright in the work, if the work itself is not intended for use in educational establishments and the extract reproduced is accompanied by a sufficient acknowledgement. According to section 33 two requirements must be met. First, the collection must be intended for use in educational establishments and must be so described in its title and in any advertisements issued by or on behalf of the publisher. The second requirement is that it must consist mainly of

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<sup>52</sup> see section 32(1) of the English Copyright Act; also see Skone James & Mummery 255.

<sup>53</sup> A complete analysis of section 36 of the English Copyright Act follows at p 17-18 below.

<sup>54</sup> see sections 32(3) and 32(4) of the English Copyright Act.

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material in which no copyright subsists. It is thus intended to cover collections of works, which mainly comprise old materials in which copyright has expired. It thus incorporates very few modern works in which copyright still subsists. Furthermore, sufficient acknowledgement must be included in respect of those modern works in which copyright does subsist. In accordance with the provisions of section 33(2), the inclusion of copyrighted material in anthologies intended for educational use, are restricted to no more than two excerpts from copyrighted works by the same author in collections published by the same publisher over a period of five years.<sup>55</sup>

Section 34 of the English Copyright Act clearly stipulates that performances of a literary, dramatic or musical work before an audience of an educational establishment, are not to be regarded as being a public performance and it is therefore not an infringement of the copyright in the particular work. The audience must consist of teachers and pupils at the educational establishment. The audience, however, may also include other persons, directly connected to the activities of the establishment. The performance must be either be by a teacher or pupil in the course of the activities of the establishment, or by any person, for the purposes of instruction at the establishment. In other words, a performance by a visiting group of actors or musicians are also covered by the provisions of section 34(1), subject to the condition that such a performance is for the purpose of instruction. It is perhaps significant to note that the legislature chose the words "*for the purpose of instruction*", rather than "*for the purpose of education*". The provisions of section 34(1)(b) therefore suggest that seminars and demonstrations utilizing copyrighted material for purposes well outside the normal school curriculum, would fall within the scope of protection provided for in terms of section 34.<sup>56</sup>

A parallel statutory exception is given in respect of the playing or showing of a sound recording, film, broadcast or cable program before such an audience at an educational establishment, provided these acts are done for the purposes of instruction.<sup>57</sup>

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<sup>55</sup> Prime 1992 145; see also, section 33(2) of the English Copyright Act .

<sup>56</sup> Prime 1992 146; see also Skone James & Mummery 258.

<sup>57</sup> section 34(2) of the English Copyright Act.

The provisions of section 34 is considerably restricted in effect. Section 34(3) clearly stipulates that a person is not directly connected with the activities of the educational establishment, simply because he is a parent of a pupil at the establishment. Since the performance or showing must be before an audience consisting of teachers and pupils, a school play or concert where the majority of the audience consists of parents of pupils, will not be covered.<sup>58</sup>

Section 35 of the English Copyright Act also authorises the making of a recording of a broadcast or cable program by, or on behalf of, an educational establishment, for the educational purposes of that establishment. However, section 35(2) provides that these provisions do not apply if, or to the extent that a licensing scheme exists which provides for the grant of licenses.

Section 36 of the English Copyright Act attempts to provide a comprehensive solution to the issue of reprographic copying. Prime<sup>59</sup> notes that this complex statutory scheme consists of three legs, namely:

- (a) the copying of one percent of a copyrighted work, during a three month period is permitted if no licensing scheme exists;
- (b) additional copying constitutes infringement and is not permissible unless a licensing scheme exists and proper arrangements are made in terms thereof;
- (c) insofar as voluntary licensing proves to be inadequate, the secretary of State may extend existing schemes and introduce new schemes, in terms of the powers conferred by sections 137 and 140 of the English Copyright Act.

Section 36 of the English Copyright Act authorises the reprographic copying of passages from published literary, dramatic or musical works, provided that such copying is made within the prescribed limits and made by or on behalf of an educational establishment, for the purposes of instruction. The extent of permitted copying is restricted to one percent of any copyrighted work, copied during any

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<sup>58</sup> Prime 1992 146.

<sup>59</sup> Prime 1992 148.

quarter.<sup>60</sup> This statutory right ceases to exist once a licensing scheme is introduced. A licensing scheme granted to an educational establishment may not restrict the proportion of work which may be copied to less than which is provided for in terms of section 36(2) of the English Copyright Act. It is significant to note that the British school terms do not coincide with the yearly quarters which are set out in section 36(2) of the English Copyright Act, thus imposing very restrictive limitations on reprographic copying by schools as such.<sup>61</sup>

In the case of *Sillitoe v McGraw-Hill Book Co (UK) Ltd*<sup>62</sup> the authors and publishers of study notes for students sued the importers and distributors of a series of study notes, intended as a supplementary aid for students, for copyright infringement. The defendants in this matter relied on the doctrine of fair dealing. This defense was, however, rejected, based on the fact that the authors of the notes in question, when writing the notes and thus dealing with the original work, were not engaged in private study or research.<sup>63</sup>

An important question surrounding the fair dealing doctrine is whether the material which has been copied, forms a substantial part of the copyrighted work and furthermore whether the test with regard to the issue of substantiality should be based on qualitative or quantitative measures. In the case of *Cate v Devon and Exeter Constitutional Newspaper Company*<sup>64</sup> the defendants raised the point that the amount that was taken from the copyrighted work was very small and therefore did not amount to copyright infringement. North J found that the defendants had no right to take the material, of which the Plaintiffs had copyright, even though the amount taken was insubstantial, and that the action for copyright infringement was therefore well-founded.<sup>65</sup>

In the case of *Trade Auxiliary Company v Middlesborough and District Tradesmen's Protection Association*<sup>66</sup> the court of appeal found that the defendant could not

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<sup>60</sup> section 36(2) defines a quarter as any period from 1 January - 31 March; 1 April - 30 June; 1 July - 30 September, or 1 October - 31 December.

