

## **Standing on the Shoulders of Giants: Reforming Fair Dealing in English Copyright Law**

Three hundred years ago, the world's first copyright law, the Statute of Anne, came into force. Conceived as "an Act for the encouragement of learning,"<sup>1</sup> it was designed to reward creativity while sharing ideas, balancing the incentive to innovate with the public interest in access to knowledge.<sup>2</sup>

How times change. Far from fostering an era of enlightenment, modern English copyright law struggles to keep up with rapidly developing technology while confusing consumers, restricting research and constraining creativity. It lacks legitimacy and impedes innovation, undermining its primary purpose of promoting the creation and exchange of new works.

The success of copyright's balance hinges on the doctrine of fair dealing, a middle ground between rights holders and users where certain reasonable uses of copyrighted works are permitted. By allowing the necessary "breathing space,"<sup>3</sup> fair dealing acknowledges that, in certain circumstances, copyrighted materials can be used to develop creative capital and further the spread of ideas.

Unfortunately, though, English fair dealing provisions are so restrictive that they are asphyxiating the copyright system, calling into question both its credibility and efficacy. This paper will argue that current fair dealing exceptions must be reformed, allowing copyright to return to its roots by bringing back a mutually beneficial balance between creators and consumers.

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<sup>1</sup> Statute of Anne, 1710, 8 Ann., c. 19.

<sup>2</sup> Luis C Schmidt, "The Changing Face of Copyright," *Copyright World* [190] 2009, at p. 34.

<sup>3</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 US 569 [Acuff-Rose]: Justice Souter at para 579.

## I. Structure

This paper will firstly explain the place of fair dealing in the copyright framework, setting out the area of reform. It will move on to demonstrate that the current list of fair dealing exceptions is inadequate, showing that it lacks legitimacy and is unnecessarily restrictive. This paper will go on to advocate the implementation of a flexible and open-ended fair dealings doctrine, arguing that this reform is necessary to ensure that copyright law remains relevant while rewarding rights holders and fuelling the further development of learning.

## II. Fair Dealing in English Copyright Law

The statutory basis of English copyright law, the *Copyrights, Designs and Patents Act 1988* (hereinafter CDPA), sets out an enumerated list of situations allowing use of a work that would otherwise constitute copyright infringement. These fair dealing exceptions effectively limit the rights of copyright holders in cases such as research and private study,<sup>4</sup> helping the visually impaired,<sup>5</sup> criticism and review<sup>6</sup> as well as library and archival usage.<sup>7</sup> The CDPA was modified by the *Copyright and Related Rights Regulations 2003*,<sup>8</sup> following an EU Directive designed to bring Union copyright law out of “the Gutenberg age.”<sup>9</sup> The Regulations limited fair dealing defences to cover only non-commercial use of copyrighted materials.<sup>10</sup> The British government subsequently commissioned the Gowers Review of Intellectual Property to survey domestic IP legislation in the Internet age, and some of its recommendations were brought into force through the recent *Digital Economy Act 2010*,<sup>11</sup> designed to regulate online media. While it has no direct bearing on the fair dealing

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<sup>4</sup> Copyright, Designs and Patents Act, 1988 c. 48 [hereinafter CDPA], §29-30.

<sup>5</sup> Ibid, §31B.

<sup>6</sup> Ibid, §30.

<sup>7</sup> Ibid, §37-44A.

<sup>8</sup> Copyright and Related Rights Regulations, 2003 (No. 2498).

<sup>9</sup> Viviane Reding, “Digital Europe--Europe’s Fast Track to Economic Recovery,” The Ludwig Erhard Lecture 2009, Lisbon Council, Brussels, July 9, 2009, p.9 (SPEECH/09/336).

<sup>10</sup> Copyright and Related Rights Regulations Act, *supra* note 8, §8-14.

<sup>11</sup> Digital Economy Act, 2010 c.24.

exceptions, the Act has raised the stakes in copyright infringement cases by allowing some quite controversial punishments, including disconnection from the Internet, if users are suspected of acting outwith a very narrow range of provisions.

