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CONTEMPORARY COPYRIGHT FAIR DEALING
MANAGEMENT ISSUES AND THEIR IMPACT ON ACCESS TO
INFORMATION SOURCES AND SERVICES: SOUTH AFRICAN
ACADEMIC LIBRARIES IN THE TRANSITION TO THE DIGITAL
ENVIRONMENT

CHARLES AKWE MASANGO
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CHARLES AKWE MASANGO

Thesis presented for the Degree of
DOCTOR OF PHILOSOPHY
in the Department of Information and Library Studies
UNIVERSITY OF CAPE TOWN

AUGUST 2005
ABSTRACT

CONTEMPORARY COPYRIGHT FAIR DEALING MANAGEMENT ISSUES AND THEIR IMPACT ON ACCESS TO INFORMATION SOURCES AND SERVICES: SOUTH AFRICAN ACADEMIC LIBRARIES IN THE TRANSITION TO THE DIGITAL ENVIRONMENT

This study investigated the perceptions of academic librarians, managers of consortia, users of digital content, and rights holders whether licensing agreements effectively inhibit access to digital content and whether there is a need to establish an equivalent to the fair dealing exemption in the digital environment. The protection that is accorded to digital content is complex. An empirical survey based on qualitative method was conducted in 2003 – 2004 in the Western Cape Province, South Africa, to examine whether licences inhibit access to digital content and whether an equivalent to the fair dealing exemption was necessary in the digital environment. Methodology used in the survey consisted of interviews from structured questions. Using grounded theory, certain perceptions and misconceptions were found in the interview responses. Thereafter it was possible to suggest that the debate as to whether licences inhibit access to digital content and whether an equivalent to the fair dealing exemption is needed in the digital environment is perhaps inconclusive. However, it is proposed that as licences theoretically inhibit access to digital content, it may be necessary for an equivalent to the fair dealing exemption to be instituted to balance the rights of rights holders with those of consumers of digital content. The new fair dealing exemption would be able to theoretically balance the alleged inhibition caused by licensing agreements.

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August 2005
Department of Information and Library Studies
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Summary

In the last quarter of the twentieth century there was an explosive increase in the number of scholarly journals published, and academics rapidly came to rely on collecting photocopies of articles on their particular speciality as a way of keeping up with developments in the field. By chance, reprographic technology also became cheaply and easily available at the same time. Naturally rights holders viewed this system with disfavour and have sometimes argued that every photocopy represents a hypothetical 'lost sale'. Nevertheless, the venerable 'fair use' or 'fair dealing' exemption was called into service and granted the right to make a copy of a text. With the advent of digitisation, academic journals are increasingly distributed via large databases, access to which is controlled by licences. While some scholars believe licences impede access to the content of the large databases, rights holders do not agree. Academic librarians, managers of consortia, users of digital content, and rights holders in South Africa were interviewed to investigate whether licensing agreements impede access to digital content and whether it is necessary to establish an equivalent of the fair dealing exemption in the digital environment. The protection that is accorded to digital content is complex. Although contextualised in South Africa, international literature was used to examine the nature and beliefs of these different groups. The question of whether licences effectively inhibit access to digital content is not unique to South Africa. The views of scholars mostly from countries like the United States of America, Australia, and United Kingdom were studied and compared. The international perceptions primarily from these countries formed the basis of reference for this thesis as most of the digital content that is used in South Africa is from these countries.

A mixed approach underpinned the thesis. The thesis used as a point of reference a historical approach. This approach was used to show the crux of both the copyright law and the fair dealing exemption. Through the historical approach, the researcher was able to show how and why there seems to be a problem that needs to be addressed in the digital environment.

The methodological methods used in the thesis followed the mixed framework. The qualitative research methods of using interviews were used in the survey. Fifty-eight
(58) out of one hundred and six (106) pre-selected academic librarians, managers of consortia, users of digital content, and rights holders from mostly the Western Cape Province of South Africa were interviewed and nine broad issues were retrieved using the grounded theory. These were:

- how users perceive the advantages of digital content;
- copyright and licensing agreements: perceptions and misconceptions;
- knowledge of measures to protect digital content;
- the subscriber in a police role: views and perceptions;
- whether licences inhibit access to digital content;
- perceptions about open access and other models;
- whether licences are flexible;
- whether licensing agreements are violated;
- whether an analogy to the fair dealing exemption is necessary in the digital environment.