<sup>61</sup> Prime 1992 148; see also Skone James & Mummery 1991 259.

<sup>62</sup> 1983 FSR 545.

<sup>63</sup> *idem* at 558-559.

<sup>64</sup> 1889 (40) Ch B500.

<sup>65</sup> *idem* at 507.

<sup>66</sup> 1889 (40) Ch D425.

escape liability on the ground that it had only copied a small portion of the copyrighted material.<sup>67</sup>

In view of the abovementioned judgements, it can readily be argued that the test for substantiality is qualitative and not quantitative.

The learned authors, Laddy, Prescott and Vitoria,<sup>68</sup> pointed out that it is impossible to lay down a hard-and-fast definition of exactly what fair dealing is, for it is a matter of fact, degree and impression, surrounding each individual case.

## 5.2 New Zealand

Section 43-49 of the Copyright Act of New Zealand<sup>69</sup> deals comprehensively with the copying of copyrighted material for education purposes. However, for the purpose of this analysis it is significant to focus only on the provisions contained in sections 43, 44 and 49.<sup>70</sup>

In accordance with the provisions of section 43(1) fair dealing with a work for the purposes of research or private study does not infringe copyright in work. Section 43(3) contains five factors which should be considered when determining whether copying, for the purposes of research or private study, constitutes fair dealing. These factors are: the purpose of the copying; the nature of the work copied; whether the work could have been obtained within a reasonable time, at any ordinary commercial price; the effect of the copying on the potential market for, or value of, the work; and the amount and substantiality of the part of the work which has been copied, in relation to the whole work.<sup>71</sup>

Section 43(4) prohibits the making of multiple copies of the same work, on any one occasion. Section 44 deals extensively with the unauthorised copying of literary, dramatic, musical or artistic works, for educational purposes. In accordance with

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<sup>67</sup> *idem* at 425.

<sup>68</sup> Laddy, Prescott & Vitoria 1995 27; see also *Associated Newspapers Group PLC v New Group Newspapers Ltd* 1986 RPC 515, where it was held that the question of fairness must depend upon the motive with which the material had been copied.

<sup>69</sup> Act 143 of 1994.

<sup>70</sup> cf English Copyright Act, sections 29, 32 and 36.

<sup>71</sup> cf USA Copyright Act, section 107.

the provisions of section 44(1)(a) copying may be done by means of a reprographic process. Section 44(1)(b) contains three conditions, subject to which the copying in question has to be made. The unauthorised copying of literary, dramatic, musical or artistic works, by means of a reprographic process, or any other means, are only authorised if the copying is done in the course of preparation for instruction, or for use in the course of instruction, or in the course of instruction.

It is significant to note that the provisions of section 44(1) only extend to copying which is done by or on behalf of the person who is to give, or who is giving a lesson at an education establishment.<sup>72</sup> It is furthermore of vital importance to note that section 44(1)(d) restricts copying, to only one copy of the work, on any one occasion.

Section 44(2) deals specifically with copying which is not done by means of a reprographic process. In addition to the conditions contained in section 44(1)(b), as set out above, section 44(2)(b)(iv) extends to those instances where material is copied after the course of instruction. Section 44(2)(c), in contrast to section 44(1)(c), does not authorise copying, "*done on behalf of the person who is to give, or who is giving*" the instruction. Despite the aforesaid limitation, section 44(2)(c) does include copying by a person who is to receive, is receiving, or has received the lesson, in the ambit of its protection. In other words, copying done by students or scholars, before, during, or after the lesson will not infringe copyright in the work. Section 44(2)(d) authorises the making of more than one copy of the work at any one occasion.

The provisions contained in section 44(3) most certainly fall at the core of photocopying practices at educational establishments. Section 44(3) clearly authorises the making of more than one copy of a copyrighted work by means of a reprographic process. It is important to note that artistic works are expressly excluded from the list of works to which the provisions of section 44(3) extend.<sup>73</sup> The provisions of section 44(3) are subject to the condition that a student is not charged for the copy of the work supplied to him. Section 44(3)(f) contains a further limitation to the effect that, as from the 1<sup>st</sup> of January 1998, copying

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<sup>72</sup> see section 44(1)(c).

<sup>73</sup> see section 44(5) of the Copyright Act of 1994.

authorised in terms of section 44(3), shall not exceed the greater of 3 percent, or 3 pages, of a work or edition of a work. The provisions of section 44(4), however, shall not apply if it results in the whole of a work or edition being copied, in which event copying, authorised in terms of section 44(3), shall not exceed fifty percent of the whole work or edition. Section 44(6) contains a further limitation, in terms of which any part of a work or edition, copied under section 44(3), may not within 14 days, be copied again.