In *Pro Sieben Media AG v. Carlton UK Television Ltd*, it was noted that English fair dealing provisions “define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection.”<sup>12</sup> For a fair dealing defence to succeed there is a two-step test: the purpose must firstly be enumerated in statute, and then it must be shown to be fair – if either condition is not met, the defence fails. The provisions only exculpate copyright infringement for very precise uses, allowing no judicial discretion whatsoever when use of a work may otherwise seem reasonable.<sup>13</sup>

In a lecture on copyright law, Laddie J. remarked that:

Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls.<sup>14</sup>

This situation must change. Ossified fair dealing provisions are unable to keep pace with the exponential growth of the Internet and subsequent shifts in public behaviour. Copyright is predicated on the assumption that rights holders and users act in concert; without reform, these camps could become inexorably polarised, rendering the system redundant.

### **III. The Case for Reform**

This section will show that fair dealing urgently needs reform. It will demonstrate a public sense of illegitimacy in the copyright system based on a perceived lack of reasonable middle

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<sup>12</sup> *Pro Sieben Media AG v. Carlton UK Television Ltd. & another*, Ch [1997] E.M.L.R. 509, 516.

<sup>13</sup> *Ibid.*

<sup>14</sup> Laddie J., “Copyright: Over-strength, Over-regulated, Over-rated?”, *European Intellectual Property Review*, 1996, 18(5), at p. 258.

ground, which is detrimental to rights holders and users alike. It will also show that the current fair dealing exceptions are restrictive and inadequate, hampering the greater public interests that copyright was designed to promote.

*a. A Crisis of Credibility*

Copyright laws were designed for an 'offline' world, and fit awkwardly into the contemporary information society marked by rapid technological change. The incongruity between the legal framework and online consumer norms creates a crisis of credibility for copyright, which largely relies on self-policing in digital domains. Unless fair dealing is reformed to provide a perceived reasonable middle ground for consumers, the door is left open to fringe activities like online piracy, a danger for rights holders and users alike.

Consumer Focus (CF), a statutory organisation that protects the rights of British consumers, has lambasted copyright law for being out-of-touch after finding that almost three out of four people (73%) do not know what they are legally allowed to record or copy.<sup>15</sup>

Meanwhile, the Intellectual Property Office has confirmed that "consumers are often unaware of [copyright] boundaries, which sometimes fail to reflect the realities of life for many people."<sup>16</sup>

The incongruity between behaviour and law is encapsulated in the issue of 'format shifting', which occurs when a form of media is converted from one format to another, like converting a song from a CD into an electronic format so that it can be played on an mp3 player.

England is one of the few European jurisdictions where this practice is illegal for personal

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<sup>15</sup> Consumer Focus, *Time to Change the Tune: Consumer Research Briefing on Copyright*, available on the Internet at <<http://www.consumerfocus.org.uk/assets/1/files/2010/02/Consumer-Focus-Time-to-change-the-tune2.pdf>>, last accessed 14 October 2010.

<sup>16</sup> The Intellectual Property Office, *The Future: Developing a Copyright Agenda for the 21<sup>st</sup> Century*, available on the Internet at <<http://www.ipso.gov.uk/c-strategy-agenda.pdf>>, last accessed 14 October 2010, at p. 4.

use, which is grossly incongruous with consumer behaviour and expectations.<sup>17</sup> Indeed, 83% of consumers are unaware that it is illegal to copy tracks from their CDs onto their mp3 players for personal use, leading to widespread feeling that “the credibility of UK copyright law has fallen through the floor.”<sup>18</sup> This sentiment is confirmed by a plethora of reports from consumer watchdogs and monitoring agencies. Consumers International found that British copyright legislation was the worst “by far” in its survey of IP rights in 16 jurisdictions, and the UK was the only country to score an ‘F’ on the group’s IP Watch List.<sup>19</sup>