Data gathered from the 58 respondents was recorded and transcribed. The thrust of the survey was to reveal the respondents' in their use of digital content. Others who took part in the survey outside the Western Cape Province of South Africa were those to whom the researcher was referred by the pre-selected respondents as potential respondents for the survey.

The key findings of the study show that in theory licences protect and inhibit access to digital content, but in practice licences do not inhibit access to digital content. Users have the potential to violate digital content. A majority of librarians and users of digital content believed that users violate digital content. Examples of violations are downloading articles and e-mailing them; sharing passwords or IP numbers with unauthorised users; unauthorised users accessing content; making of multiple copies of digital content. Other users, librarians and rights holders believed that even authorised users could violate licensing agreements. This is by systematically downloading complete journal issues; copying and allowing others to use the copy; sharing of downloaded articles; converting articles into other formats; as well as making copies from a copy. Furthermore, with regard to whether an equivalent to the fair dealing exemption is necessary in the digital environment, most librarians and
users including a few rights holders believed that it was germane to have a digital equivalent of the fair dealing exemption. The reasons most librarians and users indicated were that there has been a shift from ownership of property to access contracts; there are now two different types of content which are print and digital; licences give publishers too much power to restrict access to digital content. The few rights holders said an equivalent to the fair dealing is necessary because there are now two types of contents. Other respondents of all categories suggested that there was no need for a new kind of exemption as the present fair dealing exemption is appropriate; a fair dealing exemption already exists as digital content can be reproduced; the present fair dealing exemption has been tested in court; and following the advantages that the new technology offers to consumers, fair dealing is irrelevant.

The study produces a number of recommendations and conclusions. It has shown that the debate as to whether licences inhibit access to digital content, and whether an equivalent to the fair dealing exemption is needed in the digital environment is perhaps inconclusive. It is evident from the survey that notwithstanding licensing agreements, digital rights management (DRM) systems that monitor access to digital content, and anti-circumvention clauses that makes it an offence to crack a digital device, users still violate and are able to violate digital content. This also happens in other countries. Although there is no international empirical survey to justify this trend, international literature on the other hand shows that theoretically scholars believe that licences inhibit access to digital content and also that there is a need for a digital equivalent to the fair dealing exemption. However, as licences theoretically inhibit access to digital content, it is necessary for a digital equivalent to the fair dealing exemption to be instituted to balance the rights of rights holders and consumers of digital content.

The researcher hopes that the empirical evidence given in this thesis will be a contribution to an emerging field. The research can be used by academic librarians, managers of consortia, and users of digital content in South Africa and abroad to bring to the fore their situation in relation to access to digital content. On the other hand, this research can serve corporate rights holders in knowing what their clientele needs and how they can possibly satisfy some of the needs of their clientele.
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Signed by candidate
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ABBREVIATIONS AND ACRONYMS

