THE UNBEARABLE LIGHTNESS OF FAIR DEALING

Towards an Autochthonous Approach in Singapore

There is scant academic literature and virtually no case law on fair dealing, a significantly underexplored and underdeveloped area of copyright law, in Singapore. The goal of this article is to propose a workable interpretation of s 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed) that is consonant with global developments and Singapore's own policy imperatives. Due in part to the historical connection of Singapore's Copyright Act to its Commonwealth counterparts, and in part to the striking similarity in the text of s 35(2) to the US fair use legislative provision, the authors argue that fair dealing in Singapore should draw on appropriate elements from Australian, UK and US jurisprudence. Ultimately, since Singapore's fair dealing provision must be shaped by prevailing local circumstances and by its sociolegal context, the autochthonous approach gives effect to Singapore's legislative objectives of creating an environment conducive to the development of creative works, and also facilitating greater investment, research and development in copyright industries.

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I. Introduction

1 Fair dealing is one of several defences available under the Singapore Copyright Act[1] to copyright users. As with the other exceptions under the Copyright Act, fair dealing:[2]

1 Cap 63, 2006 Rev Ed.

2 Susanna Leong, *Intellectual Property Law of Singapore* (Singapore: Academy Publishing, 2013) at para 09.002; George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAcLJ 867 at 886:

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> … provide[s] a reasonable balance between … giving copyright owners a fair return for the investment expended … [and] the interests of copyright users to have access to and to make use of the works and information contained therein.

Although the fair dealing provision has been part of the Copyright Act since its original enactment in 1987, the interplay of the five fairness factors has never been tested before the Singapore courts.[3] Leading local textbooks on intellectual property and copyright law have similarly accorded this subject cursory treatment.[4] Given the dearth of local cases and academic commentary in this area, it is timely to explore the interpretation and relationship of Singapore's fairness factors since high-profile online copyright infringement suits appear likely to be litigated in Singapore in the future.[5] It is not inconceivable that the Google Books litigation may land on Singapore's shores,[6] and both judges and

> The alternative approach [to interpreting fair dealing] … tends to stress the purpose role of defensive provisions: to achieve a proper balancing of rights and obligations so as to secure the interests of society as a whole.

3 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 (the Court of Appeal reversed the High Court decision on the infringement point, finding that RecordTV Pte Ltd was not liable for infringement); *Creative Technology Ltd v Aztech Systems Pte Ltd* [1996] 3 SLR(R) 673 at [77], *per* Lai Kew Chai J (court found that the dealing did not fall within a permitted purpose). *Cf* the US fair use provision, which has been tested in over 300 cases between 1978 and 2005. See Barton Beebe, "Empirical Study of the US Copyright Fair Use Opinions, 1978–2005" (2008) 156 U Pa L Rev 549 at 564.

4 Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2nd Ed, 2014) at paras 11.3.27–11.3.35; Susanna Leong, *Intellectual Property Law of Singapore* (Singapore: Academy Publishing, 2013) at paras 09.047–09.049; George Wei, *The Law of Copyright in Singapore* (Singapore: SNP Editions, 2nd Ed, 2000) at para 9.41; *Halsbury's Laws of Singapore* vol 13(3) (Singapore: LexisNexis, 2013) at para 160.080. For the most comprehensive academic discussion of fair dealing in Singapore to date, albeit with great detail afforded to the consideration of only the first fair dealing factor, see David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832.

5 A clearly delineated fair dealing law may potentially be useful to some of the alleged infringers involved in Dallas Buyers Club LLC's worldwide campaign of pursuing individuals for illegal downloading of the movie "Dallas Buyers Club": see Irene Tham, "Studio Demands Compensation From More Than 500 People Here Who Downloaded Movie" *The Straits Times* (7 April 2015).

6 Through its library project and its Google Books project, acting without permission of rights holders, Google has made digital copies of tens of millions of books that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see "snippets" of text containing the searched-for terms. See *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 (SDNY, 2013), affirmed in 804 F 3d 202 (2nd Cir, 2015). See also *Perfect 10, Inc v Amazon.com Inc* 508 F 3d 1146 (9th Cir, 2007).

practitioners alike will have to wrestle with the enigmatic fair dealing provision as articulated in s 35(2) of the Singapore Copyright Act.

2 This article is concerned with the interpretation of s 35(2) – in particular, the interpretation of the five factors and their relationship with each other.[7] Part II[8] outlines the legislative history and policy behind copyright law in Singapore by tracing the development of the fair dealing provision since the inception of Singapore's Copyright Act. Additionally, it illustrates that while the legal developments in the area of fair use/fair dealing in the US, UK and Australia may have some influence on Singapore's fair dealing jurisprudence,[9] Singapore's copyright policy imperatives are not entirely aligned with any particular jurisdiction.

3 Part III[10] presents the current state of fair dealing law in Singapore. Since s 35(2) is *in pari materia* with s 40(2) of the Australian Copyright Act 1968 ("the Australian CA") in so far as the five factors are concerned,[11] which in turn codified the fairness factors in English and Australian common law, both Australian and UK jurisprudence could be highly persuasive in interpreting Singapore's s 35(2). To this end, this article surveys a number of Australian and UK cases in order to understand how their judges have approached the application of the relevant fairness factors.

4 Part IV[12] discusses the US approach to fair use, focusing particularly on the "transformative use" doctrine in an attempt to discover its relevance, if any, to s 35(2). It explores the various formulations of the doctrine that have emerged and highlights how this doctrine, through its interaction with the other factors, dominates US fair use jurisprudence.

7 See s 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed). Note: this paper is not concerned with the expanded scope of s 35(2) since its amendment in 2004. For academic treatment in this area, see generally Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2nd Ed, 2014) at paras 11.3.1–11.3.26 and George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAcLJ 867 at 879–885.

8 See paras 7–11 below.

9 For UK legislation, see the Imperial Copyright Act 1911 (c 46). For US legislation, see the US Copyright Act 17 USC §§101–810. For Australian legislation, see the Australian Copyright Act 1968.

10 See paras 12–20 below.

11 See ss 40(2) and 103C of the the Australian Copyright Act 1968.

12 See paras 21–28 below.

5 Part V[13] draws on the jurisdictions considered and proposes an autochthonous approach to interpreting s 35(2). This approach entails a more explicit balancing of the statutory fairness factors, without according *a priori* precedence to any single factor, and takes into account the peculiarities of Singapore's copyright policy and industries.

6 Finally, the proposed approach is applied to three factual scenarios to demonstrate how it might work in practice – *Authors Guild, Inc v HathiTrust*[14] ("*HathiTrust*"), *Campbell v Acuff-Rose Music, Inc*[15] ("*Campbell*") and *Cariou v Prince*[16] ("*Cariou*"). These cases present different contemporary problems which arise in fair use litigation in the US. It is the authors' modest hope that this proposed approach could provide a springboard for more academic discourse and a valuable reference point for the legal community in Singapore when called upon to tackle the issue of fair dealing in future.

II. Legislative history and policy of Singapore copyright law

7 Copyright law is ultimately designed to "benefit society by stimulating creativity through providing economic incentives to create new works".[17] It achieves this goal by securing to creators exclusive rights through which the creator may exploit. However, without appropriate limits, these rights may potentially place "manacles upon science".[18] Fair dealing in Singapore thus:[19]

13 See paras 29–48 below.

14 755 F 3d 87 (2nd Cir, 2014).

15 510 US 569 (1994).

16 714 F 3d 694 (2nd Cir, 2013).

17 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 833; *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [69]; *Sony Corp of America v Universal Studios, Inc* 464 US 417 at 429 (1984). See also Art 1, § 8, cl 8 of the United States Constitution ("Copyright Clause") (the Copyright Clause empowers Congress "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"). *Contra* Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions" (2009) 51 Wm & Mary L Rev 513 at 522–527 (arguing that the incentive theory does not square with motivations of artists in creating creative works).

18 *Cary v Kearsley* (1802) 4 Esp 168 at 170, *per* Lord Ellenborough; *Murphy v Millennium Radio Group, LLC* 650 F 3d 295 at 306 (3rd Cir, 2011), *per* Fuentes J:

> The doctrine of fair use places important limitations on a copyright owner's right to control the use of its work, so that the statute does not 'stifle the very creativity which that law is designed to foster' by preventing further uses of the work which enrich our culture and do not significantly diminish the value of the original.

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> … illustrate[s] … legislature's concern to safeguard the interests of the public at large within a framework of strong effective protection for copyright subject matter.

8 Singapore's fair dealing provision has undergone several changes since its original enactment in 1987.[20] Originally, s 35(2) was modelled largely on s 40 of the Australian CA,[21] thereby inheriting the UK categorical model where fair dealing is permitted only for specific enumerated purposes, as opposed to the US open-ended model.[22] While Singapore's fairness factors represent a codification of the factors considered in UK and Australian jurisprudence,[23] a conscious decision was made to remove the third Australian factor to suit the circumstances then prevailing in Singapore.[24] Specifically, legislators were concerned that the third factor would inhibit the access of financially strapped students to textbooks.[25] Since Singapore's Copyright Act of 1987[26] was

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See also David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 834.

19 George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAcLJ 867 at 878–879.

20 Copyright Act 1987 (Act 2 of 1987).

21 See s 40 of the Australian Copyright Act 1968.

22 See s 35(2) of the Australian Copyright Act 1968 (s 5(2) provided that fair dealing was only applicable "for the purpose of research or private study").

23 Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002) at para 11.35 ("[b]y and large, [the statutory fair dealing factors] are similar to the types of factors taken into account in the case law dealing with fair dealing in general prior to this amendment"). Similarly, the US fair dealing factors were enacted to codify the common law: see *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577 (1994), *per* Souter J (on behalf of a unanimous court):

> Congress meant §107 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster'.

24 Copyright Act 1968 (Cth) s 40(2)(c). The third factor requires the court to consider "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price". This factor is now incorporated in s 35(2)(*e*) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed).

25 *Report of the Select Committee on the Copyright Bill (Bill No 8/86)* (Parl 9 of 1986, 22 December 1986) (Chairman: Dr Yeoh Ghum Seng) at A87–A88, B56 and D11 (the removal of this factor was due to Consumers Association of Singapore's concern that students who cannot afford to buy books would be disadvantaged since the presence of this factor would almost certainly prohibit the photocopying of textbooks since textbooks "can be obtained within a reasonable time and at the ordinary commercial price"). See also *Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at col 19 (J B Jeyaretnam).

26 Act 2 of 1987.

based largely on the Australian and UK models, the national copyright policy was similarly aligned with those jurisdictions. Consequently, despite the underlying utilitarian objectives of copyright law, a strong emphasis was placed on the proprietary nature of the right,[27] which was consistent with the Singapore parliament's intent of developing the printing and publishing industries.[28]

9 Section 35 has subsequently been amended twice – in 1998 and 2004. Broadly, both amendments widened the scope of fair dealing. In 1998, s 35(2) was amended to remove "private" such that fair dealing applied to both private and "non-private" study.[29] The 2004 amendment was "of monumental significance" because for the first time, the open-ended US approach was introduced in Singapore to complement the categorical Australian and UK models.[30] However, the simultaneous adoption of the third Australian fairness factor arguably suggests that Parliament had not intended to adopt wholesale the US approach in Singapore.[31] It was emphasised by the then Law Minister that the amendment was "not connected with the [US–Singapore Free Trade Agreement]".[32] Rather, the Ministry of Law had undertaken a comprehensive review of foreign fair dealing jurisprudence before arriving at the current s 35(2),[33] and a deliberate decision was made to

27 George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAcLJ 867 at 881. *Cf* Art 1, § 8, cl 8 of the United States Constitution.

28 *Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at cols 11–12 and 14 (J B Jeyaretnam):

> The improved copyright provisions will provide a better environment for the publishing industry in Singapore. They will give an incentive to both local and foreign printing and publishing companies to expand their activities here.

29 Copyright (Amendment) Act 1998 (Act 6 of 1998).

30 Copyright (Amendment) Act 2004 (Act 52 of 2004); Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2nd Ed, 2014) at para 11.3.16.

31 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*e*); Copyright Act 1968 (Cth) s 40(2)(c) (the third Australian factor, and the currently Singapore's fifth fairness requires the court to consider "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price").

32 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1070 (Prof S Jayakumar, Minister for Law); David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 833–834; George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAcLJ 867 at 883–885; US–Singapore Free Trade Agreement (signed on 7 May 2003; entry into force on 1 January 2004), available at Office of the US Trade Representative <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> (accessed December 2015).

33 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law) ("these amendments have been

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retain the categorical fair dealing approach together with the Australian fairness factors while adopting the more open-ended US model for purposes falling outside these categories.[34] In doing so, Parliament intended s 35(2) to "strike a good balance between the interests of copyright owners and those of the copyright users"[35] by "preserv[ing] the unimpeded exchange of information and ideas to create an environment which is conducive to the development of creative works".[36]

10 It appears that an amalgamation of US, UK and Australian fair use/fair dealing experiences has influenced the formulation of the statutory fair dealing provisions in Singapore. In terms of copyright policy, a recurring theme in the parliamentary debates is the need to "strike a fair balance between the rights of copyright owners and copyright users".[37] However, this begs the question of *how* the balance should be struck. Despite this question being at "the heart of copyright legislation",[38] there is a surprising lack of guidance on the interpretation and interplay between the s 35(2) factors to achieve that balance.[39] Furthermore, apart from broad policy statements made in Parliament, there is no publicly available record on the review undertaken that led to the 2004 amendments which may illuminate this issue. The shift in copyright policy over the years has added difficulty to interpreting s 35(2), as the constant evolution of society and developments in technology raise different, but important, public interest considerations.[40]

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proposed after a careful review of the fair dealing provisions in jurisdictions such as the UK, Germany, France and the United States").