As the short-lived Strategic Advisory Board on Intellectual Property Policy (SABIP) has warned, “the fact that copyright in the UK appears so out of touch and punitive in not permitting something so commonplace as format shifting, is the kind of issue that may fuel antipathy towards the wider concept of copyright.”<sup>20</sup> Numerous consumer attitude surveys and polls have found that, as format shifting is “a contravention of intellectual property laws, consumers’ ethical decision processes are affected.”<sup>21</sup> SABIP details this psychology at length,<sup>22</sup> and notes that the law’s failure to provide breathing space is self-defeating, as it paves the way for consumers to engage in activities equally illegal but with more dangerous practical consequences, like online piracy.<sup>23</sup>

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<sup>17</sup> CDPA, *supra* note 5, §17.

<sup>18</sup> Consumer Focus, *Outdated Copyright Law Confuses Consumers*, available on the Internet at <<http://www.consumerfocus.org.uk/news/outdated-copyright-law-confuses-consumers>>, last accessed 14 October 2010.

<sup>19</sup> Consumers International, *IP Watch List Summary Report*, available on the Internet at <<http://a2knetwork.org/summary-report-2010>>, last accessed 14 October 2010.

<sup>20</sup> Strategic Advisory Board on Intellectual Property Policy [hereinafter SABIP], *Changing Attitudes and Behaviour in the ‘Non-Internet’ Digital World and Their Implications for Intellectual Property*, available on the Internet at <[www.sabip.org.uk/sabip-noninternet.pdf](http://www.sabip.org.uk/sabip-noninternet.pdf)>, last accessed 14 October 2010, at p. 45.

<sup>21</sup> J. Chiou, G. Huang, H. Lee, “The Antecedents of Music Piracy Attitudes and Intentions,” *Journal of Business Ethics*, 2005, 57(2), at p. 162.

<sup>22</sup> SABIP, *Copycats? Digital Consumers in the Online Age*, available on the Internet at <[www.sabip.org.uk/sabip-ciberreport.pdf](http://www.sabip.org.uk/sabip-ciberreport.pdf)>, last accessed 14 October 2010, at pp. 4-8, pp. 31-48; SABIP, *supra* note 20, at pp. 41-46.

<sup>23</sup> SABIP, *Copycats? Digital Consumers in the Online Age*, *supra* note 22, at p. 34.

While even entertainment industry bodies acknowledge the difference between copying a song onto a personal computer and downloading a feature-length film, the law does not.<sup>24</sup> Behaviourally, consumers react to this lack of legal distinction, feeling alienated by the blanket culpability and estranged from a system that they consider increasingly illegitimate. Ethical boundaries become blurred, as consumers feel beholden to nobody in a digital environment that is notoriously difficult to regulate. This crisis of credibility endangers consumers, who may find themselves subject to civil proceedings or Internet disconnection, and is potentially devastating for rights holders, who must to a large extent rely on ethics in a largely self-policing environment.

At the heart of this illegitimacy is the inflexibility of fair dealing provisions, which afford no middle ground amidst the “myriad rapidly developing technologies and networks”<sup>25</sup> of ‘Digital Britain.’ As fluid online behaviour is bound by rigid rules, the user must decide which side of the law to come down on. If users feel disregarded by a system, they are likely to disregard it in turn, causing fundamental problems for a functioning copyright framework.

*b. Restricting Opportunities*

Restrictive fair dealing provisions hamper the creation of new works of high artistic, intellectual and economic value.

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<sup>24</sup> BPI/Motion Picture Association of America, *Joint Memorandum of Understanding on an Approach to Reduce Unlawful Filesharing*, available on the Internet at <<http://www.bpi.co.uk/our-work/protecting-uk-music/article/joint-memorandum-of-understanding-on-an-approach-to-reduce-unlawful-file-sharing.aspx>>, last accessed 12 October 2010.

<sup>25</sup> SABIP, *Copycats? Digital Consumers in the Online Age*, *supra* note 22, at p. 6.