AEBPR  Advanced eBook Processor
ARM    Automated Rights Management
BMC    BioMed Central
CALICO Cape Library Co-operative
CAUL   Council of Australia University Librarians
CCC    Copyright Clearance Centres
CD     Compact Disc
CD-ROM  Compact Disk – Read Only Memory
COSALC Coalition of South African Library Consortium
CSS    Content Scramble System
CTEA   Copyright Term Extension Act
DAA    Digital Agenda Act
DeCSS  Decryption Computer Program
DMCA   Digital Millennium Copyright Act
DOI    Digital Object Identifiers
DRM    Digital Rights Management
DRMS   Digital Rights Management systems
DVD    Digital Video Disc
DVDs   Digital Versatile Disks
esAL   Eastern Seaboard Association of Libraries
EU     European Union
FRELICO Free State Library and Information Consortium
FTC    Federal Trade Commission
GAELIC Gauteng and Environs Library Consortium
HSRC   Human Sciences Research Council
IBM    International Business Machines
IBSS   International Bibliography of Social Sciences
ILL    Inter Library Loan
ISI    Institute of Scientific Information
ISP    Internet Service Provider
JISC   Joint Information Systems Committee
<table>
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<tr>
<th>Acronym</th>
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<tr>
<td>LIASA</td>
<td>Library and Information Association of South Africa</td>
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<tr>
<td>MPAA</td>
<td>Motion Picture Association of America</td>
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<tr>
<td>N2</td>
<td>National road</td>
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<tr>
<td>NESLi2</td>
<td>National Electronic Site Licence Initiative</td>
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<tr>
<td>NISC</td>
<td>National Information Services Corporation</td>
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<tr>
<td>OAI</td>
<td>Open Archives Initiative</td>
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<tr>
<td>OAI</td>
<td>Open Access Initiative</td>
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<tr>
<td>OPAC</td>
<td>Online Public Access Catalogue</td>
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<td>OSI</td>
<td>Open Society Institute</td>
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<td>P2P</td>
<td>Peer-to-Peer</td>
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<td>PASA</td>
<td>Publishers’ Association of South Africa</td>
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<td>PC</td>
<td>Personal Computer</td>
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<td>PDF</td>
<td>Portable Document Format</td>
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<td>PLoS</td>
<td>Public Library of Science</td>
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<td>PS2</td>
<td>PlayStation 2</td>
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<td>RAM</td>
<td>Random Access Memory</td>
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<td>RRO</td>
<td>Reproductive Rights Organisations</td>
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<td>SABINET</td>
<td>South African Bibliographic and Information Network</td>
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<td>SASLI</td>
<td>South African Site Licensing Initiative</td>
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<td>SCM</td>
<td>Smith-Corona and Marchant</td>
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<td>SCMS</td>
<td>Serial Copyright Management Systems</td>
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<td>SDMI</td>
<td>Secure Digital Music Initiative</td>
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<td>SEALS</td>
<td>South Eastern Association of Libraries</td>
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<td>University of Cape Town</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>USA</td>
<td>United States of America</td>
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<tr>
<td>VCR</td>
<td>Video Cassette Recorder</td>
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<td>WCTT</td>
<td>Western Cape Tertiary Trust</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<tr>
<td>WRMS</td>
<td>Windows Rights Management Services</td>
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<td>WWW</td>
<td>World Wide Web</td>
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Chapter One:
Introduction

COPYRIGHT, FAIR DEALING AND SCHOLARLY COMMUNICATION IN THE DIGITAL AGE

Before scholarly texts became widely available in electronic format from commercial databases, scholarly communication relied largely on a complex of formal and informal conventions—fair dealing rules, inter-library lending, the distribution of offprints via informal networks—designed to ensure that researchers had easy and inexpensive access to printed sources in their particular field. The changeover to electronic or digital sources has dramatically altered the way in which these conventions operate, by redefining the ownership relations governing content, by making possible additional kinds of protection of content, and by augmenting the power and the role of the private sector in sustaining the scholarly record. There is little question that the availability of digital versions of scholarly articles, for example, contains the promise of huge efficiencies in terms of rapid worldwide distribution. However, it may also contain threats to the traditional methods of communication among scholars, and this thesis sets out to examine, first, the theoretical arguments that have been made for the existence of such threats. It then attempts to test these arguments against the perceptions and experience of a particular subset of researchers, librarians and rights holders in the South African context, focussing principally on two questions: is the fair dealing exemption, vaguely defined as it is in South African legislation, likely to remain workable in South Africa; and do the access licences that institutions typically sign with overseas vendors for access to database resources in fact inhibit access for some categories of library users who would in the past have had little or no difficulty?

The desire to investigate whether access licences have the effect of inhibiting rather than facilitating access to digital information and whether it is inappropriate to use the fair dealing exemption, developed in the epoch of printed sources, in the digital
environment in South African academic libraries, motivated the researcher in broad terms to undertake an investigation into the fair dealing exemption. This is because there 'is a growing concern for legal scholars as well as the library, education and research communities' (Trosow, 2003: 221) about how to migrate the fair dealing exemption into the digital environment. The focal aim of the fair dealing exemption is to balance the rights of corporate rights holders with the needs of users of copyrighted works. The fair dealing exemption does not promote the right of corporate rights holders to the exclusion of others (Trosow, 2003: 220). In the study therefore, the researcher uses the Republic of South Africa to investigate whether licences inhibit access to digital content and gives more rights to corporate rights holders and whether an analogy to the fair dealing exemption in the digital environment is necessary to balance the rights of rights holders with those of users of the information as the exemption is one that balances such rights.