34 See s 35 of the Copyright Act (Cap 63, 2006 Rev Ed) (s 35 is only applicable if the purpose of the dealing falls outside criticism or review or reporting current events, which suggests that the court has to analyse the purpose of the dealing before applying the s 35(2) fairness factors).

35 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1042 and 1052 (Prof S Jayakumar, Minister for Law).

36 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1070 (Prof S Jayakumar, Minister for Law).

37 *Singapore Parliamentary Debates, Official Report* (15 September 2009) vol 86 at col 1497 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law); *Singapore Parliamentary Debates, Official Report* (17 August 1999) vol 70 at col 2090 (Prof S Jayakumar, Minister for Law); *Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at cols 11–12 (J B Jeyaretnam).

38 *Singapore Parliamentary Debates, Official Report* (17 August 1999) vol 70 at col 2090 (Prof S Jayakumar, Minister for Law).

39 See text accompanying n 3 above.

40 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [69], *per* V K Rajah JA:

> Although copyright law is intended to promote creativity and innovation by granting exclusive rights to copyright owners to exploit their rights for a specific period of time, there is also a public interest in not allowing copyright law to hinder creativity and innovation … Thus, unless the statutory words clearly reflect the legislative policy on the extent of the rights to be conferred on the copyright owner, the courts should not be quick to interpret the

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This shift is evident not only in the broadening of the fair dealing defence but also in local cases where courts are cautious about interpreting the exclusive monopoly rights too broadly.[41] Moreover, the rejection of the "sweat of the brow" doctrine and acceptance of the originality standard as a condition for copyright subsistence in compilations have further eroded the scope of exclusive rights granted to copyright owners.[42]

11 Indeed, as V K Rajah JA observed:[43]

> In the normal course of events … Legislature balances the rights and interests of all affected stakeholders after considering the social costs and the economic implications. Where the statute is not clear, however, the courts have to perform this difficult task.

Section 35(2) is one such instance where the court necessarily has to weigh the social costs and economic implications. Nonetheless, this provision should not be interpreted in a vacuum. Since the adoption of the fair dealing provision in Singapore has been influenced by developments in the US, UK and Australia, the jurisprudence of these countries should be persuasive in interpreting s 35(2). The following

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> statutory words expansively if doing so may stifle technological advances which are in the public's interest.

See also David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 837–838 and Susanna Leong, *Intellectual Property Law of Singapore* (Singapore: Academy Publishing, 2013) at paras 02.018–02.020 (author suggests that "Singaporean society is evolving to one where individualistic aspirations … are increasingly cherished" and "Singapore may look beyond the traditional and accepted view, of regarding copyright as an economic incentive for copyright owners, to one which also sees copyright as enshrining authors' natural rights in the justification for her copyright laws").

41 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [69], *per* V K Rajah JA.

42 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [38] (citing *Feist Publications Inc v Rural Telephone Service Company Inc* 499 US 340 (1991) and *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCA 44 at [20]); *Global Yellow Pages Pte Ltd v Promedia Directories Pte Ltd* [2016] SGHC 9 at [198] and [200]:

> In my judgment, the introduction of s 7A is consistent with the scope of copyright protection conferred on compilations by *Feist*. Singapore is not of course bound by *Feist*, but the creativity standard is entirely consistent with the Berne Convention, TRIPS and the language of section 7A. …
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> …
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> I am fortified in this conclusion by the Court of Appeal's approach in *Pioneers & Leader*s. In my view, Rajah JA expressed a clear preference for the creativity approach and agreed with *Feist* and *Telstra (Full Court)*. …

This approach was earlier foreshadowed in David Tan, "Copyright in Compilations: Embarking on a Renewed Quest for the Human Author and the Creative Spark" (2013) 18 MALR 151.

43 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2].

section thus seeks to outline the law on fair dealing in Singapore as gleaned from its Australian and English roots.

III. Current approach to fair dealing in Singapore

12 Section 35(2) provides a compulsory, non-exhaustive list of factors that courts must consider in deciding whether dealings "for any purpose other than [criticism or review and reporting of current events]"[44] are fair. Although the present formulation of s 35(2) differs from the Australian and English formulation in relation to the scope of permitted purposes, Australian and English jurisprudence is nonetheless persuasive in interpreting s 35(2) since it was from the common law that Australia first derived its fairness factors.[45] The move towards an open-ended fair dealing model was only "to ensure that our copyright laws remain relevant in an age of rapid technological development".[46] Although the open-ended model in s 35(2) "signals that Singapore has developed a fair dealing standard that departs from the current practice of other Commonwealth common law jurisdictions like the UK and Australia",[47] that does not in itself mean that the decisions in these jurisdictions regarding the interplay of the fairness factors are irrelevant.

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44 Section 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed) in full provides:

> For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes fair dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 shall include –
>
> (*a*) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
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> (*b*) the nature of the work or adaptation;
>
> (*c*) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
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> (*d*) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
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> (*e*) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

45 Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002) at para 11.35.

46 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1041 and 1061–1062 (Prof S Jayakumar, Minister for Law); Warren B Chik & Saw Cheng Lim, "Opportunity Lost? Revisiting *RecordTV v MediaCorpTV*" (2012) 24 SAcLJ 16 at 22 (the authors observe that the open-ended model "is conceptually wider and allows for a more flexible and expansionist interpretation … it is also a more forward looking and adaptive instrument").

47 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 833.

This part thus explores English and Australian jurisprudence to ascertain how these factors are interpreted.

A. Purpose and character

13 The "purpose and character of the dealing" factor features in the majority of UK cases. Lord Ellenborough first conceived this notion in *Cary v Kearsley*,[48] observing that "a man may fairly adopt part of the work of another … *for the promotion of science, and the benefit of the public*" [emphasis in original].[49] Later cases expanded this principle and consistently found fair dealing more likely where "the defendant can show that they have added to or recontextualized the part taken … [or] if they can show that the dealing was transformative".[50] Contrastingly, the courts have rejected the fair dealing defence when the defendant's work was:[51]

> … not a mental operation involving thought and labour and producing some original result, but a mechanical operation with scissors and paste, without the slightest pretension to an original result of any kind.

14 Whether the infringing work has a commercial purpose is another aspect of this factor.[52] In *De Garis v Neville Jeffress Pidler*, the

48 (1802) 4 Esp 168.

49 *Cary v Kearsley* (1802) 4 Esp 168 at 170, *per* Lord Ellenborough.

50 Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th Ed, 2014) at para 2.1.2; *Newspaper Licensing Agency v Marks & Spencer plc* [1999] EMLR 369 at 380, *per* Lightman J; *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 613–614. *Cf British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 159 (the court remarked that the defendant's work consisted of news reports and were distinct from programmes of football analysis or of review, which the plaintiff was producing. The court eventually found that the use was fair dealing).

51 *Walter v Steinkopff* [1892] 3 Ch 489 at 495, *per* North J; *Time Warner Entertainment v Channel Four Television Corp* [1994] EMLR 1 at 13 (the court found that the purpose of the defendant's programme was distinct from that of the plaintiff's film since "[t]he producers of the programme are seeking a re-examination of the film and of its social and artistic importance" and is for criticism and review); *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 302 (the court found that the defendant did not comment or make any analysis on the material and found the defendant's use to be unfair); *Associated Newspapers Group plc v News Group Newspapers* [1986] RPC 515 at 518–519 (the court held that the defendants had not criticised the letters but merely presented them to state the contents of the letter. Further, while the court described "motive" as a relevant factor, its application of "motive" suggests that it had in mind the purpose of the infringing work).

52 *Newspaper Licensing Agency v Meltwater Holding BV* [2011] EWCA Civ 890 at [41] (in *obiter*, the court observed that even if the defendant's work fell within one of the permitted purposes, the dealing would not be fair on the ground that the dealing was for commercial purposes and was encouraging end-users to infringe

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Federal Court of Australia, citing the US Eleventh Circuit, went as far as to say that "commercial nature of the use militates quite strongly against a finding of fair use … a commercial purpose makes copying … 'presumptively unfair'".[53] These two dimensions to the first factor highlight a tension between the proprietary rights of the copyright owner and the need for unimpeded access to works for the creation of new works. Although the assessment of fairness is fact-specific, the trend in UK and Australian decisions shows that the utilitarian objectives of copyright law in advancing the sciences often trump the commerciality of the dealing.[54]

B. Nature of the work

15 The second factor appears in case law as synonymous with whether the work is unpublished.[55] Courts consistently find the use of an unpublished work to be "a much more substantial breach of copyright than publication of a published work".[56] This greater protection given to unpublished works recognises the author's "right to prevent its being published at all"[57] or the "right to control the first public appearance of

the publishers' copyright); *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 302 (the court held that the defendant had taken the whole of the plaintiff's work and supplied it to its own customers in the course of trade); *Hawkes & Son (London) v Paramount Film Service* [1934] 1 Ch 593 at 605 (the court found that the work was for a commercial purpose).

53 *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 301 (citing *Pacific Southern Co Inc v Duncan* 744 F 2d 1490 at 1496 (11th Cir, 1984), *per* Johnson J, with approval).

54 For cases where courts have found fair dealing because the dealing involved a distinct purpose from the original work despite the defendants' commercial use of the work, see *Time Warner Entertainment v Channel Four Television Corp* [1994] EMLR 1; *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141; and *Cary v Kearsley* (1802) 4 Esp 168.

55 See Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th Ed, 2014) at para 2.1.4 and Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002) at para 11.35.

56 *Beloff v Pressdram* [1973] FSR 33 at 62, *per* Ungoed-Thomas J. See also *Time Warner Entertainment v Channel Four Television Corp* [1994] EMLR 1 at 10 (the court observed that "criticism and review of a work already in the public domain … would seldom if ever be rendered unfair because of the method by which the copyright material had been obtained" and found that the fact that the plaintiff's film was available for purchase in shops weighed against fair dealing).

57 *Beloff v Pressdram* [1973] FSR 33 at 62; *Hyde Park Residence v Yelland* [2001] Ch 143 at 158–159.

his undisseminated expression".[58] The underlying concern in affording unpublished works additional protection is one of fairness as:[59]

> … it would be manifestly unjust that an unpublished literary work should, without the consent of the author, be subject of public criticism, review or newspaper summary.

16 A related issue of how the work was obtained is often considered together with unpublished works. Here, "the absence of consent … [is] an important factor in deciding whether there has been 'a fair dealing'".[60] This inquiry is closely linked to the fifth factor. As the courts' reasoning in *Beloff v Pressdram*[61] and *Commonwealth v John Fairfax*[62] indicates, despite the impossibility for the defendant to obtain the work because of the lack of consent, the fifth factor nonetheless weighs against fair dealing. Another dimension to this factor that rarely features in case law is the relative susceptibility of the work to unfair dealings.[63] Here, greater protection should be accorded to works that are highly creative in nature.[64]

C. Amount and substantiality

17 Frequently raised in case law, the starting point of this analysis is to:[65]

> … consider first the number and extent of the quotations and extracts. Are they altogether too long and too many to be fair? … To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair.

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58 This was a point made in the US decisions: *eg*, *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 555 (1985) and *Monge v Maya Magazines* 688 F 3d 1164 at 1177 (9th Cir, 2012).

59 *British Oxygen v Liquid Air* [1925] 1 Ch 383 at 393, *per* Romer LJ.

60 *Commonwealth v John Fairfax & Sons* (1980) 32 ALR 485 at 495; *Hyde Park Residence v Yelland* [2001] Ch 143 at 159; *Queensland v TCN Channel Nine* (1992) 25 IPR 58 at 63; *Beloff v Pressdram* [1973] FSR 33 at 62.

61 [1973] FSR 33.

62 (1980) 32 ALR 485.

63 Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002) at para 11.35.

64 Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002). See also *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 586 (1994):

> This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.

65 *Hubbard v Vosper* [1972] 2 QB 84 at 94; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 302; *Associated Newspapers Group plc v News Group Newspapers* [1986] RPC 515 at 518.

However, the quantity taken does not resolve the matter as the quality of the part taken is equally important.[66] Another consideration is the necessity of the taking to achieve the defendant's purpose.[67] Where more is taken than is necessary, the factor tends to weigh against fair dealing.[68]

D. Effect on market

18 Although UK and Australian cases do not use the label "effect or consequence of the dealing",[69] the equivalent of this factor is considered under the rubric of preventing unfair competition and unjust enrichment.[70] In a strongly worded statement, Lord Denning succinctly captured the crux of this factor, observing that "[i]t is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit".[71] The court's ultimate concern is to ensure that defendants do not "reap where they have not sown, and to take advantage of the labour and expenditure of the Plaintiffs … for the purpose of saving labour and expense to themselves".[72] However, where the defendant's work has a different purpose or character from the original, this factor is less likely to weigh against fair dealing.[73]

66 *Time Warner Entertainment v Channel Four Television Corp* [1994] EMLR 1 at 12–13; *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 150; *Hawkes & Son (London) v Paramount Film Service* [1934] 1 Ch 593.

67 *Hyde Park Residence v Yelland* [2001] Ch 143 at 159; *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 150. See also Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th Ed, 2014) at para 2.1.7 (the authors label this point as "Could the purpose have been achieved by different means?").

68 *Hyde Park Residence v Yelland* [2001] Ch 143 at 159; *British Oxygen v Liquid Air* [1925] 1 Ch 383 at 393.

69 "Effect of the dealing" is the terminology used in both s 35(2) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) and s 40(2) of the Australian Copyright Act 1968. Bently and Sherman refer to this factor as "consequences of the dealing": see Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th Ed, 2014) at para 2.1.3.