In accordance with the provisions of section 49, copyright is not infringed by anything done for the purposes of an examination, whether by way of setting the questions, communicating the questions to the candidates, or answering the questions.<sup>74</sup>

It is significant to note that the provisions of the Copyright Act of New Zealand, with regard to copying for educational purposes, seem to run parallel with the provisions contained in the English Copyright Act.

The most pertinent issues surrounding the reproduction and distribution of copyrighted works in an educational context was recently considered by the New Zealand High Court in *Longman Group Ltd and others v Carrington Technical Institute and another*.<sup>75</sup> Doogue J pointed out that the issue of whether the copying in question amounted to fair dealing, was one of fact and impression, having regard to all the relevant circumstances.<sup>76</sup> It was held in that the dealing by the tutor and Carrington Technical Institute (CTI), with the copyrighted works was not for the purpose of research or private study, but for the express purpose of compiling a textbook to assist in the teaching of a particular course.<sup>77</sup> The defendants have sought to rely on the possible end use of the Carrington book by the students. However, the dealing with the copyrighted works in question was by the tutor and CTI and not by the students.<sup>78</sup> Student use was in fact held to be incidental to the purpose.<sup>79</sup> The Carrington book was a teaching aid and thus not something

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<sup>74</sup> cf Copyright, Designs and Patents Act 1988, Section 32(3).

<sup>75</sup> 1991 (2) NZLR 574.

<sup>76</sup> *ibid.*

<sup>77</sup> 1991 (2) NZLR 574 at 588.

<sup>78</sup> *ibid.*

<sup>79</sup> 1991 (2) NZLR 574 at 588.

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produced for research or private study. The court thus held that the statutory defense of fair dealing was not available to the defendants.<sup>80</sup>

### 5.3 United States of America

The judicial doctrine of fair use, which is one of the most important and well established limitations on the exclusive rights of copyright owners, was given express statutory recognition in section 107 of the American Copyright Act. Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Since the doctrine is an equitable rule of reason, no generally applicable definition is possible and therefore each case must be decided on its own facts. The specific wording of section 107, however, is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes.

The incorporation of the reference to "*multiple copies for classroom use*" in section 107 is an express recognition that, under proper circumstances, the doctrine can be applied to reproductions of multiple copies for members of a class. A set of criteria has been incorporated in section 107 to provide some gauge for balancing the equities. These criteria have essentially been reduced to four standards: first, the purpose and character of the use, including whether such use is of a commercial nature, or for non-profit educational purposes; secondly, the nature of the copyrighted work; thirdly, the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and fourthly, the effect of the use upon the potential market for or value of the copyrighted work.

These criteria are relevant in determining whether the basic doctrine of fair use applies in a particular case.

Although section 107 does not attempt to define fair use, it does list the factors to be considered for the purpose of determining whether the use made of a work in any particular case falls within the scope of the fair use defense. It does not

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<sup>80</sup> 1991 (2) NZLR 574 at 588; see also Katz 1993 70.

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provide a rule that may be applied automatically in deciding whether any particular use is fair. The factors contained in section 107 are merely by way of example and are not exhaustive. Furthermore, section 107 gives no guidance as to the relative weight to be ascribed to each of the listed factors. Each of these factors is defined in the most general terms, so that the courts are afforded almost complete discretion in deciding whether any particular use is fair. The section 107 factors nevertheless do offer some guidelines in the determination of fair use. These four factors are carefully balanced, in order to identify the dominant disposition when determining whether a particular use is fair or not.<sup>81</sup> It is significant to note that the fair use defence in the United States has a considerably wider application than the fair dealing defence in the United Kingdom.<sup>82</sup> A brief discussion of the essential issues surrounding the four factors follows below.

### **5.3.1     *The Purpose and Character of the Use***

In a university context the fair use doctrine is intrinsically aligned with the notion that education deserves preferential treatment and should therefore not be unduly inhibited. Although fair use undoubtedly gives special deference to academic needs, specific emphasis is placed on the fact that a non-profit, educational purpose does not automatically result in a free license to appropriate protected works.<sup>83</sup> This first factor thus explicitly includes a consideration of "*whether such use is of a commercial nature, or for non-profit educational purposes*". This provision gives express recognition to the fact that the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can, and should, be weighed along with the other factors in fair use decisions.<sup>84</sup>

Although it is clear that non-profit education uses are preferred over commercial activities, one should not lose sight of the fact that not all academic uses are

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<sup>81</sup> Nimmer & Nimmer 1978 13–154; see also Jassin & Schechter 1998 28.

<sup>82</sup> Barrow 1992; see also Heller & Wiant 1984 9-10.

<sup>83</sup> Crews 1993 22.