Stravinsky famously said that “good artists borrow, great artists steal,”<sup>26</sup> rephrasing the earlier sentiments of T.S. Eliot.<sup>27</sup> Composers from Beethoven and Mozart to Bartok and Charles Ives have recycled themes, motifs and segments of prior works to craft new creations.<sup>28</sup> In the 1940s, the Parisian *musique concrète* movement cut and looped sounds from melodies on analogue tapes, applying various other manipulations to entertain and inspire, much like New York hip hop in the 1970s and contemporary genres like mixed-media spoken word.<sup>29</sup> Such artistic innovation is curbed in the UK, where strict fair dealing restrictions stunt the development of new creative outputs.

Current fair dealing provisions also impede scholarly development. A paper commissioned by the British Library states that “laws on copyright and their interpretation must be redefined in the context of a modernising world and developing research techniques.”<sup>30</sup>

Academics face heavy licensing burdens, as permission must be granted from individual rights holders and, if permission is not granted or the rights holder cannot be found, the source cannot be used and new research dematerialises.<sup>31</sup> This is especially problematic when dealing with orphan works, where the copyright owner is unknown or cannot be found. The British Library estimates that some 40% of works in publication are orphan works<sup>32</sup> but, without permission, any use of the work constitutes infringement, and so many

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<sup>26</sup> As quoted in R. Ashtar, “Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime.” *Albany Law Journal of Science and Technology*, 2009, 19(2), at p. 282.

<sup>27</sup> T.S. Eliot, *The Sacred Wood* (London: Methune, 1920), at p. 11.

<sup>28</sup> O. Arewa, “From JC Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context,” *North Carolina Law Review*, 2006, 84(2), at p. 630.

<sup>29</sup> F. Preve, *Power Tools: Software for Loop Music: Essential Desktop Production Techniques* (San Francisco: Backbeat Books, 2004), at p. 2; J. Beck, “Music Composition, Sound Recordings, and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests,” *UCLA Entertainment Law Review*, 2005, 13(2), at p. 23.

<sup>30</sup> British Library, *Driving UK Research: Is Copyright a Help or a Hindrance? A Perspective from the Research Community*, available on the Internet at <[www.bl.uk/ip/pdf/drivingukresearch.pdf](http://www.bl.uk/ip/pdf/drivingukresearch.pdf)>, last accessed 14 October 2010, at p. 1.

<sup>31</sup> E. Gadd, *Clearing the Way: Copyright Clearance in UK Libraries* (LISU Occasional Paper no. 31, 2002).

<sup>32</sup> British Library, *Copyright and Research in the UK: Maintaining a Balance in the Digital Age*, available on the Internet at <<http://www.bl.uk/ip/pdf/maintainingbalance.pdf>>, last accessed 14 October 2010.

works are ignored as academics fear legal recrimination,<sup>33</sup> resulting in wasted intellectual capital.<sup>34</sup> Further, fair dealing provisions are incredibly stringent, as format shifting is outlawed for preservation when, for instance, microfiche is deteriorating. The Gowers Report notes that Nelson Mandela's Rivonia trial speech was recorded on dictabelt in 1964, but the British Library is unable to copy this for preservation without clearing the rights, and there are fears that the tape will deteriorate before copyright expires.<sup>35</sup> As noted by the Libraries and Archives Copyright alliance, the current provisions "unduly harm the educational, research and lifelong learning environments;"<sup>36</sup> public bodies must be allowed to fulfil their statutory duty of safeguarding heritage and learning, allowing future innovators to build on the past.

There is also a compelling economic argument for flexible fair dealing provisions. A 2007 study by the Computer and Communications Industry Association conducted in accordance with World Intellectual Property Organisation methodologies found that companies benefiting from limitations on copyright-holders' exclusive rights "generate substantial revenue, employ millions of workers and, in 2006, represented one-sixth of total US GDP."<sup>37</sup> Such enthusiastic findings beg some scepticism, but the Gowers Report highlights a good example of the principle: Google's ability to 'cache' websites of search results, which allows the search engine to display textual previews of the website without first acquiring

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<sup>33</sup> British Academy, *Copyright and Research*, available on the Internet at <<http://www.britac.ac.uk/policy/copyright/issues.cfm>>, last accessed on 12 October 2010.