Modern copyright law in the English-speaking tradition has developed in the years since the first legislation was passed in England in 1710 primarily as a protection for the producers of printed materials, granting them a time-limited monopoly for the sale of their wares. The protection covers moral rights -the right to assert authorship, and the right to maintain textual integrity that belongs to the author, and which the author retains even after publication (Feather, 1998: 105) - but by far the most important right is the right to exploit the economic potential of a printed work for a given number of years, without competition from rival publishers who have made no investment in the creative process, and have no obligation to pay royalties to authors. Such publishers have, from the earliest times, been belittled as 'pirates', perhaps not the most appropriate of metaphors, but one that has gained widespread acceptance. It is also important to note that modern copyright law established, virtually from the beginning, that there was no such thing as 'perpetual copyright', but commercial interests have always resisted this, and continue to do so right up to the present day.

This system of monopoly that had emerged from earlier mechanisms of censorship control, worked well enough until social circumstances changed, or new technologies emerged. In fact, the history of copyright practice has been, as I argue in chapters two and three, the history of a pretty much unchanging discourse, accompanied by quite radical change in the meaning and significance of specific terms and expressions. This
history, in addition, has played out largely in the legislatures and courtrooms of the United Kingdom and the United States, defined and demarcated by the concrete social, political, economic and philosophical circumstances of the times. This legislative tradition was then transferred wholesale to South Africa, Australia, Canada, New Zealand and other subordinated dominions of the former British Empire, without too much concern for specific local conditions. These countries together with the fully colonised territories, such as the present South and North West Provinces of Cameroon that were governed from Nigeria but today form the Republic of Cameroon, Kenya or Zimbabwe, inherited the Berne Convention together with all the other treaty obligations of the former colonial masters, and so found themselves bound by these treaties.

The emergence of the last new reprographic technology in the form of digitisation as we shall see, also witnessed a change in the social behaviour of scholars. The nature of the technology of digitisation as I shall argue in chapter three, has given scholars in the digital environment the opportunity to manipulate, alter, reformat, or erase digital information (Neacsu, 2002: 111). In the digital environment, scholars have the possibility to locate digital information from any computer that is connected to the Internet and distribute to other scholars (Peters, 2003: 217). Following the advantage and convenience that the technology of digitisation offers to scholars, rights holders no longer sell copies of works, as they did during the dominance of print information but sell access through access licences (McCracken, 2004: 122), which are legal agreements between the rights holders and users that have conditions on use of digital information (Keenan & Johnston, 2000: 154), in exchange for a fee (Matheson, 2002: 157). The licensing model as we shall see in chapter three, has disadvantages among which is that subscribers who stop paying fees are likely to lose access of the digital information which consequently might have a negative stance on the archival role of institutions. On the other hand, with the initiation of licences, rights holders have obtained more control against end-users of the information than they would have been granted by national copyright as modern copyright law protects print and digital copyrighted materials, as these are original works of the mind presented in literary form. It is argued that licences are written to customize terms to the needs of the marketplace, and offer rights holders control of the information even after the information has been delivered to the subscribers. As I shall demonstrate in chapter
three, there are two extreme positions vis-à-vis licensing agreements, one supported by rights holders that justifies the institution of licences in digital information (Elkin-Koren, 1997; Nimmer, 1998: 831) and another position supported by users of digital information that argue that the institution of licences has deterred research and studies as, licences are not consistent in their approach to copying (International Coalition of Library Consortia, 2001). The arguments presented by rights holders in support of licences on digital information are on the premise that digital technology allows users to make perfect copies of texts that can be disseminated easily via the World Wide Web (Gasaway, 2000: 194). In digitisation it is "much easier to copy and distribute anything online. Ready duplication and perfect transmission are both possible in the digital environment, and can be achieved without requiring the permission of the copyright holder" (Ou, 2003: 89). Rights holders believe that through licences they will have chance to increase revenue and this will encourage them to create more (Rogers et al., 2000). These assertions as I have argued in chapter three are questionable.