<sup>84</sup> In this regard also see Van der Merwe 1998 247.

necessarily fair. The educational purpose alone does not render a use fair.<sup>85</sup> However, the fact that a given use is commercial does not necessarily negate fair use. Any presumption that commercial use of a work is *ipso facto* unfair should be regarded as rebuttable by the characteristics of that particular commercial use. Consideration should therefore be given to whether the alleged infringing use was primarily for public benefit or for private commercial gain.<sup>86</sup>

The greater the private economic rewards reaped by the secondary user, the more likely it is that the first factor will favor the copyright holder, and the less likely it is that the use will be considered as fair. The crux of the commercial/non-profit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.<sup>87</sup>

An investigation under the first factor should determine whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character. In other words one should determine whether and to what extent the new work is transformative.<sup>88</sup>

### **5.3.2 The Nature of the Copyrighted Work**

The scope of fair use is greater when factual works, as opposed to more creative, fictional works, are involved. It is in some instances necessary, in calibrating the fair use defense, to advert to the defendant's use simultaneously with the nature of the plaintiff's work.<sup>89</sup> Another important aspect which should be considered under the second factor is whether or not the work is available to the potential user. If the work is "*out of print*" and unavailable for purchase through the normal channels, the user may have more justification for reproducing it.<sup>90</sup> However, the existence of organizations, licensed to provide photocopies of out of print works

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<sup>85</sup> Crews 1993 23-24.

<sup>86</sup> *ibid.*

<sup>87</sup> Nimmer & Nimmer 1978 13-165; see also Barrow 1992 20-21.

<sup>88</sup> Nimmer & Nimmer 1978 13-160; See also *Princeton Univ Press v Michigan Doc Servs Inc*, 99F 3d 1381 (6<sup>th</sup> Cir 1996) at 1400 (Rynon, J, dissenting), 117 S Ct 1336 (1997) where it was held that non-transformative value does not weigh against fair use in the context of multiple copies for classroom use.

<sup>89</sup> Nimmer & Nimmer 1978 13-172; see also Talab 1986 20-21.

<sup>90</sup> Nimmer & Nimmer 1978 13-172.

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at a reasonable cost is a factor to be considered. The fact that a work is out of print cannot mean that the copyright therein has ceased to exist. Such works are published in new editions when the demand becomes sufficient. Such a demand may never arise if competitors may freely copy works which are out of print.<sup>91</sup>

The applicability of the fair use doctrine to unpublished works is limited since, although the work is unavailable, it is the result of a deliberate choice on the part of the copyright owner. The copyright owner's right of first publication would, under ordinary circumstances, outweigh any needs of reproduction for classroom purposes.<sup>92</sup> The unpublished nature of a work is a key, though not necessarily determinative factor, which tends to negate a defense of fair use.<sup>93</sup>

### **5.3.3     *The Amount and Substantiality of the Portion Used***

The third factor, listed in section 107 is the amount and substantiality of the portion used in relation to the copyright work as a whole. A proper analysis of this factor includes an evaluation of not only quantitative, but also qualitative substantiality. Quantity must be evaluated relative to the length of the entire original work and regard should also be given to the amount needed to serve a proper objective.<sup>94</sup> Generally, it will not constitute fair use if the entire work is reproduced. It is, however, important to bear in mind that although only a small portion of work is reproduced, the "*heart of the work*" can still be taken.<sup>95</sup>

### **5.3.4     *The Effect Upon the Plaintiff's Potential Market***

An important aspect that should be considered with regard to the fourth factor is whether the availability of the reproduced works will serve as a substitute for the purchase of the original work, thus competing directly with the original work.

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<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*

<sup>93</sup> Nimmer & Nimmer 1978 at 13-73.

<sup>94</sup> Nimmer & Nimmer 1978 13-179; see also Wall 1998 165-166.

<sup>95</sup> Nimmer & Nimmer 1978 13-179.

The less adverse effect an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit needs to be shown to justify the particular use.<sup>96</sup> This factor poses the issue of whether unrestricted and widespread copying of the copyrighted work by the defendant would result in a substantially adverse impact on the potential market for, or value of, the plaintiff's present work. The fourth factor does emerge as the central and most important fair use factor.<sup>97</sup>

### **5.3.5 Application of the Four Fair Use Factors - With Reference to Relevant Case Law**

#### **5.3.5.1 Texaco Case**

In *American Geophysical Union v Texaco Inc*<sup>98</sup> a class action suit was brought by the publishers of scientific, technical and medical journals. It was alleged that the scientists, the defendant's employees, had copied the plaintiff's journals, which copying constituted copyright infringement. In order to avoid the enormous expense of exploring the photocopying practices of each of the 400 to 500 research scientists employed by Texaco, the parties agreed that one scientist would be chosen at random as being representative of the entire group. The scientist chosen was Dr Donald H Chickering. For consideration at trial, the publishers selected photocopies of eight particular articles, from the "Journal of Catalysis", from Chickering's files. The court held that Texaco's photocopying, as represented by Chickering's copying of those eight articles, did not constitute fair use.<sup>99</sup>

#### **(a) Purpose and Character of the Use**

Especially pertinent to an assessment of the first fair use factor is the precise circumstances under which the articles were copied. Chickering had requested copies of the articles in question for the same basic purpose that one would normally seek to obtain the original. The copies were made for Chickering's personal convenience. The defendant emphasised the fact that it would be more practical in a laboratory environment to use a photocopied article, instead of an entire issue or bound volume of a year's issues. Use of a

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<sup>96</sup> Nimmer & Nimmer 1978 13-181.