70 See, for example, *University of London Press, Ltd v University Tutorial Press, Ltd* [1916] 2 Ch 601 at 614 (the use was unfair since the defendant had copied the plaintiff's work and sold them in the same market for the same group of students); *Walter v Steinkopff* [1892] 3 Ch 489 at 498 (the dealing was unfair because the parties were in competition and the defendant had copied wholesale the plaintiff's work for the very purpose which was used by the plaintiffs); and *Scott v Stanford* (1867) LR 3 Eq 718 at 723–724 (the dealing was unfair since the plaintiff was injured because the defendant was selling the infringing work at a lower price as the plaintiff to the same market).

71 *Hubbard v Vosper* [1972] 2 QB 84 at 93.

72 *Walter v Steinkopff* [1892] 3 Ch 489 at 495, *per* North J.

73 *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 157 and 159.

E. Possibility of obtaining the work

19 Hitherto, case law sheds little light on the application of the fifth factor. The three cases that considered this factor did so in the context of unpublished works where the courts found the fifth factor to weigh against fair dealing.[74] Nonetheless, ss 45, 48, 52, 54 and 113 of the Singapore Copyright Act support the suggestion that the fifth factor operates to prevent copyright users from copying a copyrighted work if the work is readily available for purchase.[75] These sections, which permit copying for particular purposes under certain circumstances, stipulate that copying is impermissible "*unless* … after reasonable investigation … the work cannot be obtained within a reasonable time at an ordinary commercial price" [emphasis in original].[76] Interpreting the fifth factor consistently with these other provisions, it seems to be a requirement for the defendant to conduct reasonable investigations to determine the possibility of obtaining the work; where there is no possibility of doing so, the factor weighs in favour of fair dealing.[77] Procedurally, this could be a problematic factor – if courts choose to interpret this factor as a requirement that the infringer should have at least made some effort to request for a licence – as high search and transaction costs would be incurred for what otherwise might be a permissible activity.[78]

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74 See para 16 above.

75 *Report of the Select Committee on the Copyright Bill (Bill No 8/86)* (Parl 9 of 1986, 22 December 1986) (Chairman: Dr Yeoh Ghum Seng) at A87–88, B56 and D11; Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002) at para 11.35.

76 See the following provisions of the Singapore Copyright Act (Cap 63, 2006 Rev Ed): s 45(5) (copying by libraries and archives for users); s 48(3) (copying of works for preservation and other purposes); ss 52(5) and 52(7B) (multiple copying or communication under statutory licence by educational institutions); ss 54(3), 54(4), 54(5) and 54(6) (multiple copying under statutory licence by institutions assisting handicapped readers); and s 113(3) (copying of sound recordings and cinematograph films for preservation and other purposes).

77 Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2nd Ed, 2014) at para 11.3.33 (giving the example of an out-of-print book, where this factor should weigh in favour of fair dealing).

78 In particular, Peter Jaszi is opposed to the inclusion of such a factor. He further contends that:

> … in daily life, [fair use is] experienced as an important positive right by readers and publishers, movie companies and remix artists, tech giants, start-up innovators, teachers, developers of educational materials, artists, scholars, librarians, filmmakers and a long list of other contributors to the condition of 'cultural flourishing' that our copyright system exists to support.

United States, House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, *Fair Use Now* (Testimony of Peter Jaszi, Hearing on "The Scope of "Fair Use") (28 January 2014), available at <http://judiciary.

(*cont'd on the next page*)

F. Interim conclusions

20 It is often said that the fairness of dealing is "a question of degree and impression".[79] Despite the authors' extensive review of UK and Australian case law, it is conceded that there are limitations to the usefulness of UK and Australian jurisprudence in interpreting s 35(2). First, because there is no fixed list of statutory fairness factors in the UK, English courts may consider only the factors that judges think are relevant to the case at hand.[80] Consequently, it is impossible to discern the interrelationship between the five fairness factors. Second, while s 40(2) of the Australian CA prescribes a fixed list of factors identical to s 35(2) of the Singapore Copyright Act,[81] Australian cases are unhelpful because the dealing in all the cases had fallen outside the scope of permitted purposes and the judicial discussion on fairness was *obiter* without serious consideration on the interpretation and interplay between the factors.[82] However, the lack of guidance from the Singapore

house.gov/_cache/files/496f0a48-1c95-4f88-aabf-9a98b0b22aa7/012814-testimony--jaszi.pdf> (accessed December 2015).

79 Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th Ed, 2014) at para 2.1; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 302; *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 148–149; *Sillitoe v McGraw-Hill Book Co* [1983] FSR 545 at 563; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12; *Beloff v Pressdram* [1973] FSR 33 at 61; *Hubbard v Vosper* [1972] 2 QB 84 at 94.

80 Copyright, Designs and Patents Act 1988 (c 48) (UK) ss 29 and 30.

81 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2); Copyright Act 1968 (Cth) ss 40(2) and 103C.

82 See *Queensland v TCN Channel Nine* (1992) 25 IPR 58; *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292; and *Commonwealth v John Fairfax & Sons* (1980) 32 ALR 485. See also Emily Hudson, "Implementing Fair Use in Copyright Law: Lessons from Australia" (2013) 25 IPJ 201 (observing that there has not been a great deal of fair dealing case law in Australia); Mark J Davison, Ann L Monotti & Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 2nd Ed, 2012) at p 307, fn 348 (the authors note that the operation and scope of fair dealing is rarely tested in Australia); Graeme W Austin, "Four Questions about the Australian Approach to Fair Dealing Defences to Copyright Infringement" (2010) 57 J Copyright Soc'y USA 611 at 617 (suggesting that there is no clear ruling in the leading case of *TCN Channel Nine v Network Ten* (2004) 218 CLR 273 because of the significant disagreement between the judges on whether the dealing was fair and whether it fell within a permitted purpose); Nicolas Suzor, "Where the Bloody Hell Does Parody Fit in Australian Copyright Law?" (2008) 13 MALR 219 at 224 (author observes that "the question of 'fairness' was to a large extent overlooked at both first instance and on appeal to the Full Federal Court" in *TCN Channel Nine v Network Ten* [2001] FCA 108 and *TCN Channel Nine v Network Ten* (2002) 118 FCR 417 respectively); and Peter Brudenall, "Fair Dealing in Australian Copyright Law: Rights of Access under the Microscope" (1997) 2(2) UNSWLJ 433 at 448 (author similarly laments the lack of relevant case law in Australia).

Court of Appeal on the interplay of the s 35(2) fairness factors has resulted in a gaping chasm in fair dealing in Singapore.[83]

IV. US approach to fair use

21 Understanding US fair use jurisprudence is useful in enlightening the interpretation of fair dealing in Singapore. As one of the present authors had observed, Singapore's fair dealing provision is not only "strikingly similar" to the US fair use provision, but Singapore courts have shown a willingness to consider US jurisprudence in other aspects of copyright law.[84] Admittedly, US fair use has a "built-in First Amendment accommodation",[85] to which Singapore has no equivalent.[86] However, US authorities remain persuasive because even before the 2004 amendment, which brought Singapore fair dealing closer to the US model,[87] the Singapore High Court had already considered US decisions

83 *Cf RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at [95]–[110] (the court applied the fair dealing factors with reference to US case law but without consideration of the English and Australian positions). In any event, this case does not represent the current state of law in Singapore as it was overturned on appeal, albeit on different grounds: see *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

84 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 837–838. See, for example, *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [38] (the Singapore Court of Appeal cited the US case of *Feist Publications Inc v Rural Telephone Service Company Inc* 499 US 340 (1991) for four key principles in assessing copyright for compilations); *Creative Technology Ltd v Aztech Systems Pte Ltd* [1996] 3 SLR(R) 673 at [86]–[93] (the Singapore Court of Appeal relied on a string of US cases for guidance in interpreting s 39(3) of the Copyright Act (Cap 63, 2006 Rev Ed)); and *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [70] (the Singapore Court of Appeal adopted the reasoning in *Cartoon Network LP v CSC Holdings, Inc* 536 F 3d 121 (2nd Cir, 2008)).

85 *Eldred v Ashcroft* 527 US 186 at 219 (2002) ("*Eldred*"); *Golan v Holder* 132 S Ct 873 at 876 (2012) (court reaffirmed *Eldred* by ruling that the extension of copyright term did not offend First Amendment principles because the extension did not affect the idea/expression dichotomy and fair use defence, which served as built-in First Amendment accommodations); *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 560 (1985) (court observed that fair use is one of the "First Amendment protections already embodied in the Copyright Act"). See also David Tan, "The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the 'Transformative Use' Doctrine Twenty-five Years On" (2016) 26 Fordham Intell Prop Media & Ent LJ 311.

86 *Cf* Art 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

87 See para 9 above.

on whether "public interest" is a factor under s 35(2).[88] Moreover, US fair use has "its origins in English copyright law … [and] is the continuation of a long line of English fair abridgment cases" dating back to the Statute of Anne.[89] This part focuses on the "uniquely American"[90] transformative use doctrine that is embedded in the first factor and how this doctrine influences the application of the other factors. It, however, does not undertake the laborious yet unproductive effort of analysing all four factors since these are similar to that discussed under the UK and Australian approach.[91]

A. The "transformative use" doctrine

22 The transformative use doctrine, which "lie[s] at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright",[92] was found to "exert nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use

88 *Aztech Systems Pte Ltd v Creative Technology Ltd* [1995] 3 SLR(R) 568 at [60]–[64] (court first noted the similarities between s 35(2) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) and the US fair use provision and proceeded to consider *Sega Enterprises Ltd v Accolade, Inc* 977 F 2d 1510 (9th Cir, 1992) and *American Geophysical Union v Texaco* 60 F 3d 913 (2nd Cir, 1995) favourably).

89 Matthew Sag, "The Prehistory of Fair Use" (2011) 76 Brook L Rev 1371 at 1371–1373; Matthew Bunker & Clay Calvert, "The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after *Campbell v Acuff-Rose Music*" (2014) 12 Duke L & Tech Rev 92 at 96. For early 19th-century copyright cases citing English precedents, see *Folsom v Marsh* 9 F Cas 342 (CCD Mass, 1841); *Wheaton v Peters* 33 US 591 (1834); *Clayton v Stone* 5 F Cas 999 (CCSDNY, 1829); *Ewer v Coxe* 8 F Cas 917 (CCED Pa, 1824); and *Binns v Woodruff* 3 F Cas 421 (CCD Pa, 1821).

90 Paul Goldstein, "Fair Use in Context" (2008) 31 Colum JL & Arts 433 at 433.

91 US Copyright Act 17 USC § 107. Section 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

92 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994), *per* Souter J (unanimous court); *Sony Corp of America v Universal Studios, Inc* 464 US 417 at 478–480 (1984), *per* Blackmun J (dissenting).

test".[93] This inquiry forms part of the "purpose and character of the use" factor and asks:[94]

> … whether the new work merely 'supersedes the objects' of the original creation, or instead adds something new, with a *further purpose or different character*, altering the first with *new expression, meaning or message* … in other words, whether and to what extent the new work is *transformative*. [emphasis added]

While the court recognised that:[95]

> … transformative use is not absolutely necessary for a finding of fair use … *the more transformative the new work, the less will be the significance of other factors*, like commercialism, that may weigh against a finding of fair use. [emphasis added]

23 Despite the *Campbell* formulation:[96]

> … [t]he plethora of cases addressing this topic means that there is no shortage of language from other courts elucidating (or obfuscating) the meaning of transformation.

This undoubtedly contributed to the criticism of the entire fair use doctrine as US copyright law's "most nebulous and unpredictable aspects",[97] which has led to "highly idiosyncratic results".[98] From a more

93 Barton Beebe, "Empirical Study of the US Copyright Fair Use Opinions, 1978–2005" (2008) 156 U Pa L Rev 549 at 584 and 605; Matthew Sag, "Predicting Fair Use" (2012) 73 Ohio St LJ 47 at 76 and 84 (measuring the impact of transformative use in terms of "creative shift", it was found that the creative shift variable was "statically significant in each of the five models" and "is a robust predictor of a finding of fair use"); David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 840 ("the transformative test has become the defining standard for fair use, and has risen to the top of the agenda of the copyright community in the US in the last five years"); Neil Weinstock Netanel, "Making Sense of Fair Use" (2011) 15 Lewis & Clark L Rev 715 at 755. *Cf Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 566 (1985) (the court declared the last factor of effect on the market to be "undoubtedly the single most important element of fair use").

94 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994), *per* Souter J (unanimous court); Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1111.

95 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994).

96 *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1176 (9th Cir, 2013), *per* O'Scannlain J.

97 J Thomas McCarthy, *The Rights of Publicity and Privacy* (Clark Boardman Callagan, 2nd Ed, 2000) at § 8:38; David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 843 ("[i]ndeed, the transformative use doctrine in the first factor of fair use is a difficult one to elucidate"); Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (2) 82 Colum L Rev 1600 at 1602–1603 ("the fair use doctrine … has been called 'the most troublesome in the whole law of

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charitable perspective, Pam Samuelson contends that fair use is "more coherent and more predictable than many commentators have perceived".[99]

24 The present judicial language used in defining transformativeness falls into three categories.[100] The first and most liberal definition is spearheaded by the Second Circuit Court of Appeals, with recent support from the Ninth Circuit. Under this formulation, secondary works are transformative if:[101]

> … the secondary use adds value to the original – if [the original expression] is used as raw material, transformed in the creation of *new information, new aesthetics, new insights and understandings*. [emphasis added]

copyright,' and has traced a quicksilver course of judicial development"); Matthew Bunker & Clay Calvert, "The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after *Campbell v Acuff-Rose Music*" (2014) 12 Duke L & Tech Rev 92 at 94 (the authors describe the tremendous uncertainty created by the transformative use doctrine as "something close to the *sine qua non* in fair use cases").