The rights obtained by rights holders with the institution of licences to govern digital information, as I argue in chapter three and four, are fortified by digital rights management (DRM) systems that monitor the use of the information. DRM is also fortified by anti-circumvention clauses promulgated by certain nations in their legislative acts. This is because there are countries that have introduced anti-circumvention clauses in the digital environment to protect the use of digital information. The United States promulgated the Digital Millennium Copyright Act (DMCA) 1998, Australia promulgated the Copyright Amendment (Digital Agenda) Act (DAA) 2000. Although the United Kingdom for example, does not have acts like those of the United States and Australia, it has incorporated an anti-circumvention clause in its copyright act that allegedly protects DRM. Hence, there are three types of protections that one can identify with digital content. These are copyright, licensing agreements, and DRM that is also protected by anti-circumvention clauses that prohibit the cracking of any digital device. However, notwithstanding DRM that acts as another protection for digital content and that is also protected by anti-circumvention clauses, as we shall see in chapter four, digital information is difficult to police in practice.
STATEMENT OF THE PROBLEM

The emergence after the first copyright law in 1710 of new printing technologies in the eighteenth century witnessed the appearance of the concept of the fair dealing exemption. The content of the exemption changed as I demonstrate in chapter two as new methods of printing emerged in the eighteenth century and when reprographic technology emerged in the nineteenth century but has not changed with the emergence of digitisation. The history of the fair dealing exemption as we shall see in chapter two, developed from British case law and was subsequently codified to varying degrees by statute law in Britain, the United States, Australia, and South Africa. With the emergence of new print media reprographic technologies, which influenced the social behaviour of users, the content of the fair dealing exemption changed until it settled as a means of freeing users of information from the obligation to ask permission or pay a fee for the copy and use of copyrighted works (Harper, 2001). The function of the exemption is to balance the rights of publishers and users of copyrighted works. The exemption expressly impacts on all copying of printed copyrighted works as it is intended to avoid the rigid application of the copyright law when such an application would defeat the law's underlying purpose (Loundy, 1995).

The development of the fair dealing exemption as I argue in chapter two, started among publishers in the publishing industry, as there were no periodical press, no book reviews, no quotations, nor copying devices that scholars and researchers could use to print information.

The photocopier reprographic technology in 1974 witnessed the final change in the content of the fair dealing exemption in the print environment. When Xerox in late 1974 was forced to relinquish its monopoly on photocopying and the Japanese entered and flooded the market with cheaper and better copiers than those Xerox produced, the social behaviour of scholars changed as it became cheaper to photocopy a book than buy one. In order to protect the might be abusive photocopying of copyrighted printed works that might have been as a result of users preferring to photocopy copyrighted works for commercial purposes, the content of the fair dealing exemption changed. In the change, the exemption allows individuals to copy portions of works for certain purposes such as research, criticism, teaching, and under certain
circumstances that will not interfere with the legitimate rights of the copyright holders (Amen, Keogh & Wolff, 2002: 24). This change of the content of the fair dealing exemption laid down the final version of the exemption that is used today and that countries such as United States, Britain, Australia, and South Africa have subsequently codified in their copyright laws. Worth noting is that all the modifications of the exemption as new reprographic technologies emerged delimited the rights of copyright holders because end users could copy within the modified fair dealing exemption without having to pay a fee or obtain permission from the copyright holders.