<sup>97</sup> Nimmer & Nimmer 1978 13-181, 13-183; see also Barrow 1992 22-23.

<sup>98</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994).

<sup>99</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 914-915.

photocopy would, according to the defendant, also prevent damage to the original document, by for example, exposure to chemicals. Although the aforesaid purpose were favorable for Texaco, it was not dominant. Chickering's use of the articles were also not spontaneous and could in fact be described as archival.<sup>100</sup>

Although research is generally a favoured purpose, the ultimate purpose in this case was to strengthen Texaco's corporate profits. It was noted that the research was conducted solely for commercial gain. The court also emphasized the fact that exact photocopies are not transformative and that they did not build on the existing work in a productive manner. The "*transformative use*" concept is pertinent to the first factor, because it assesses the value generated by the secondary use.<sup>101</sup>

Although it is clear that non-profit educational uses are preferred over commercial uses, one should not lose sight of the fact that not all academic uses are fair. The first fair use factor favoured the publishers.

**(b) Nature of the Copyrighted Work**

The articles copied by Chickering were predominantly of a factual nature, which weighed in favour of fair use. The law generally recognizes a greater need to disseminate factual works, than works of fiction or fantasy. The second fair use factor weighed in favour of Texaco.<sup>102</sup>

**(c) Amount and Substantiality of the Portion Used**

It is clear that the extent of the copying, by the defendant, is measured both quantitatively and qualitatively. Quantity must be evaluated relative to the length of the entire original work and the amount which is required to serve a proper objective. The substantiality concept is therefore a qualitative measure that may weigh against fair use.<sup>103</sup> In this regard it is important to

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<sup>100</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 918-919.

<sup>101</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 920.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

evaluate whether the extend of the copying is essential for serving the academic purpose. The articles which appeared in the periodicals were independent works. Each article which appeared in the journal was separately authored and constituted an original work of authorship. Copying an article from a periodical thus results in the copying of an entire work. The third fair use factor weighed in favour of the publishers.<sup>104</sup>

**(d) Effect on the Potential Market for or Value of the Original**

A fact that should be considered carefully is whether the availability of the reproduced works will serve as a substitute for the purchase of the original work. In casu the court held that the effect of Texaco's photocopying, of individual articles within the journal, on the traditional market for Catalysis subscriptions, was of somewhat limited significance, in determining the effect of Texaco's photocopying "*upon the potential market for or value of*" the individual articles. It was, however, not suggested that the effect on the marketability of journal subscriptions, was completely irrelevant to gauging the effect on the market for and value of the individual articles.<sup>105</sup> The court pointed out, that were the publishers able to demonstrate that Texaco's type of photocopying practice, if widespread, would impair the marketability of journals, then they might have had a strong claim under the fourth factor.<sup>106</sup> Likewise, were Texaco able to demonstrate that its type of photocopying, even if widespread, would have virtually no effect on the marketability of the journals, then they might have had a strong claim under the fourth factor.<sup>107</sup>

The court found that the unauthorised photocopying by the defendant competed directly with the ability of the publishers to collect license fees. Such photocopying was not permitted as fair use, the publishers' revenues would increase significantly, since Texaco would then have to obtain articles from document delivery services (who pay royalties to publishers for the right to photocopy the articles), or alternatively negotiate photocopying licenses directly with individual publishers, and/or at least acquire some form of

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<sup>104</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 925-926.

<sup>105</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 927.

<sup>106</sup> *ibid.*

<sup>107</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 928.

photocopying license. The court emphasized the fact that a ready market, or means to pay for the use existed.<sup>108</sup> The particular journal in question was one to which a photocopying license was available. Primarily because of the lost licensing revenue, and to a minor extent, because of lost subscription revenue, the fourth statutory factor favoured the publishers.<sup>109</sup>

Three of the four fair use factors, including the vitally important first and fourth factors, favoured the publishers. The court accordingly held that Texaco's photocopying of the eight articles, from the *Journal of Catalysis* was not fair use. The court did, however, confine its ruling to the "*institutional, systematic photocopying*" of protected works.<sup>110</sup>

It is significant to note that Jacobs, J, who dissented, based his opinion on the first and fourth factors. With regard to the first factor, namely the purpose and character of the use, he pointed out that Chickering's use was indeed integral to transformative and productive ends of scientific research. In respect of the fourth factor, he noted that the adverse effect of Chickering's use, on the potential market value for the work, was merely illusory. Jacobs, J, argued in favor of the realistic needs of the research community.<sup>111</sup>

### 5.3.5.2 *Basic Books Case*

In *Basic Books v Kinko's Graphic Corp*<sup>112</sup> the book publishers brought a copyright infringement action against a duplication business which copied excerpts from books without authorization, compiled them into university course packs and sold them to students.

The duplication business merely repackaged the original works. No literary effort was made to expand upon, or to contextualize the materials which were copied. In fact, entire chapters of the books were copied. The copying of the works by the duplication business unfavorably impacted upon the publishers' sales of the books

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<sup>108</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 929.

<sup>109</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 929-931.

<sup>110</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 932-933.

<sup>111</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 932-933.

<sup>112</sup> 758 F Supp 1522 (SDNY 1991).