98 Kim Landsman, "Does *Cariou v Prince* Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence?: A Plea for a Neo-traditional Approach" (2014) 24 Fordham Intell Prop Media & Ent LJ 321 at 323 ("[t]ransformative use has … failed to provide the hoped-for consistent governing principles. It has, to the contrary, led courts to highly idiosyncratic results").

99 Pamela Samuelson, "Unbundling Fair Uses" (2009) 77 Fordham L Rev 2537 at 2541. See also Matthew Sag, "Predicting Fair Use" (2012) 73 Ohio St LJ 47 at 47, 49 and 51 (noting that fair use has "consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims"); David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 846–848.

100 See also Matthew Bunker & Clay Calvert, "The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after *Campbell v Acuff-Rose Music*" (2014) 12 Duke L & Tech Rev 92 (authors identify three models of transformative use: namely, (a) transformation as new insights; (b) transformation as creative metamorphosis; and (c) transformation as new purpose).

101 *Cariou v Prince* 714 F 3d 694 at 706 (2nd Cir, 2013); *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1177 (9th Cir, 2013) (Green Day's use of the Scream Icon was transformative as it was used as "raw material" in the construction of the four-minute video backdrop); *Blanch v Koons* 467 F 3d 244 at 252 (2nd Cir, 2006). The courts have essentially adopted Pierre Leval's formulation articulated over two decades ago: see Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1111.

Under the second formulation:[102]

> … a transformative work is one that *serves a new and different function* from the original work and is not a substitute for it. [emphasis added]

The third and most restrictive interpretation stems potentially from a misreading of *Campbell*,[103] whereby some courts would find transformativeness if the secondary work:[104]

> … [makes] use of some elements of a prior author's composition to create a new one that … *comments on that author's works*. [emphasis in original]

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102 *Authors Guild v Google, Inc* 804 F 3d 202 at 216–218 (2nd Cir, 2015); *Authors Guild v HathiTrust* 755 F 3d 87 at 96 (2nd Cir, 2014); *Bouchat v Baltimore Ravens, LP* 737 F 3d 932 at 939 (4th Cir, 2013); *Vanderhye v iParadigms, LLC* 532 F 3d 630 at 638 (4th Cir, 2009); *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1165 (9th Cir, 2007) (the court found Google's use of the images to be highly transformative since it has transformed the function of the image from entertainment into "a pointer directing a user to a source of information"); *Kelly v Arriba Soft Corp* 336 F 3d 811 at 819 (9th Cir, 2003) (the court found Arriba's use of thumbnails to be transformative since "Arriba's use of the images serve[d] a different function than Kelly's use – improving access to information on the internet *versus* artistic expression"); *Castle Rock Entertainment, Inc v Carol Publishing Group, Inc* 150 F 3d 132 at 142 (2nd Cir, 1998) (court found the defendant's Seinfeld trivia quiz book to have little or no transformative value because it was merely "to repackage Seinfeld to entertain Seinfeld viewers"); Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1111.

103 See also David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 844–845, contending that:

> … if Congress had intended to impose a requirement that all secondary works must comment, it would have done so by adding a comment requirement as a conjunctive element, or by exclusively providing that only those activities listed in section 107 can qualify as fair use.

104 *Murphy v Millennium Radio Group, LLC* 650 F 3d 295 at 307 (3rd Cir, 2011):

> [N]o similar broader news coverage or editorial commentary existed in this case … [t]he absence of any broader commentary significantly undercuts the Station Defendants' argument that their use gave any new meaning to the Image.

See also *Cariou v Prince* 784 F Supp 2d 337 at 348–349 (SDNY, 2011) (decision was reversed on appeal to the Second Circuit); *Gaylord v US* 595 F 3d 1364 at 1373 (Fed Cir, 2010) (there was no transformation because "the stamp did not use The Column as part of a commentary or criticism"); and *Sundeman v The Seajay Society, Inc* 142 F 3d 194 at 202–203 (4th Cir, 1998), where the defendant's work was transformative because the work:

> … attempted to shed light on Rawlings' development as a young author, review the quality of *Blood of My Blood*, and comment on the relationship between Rawlings and her mother … its purpose is to criticize and comment on Ms Rawlings' earliest work.

However, more recently, other Circuit Courts have cast scepticism or have downplayed the importance of the transformative use doctrine.[105]

25 The transformative use doctrine, as illustrated, demonstrates that "the law in this area is splintered"[106] with each formulation presenting different and potentially incompatible touchstones.[107] However, differences between the first and second formulations can be rationalised on the basis that the first formulation represents the general fair use test for expressive uses whereas the second is an alternative for non-expressive cases, where "new aesthetics, new insights and understandings" are not necessarily created, but a new purpose has been found for the original work.[108] For instance, applying the first formulation rigidly to the facts of *Perfect 10, Inc v Amazon.com, Inc*[109] ("*Perfect 10*") "would stifle the very creativity which [copyright] is designed to foster",[110] since the thumbnails of copyrighted photos served "considerable public benefit" by "enhancing an individual's computer use" whilst not creating new information, aesthetics, insights or understandings.[111] Instead, since fair use "permits and requires courts to avoid rigid application",[112] the second formulation was developed such that works generating considerable public benefit through "serv[ing] a new and different function from the original" are protected.[113]

105 *Kienitz v Sconnie Nation* 766 F 3d 756 at 758 (7th Cir, 2014); *Cambridge University Press v Sage Publications* 769 F 3d 1232 at 1283 (11th Cir, 2014); *Diversey v Schmidly* 738 F 3d 1196 at 1203 (10th Cir, 2013).

106 *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1177 (9th Cir, 2013).

107 Matthew Bunker & Clay Calvert, "The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after *Campbell v Acuff-Rose Music*" (2014) 12 Duke L & Tech Rev 92 at 125–126.

108 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 844.

109 508 F 3d 1146 (9th Cir, 2007).

110 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577 (1994); *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1163 (9th Cir, 2007).

111 *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 291 (SDNY, 2013) (Google had not created new aesthetics, new insights and understandings; rather, it had "created something new in the use of book text … allow[ing] for the creation of new information, new aesthetics, new insights and understandings"); *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1169 (9th Cir, 2007) ("*Perfect 10*") (the search engine's use of the images did not "add value to the original" since the original photographs were used without adding any artistic expression or recontextualisation); *Kelly v Arriba Soft Corp* 336 F 3d 811 at 819 (9th Cir, 2003) (facts are highly similar to that of *Perfect 10*).

112 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577 (1994); *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1163 (9th Cir, 2007).

113 See also *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 293 (SDNY, 2013):

> Google Books provides significant public benefits … It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability,

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Nevertheless, it is crucial to observe that these two formulations are not mutually exclusive but may be applied together in appropriate cases.[114]

B. The relationship between transformativeness and the other factors

26 The relationship between the "transformative use" doctrine and the other factors can be illustrated by analysing the decision in *Cariou*. After finding transformativeness, the court downplayed the significance of the other factors such that transformativeness single-handedly determined the outcome of the case. Not only did the court "not place much significance to [commerciality]",[115] it also found the nature of the work to be of "limited usefulness … [since] the creative work of art is being used for a transformative purpose".[116] Similarly, the amount and substantiality factor turned heavily on transformative use, as it "must take into account that the extent of permissible copying varies with the purpose and character of the use".[117] Unsurprisingly, this factor turned in the appropriation artist Richard Prince's favour.[118] Finally, transformativeness also influenced the fourth factor since:[119]

> for the first time, to conduct full-text searches in tens of millions of books. … Indeed, all society benefits.

See also *Kelly v Arriba Soft Corp* 336 F 3d 811 at 942 (9th Cir, 2003) ("this first factor weighs in favour of Arriba due to the public benefit of search engine and the minimal loss of integrity to Kelly's images").

114 See, *eg*, *North Jersey Media Group, Inc v Pirro & Fox News Network, LLC* 13 Civ 7153 (ER) (SDNY, 2014) at [11] and *Society of the Holy Transfiguration Monastery v Gregory* 689 F 3d 29 at 60 (1st Cir, 2012).

115 *Cariou v Prince* 714 F 3d 694 at 708 (2nd Cir, 2013).

116 *Cariou v Prince* 714 F 3d 694 at 710 (2nd Cir, 2013); *Bill Graham Archives v Dorling Kindersley Ltd* 448 F 3d 605 at 612 (2nd Cir, 2006).

117 *Cariou v Prince* 714 F 3d 694 at 710 (2nd Cir, 2013); *Bill Graham Archives v Dorling Kindersley Ltd* 448 F 3d 605 at 613 (2nd Cir, 2006).

118 *Cariou v Prince* 714 F 3d 694 at 710 (2nd Cir, 2013); *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1178 (9th Cir, 2013):

> … this factor necessarily overlaps somewhat with the first factor – the extent of permissible copying varies with the purpose and character of the use. Here … the use of the entire work was necessary to achieve Green Day's 'new expression, meaning or message'.

119 *Cariou v Prince* 714 F 3d 694 at 709 (2nd Cir, 2013), citing *Castle Rock Entertainment, Inc v Carol Publishing Group, Inc* 150 F 3d 132 at 145 (2nd Cir, 1998):

> [The effect on the market is not centred around] whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps or substitutes* for the market of the original work. The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original. [emphasis in original]

See also *Sony Computer Entertainment, Inc v Connectix Corp* 203 F 3d 596 at 607 (9th Cir, 2000): "Whereas a work that merely supplants or supersedes another is

(*cont'd on the next page*)

> … the more transformative the secondary use, the less likelihood that the secondary use substitutes for the original, even though the fair use … might well harm, or even destroy the market for the original.

In other words, a transformative work is deemed to appeal to a different consumer market compared to the original work.

27 The Second Circuit's decision in *Cariou* provides clarity to the relationship between transformative use and the other factors (albeit with much academic disagreement as to the correctness of privileging transformative use), and confirms the findings of academics that transformative use is determinative of the outcome of the fair use test.[120] However, over at the Seventh Circuit, Easterbrook J had expressed scepticism over *Cariou*'s approach "because asking exclusively whether something is 'transformative' not only replaces the list in §107 but also could override 17 USC § 106(2), which protects derivative works".[121]

C. Interim conclusions

28 Studying US fair use jurisprudence is useful in elucidating the interplay between the fairness factors. Despite this doctrine being described as a "built-in First Amendment accommodation", there is little indication from US cases on how the First Amendment impacts fair use.[122] Further, the notion of transformation is not foreign to UK and Australian jurisprudence as there is judicial recognition that original contribution or a change in purpose weighs in favour of fair dealing.[123] Thus, given the "strikingly similar" statutory provisions and the similarities in US, UK and Australian jurisprudence in the first factor,

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likely to cause a substantial adverse impact on the potential market of the original, a transformative work is less likely to do so."

120 See para 22 above.

121 *Kienitz v Sconnie Nation* 766 F 3d 756 at 758 (7th Cir, 2014). *Contra* William F Patry, *Patry on Copyright* vol 4 (West, Online, 2015) at §10:21 (the author disagrees with Easterbrook J's criticism on the transformative use doctrine on two grounds: first, that fair use and the right to prepare derivative works ought to be distinguished; and second, *Campbell v Acuff-Rose Music, Inc* 510 US 569 had not intended the transformative use concept "to swallow up all of the fair use analysis – after all, when used, it only applies to the first factor").

122 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 849; Emily Hudson, "Implementing Fair Use in Copyright Law: Lessons from Australia" (2013) 25 IPJ 201 at 217–218 (arguing that the transformative use doctrine is persuasive in Australia despite the absence of a First Amendment guarantee since an "analysis of fair use cases does not seem to suggest that freedom of speech concerns are ventilated by reference to some free-standing constitutional argument" and that Australian courts have previously drawn on US copyright cases, including fair use cases).

123 See para 13 above.

the US transformative use doctrine could be highly persuasive in interpreting the first fair dealing factor in Singapore's s 35(2).[124]

V. AN AUTOCHTHONOUS APPROACH

29 In interpreting s 35(2), it is important to recognise that Parliament had carefully calibrated the five factors to "create an environment conducive to the development of creative works, and also facilitate greater investment, research and development in copyright industries in Singapore".[125] While formulating bright-line rules are neither possible nor prudent given the fact-specific nature of fair dealing,[126] general principles nonetheless are useful in guiding the court's reasoning process and maintaining a degree of certainty and predictability. Crucially, in applying s 35(2), the five factors should not be treated in isolation from one another; instead, all are to be examined and weighed together in light of the policy objectives of Singapore's copyright law.[127]

A. Purpose and character[128]

30 The first factor "raises the question of justification … [whether] the use fulfil[s] the objective of copyright law to stimulate creativity for public illumination".[129] In Singapore, this justification extends beyond stimulating creativity to facilitating greater investment, research and development.[130] Appreciating the nuances of Singapore's copyright policy, it is submitted that the US transformative use doctrine could play a role in interpreting this factor,[131] albeit with some modifications and without privileging its status over the other factors. While the

124 See para 23 above.

125 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law) (Parliament commissioned a study which considered jurisdictions including the UK, Australia, Canada, Germany, France and the US).

126 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577 (1994); *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12; *Hubbard v Vosper* [1972] 2 QB 84 at 94.

127 See *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 578 (1994).

128 The legislative provision states: "the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes": Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*a*).

129 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1111.

130 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law).