<sup>34</sup> Chartered Institute of Library and Information Professionals, *Statement on Orphan Works*, available on the Internet at <<http://www.cilip.org.uk/sitecollectiondocuments/PDFs/policyadvocacy/laca/LACAorphanworkstatementFINAL19dec07.pdf>>, last accessed 13 October 2010, at p. 2.

<sup>35</sup> *The Gowers Review of Intellectual Property* [hereinafter, Gowers Report], available on the Internet at <[http://www.hm-treasury.gov.uk/gowers\\_review\\_index.htm](http://www.hm-treasury.gov.uk/gowers_review_index.htm)>, last accessed 11 October 2010, at p. 65.

<sup>36</sup> Libraries and Archives Copyright Alliance, *Copyright: The Future*, available on the Internet at <[www.ipo.gov.uk/responses-copyissues-laca.pdf](http://www.ipo.gov.uk/responses-copyissues-laca.pdf)>, last accessed 11 October 2010, at p. 5.

<sup>37</sup> Computer and Communications Industry Association, *Fair Use in the US Economy*, available on the Internet at <[www.arl.org/bm~doc/ccia-fair-use-study-exec-summ.pdf](http://www.arl.org/bm~doc/ccia-fair-use-study-exec-summ.pdf)>, last accessed 14 October 2010, at p. 2.

permission, was only allowed in the UK after special provisions were introduced in 2002, long after the service was created. In its own testimony to the Gowers Report, the company notes that “the existence of a general fair dealing exception that can adapt to new technical environments may explain why the search engines first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement.”<sup>38</sup>

The current fair dealing provisions are out of line with consumer realities, and the needs of the creative, scholarly and business communities. They lack legitimacy and stifle innovation; they must be reformed.

#### **IV. Proposal for Reform**

This paper has shown that copyright exceptions for fair dealing are limited and unduly restrictive, causing a credibility crisis for copyright and restraining new ideas. This section will propose a workable reform to the law that ensures its flexibility and relevance in the digital age, while also protecting the interests of rights holders.

##### *Rejecting More of the Same*

The Gowers Report has recommended additional statutory exceptions to expand the list of fair dealing provisions under the CDPA. This solution, unfortunately, is facile. Additional exceptions would still be incapable of flexibility, disregarding the key problem of statutory rigidity. Merely adding to the already pedantic list of fair dealing exceptions guarantees that copyright law perennially plays catch up. It fails to anticipate the fluidity of user behaviour amid exponentially evolving technology, thereby simply delaying the legitimacy problem without addressing it. Its purported advantage, that there is certainty for users and rights

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<sup>38</sup> Gowers Report, *supra* note 35, at p. 62.

holders alike, reveals only a cursory glance at existing case law on fair dealing which reveals that, contrary to Gowers' assertions, "the current approach does not, in fact, provide certainty for users."<sup>39</sup> Indeed, more of the same ignores the persistent problems outlined above.

### *An Open-Ended Fair Dealing Test*

This paper proposes an extended principle of fair dealing that acts as a general touchstone for determining permitted exceptions to copyright, drawing on a mixture of English as well as recent Canadian jurisprudence and the flexible US 'fair use' defence.<sup>40</sup> As recommended in a pre-CDPA report on British copyright, it is necessary to "expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and that cause little prejudice to rights' holders abilities to exploit their works."<sup>41</sup>

The principle objective should not be to erect Laddie J.'s "high and immutable walls,"<sup>42</sup> but rather to establish an open-ended set of guidelines reflective of the rapidly changing digital environment. They would operate roughly along the following lines:

*Fair dealing with regards to copyrighted work, for purposes such as review, private format shifting, education, historical preservation, and such, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair dealing the factors to be considered shall include –*

- (1) the purpose and nature of the dealing, including whether such use is of a commercial nature;*
- (2) alternatives to the dealing, including the possibility of obtaining the material within a reasonable time at a normal commercial price;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the dealing upon the work, including the potential market for or value of the copyrighted work.*

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<sup>39</sup> R. Burrell, A. Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005), particularly at p. 252, but for an overview see pp. 20-35, 47-57, 67-79, 91-94.