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in question.<sup>113</sup> Furthermore, the said copying also detrimentally effected the publishers' right to collect royalties with regard to the copying of their respective works. The court accordingly held that the copying was not fair use of the publishers' works and thus constituted copyright infringement.<sup>114</sup>

**(a) Purpose and Character of the Use**

Section 107 specifically provides that consideration be given to the question of whether the use is of a commercial nature, or for a non-profit educational purpose. Commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the copyright owner. It has been argued that the essence of this factor is the transformative value of the secondary work compared to the original work. Kinko's merely repackaged and republished the original work. No literary effort was made by Kinko's to expand upon, or contextualize the materials which were copied. The works were merely copied and bound into a new form once sold to the students. The use of the course packs in the hands of the students was no doubt educational. However, the use in the hands of Kinko's employees was deemed to be of a commercial nature. Kinko's received a profit component from the revenue which it collected from its anthologies. Kinko's copying had the intended purpose of supplanting the copyright holder's commercially valuable right. This factor weighed strongly in favour of the plaintiffs.<sup>115</sup>

**(b) Nature of the Copyrighted Work**

In both the *Texaco*<sup>116</sup> and *Basic Books*<sup>117</sup> cases it was held that the scope of fair use is greater with respect to factual than non-factual works. Fictional works, on the other hand, are often based closely on the author's subjective impressions and therefore require more protection. The books infringed upon

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<sup>113</sup> 758 F Supp 1522 (SDNY 1991) at 152.

<sup>114</sup> *ibid.*

<sup>115</sup> 758 F Supp 1522 (SDNY 1991) at 1530-1531.

<sup>116</sup> 60 F 3d 913 (2<sup>nd</sup> Cir 1994) at 925.

<sup>117</sup> 758 F Supp 1522 (SDNY 1991) at 1533.

in casu were purely factual in nature. This factor weighed in favour of the defendant.<sup>118</sup>

**(c) Amount and Substantiality of the Portion Used**

This factor considers not only the percentage of the original work which was used, but also the substantiality of that portion to the whole of the work. In other words the courts must evaluate the qualitative aspects as well as the quantity of material copied.<sup>119</sup> The copying of a short piece, which the "*heart of the work*" may not be fair use. The purpose of the use may be balanced against the amount and substantiality of the use.<sup>120</sup>

Reference to a work's availability is appropriate.<sup>121</sup> It can be argued that longer portions, copied from an out-of-print work may be fair use because the book is not available.<sup>122</sup> However, the plaintiffs in this case convincingly argued that damage to out-of-print works may in fact be greater, since royalty payments may be the only income for such authors and copyright holders.<sup>123</sup> This factor weighed against the defendant.<sup>124</sup>

**(d) Effect of the Use on the Potential Market for or Value of the Copyrighted Work**

This factor has been held to be undoubtedly the single most important element of fair use.<sup>125</sup> To negate fair use one need only show that if the unauthorised use of the copyrighted work became widespread, it would adversely affect the potential market for the copyrighted work. The court found that the plaintiffs derived a significant part of their income from the sale of textbooks.<sup>126</sup> The purchase of the course packs obviated the purchase of the full texts. The court further found that Kinko's copying unfavorably impacted upon the

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<sup>118</sup> 785 F Supp 1522 (SDNY 1991) at 1533.

<sup>119</sup> *ibid.*

<sup>120</sup> In this regard also see *Harper & Row Publishers, Inc v Nation Enterprises* 471 US 539 (1985) at 564-565.

<sup>121</sup> Gorman & Ginsburg 1993 620.

<sup>122</sup> *ibid.*

<sup>123</sup> 785 F Supp 1522 (SDNY 1991) at 1532-1533.

<sup>124</sup> 785 F Supp 1522 (SDNY 1991) at 1533.

<sup>125</sup> Gorman & Ginsburg 1993 621.

<sup>126</sup> 785 F Supp 1522 (SDNY 1991) at 1533-1534.

plaintiff's sales of their books and the collection of royalty payments. This factor weighed against the defendant.<sup>127</sup>

The court accordingly found that the excerpts copied by the defendant were not fair use of the plaintiff's copyrighted works and therefore constituted copyright infringement.<sup>128</sup>

### 5.3.6 *The Classroom Guidelines*

In the *Basis Books* case the Classroom Guidelines were discussed at length. It may be significant to briefly focus on the most pertinent issues which were raised in this regard.

The Classroom Guidelines, entitled the "*Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions*"<sup>129</sup>, are part of the legislative history of the Copyright Act of 1976. In order to delineate the scope of fair use and its application to various categories of copyrightable works, the American Congress has endorsed guidelines in respect of copying for educational purposes.<sup>130</sup> These guidelines were the result of negotiations and agreement among the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc, and the Association of American Publishers.<sup>131</sup> These guidelines were necessitate by the widespread availability of reprographic technology which eliminated much of the copyright owner's control over the reproduction of his work. The purpose of the guidelines is to state the minimum and not the maximum standards of educational fair use under section 107. The guidelines clearly state that notwithstanding its promulgation, fair use standards may be more or less permissive, depending upon the circumstances and based upon equitable considerations.<sup>132</sup> There may be instances in which copying, which does not fall within the guidelines, may nonetheless be permitted under the criteria of fair use.<sup>133</sup>

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<sup>127</sup> 758 F Supp 1522 (SDNY 1991) at 1534.