131 See para 13 above. See also Matthew Sag, "The Prehistory of Fair Use" (2011) 76 Brook L Rev 1371 at 1407 (author observes that "the distance between [transformative use] and the views of the early English copyright courts may be narrower than an input-output dichotomy suggests").

transformative use doctrine may arguably be incompatible in Singapore because it is imbued with First Amendment influences,[132] very few US decisions have actually referred to the First Amendment in analysing fair use.[133] As Tan argues, it would be appropriate for Singapore courts to refer to US decisions in analogous cases.[134]

31 Bearing in mind that "IP statutes should be interpreted in light of their historical origins and sociolegal context",[135] it must first be recognised that adopting the transformative use doctrine does not depart from the UK and Australian historical moorings of Singapore's Copyright Act, since similar principles are recognised in these jurisdictions.[136] The US approach is preferred because the principles are more clearly enunciated and better developed through the sheer volume of cases.[137] Second, since fair dealing is "a quintessentially pragmatic doctrine" which must be applied in its sociolegal context,[138] appreciating that the bulk of Singapore's copyright industries are non-expressive in nature helps shape the focus of the autochthonous approach.[139]

32 Against this backdrop, the first factor should principally be concerned with the second formulation of the "transformative use"

132 See para 21 above. See also David Tan, "The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the 'Transformative Use' Doctrine Twenty-five Years On" (2016) 26 Fordham Intell Prop Media & Ent LJ 311.

133 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 835.

134 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832.

135 Burton Ong, "Interpreting Intellectual Property Statutes in Singapore: What Are the Limits of Judicial Creativity?" (2012) 24 SAcLJ 1020 at 1058.

136 See para 13 above and Graeme W Austin, "Four Questions about the Australian Approach to Fair Dealing Defences to Copyright Infringement" (2010) 57 J Copyright Soc'y USA 611 at 628 (commenting that "the distinctions between the Australian fair dealing and the US fair use approaches do not seem particularly sharp").

137 Barton Beebe, "Empirical Study of the US Copyright Fair Use Opinions, 1978–2005" (2008) 156 U Pa L Rev 549 at 564 (the author observes that over 300 fair use cases have been decided in the US between 1978 and 2005). *Contra* Emily Hudson, "Implementing Fair Use in Copyright Law: Lessons from Australia" (2013) 25 IPJ 201 at 215 (the author remarks that there has not been a great deal of fair dealing case law in Australia).

138 Paul Goldstein, "Fair Use in Context" (2008) 31 Colum JL & Arts 433 at 438; Burton Ong, "Interpreting Intellectual Property Statutes in Singapore: What Are the Limits of Judicial Creativity?" (2012) 24 SAcLJ 1020 at 1058.

139 Chow Kit Boey *et al*, "Economic Contribution of Copyright-based Industries in Singapore: An Update" (IP Academy, 2006) (report shows that the computer and equipment and software and databases industries account for the greatest economic output and employment).

doctrine.[140] Since much of Singapore's copyright industries are non-expressive and "the law strives to encourage both creativity and innovation *for the common good*" [emphasis added],[141] significant public benefit is generated when fair dealing is found in these non-expressive industries.[142] Hence, where the dealing generates public benefit by "serv[ing] a new and different function from the original work and is not a substitute for it",[143] the "degree of transformativeness"[144] is at its greatest and the first factor should strongly favour fair dealing. This consideration of preserving the benefit accruing to the public is similarly encapsulated in local case law.[145]

33 Conversely, satisfying the first formulation not only fails to yield the same degree of public benefit, but may tilt the balance too far in favour of infringers, thus undermining Parliament's goal of "facilitat[ing] greater investment, research and development in copyright industries".[146] While acknowledging that such dealings are nonetheless transformative, the first factor should, however, not lean too strongly in favour of fair dealing since only half of Singapore's copyright policy is fulfilled.[147] In any event, it must be emphasised that these two categories serve only as rough guidelines and transformativeness should be measured along a spectrum.

34 Another facet of this factor is "whether such dealing is of a commercial nature or is for non-profit educational purpose".[148] It is widely accepted that commercial dealings "tend to weigh against a finding of fair use".[149] However, cases illustrate that commerciality is confined to "purely commercial" dealings or when the secondary user engages in "direct commercialisation of copyrighted works" without any appreciable transformation.[150] Put differently, the court would assess

140 See para 26 above.

141 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2].

142 Industry-specific protection in copyright was also apparent in the 1980s where Parliament identified the publishing industry as the primary beneficiary of improved copyright laws: *Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at col 14 (J B Jeyaretnam).

143 See para 26 above.

144 Laura A Heymann, "Everything is Transformative: Fair Use and Reader Response" (2008) 31 Colum J L & Arts 445 at 449.

145 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [69].

146 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law); Peter Jaszi, "Is There Such a Thing as Postmodern Copyright?" (2009) 12 Tul J Tech & Intell Prop 105 at 116.

147 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law).

148 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*a*).

149 *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 562 (1985).

150 *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 291 (SDNY, 2013); *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 298.

"the degree to which the new user exploits the copyright for commercial gain".[151]

35 The two considerations of transformativeness and commerciality must then be balanced internally to determine whether the first factor favours or weighs against fair dealing. However, weighing this factor overall in favour of fair dealing merely establishes that the dealing fulfils the objectives of copyright law and is justified.[152] It does not address the question of why the original creator should not be compensated when his work was used as "raw material" in the creation of the secondary work – an issue resolved under the fifth factor.[153]

B. Nature of the work[154]

36 The second factor, along with the remaining factors, "concerns itself with protecting the incentives of authorship"[155] and are factors "tending to negate a defence of fair [dealing]".[156] This factor "is the most easily and objectively determined"[157] as courts "recognise … a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative or factual compilations" and unpublished works receive greater protection than published works.[158]

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151 *Elvis Presley Enterprises, Inc v Passport Video* 349 F 3d 622 at 627 (9th Cir, 2003) ("the degree to which the new user exploits the copyright for commercial gain – as opposed to incidental use as part of a commercial enterprise – affects the weight we afford commercial nature as a factor"), cited approvingly in *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1178 (9th Cir, 2013).

152 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1111.

153 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*e*).

154 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*b*) (this factor calls for the consideration of "the nature of the work or adaptation").

155 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1116.

156 *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 551, 554 and 568 (1985).

157 Kim Landsman, "Does *Cariou v Prince* Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence?: A Plea for a Neo-traditional Approach" (2014) 24 Fordham Intell Prop Media & Ent LJ 321 at 372.

158 *Suntrust Bank v Houghton Mifflin Co* 268 F 3d 1257 at 1271 (11th Cir, 2001). For the US position, see *Cariou v Prince* 714 F 3d 694 at 719–720 (2nd Cir, 2013), citing *Blanch v Koons* 467 F 3d 244 at 256 (2nd Cir, 2006):

> We consider (1) whether the work is expressive or creative, … with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.

For the UK/Australian position, see *Beloff v Pressdram* [1973] FSR 33 at 62:

> The law by bestowing a right of copyright on an unpublished work bestows a right to prevent its being published at all; and even though an unpublished work is not automatically excluded from the defence of fair dealing, it is yet a

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37 However, Singapore courts should be wary of dismissing the usefulness of this factor upon a finding of transformativeness.[159] This limitation does not align with the legislative wording, which requires an analysis of the "nature of the work or adaptation".[160] Further, the rationale behind the US approach of privileging the first factor is not apparent from the decisions and is contrary to "the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that copyright seeks to encourage",[161] thus undermining Parliament's finely calibrated balance of incentivising development in copyright industries.[162]

38 With regard to unpublished works, Pierre Leval argues that an unpublished document "should be of small relevance unless it was created for or is on its way to publication".[163] However, Leval's position is untenable in the local context because of Singapore's inadequate privacy laws compared to those present in the US.[164] While Leval's view is not

much more substantial breach of copyright than publication of a published work.

159 *Cf Cariou v Prince* 714 F 3d 694 at 710 (2nd Cir, 2013); *Bill Graham Archives v Dorling Kindersley Ltd* 448 F 3d 605 at 612 (2nd Cir, 2006); and *Blanch v Koons* 467 F 3d 244 at 257 (2nd Cir, 2006).

160 Kim Landsman, "Does *Cariou v Prince* Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence?: A Plea for a Neo-traditional Approach" (2014) 24 Fordham Intell Prop Media & Ent LJ 321 at 373 (the author similarly argues that the second factor "should be rehabilitated to return to meaning and significance in fair use determination" and should not be so easily dismissed").

161 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1122 (Leval further contends that "the more the copyright matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification must favour the secondary user in order to earn a fair use finding"); Kim Landsman, "Does *Cariou v Prince* Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence?: A Plea for a Neo-traditional Approach" (2014) 24 Fordham Intell Prop Media & Ent LJ 321 at 373. Landsman argues that:

> … creative works should receive greater protection, and the statutory tilting toward greater protection for creative works should not be so easily dismissed with the statement that it is 'of limited usefulness where the creative work of art is being used for a transformative purpose.

162 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law).

163 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1122.

164 Other possible avenues of protection in Singapore may, depending on the circumstances of the case, include: (a) confidential information or trade secrets (*Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR(R) 540); and (b) the Personal Data Protection Act 2012 (Act 26 of 2012). *Cf* Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1119 (arguing that "the law of privacy … and not the law of copyright supplies such protection [to unpublished works]" and that protecting unpublished works under the rubric of copyright law "would use copyright to further secrecy and concealment instead of public illumination").

contrary to Parliament's objectives, the protection of an author's right to publication is important as a matter of upholding the equitable foundations of fair dealing.[165] This issue of whether the work is published or unpublished also affects the fifth factor.[166] Where the work is unpublished, the fifth factor should not weigh in favour of fair dealing in order to uphold the author's right to control when to first publish his or her work.[167]

C. Amount and substantiality[168]

39 "Boast[ing] the most settled and easily understood doctrine",[169] the principle behind this factor is that:[170]

> … the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as fair use.

This assessment of this factor must "take into account that the extent of permissible copying varies with the purpose and character of the use" and there is no blanket rule against copying an entire work when such copying is *reasonably necessary*.[171] This criterion of necessity informed

165 Matthew Sag, "The Prehistory of Fair Use" (2011) 76 Brook L Rev 1371 at 1373.

166 See, for example, *Queensland v TCN Channel Nine* (1992) 25 IPR 58 at 63 (the defendants made use of an unpublished work and White J opined that "the defendants will have real difficulty in maintaining the defence of fair dealing in the absence of consent").

167 See paras 16 and 17 above.

168 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*c*) ("the amount and substantiality of the part copied taken in relation to the whole work or adaptation").

169 Barton Beebe, "Empirical Study of the US Copyright Fair Use Opinions, 1978–2005" (2008) 156 U Pa L Rev 549 at 615.

170 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1122. See, for example, *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 564–565 (1985) (court found this factor to weigh against fair use although the secondary work only took 13% of the original, since that 13% was "essentially the heart of the book") and *Hawkes & Son (London) v Paramount Film Service* [1934] 1 Ch 593 at 605, 606 and 609, where all three judges found that the amount taken was substantial despite being only 20 seconds of a four-minute musical work since:

> … the part which has been taken … contain[s] what is the principal air of the 'Colonel Bogey' march – the air which every one who heard the march played through would recognise as being the essential air of the 'Colonel Bogey' march.

171 For the US position, see *Cariou v Prince* 714 F 3d 694 at 710 (2nd Cir, 2013), citing *Bill Graham Archives v Dorling Kindersley Ltd* 448 F 3d 605 at 613 (2nd Cir, 2006):

> Although neither our court nor any of our sister circuits has ever ruled that the copying of an entire work favours fair use, … courts have concluded that such copying does not necessarily weigh against fair use because *copying the entirety of a work is sometimes necessary* to make a fair use of the image. The third-factor inquiry must take into account that *the extent of permissible copying varies with the purpose and character of the use*. [emphasis added]

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by the first factor[172] achieves the balance in Singapore's copyright policy since it is "conducive to the development of creative works" for users to make use of pre-existing material while concurrently preserving the incentive structure by prohibiting excessive taking[173] – a consideration that influences the fourth factor analysis since the degree of copying affects the market for the original.[174]

D. Effect on the market[175]

40 Apart from subtle differences between the UK, Australian and US approaches,[176] the fourth factor generally seeks to uphold the incentive rationale that underpins copyright law by preventing unjust enrichment and harm to the original works,[177] thereby "facilitat[ing] greater investment, research and development in copyright industries in Singapore".[178] While US courts have defined "effects" to mean only

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See also *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 586–587 (1994) ("the enquiry will harken back to the first of the statutory factors, for … we recognize that the extent of permissible copying varies with the purpose and character of the use"). For the UK position, see *Hyde Park Residence v Yelland* [2001] Ch 143 at 159 (court made the finding that the extent of the use was *excessive*); *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 150 (court found that the quality and quantity of copyrighted work used was "consistent with the nature of a news report and to be no more than was reasonably requisite for a television news report of the result of an important match"); and *British Oxygen v Liquid Air* [1925] 1 Ch 383 at 393:

> I cannot see that it was *necessary* for the defendants, for the purposes of criticism, to have photographic copies of the work prepared, and to send one of those copies to a broker on the London Stock Exchange for perusal by him and by the defendants' jobber friends. [emphasis added]

172 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 586–587 (1994); Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1123.

173 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law).

174 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 587 (1994):

> The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives.

175 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*d*) (the factor calls for the consideration of "the effect of the dealing upon the potential market for, or value of, the work or adaptation").

176 The UK and Australian approaches focus on the unfair advantage the defendant obtains by using the plaintiff's work to the plaintiff's detriment: see para 18 above. The US approach focuses on the harm caused to the plaintiff because of the defendant's use: see *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 590 (1994) and *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 569 (1985).

177 Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1124–1125.