<sup>40</sup> Canada's landmark fair dealing ruling can be found in *CHH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, at paras. 16-84. 'Fair use' is the American term for 'fair dealing', and the flexible US provisions can be found in the Copyright act of 1976, 17 U.S.C. §106-107.

<sup>41</sup> *The Whitford Committee Report on Copyright and Designs Law*, Cmnd 6732 (1977), paras. 676-677.

<sup>42</sup> Laddie J., *supra* note 14.

The key advantage of this proposal is increased flexibility, which would allow law enforcers sufficient leeway to address shifting perceptions relating to creative processes and the permissible use of intellectual property, drawing from the findings above as well as case law. Lord Denning M.R., in deciding *Hubbard v Vosper*, famously noted that:

it is impossible to define what is 'fair dealing.' It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them...Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.<sup>43</sup>

In a later judgment, Ungood-Thomas J. stated that "fair dealing is a question of both fact and impression."<sup>44</sup> The proposed reform is technologically neutral, allowing courts to respond to new technological and artistic practices, without constantly rewriting statutes. Moreover it assumes that Parliament cannot foresee and legislate for all possible situations in which enforcing copyright would be unreasonable; rather than exceptions that are frozen in statute, the reform allows for the organic development of the common law.

It should be noted that this reform does not seek to eliminate the legitimate interests held by rights holders; fair dealing must not be perceived as fair stealing,<sup>45</sup> which provisions (3) and (4) attempt to address. In the short-term, this reform may reduce certainty for rights holders, but in the longer-term, it encourages an ethical investment from users in the framework, stemming a general apathy to copyright. Additionally, in considering the 'purpose and nature' of the dealing, the proposed reform would be compatible with the European

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<sup>43</sup> *Hubbard v Vosper* CA 1971 ([1972] 2 WLR 389, [1971] 1 All ER 1023 CA [1972] 2 QB 84).

<sup>44</sup> *Beloff v Pressdram Ltd* Ch [1973] ([1973] 1 All E.R. 241; [1973] F.S.R. 33; [1973] R.P.C. 765).

<sup>45</sup> Jeremy Phillips, "Fair Stealing and the Teddy Bears' Picnic," *Entertainment Law Journal*, 1999, 10(3), at p. 58.

Information Society Directive,<sup>46</sup> as well as the “three-step test” of the Berne Convention, thereby keeping domestic copyright law in line with international obligations.<sup>47</sup>

Most importantly, the reform strikes a better balance between the interests of incentivising innovation and spreading the public knowledge. This expansion of fair dealing provisions allows copyright to return to its roots to facilitate the encouragement of learning.

## V. Concluding Remarks

As the Statute of Anne celebrates its tercentenary, it is worth looking back at one of the earliest copyright cases to come before the courts, *Sayre v. Moore*, in which Mansfield C.J. cautioned that:

We must take care to guard against two extremes equally prejudicial: the one, that men of ability...may not be deprived of their just merits, and the rewards of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>48</sup>

This paper has shown that current legislation does not appropriately balance the rights of creators and the greater public interest. It has shown that reforming the fair dealing defence to be flexible and open-ended, but with guarantees for rights holders, would create a credible copyright system better geared to achieve its aims. By reforming fair dealing provisions, legitimacy and balance can be brought back to the copyright system, allowing future innovators to see further by standing on the shoulders of giants.

*Word Count: 2,942*

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<sup>46</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (‘the Information Society Directive’), art. 5.

<sup>47</sup> Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art.9(2).

<sup>48</sup> *Sayre v. Moore* (1785), 1 East. 361n, 102 E.R. 139.