<sup>128</sup> *ibid.*

<sup>129</sup> issued by the Ad Hoc Committee on Copyright Law Revision, 19 March 1976.

<sup>130</sup> 758 F Supp 1522 (SDNY 1991) at 1535-1536; also see Miller 1979 15-16.

<sup>131</sup> 785 F Supp 1522 (SDNY 1991) at 1536.

<sup>132</sup> *ibid.*

<sup>133</sup> 758 F Supp 1522 (SDNY 1991) at 1536.

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The courts may decide whether a use which exceeds the guidelines may be fair use and whether a use which is within the guidelines may exceed fair use. The courts thus have to carefully balance the interests of the parties involved.<sup>134</sup>

The guidelines provide that a teacher may make multiple copies of copyrighted material if the copying meets the tests of brevity, spontaneity and cumulative effect. It is furthermore required that each copy also includes a notice of copyright.<sup>135</sup>

## 6 CONCLUSION

The unauthorised reproduction of copyrighted material, for scholarly or educational purposes, has become one of the most important problems surrounding the fair dealing exception to copyright infringement. With regard to the technological advances in methods for the making of inexpensive photocopies, the problem becomes more acute each year. Nimmer<sup>136</sup> rightfully pointed out that present photocopying practices merely present the tip of the iceberg. Classroom reproduction of copyrighted material commands a certain sympathy because they generally involve no commercial exploitation of the work.

In terms of South African law both teachers and students are afforded the right to make copies of works in which copyright subsists, without obtaining the prior authorization of the copyright owner. These concessions are embodied mainly in sections 12(1), 12(4) and 13 of the Copyright Act of 1978.

In the absence of sound copyright policies at universities, confusion and fear of liability regarding copyright issues have reached alarming levels. Copyright law affects universities directly, especially given the enormous amount of unauthorised

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<sup>134</sup> *ibid.*

<sup>135</sup> The tests of brevity, spontaneity and cumulative effect are defined in *Basic Books Inc v Kinko's Graphics Corp supra* at 1537. "**Brevity**: With regard to prose this concept is defined as a complete article, story or essay of less than 2 500 words, or an excerpt of not more than 1 000 words, or 10% of the work, whichever is less. **Spontaneity**: This test requires that the inspiration and decision to use the work and the moment of its use, be so close in time that it would be unreasonable to expect a timely reply to a request for authorization. **Cumulative effect** : This factor proscribes any more than nine instances of multiple copying for one course during one class term. The copying is limited to one course only and to no more than one piece of work per author."

<sup>136</sup> Nimmer & Nimmer 1978 13-239.

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copies, made by both the students and the teachers in the course of instruction each semester. Nimmer and Nimmer<sup>137</sup> authoritatively noted that an issue which is often overlooked is the tremendous reduction in the value of copyrighted works which results from the consistent and pervasive application of this practice. An author who creates a work specifically for educational purposes may not suffer greatly by an occasional unauthorised reproduction. However, if every educational institution by merely purchasing a single copy of the original work supply a demand for numerous copies through photocopying, or similar devices, the market for copyrighted educational materials would be almost completely obliterated.<sup>138</sup> This could well discourage authors from creating works of a scientific or educational nature. Ideally, the goal will be to balance the law's diverging goals.<sup>139</sup> It is proposed that a university copyright policy should balance private interests and academic pursuits and should also supply descriptions of permitted and non-permitted uses of protected materials.

In the absence of authoritative judgments in South Africa with regard to the educational use of copyrighted material, many questions seem to remain unresolved, thus further complicating the vexed issue. There also does not appear to be any South African case law, defining what exactly is meant by the concept of fair dealing. In view of the aforesaid, consideration should be given to the circumstances surrounding each individual case. The fair dealing doctrine seems to be extremely vague and thus open to interpretation. It may therefore be significant to consider the four fair use factors, as defined in section 107 of the American Copyright Act of 1976, in balancing the relevant facts, in an attempt to establish whether a particular use was fair or not.

In accordance with the provisions of section 12(4) of the South African Copyright Act of 1978, the systematic photocopying of the whole, or a substantial part of an article or a book, which competes directly or indirectly with the original work, thus detracting from the income of the copyright owner, does not amount to fair dealing. It is important to note that the exploitation of a protected work shall not detract from the copyright owner's legitimate interests in the work.

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<sup>137</sup> Nimmer & Nimmer 1978 13-239.

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*

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The author offers the view that a single uniform approach to the problem at hand will be too rigid and impractical to cater for the variables peculiar to the facts of each individual case. The solution, it would appear, may be found in a composite approach. Such an approach should incorporate the various elements of international case law, as well as developing clear guidelines with regard to the minimum and maximum standards pertaining to unauthorised copying practices. Such an approach should ideally offer a measure of flexibility and circumspection.