178 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law) (Parliament commissioned a

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negative effects caused to "the potential market for the original … [and] to the market for derivative works",[179] this approach fails not only to accord with the plain meaning of s 35(2)(*d*),[180] but also to give full effect to Singapore's legislative objectives. Instead, defining "effects" to include both positive and negative effects better serves Parliament's objectives since positive effects on the market for the original would certainly result in "greater investment, research and development".[181] Thus, this factor ought to weigh in favour of fair dealing when positive effects are generated.

41 However, courts have rightly limited the scope of harm to instances where the dealing "*usurps* the market of the original work" [emphasis in original], but not when the market for the original is suppressed or destroyed through critical reviews or parody.[182] This approach comports with Parliament's objectives by preserving the incentives of authorship while not stifling creativity and the public benefits that might accrue through the creation of new works. Furthermore, it is noteworthy that proof of positive or negative effects is

study which considered jurisdictions including the UK, Australia, Canada, Germany, France and the US).

179 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 590 (1994).

180 David Fagundes, "Market Harm, Market Help, and Fair Use" (2014) 17 Stan Tech L Rev 359 at 362:

> Plainly, an 'effect' can be positive or negative, and 'value' can increase or decrease. Nothing in the statute's language limits judicial consideration to a particular kind of effect on the value of or market for a work.

181 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law); David Fagundes, "Market Harm, Market Help, and Fair Use" (2014) 17 Stan Tech L Rev 359 at 386:

> … approaching factor four analysis from the perspective of net economics effect would enable a richer and more complete consideration of the market impact of unlicensed use than the one-sided market-harm version of this calculus that currently prevails.

See, for example, *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 293 (SDNY, 2013) (Chin J weighed the fourth factor strongly in favour of fair use since Google Books not only does not usurp the market for the original, but "enhances the sales of books to the benefit of copyright holders") and David Tan, "What Do Judges Know about Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law" (2011) 16 MALR 381 at 390 (suggesting that the fourth factor could have weighed in favour of fair dealing for different reasons provided by the courts on the basis that "the value of Cariou's photographs are likely to be significantly enhanced rather than diminished by their association with Prince's Canal Zone series").

182 *Cariou v Prince* 714 F 3d 694 at 708 (2nd Cir, 2013), citing *Blanch v Koons* 467 F 3d 244 at 258 (2nd Cir, 2006); *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 593 (1994) ("the only harm to derivatives that need concern us … is the harm of market substitution"); Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1125 (author argues that certain types of market harms, in particular those brought about by critical reviews, are not relevant to the fair use determination).

not limited to actual effects or effects caused by the defendant's individual conduct, but extends to potential effects and the "[effects] caused by … unrestricted and widespread conduct of the sort engaged in by the defendant".[183]

42 A criticism of this factor relates to parody cases where courts assume that no licensing market exists because of "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions",[184] thus weighing the factor in favour of fair use. However, this approach does not reflect reality, since authors are increasingly willing to license ridicule or create self-parodies.[185] It is therefore important that Singapore courts undertake an analysis of whether such a market actually exists or is likely to exist in order to effectively protect the incentives of authorship[186] and "the existence [or non-existence] of this potential market cannot be presumed".[187] This

183 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 593 (1994); *Sony Corp of America v Universal Studios, Inc* 464 US 417 at 451 (1984) (where no actual harm is caused, "what is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists").

184 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 592 (1994) ("[y]et, the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their very own productions removes such uses from the very notion of a potential licensing market"); *Mattel, Inc v Walking Mountain Productions* 353 F 3d 792 at 806 (9th Cir, 2003) ("[w]e think it safe to assume that Mattel will not enter such a market or license others to do so"); *Mattel, Inc v Pitt* 229 F Supp 2d 315 at 324 (SDNY, 2002):

> … the dolls do not appear to pose any danger of usurping demand for Barbie dolls in the children's toys market. The sale or display or 'adult' dolls does not appear to be a use Mattel would likely develop or license others to develop.

185 Kim Landsman, "Does *Cariou v Prince* Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence?: A Plea for a Neo-traditional Approach" (2014) 24 Fordham Intell Prop Media & Ent LJ 321 at 375 (the author argues that "the assumption that no one would be willing to license ridicule needs to be challenged"); Alex Kozinski & Christopher Newman, "What's So Fair about Fair Use?" (1999) 46 J Copyright Soc'y USA 513 at 525 (authors argue that "people do write with the goal of being parodied, indirectly – because they write with the goal of becoming the kind of success that attracts parody"). For examples of self-parodies, see Kenneth Turan, "'Enchanted,' a Spellbinding Self-parody from Disney" *National Public Radio* (23 November 2007) and Daniel Ferreras Savoye, *The Signs of James Bond: Semiotic Explorations in the World of 007*, (McFarland, 2013) at pp 143–144 (author explains that parodies in the James Bond films appeared since the 1960s and are infused as part of the original work). For examples of artists licensing ridicule, see "Weird Al" Yankovic, "FAQ", available at <http://weirdal.com/archives/faq> (last accessed 10 June 2015).

186 Kim Landsman, "Does *Cariou v Prince* Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence?: A Plea for a Neo-traditional Approach" (2014) 24 Fordham Intell Prop Media & Ent LJ 321 at 375 (observing that whether a market exists "should be a factual determination in the individual case rather than assumed").

187 *Lewis Galoob Toys, Inc v Nintendo of America, Inc* 964 F 2d 965 at 972 (9th Cir, 1992).

approach departs from American orthodoxy which elevates transformativeness over the other factors.[188]

43 As mentioned earlier, this fourth factor is influenced by transformative use, which renders market substitution less certain, and market harm not so readily inferred.[189] However, the greater the quantity or quality taken (third factor) may indicate that the secondary work serves as a market substitute, weighing this factor against fair dealing.[190]

E. Possibility of obtaining the work[191]

44 Despite the lack of cases interpreting this factor,[192] insights on how Singapore courts ought to approach this fifth fairness factor may be gleaned from the other provisions of the Singapore Copyright Act and a better understanding of the nature of market failure.[193] The scheme of

188 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994): "*the more transformative the new work, the less will be the significance of other factors*, like commercialism, that may weigh against a finding of fair use" [emphasis added]. See also paras 25–26 above.

189 For the US position, see *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 593 (1994); *Cariou v Prince* 714 F 3d 694 at 709 (2nd Cir, 2013), citing *Castle Rock Entertainment, Inc v Carol Publishing Group, Inc* 150 F 3d 132 at 145 (2nd Cir, 1998):

> … the more transformative the secondary use, the less likelihood that the secondary use substitutes for the original, even though the fair use, being transformative, might well harm, or even destroy, the market for the original.

For the UK position, see *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1990] Ch 141 at 157:

> But if a programme is a genuine reporting of current events, it is, in my opinion, absurd to say that an endeavor to make the programme more attractive is an oblique motive [to unfairly compete with the plaintiff].

190 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 587 (1994) ("[t]he facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives"); *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 at 565 and 568 (1985) (the court found that the content taken was "essentially the heart of the book" and that the quantity and quality taken "directly competed for a share of the market for prepublication excerpts"); Pierre N Leval, "Toward a Fair Use Standard" (1990) 103 Harv L Rev 1105 at 1123.

191 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(*e*) ("the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price").

192 See para 19 above and s 40(2)(c) of the Australian Copyright Act 1968.

193 See para 19 above and Roya Ghafele & Benjamin Gibert, "The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore" (MPRA Paper, 2012) at p 27 (the authors remark that the fifth factor "seems to be informed by market failure approaches to fair use decisions"). A thorough discussion on what might be "an ordinary commercial price" is beyond the scope of this article,

(*cont'd on the next page*)

the Copyright Act appears to impose *two duties* on the defendant: namely, the duty to make "reasonable investigations" and the duty to obtain the work within a reasonable time at an ordinary commercial price when possible.[194] The first duty is uncontroversial and requires a factual determination on whether the defendant's efforts at investigating are reasonable in light of the circumstances. This squares with Sam Ricketson's view that fair dealing "should not be used simply for the sake of convenience", even if the dealing is transformative.[195]

45 The second duty "assumes that a use is not fair if there is the possibility of obtaining a license" and turns in favour of fair dealing only if market failure is shown. Market failure provides "an economic justification for depriving a copyright owner of his market entitlement" since it represents a situation where "the possibility of consensual bargain has broken down in some way",[196] rendering it impossible to obtain a licence. Wendy Gordon identifies three situations of market failure: where (a) the market barriers exceed the anticipated benefits of the dealing;[197] (b) the dealing yields externalities that are not easily monetised;[198] and (c) the owner has anti-dissemination motives.[199]

46 These circumstances provide an exception to the defendant's obligation to obtain a licence since it would not be possible to do so. First, where market barriers, such as transaction costs, exceed the anticipated benefits, finding fair dealing is socially desirable as "transaction costs are likely to prevent at least some value-maximising transfers from occurring if the copyright is enforced".[200] In the second

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although it suffices to say that this price should be determined by reference to the market price for licensing of the particular dealing (if any).

194 See para 19 above.

195 Staniforth Ricketson & Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, 2nd Ed, 2002) at para 11.35.

196 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1615.

197 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1627–1630.

198 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1630–1632.

199 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1632–1635.

200 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1629; William M Landes & Richard A Posner, "An Economic Analysis of Copyright Law" (1990) 18 J Leg Stud 325 at 332.

situation, there exists a mismatch between the costs and benefits in creating the work and the social costs and benefits that are at stake.[201] Allowing fair dealing in such a scenario increases social benefit since "the market cannot be relied upon as a mechanism for facilitating socially desirable transactions".[202] Third, when the owner has anti-dissemination motives, the market generally breaks down. However, anti-dissemination motives should not be relied upon to deprive the owner of his right to first publication and the fear of market substitution since these are legitimate interests protected by copyright law.[203] Instead, the defendant must show that the owner "would refuse to license out of a desire unrelated to the goals of copyright – notably, a desire to keep certain information from the public".[204]

47 At the heart of the fifth factor is the general rule that "a use is not fair if there is the possibility of obtaining a license".[205] This protects the incentives of authorship and promotes the Singapore parliament's objective of facilitating investment, research and development in copyright industries. However, extending copyright protection in the three situations of market failure where consensual bargain is impossible

201 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1630–1631.

202 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1630; Brett M Frischmann & Mark A Lemley, "Spillovers" (2007) 107 Colum L Rev 257 at 280 (the authors argue that secondary users "are not necessarily optimal purchasers of access, because … they do not themselves capture the full social value of their use. Their private willingness to pay accordingly understates the social value of their use"); Brett M Frischmann, "An Economic Theory of Infrastructure and Commons Management" (2005) 89 Minn L Rev 917 at 988–989, where the author posits that:

> … the problem with relying on the market is that potential positive externalities may remain unrealized if they cannot be easily valued and appropriated by those that produce them, even though society as a whole may be better off if those potential externalities were actually produced.

See, for example, *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 287–288 and 291–292 (SDNY, 2013) (the benefits that Google Books generated would arguably not accrue to society if Google had to negotiate individually with the millions of authors, especially since it was found that Google does not directly profit from the Google Books project).

203 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1624.

204 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1624; *Monge v Maya Magazines* 688 F 3d 1164 at 1191 (9th Cir, 2012), *per* Smith J (dissenting).

205 Roya Ghafele & Benjamin Gibert, "The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore" (MPRA Paper, 2012) at p 27.

would frustrate Parliament's objectives by impeding the exchange of information and ideas, thereby hindering the development of copyright industries.[206] In spite of some support for this fifth factor,[207] one must nonetheless pay heed to the recent considerations by the Australian Law Reform Commission in its final report on copyright and the digital economy where the Commission recommended dropping the fifth factor in favour of retaining only the first four factors for a general fair dealing defence.[208] There is a compelling case to be made that this factor is related to, or a subset of, the fourth factor;[209] and that this factor, in light of advances in digital technology, can impede the creation of non-commercial user-generated content on social media platforms.[210]

F. Interim conclusions

48 This proposed autochthonous approach to interpreting the interplay of the fair dealing factors under s 35(2) accounts for Singapore's copyright policy and economic landscape. Although Singapore courts may be guided by principles from foreign jurisdictions, including the transformative use doctrine in the US, substantial regard must be had to unique local conditions. Therefore, instead of importing the primacy of the transformative use doctrine, the proposed approach urges Singapore courts to engage in a nuanced balancing of the five factors on a case-by-case basis, taking into consideration "the social costs and the economic implications",[211] without privileging any factor over the others.

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206 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1070 (Prof S Jayakumar, Minister for Law) (the Copyright (Amendment) Act (Act 52 of 2004) "is an amendment which we need because they seek to *preserve the unimpeded exchange of information and ideas* to create an environment which is conducive to the development of creative works" [emphasis added]).

207 See para 7 above. See also Ng-Loy Wee Loon & Andy Lek, "Protection of Intellectual Property Rights" in *Singapore Academy of Law Conference 2006: Developments in Singapore Law between 2001 and 2005* (Teo Keang Sood ed) (Singapore Academy of Law, 2006) at pp 249–250 (the authors argue that the impact of the fifth factor against the interests of creators is overstated since "it had always been open to the court to take this new factor in consideration" in light of the non-exhaustive list under s 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed) and that it is impossible to assess this factor in isolation since a finding of fair dealing also depends on the other four factors).

208 Australia, Australian Law Reform Commission, *Final Report: Copyright and the Digital Economy* (ALRC Report 122, November 2013) at paras 5.93–5.109.

209 Australia, Australian Law Reform Commission, *Final Report: Copyright and the Digital Economy* (ALRC Report 122, November 2013) at para 5.99.

210 See, for example, s 29.21 of Canada's Copyright Act 1985 (RSC, 1985, c C-42).

211 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2], *per* V K Rajah JA.

VI. Application to three factual scenarios

49 It is important to recognise that the previous part only enunciates the general principles in interpreting s 35(2), whereas the application and interrelationship of each factor can only be illustrated on a "case-by-case analysis".[212] Therefore, this section attempts to apply the fairness factors to three contemporary fact patterns – mass digitisation,[213] parodies[214] and contemporary art[215] – to illustrate the workability of the proposed approach.

A. Authors Guild v HathiTrust

50 In *HathiTrust*, decided by the Second Circuit Court of Appeals in 2014, authors and authors' associations alleged that the digitisation of copyrighted works by 13 universities and other non-profit organisations in creating the HathiTrust Digital Library ("HDL") without authorisation violated the US Copyright Act.[216] Currently, the HDL "contains digital copies of more than ten million works, published over many centuries, written in a multitude of languages, covering almost every subject imaginable".[217] The HDL permits three different uses of the copyrighted works in its repository. First, it allows the public to use its search engine to search for particular terms across all digital copies of its repository. However, the search results do not produce the full text of the copyrighted works, but instead show only the page numbers on which the search term is found within the work and the number of times the search term appears on each page.[218] Second, it allows patrons with print disabilities to access the full text of copyrighted works. Third, it allows members to create a replacement copy of the work if the member had already owned an original copy and that original copy

212 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 577–578 (1994); *Blanch v Koons* 467 F 3d 244 at 251 (2nd Cir, 2006). For a UK case recognising the fact-intensive nature of fair dealing, see *Hubbard v Vosper* [1972] 2 QB 84 at 94. See generally Matthew Sag, "The Prehistory of Fair Use" (2011) 76 Brook L Rev 1371 at 1393–1395 (author observes that the requirement of a case-by-case analysis has not changed since 1828).

213 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 (2nd Cir, 2014). For another mass digitisation case, see *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 (SDNY, 2013).

214 *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994). For other parody cases, see *Mattel, Inc v Walking Mountain Productions* 353 F 3d 792 (9th Cir, 2003); *Suntrust Bank v Houghton Mifflin Co* 268 F 3d 1257 (11th Cir, 2001); and *Leibovitz v Paramount Pictures Corp* 137 F 3d 109 (2nd Cir, 1998).

215 *Cariou v Prince* 714 F 3d 694 (2nd Cir, 2013). For another appropriation art case, see *Blanch v Koons* 467 F 3d 244 (2nd Cir, 2006).

216 17 USC §§101–810.

217 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 90 (2nd Cir, 2014).

218 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 91 (2nd Cir, 2014).

"[was] lost, destroyed, or stolen, and a replacement copy is unobtainable at a 'fair' price elsewhere".[219]

51 Although the HDL has three different uses, the application of s 35(2) is likely to focus only on the first use. While the Second Circuit applied the US fair use analysis to the second use, this is perhaps unnecessary in the Singapore context due to the recently added s 54 of the Singapore Copyright Act, which stipulates certain conditions under which institutions assisting persons with reading disabilities are granted a statutory licence to make copies. Similarly, the third use of the HDL, which allows the preservation of works, is covered under s 48.

52 Under s 35(2), the first factor weighs strongly in favour of fair dealing. The dealing satisfies the second formulation of the "transformative use" as the enabling of full-text search "serves a new and different function from the original" and is socially beneficial.[220] In fact, consistent with the proposed approach, the Second Circuit added that the transformative value of full-text searches "adds a great deal more to the copyrighted works at issue than the transformative uses [the court] approved in several other cases".[221] Furthermore, the dealing arguably has a "non-profit educational" purpose as the HDL was a project started by educational and non-profit institutions targeted at providing greater access to works without any "purely commercial" motive.[222]

53 In respect of the second factor of "the nature of the work", the Singapore courts should be hesitant in following the Second Circuit's decision that this factor is of limited usefulness upon the finding of transformativeness.[223] Instead, the second factor should weigh against fair dealing since the millions of works digitised would almost certainly contain works of creative endeavour, as opposed to factual compilations.[224]

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219 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 92 (2nd Cir, 2014).

220 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 97 (2nd Cir, 2014) ("*HathiTrust*"); William F Patry, *Patry on Copyright* vol 4 (West, Online, 2015) at § 10:21 (observing that the use in *HathiTrust* is "socially beneficial, serves a different purpose than the original, and is in no way substitutional"). See also *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 293 (SDNY, 2013).

221 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 97 (2nd Cir, 2014) (these cases include *Cariou v Prince* 714 F 3d 694 (2nd Cir, 2013); *Bill Graham Archives v Dorling Kindersley* 448 F 3d 605 (2nd Cir, 2006); *Blanch v Koons* 467 F 3d 244 (2nd Cir, 2006); and *Leibovitz v Paramount Pictures* 137 F 3d 109 (2nd Cir, 1998)).

222 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 90–91 (2nd Cir, 2014).

223 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 98 (2nd Cir, 2014). See para 37 above.

224 *Cf Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 98 (2nd Cir, 2014) (court found the "nature of the copyrighted work" factor to be "of limited usefulness").

54 The touchstone under the third factor is whether the quantity and quality taken is reasonably necessary. Further, there is no blanket rule against copying entire works.[225] Thus, although the HDL copied entire works, such copying is necessary in order for the HDL to perform the full-text search function effectively.[226] As the Ninth Circuit explained in *Kelly v Arriba Soft Corp*[227] and *Perfect 10*, the use of the entire copyrighted works is necessary in cases involving search engines since using only a part of the copyrighted work would create practical difficulties for users, thereby reducing the usefulness of the search engine.[228] Thus, although entire works were taken, such taking is reasonable in light of the purpose of the dealing and the third factor favours fair dealing.

55 Under the fourth factor, instead of focusing on actual harm done and presuming that no market exists for the licensing of works,[229] Singapore courts are likely to find the existence of a market for licensing – except for out-of-print works – and that potential harm results from the lost opportunity to license the works.[230] Although the market for the original may previously be confined to point-to-point sales with purchasers seeking to possess the entire book, markets are dynamic and change over time to meet new demands.[231] Thus, licensing of the works to third parties should be a potential market for the originals. However, Singapore courts should also recognise the positive effects on the market for the originals.[232] Here, the positive effects would likely counterbalance the negative effects since the HDL, similar to *Authors Guild, Inc v Google, Inc*,[233] could enhance the sale of books by providing a more accessible and convenient way for authors to become

225 See para 39 above.

226 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 98 (2nd Cir, 2014):

> In order to enable the full-text search function, the Libraries … created digital copies of all the books in their collections. Because it was reasonably necessary for the HDL to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.

227 336 F 3d 811 (9th Cir, 2003).

228 *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1167–1168 (9th Cir, 2007); *Kelly v Arriba Soft Corp* 336 F 3d 811 at 821 (9th Cir, 2003).

229 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 99 (2nd Cir, 2014).

230 *Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 99 (2nd Cir, 2014) (this was the first argument the authors raised).

231 *Cf Authors Guild, Inc v HathiTrust* 755 F 3d 87 at 100 (2nd Cir, 2014):

> [T]his theory of market harm does not work under Factor Four, because the full-text search function does not serve as a substitute for the books that are being searched … Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text search use does not.

232 See paras 40–41 above.

233 954 F Supp 2d 282 (SDNY, 2013); affirmed in 804 F 3d 202 (2nd Cir, 2015).

noticed, thereby stimulating demand for the original works.[234] Despite this analysis, given the lack of evidence supporting either side, this factor remains neutral.

56 Considering the fifth factor, although there is no evidence as to whether the libraries made "reasonable investigations", this case falls squarely within the first two categories of market failure and the factor favours fair dealing.[235] First, if the libraries were expected to approach the individual authors of the tens of millions of works, the transaction costs would be exceedingly high and would cripple the highly beneficial HDL public project.[236] Second, the HDL generates significant externalities but does not yield a proportionate benefit to the libraries since the HDL is non-profit and educational in nature.[237] Therefore, since consensual bargain is impossible and there is no risk of diminishing the incentives of authorship, permitting such dealings serves the Singapore parliament's objectives of facilitating the unimpeded exchange of information and the development of copyright industries.[238]

57 Ultimately, since three factors – purpose and character, amount and substantiality, and possibility of obtaining the work – favour fair dealing, whereas only the nature of the work factor weighs against fair dealing, the defence should succeed.

B. Campbell v Acuff-Rose Music

58 In *Campbell*, 2 Live Crew ("2LC") parodied the song "Oh, Pretty Woman" written by Orbison and Dees whose copyright vests in Acuff-Rose Music ("Acuff-Rose").[239] Before releasing the parody, 2LC approached Acuff-Rose for permission to use the song and offered to credit Acuff-Rose for ownership and authorship of the original song together with a payment of a fee.[240] However, Acuff-Rose refused, stating that it "cannot permit the use of a parody of 'Oh, Pretty Woman'".[241]

234 *Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 293 (SDNY, 2013) (Chin J rightly noted the positive effects Google Books might have on the copyright holders).

235 See para 45 above.

236 See para 45 above.

237 See para 45 above.

238 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1052 and 1070 (Prof S Jayakumar, Minister for Law).

239 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 572 (1994). For the sound recording of the two songs, see Music Copyright Infringement Resource, "*Campbell v Acuff-Rose* 510 US 569 (1994)", available at <http://mcir.usc.edu/cases/1990-1999/Pages/campbellacuffrose.html> (accessed 1 June 2015).

240 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 572–573 (1994).

241 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 572–573 (1994).

A year later and after nearly 250,000 copies were sold, Acuff-Rose sued 2LC for copyright infringement of "Oh, Pretty Woman".[242] There was no real dispute that 2LC's use amounted to copyright infringement; the only issue was whether 2LC's use was fair.[243]

59 In the Singapore context, analysing the first factor under s 35(2), although both works serve the same entertainment function and fall outside the second formulation, the parody nonetheless satisfies the first formulation of creating "new information, new aesthetics, new insights and understandings",[244] thus weighing the factor in favour of fair dealing, albeit not to a great extent. Specifically, parodies "can provide social benefit, by shedding light on an earlier work, and, in the process, creat[e] a new one".[245] In *Campbell*, the parodic element was found because 2LC's "Pretty Woman" commented and criticised the original work by "substituting predictable lyrics with shocking ones … [that] demonstrates how bland and banal the Orbison song seems to them".[246] However, the dealing was of a commercial nature involving the "direct commercialisation of copyrighted works".[247] The most obvious purpose of 2LC's dealing was to generate revenue from sales. On balance, the first factor weighs neutral since the parody's commercial nature militates against its transformative value. The "built-in First Amendment accommodation"[248] in the US fair use doctrine arguably exalts parody to a heightened status of constitutionally protectable expression,[249] but it is highly unlikely to be accorded that same treatment under Singapore law.

60 The second factor weighs against fair dealing since the song "Oh, Pretty Woman" clearly falls within "the core of intended copyright protection".[250] Contrary to the Supreme Court's reasoning that the second factor is unlikely to be useful "in separating the fair use sheep from the infringing goats in a parody case, since parodies almost

242 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 573 (1994).

243 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 574 (1994).

244 See para 24 above. See also *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994):

> Suffice to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny … it can provide social benefit, by shedding light on an earlier work, and in the process, creating a new one.

245 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994).

246 *Acuff-Rose Music, Inc v Campbell* 754 F Supp 1150 at 1155 (MD Tenn, 1991); *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 582 (1994).

247 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 573 (1994) (the parody was released as part of an album and had sales of over a quarter of a million copies). *Cf Authors Guild, Inc v Google, Inc* 954 F Supp 2d 282 at 291 (SDNY, 2013) (Google had not engaged in the sale of the copyrighted works it digitised).

248 See para 21 above.

249 *Eg*, *Hustler Magazine Inc v Falwell* 485 US 46 at 53 (1988); *Eldred v Ashcroft* 537 US 186 at 219–220 (2003).

250 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 586 (1994).

invariably copy publicly known, expressive works",[251] the Singapore court must not abdicate from its duty to thoroughly consider the second factor. Thus, the US District Court's opinion that this factor weighs against fair dealing since Acuff-Rose's "Oh, Pretty Woman" because it "is a published work, with creative roots" should be preferred.[252]

61 Considering the third factor in light of 2LC's parodic purpose, it is crucial to observe that parodies "must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable".[253] This purpose should then inform the court's inquiry of what is *reasonably necessary*. 2LC had copied both the lyrics and the music, including the guitar refrain, opening drumbeat, melody and chorus.[254] In this regard, since the copying of the lyrics involved only the taking of the first line of the original, but "departed markedly" thereafter, the taking was not excessive.[255] With respect to the music copied, the Supreme Court declined to rule definitively on whether it was excessive or reasonably necessary, but preferred to rely on the other factors to dispose of the issue.[256] In contrast, the District Court citing the Ninth Circuit's decision in *Fisher v Dees* suggested that greater leeway should be afforded to musical parodies since:[257]

> … a song is difficult to parody effectively without exact or near-exact copying [and] if the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience.

Ultimately, since "context is everything",[258] the copying of Acuff-Rose's music should not be excessive as the bass riff and other distinctive sounds are key elements which help the audience identify the original and thereupon appreciate the parody.

62 Under the fourth factor, the facts illustrate that there was no market for licensing the original since Acuff-Rose refused to grant permission for the parody.[259] Since no market was in existence,

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251 *Cf Campbell v Acuff-Rose Music, Inc* 510 US 569 at 586 (1994) (the Supreme Court was of the opinion that this factor "is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known expressive works").

252 *Acuff-Rose Music, Inc v Campbell* 754 F Supp 1150 at 1155–1156 (MD Tenn, 1991).

253 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 589 (1994).