## **TABLE OF ACTS AND REGULATIONS**

### **South Africa**

Copyright Act 98 of 1978, as amended

Government Gazette No 6254 vol 398, 7 August 1998, No 19112

Government Gazette No R2530, published in Government Gazette No 652, 22  
December 1978

National Education Policy Act 27 of 1996

### **United Kingdom**

Copyright Design and Patents Act, Chapter 48 of 1988

### **New Zealand**

Copyright Act 143 of 1994

### **United States of America**

Copyright Act, Title 17, of 1976, as amended

## **INTERNATIONAL CONVENTIONS AND AGREEMENTS**

Berne Convention for the Protection of Literary and Artistic Works

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPPS)

---

**BIBLIOGRAPHY****ARTICLES**

**Barrow 1992** : Barrow, E "Fair dealing and the *Texaco* decision - Implications for the UK", 1992 issue 25 *Copyright World* 18

**Copeling & Pienaar 1980** : Copeling, AJC & Pienaar, DJ "Onderrig en die Wet op Outeursreg", 1980 (2) *Modern Business Man's Law* 49-50

**Katz 1993** : Katz, J "Reprography and fair dealing – Copying for educational use: *Longman v Carrington*", 1993 *EIPR* 67–71

**Van der Merwe 1998** : Van der Merwe, APS "Die begrip "billike gebruik" in navorsings- en onderwysverband as verweer by beweerde outeursregskending by wyse van reproduksie", 1998 (2) *De Jure* 243-249

**BOOKS**

**Copeling 1978** : Copeling, AJC *Copyright and the Act of 1978* (1978) DURBAN: Butterworths

**Copinger & Skone James 1980** : Copinger, WA & Skone James, EP, *Copinger and Skone James on Copyright* (1980) LONDON : Sweet & Maxwell

**Crews 1993** : Crews, KP *Copyright, Fair Use and the Challenge for Universities* (1993) CHICAGO & LONDON : University of Chicago Press

**Dean 1998** : Dean, OH *Handbook of South African Copyright Law* (1998) CAPE TOWN & JOHANNESBURG :Juta & Co, Ltd

**Garmen & Ginsburg 1993** : Gorman, RA & Ginsburg, JC *Copyright for the Nineties* (1993) VIRGINIA: The Michie Co

**Heller & Wiant 1984** : Heller, JS & Wiant, SK *Copyright Handbook* (1984) COLORADO: Fred B Rothman & Co

**Jassin & Schechter 1998** : Jassin, LJ & Schechter, SC *The Copyright Permission and Libel Handbook* (1998) NEW YORK : John Wiley & Sons, Inc

**Laddy Prescott & Vitoria 1995** : Laddy, H, Prescott, P & Vitoria, M *The Modern Law of Copyright and Designs* (1995) LONDON : Butterworths

**Nimmer & Nimmer 1978** : Nimmer, MB & Nimmer, D *Nimmer on Copyright* (1978) NEW YORK : Matthew Bender

- Patry 1995** : Patry, WF *The Fair Use Privilege in Copyright Law* (1995)  
WASHINGTON, DC : The Bureau of National Affairs Inc
- Prime 1992** : Prime, T *Law of Copyright* (1992) LONDON : Fourmat
- Talab 1986** : Talab, S *Commonsense Copyright : A guide to the new technologies*  
(1986) NORTH CAROLINA : McFarland & Company Inc
- Wall 1998** : Wall, RA *Copyright made easier* (1998) LONDON : Aslib

---

**TABLE OF CASES**
**New Zealand**

<i>Longman Group and others v Carrington Technical Institute and another</i> 1991 (2) NZLR 574.....	.21
---	-----

**South Africa**

<i>Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd and another</i> 1985 (4) SA 882 (c) .....	8
<i>Galago Publisher (Pty) Ltd and Another v Erasmus</i> 1989 (1) SA 276 (A) .....	8
<i>Hallmark Card Inc &amp; others v Prima Toys (Pty) Ltd</i> Case No 17039/85 TPD unreported .....	8
<i>Klep Valves (Pty) Ltd v Saunders Valve Co Ltd</i> 1987 (2) SA 1 (A) .....	8
<i>Juta &amp; Co Ltd and others v De Koker and others</i> 1994 (3) SA 499 (T) .....	8

**United Kingdom**

<i>Associated Newspapers Group PLC v Hew Group Newspapers Ltd</i> 1986 RPC 515 .....	18
<i>Cate v Devon and Exeter Constitutional Newspaper Company</i> 1889 (40) Ch 13 500 .....	18
<i>Exxon Corporation and others v Exxon Insurance Consultants International Ltd</i> 1982 RPC 69 .....	9
<i>Ladbroke (Football) Ltd v William Hill (Football) Ltd</i> 1964 1 A 11 ER 465 (HL) .....	9
<i>Sillitoe v McGraw-Hill Book Co (UK)</i> 1983 FSR 545 .....	17
<i>Trade Auxiliary Company v Middlesborough and Protection Association</i> 1889 (40) ChD 425 .....	18

**United States of America**

<i>American Geophysical Union v Texaco Inc</i> 60 F 3d 913 (2 <sup>nd</sup> Cir 1994) .....	25
<i>Basic Books v Kinko's Graphic Corp</i> 758 F Supp 1522 (SDNY 1991) .....	29
<i>Harper &amp; Row Publishers Inc v Nation Enterprises</i> 471 US 539 (1985) .....	30
<i>Princeton University Press v Michigan Doc Servers Inc</i> 99 F 3d 1381 (6 <sup>th</sup> Cir 1996).....	24