254 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 589 (1994); *Acuff-Rose Music, Inc v Campbell* 754 F Supp 1150 at 1156 (MD Tenn, 1991).

255 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 589 (1994).

256 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 589 (1994).

257 *Acuff-Rose Music, Inc v Campbell* 754 F Supp 1150 at 1156–1157 (MD Tenn, 1991); *Fisher v Dees* 794 F 2d 432 at 439 (9th Cir, 1986).

258 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 589 (1994).

259 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 573–574 (1994).

it logically follows that no harm was done.[260] In relation to positive effects on the market, 2LC did not adduce evidence that the parody brought benefits to the market for the original. Ultimately, since there is no discernible effect on the market – whether positive or negative – this factor remains neutral.

63 Finally, the fifth factor favours fair dealing because 2LC discharged its duty to make reasonable investigations and the failure to obtain a licence for "Oh, Pretty Woman" is excused on the third ground of market failure.[261] Specifically, 2LC approached Acuff-Rose with an offer to pay a licence fee for the work, but was flatly refused.[262] Anti-dissemination motive may be inferred since Acuff-Rose had no legitimate copyright interests in withholding permission, such as the right of first publication or the fear of market substitution,[263] but was perhaps concerned over the reputational damage the parody might cause because of its obscenity – an interest "unrelated to the goals of copyright" and perhaps better protected under defamation law.[264]

64 On balance, the dealing is likely to be fair under s 35(2) since two factors – amount and substantiality and possibility of obtaining the work – favour fair dealing, two factors – purpose and character and the effect on the market – weigh neutral and one factor – nature of the copyrighted work – weighs against fair dealing. Parodies do fall closer to the borderline between infringement and fair dealing than mass digitisation. This result naturally follows from Parliament's careful calibration of the factors whereby the degree of protection afforded directly corresponds to the furtherance of Singapore's copyright policy.[265]

260 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 594 (1994) (the court did not resolve this issue because of insufficient evidence and remanded the case).

261 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 572–573 (1994).

262 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 572–573 (1994). However, this factor would weigh against the parodists in other cases where no reasonable investigation was conducted and no anti-dissemination motive can be inferred: see, for example, *Suntrust Bank v Houghton Mifflin Co* 268 F 3d 1257 at 1259 (11th Cir, 2001) and *Leibovitz v Paramount Pictures Corp* 137 F 3d 109 at 111–112 (2nd Cir, 1998).

263 See para 46 above.

264 Wendy J Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors" (1982) 82 Colum L Rev 1600 at 1624; Gary Chan, *The Law of Torts in Singapore* (Singapore: Academy Publishing, 2011) at p 447.

265 See paras 32–33 above.

C. Cariou v Prince

65 A professional photographer, Cariou, brought an action against a well-known appropriation artist, Prince, for copyright infringement of *Yes, Rasta*, a book containing photos of Rastafarians in Jamaica.[266] Cariou had previously spent six years gaining the trust of Rastafarians and taking their portraits before publishing the book. The alleged infringement was Prince's 28 paintings in the "Canal Zone" series, which "consist almost entirely of images taken from *Yes, Rasta*, albeit [visually modified]".[267] However, the degree of copying in Prince's work varied significantly from piece to piece and Cariou's work "is almost entirely obscured" in some,[268] while being "readily apparent" in others.[269]

66 Similar to *Campbell*, although Prince's works fall within the first formulation of the "transformative use" doctrine, their commercial nature reduces the strength of transformativeness.[270] Thus, the first factor should weigh neutral under Singapore law. Contrary to the Second Circuit's decision, the result does not depend on the amount of visual transformation.[271] Instead, all of Prince's works are transformative since Prince has recoded and recontextualised the originals to create "new information, new aesthetics, new insights and understandings".[272] As Tan argues elsewhere, the transformative value in Prince's work lies in the "change in context and visual embellishments, thus allowing the audience to reasonably perceive and decode a number of possible new meanings".[273]

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266 *Cariou v Prince* 784 F Supp 2d 337 at 343 (SDNY, 2011).

267 *Cariou v Prince* 784 F Supp 2d 337 at 344 (SDNY, 2011).

268 *Cariou v Prince* 714 F 3d 694 at 700 (2nd Cir, 2013).

269 *Cariou v Prince* 714 F 3d 694 at 701 (2nd Cir, 2013).

270 *Cariou v Prince* 784 F Supp 2d 337 at 350–351 (SDNY, 2011) ("*Cariou*") (it was found that after the Canal Zone show, eight paintings were sold for a total of US$10,480,000, of which 60% went to Prince. Additionally, seven other paintings were exchanged for art with an estimated value of between US$6,000,000 and US$8,000,000); *Cariou v Prince* 714 F 3d 694 at 708 (2nd Cir, 2013) (the court similarly found Prince's work to be commercial. However, the court downplayed the significance of commerciality in light of the transformative nature of Prince's work). Note: It should be an open question before the Singapore courts as to what "commerciality" entails, since a mass-produced work such as that in *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994) is different in nature from a single piece sold at a high price as *per Cariou*.

271 *Cariou v Prince* 714 F 3d 694 at 706 (2nd Cir, 2013) (the court held that 25 of Prince's artworks "manifest an entirely different aesthetic from Cariou's photographs" whereas the other five works were found to be insufficiently transformed and was remanded to the District Court for further proceedings).

272 *Cariou v Prince* 714 F 3d 694 at 706 (2nd Cir, 2013); *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1177 (9th Cir, 2013).

273 David Tan, "The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the 'Purpose and Character' of Appropriation Art" (2012) 24 SAcLJ 832 at 860–861. See also Emily Meyers, "Art on Ice: The Chilling Effect of

(*cont'd on the next page*)

67 The second factor weighs against fair dealing since Cariou's photographs, being original and creative works, deserve greater protection.[274] In particular, Cariou testified before the District Court that he made creative choices:[275]

> … in determining which equipment to use in taking his photos, the staging choices he made when composing and taking individual photos, and the techniques and processes he used when developing the photos.

68 Under the third factor, the permissible quantity and quality taken must be considered in the context of the appropriation art movement within the modern art world as "an ideological critique that takes or hijacks 'dominant words and images to create insubordinate, counter messages'".[276] Given that this genre of art is widely accepted by the best museums around the world, like the Guggenheim and Museum of Modern Art, as involving the taking of pre-existing material and recoding it to create new messages, it is unsurprising that a greater leeway should be afforded to Prince's works.[277]

69 Considering both positive and negative effects on the market, Cariou suffered economic harm in the actual market flowing from the cancellation of the planned *Yes, Rasta* show and in the potential market due to the loss of licensing revenue.[278] Further, the record illustrates that the *Yes, Rasta* show was cancelled because of Prince's "Canal Zone" series as Celle, the organiser of the planned *Yes, Rasta* show, testified that "she decided to cancel the show because she did not want to seem to be capitalizing on Prince's success and notoriety".[279] Conversely, the Second Circuit's finding that the works served different markets "smacks of Manhattan elitism" which overly protects famous artists and should be discredited.[280] In terms of positive market effects, it is arguable

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Copyright on Artistic Expression" (2007) 30 Colum JL & Arts 219 at 220; Jonathan Francis, "On Appropriation: *Cariou v Prince* and Measuring Contextual Transformation in Fair Use" (2014) 29 Berkeley Tech LJ 681 at 682; and David Tan, "What Do Judges Know about Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law" (2011) 16 MALR 381 at 381–382.

274 *Cariou v Prince* 784 F Supp 2d 337 at 352 (SDNY, 2011).

275 *Cariou v Prince* 784 F Supp 2d 337 at 343 (SDNY, 2011).

276 David Tan, "What Do Judges Know about Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law" (2011) 16 MALR 381 at 381.

277 For an explanation on how the taking of an entire original image may nonetheless be "fair" in contemporary art context, see David Tan, "What Do Judges Know about Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law" (2011) 16 MALR 381 at 395–396.

278 *Cariou v Prince* 784 F Supp 2d 337 at 344 and 353 (SDNY, 2011) (Celle had planned to exhibit between 30 and 40 of Cariou's photos at her gallery with multiple prints of each to be sold at prices ranging from US$3,000 to US$20,000).

279 *Cariou v Prince* 784 F Supp 2d 337 at 344 (SDNY, 2011).

280 William F Patry, *Patry on Copyright* vol 4 (West, Online, 2015) at § 10:35.20.

"that the value of Cariou's photographs are likely to be significantly enhanced … by their association with Prince".[281] However, given the lack of evidence supporting this position, this factor is likely to weigh against fair dealing.

70 The fifth factor weighs against fair dealing since Prince, unlike 2LC in *Campbell*, did not take any step to investigate whether Cariou was willing to license his work. Prince also would be unable to show that it was impossible to obtain a licence since he had never formally approached Cariou. Moreover, market failure on either ground is also unlikely since: (a) the transaction costs of obtaining licences for *Yes, Rasta* is probably low;[282] (b) the "Canal Zone" series brought Prince significant financial reward;[283] and (c) there is no evidence that Cariou harboured anti-dissemination motives. The circumstances, therefore, do not afford Prince a justification to derogate from his duty to obtain a licence when possible.

71 Balancing the factors, the defence of fair dealing is not satisfied since three factors – nature of the copyrighted work, effect on the market and possibility of obtaining the work – significantly weigh against fair dealing while only one factor – amount and substantiality – favours fair dealing with the remaining factor – purpose and character – weighing neutral.

72 Comparing this fact scenario to those in *Campbell* and *Cariou*, the decisive factor in the s 35(2) fair dealing analysis is the fifth factor. Because 2LC attempted to obtain a licence from Acuff-Rose, albeit unsuccessfully,[284] both the fourth and fifth factors favoured fair dealing – 2LC had discharged its duties under the fifth factor while Acuff-Rose's unequivocal rejection strongly suggests the absence of a licensing market hence rendering market harm improbable. Conversely, Prince's inaction weighed both the fourth and fifth factors against fair dealing. These results are aligned with Singapore's copyright policy where the incentives of authorship are taken seriously and laziness is not condoned but efforts are rewarded. Furthermore, it reinforces the crucial difference between Singapore and US copyright policies where the latter is staunchly committed only to "promot[ing] the progress of science and useful arts"[285] and is possibly influenced by First Amendment

281 David Tan, "What Do Judges Know about Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law" (2011) 16 MALR 381 at 390.

282 *Cariou v Prince* 714 F 3d 694 at 714 (2nd Cir, 2013) (the licensing fee for *Yes, Rasta* is probably low since each book only sold for US$60 and only 5,791 copies were sold, compared to the millions Prince received for the sale of his paintings).

283 *Cariou v Prince* 784 F Supp 2d 337 at 350–351 (SDNY, 2011).

284 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 572–573 (1994).

285 United States Constitution Art 1, § 8, cl 8.

considerations without an explicit regard for the development of its copyright industries.[286]

VII. CONCLUSION

73 Fair dealing in Singapore ought to reflect and be informed by Singapore's prevailing copyright policy. It is therefore crucial that when relying on foreign fair use/fair dealing jurisprudence, Singapore courts should be attuned to the legislative objectives that underpin Singapore copyright law and the potential impact of transplanting foreign law on Singapore's copyright industries. Essentially, one has to carefully weigh the social costs and economic implications in deciding where the balance should be struck.[287]

74 The proposed approach represents a uniquely Singaporean perspective that not only takes into account judicial cosmopolitanism but also strikes an appropriate balance between the competing interests of rights owners, consumers, entrepreneurs and future creators. However, this approach was not formulated in a vacuum, but has drawn inspiration from UK, Australian and US jurisprudence. The former two jurisdictions have strong historical connections with Singapore's copyright law, while the latter not only has a similar fair use provision, but is also presented as a viable model that has been considered by law reform commissions around the world in the development of their national fair dealing provisions. However, this approach marks a significant improvement over the UK and Australian approaches as the UK lacks systematic fixed-list factors which inject certainty into the law and the Australian courts have yet to formulate clear and workable fair dealing principles.[288]

75 It should be noted that the authors' autochthonous approach departs from American orthodoxy in three significant ways. First, it considers effects on the market holistically, accounting for both positive and negative effects that might impact Singapore's copyright industries.[289] Second, s 35(2) requires the court to consider a fifth factor that is absent in § 107 of the US Copyright Act,[290] and the presence of this factor would undoubtedly affect the application of the transformative use doctrine (if adopted) in the first factor.[291] Third, and

286 *Cf* Singapore's position: see para 30 above.
287 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2].
288 See para 20 above.
289 See para 40 above. *Cf Campbell v Acuff-Rose Music, Inc* 510 US 569 at 590 (1994).
290 17 USC §§101–810.
291 Section 35(2)(*e*) of the Copyright Act (Cap 63, 2006 Rev Ed). *Cf* § 107 of the US Copyright Act 17 USC §§101–810.

perhaps most importantly, the proposed approach advocates a nuanced case-by-case balancing of the five statutory factors without according privilege to any single factor.[292]

76 This approach is by no means perfect. The fifth factor ultimately may not be retained as it can impose very high search costs, particularly for users who produce non-commercial transformative online content that contribute to social discourse, or it can be used by rights holders to control entrepreneurial countercultural markets on the basis that they also offer products in such markets. For now, however, the authors hope that this proposal would serve as a useful guide in future fair dealing cases brought before Singapore courts and would stimulate more conversations about how a reading – or even a revision – of s 35(2) can best "create an environment conducive to the development of creative works, and also facilitate greater investment, research and development in the copyright industries in Singapore".[293]

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292 See para 48 above. *Cf* the US approach, which prioritises the first factor, and particularly the transformative use doctrine, above all other factors: see paras 26–27 above.

293 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1052 (Prof S Jayakumar, Minister for Law).