With the advent of digitisation where property is not transferred and owned as it is done in the print environment, rights holders in addition to the protection that copyright confers on digital content have introduced licences to control the use of digital information without an equivalent to the fair dealing exemption to show how such information can be used fairly. This is a cause for concern for scholars who really need to use the information and librarians whose duties entail distributing documents electronically (Ou, 2003: 89), but cannot because of the terms and conditions of the licensing agreements. As we shall see in chapter three, licences inhibit access to unauthorized users and librarians are forbidden by certain licensing agreements from distributing documents via Inter Library Loan (ILL) to unauthorized users. Licences override copyright rules, as access to digital information is governed by the express terms and conditions contained in a signed agreement. Licences favour rights holders as it permit rights holders to terminate access to digital content when a clause in the agreement is breached. Licences expand rights holders control over digital information than what copyright law would as any use made of digital information without permission is considered unfair. Licences impose certain restrictions, as its agreements are limited to authorized users who can print or otherwise use the content of the information for scholarly purposes. The rights holders in the licensing agreements require subscribers to protect digital information by instituting passwords or IP numbers that would not allow unauthorized users access to the content of the information. Furthermore, as we shall see in chapter three, some rights holders through licensing agreements claim extensive rights as they expressly state in their agreement that they have the absolute discretion to change the terms and conditions in the agreements.
The introduction of new controls in the form of licences over digital content without any equivalent to the fair dealing exemption as I illustrate in chapters two and three seem to be inappropriate. In the print environment where the fair dealing exemption originated, the exemption is widely understood as a balancing point between the rights of rights holders to control protected content, and the right of users to copy texts for socially approved purposes without having to ask permission or pay a fee for the copy of copyrighted works (Harper, 2001). In the digital environment where uses of content appear to be chargeable through licensing agreements (Liebowitz, 2002: 17), it is argued by the researcher in chapter three that it may be reasonable to introduce an equivalent to the fair dealing exemption to act as a balancing point between corporate rights holders and users of digital content.

In the digital realm, nations such as the United States and Australia in their promulgated digital acts have expressly stated that the print media fair dealing exemption is applicable in the digital environment. The express incorporation of the print fair dealing exemption by countries such as the United States in its Digital Millennium Copyright Act (DMCA) 1998, and Australia in the Copyright Amendment (Digital Agenda) Act (DAA) 2000 as the researcher argues in chapter three is inapt. Furthermore, although South Africa does not expressly incorporate print media fair dealing exemption in the digital environment, it is evident from the responses from the empirical survey in chapter six that users and libraries have adopted a common practice to transfer the unmodified fair dealing exemption in the digital environment.

On the other hand, although licences incorporate a fair dealing exemption or an equivalent to one, as they do not prevent authorized users from downloading and printing copies of texts from digital content for research purposes, some scholars as we shall see in chapter three, argues that following the new issues that information technology has made possible in the digital environment, an analogy to the fair dealing exemption is necessary. The technical characteristics of digital information as we shall see in chapter three, and licensing agreements have the potential to restrict access to the provision of fair dealing exemption (McCracken, 2004: 130). Since licences are contracts that state what is being licensed and the contractual obligations
to be honoured, the agreements may limit the legitimate copying of digital
information where specific clauses are ambiguous and users may refrain from making
legitimate copies of texts that have been subscribed to by institutions (Hardy &
Oppenheim, 2002: 100). In this regard, notwithstanding the fact that that licences
incorporate the fair dealing exemption implicitly, they inhibit access to digital
information, with and without embedded clauses, as opposed to copyright law.

DEVELOPMENT OF THE RESEARCH STRATEGY

As in many developed and developing nations, South African academic library users
may be faced with the problem of accessing digital content as access to the
information is allegedly inhibited by clauses embedded in licensing agreements that
impose limitations on what users can do with the documents. Notwithstanding that the
literature of this assertion and other related debates around these issues has only been
covered by the views of authors from developed countries, the researcher intends to
check general theories that are examined in chapter five, against South African
realities. In this study, although most of the literature is mainly from authors from the
United Kingdom, United States, and Australia, it is worth noting that secondary data
has been gathered from scholarly literature worldwide. Primary data, to the best of my
knowledge is non-existent as there is no study that has been conducted on this subject
in Europe, North America, Asia, South America, Australia or in the continent of
Africa. Specifically, little or no studies have been done on the views of the public on
this subject in Africa not to talk of South Africa. Following the fact that there has not
been any primary investigation on this subject, the researcher carried out an empirical
study in the Republic of South Africa to compare the views of end users, librarians,
consortia and corporate rights holders mainly vendors of digital content with those of
general authors' secondary data. Specifically, the following aspects served as
incentives and raison d'être for the study:

- From the literature (Ou, 2003:89; Richey, 2002: 17; Khoo, 2002; Lawrence,
  2001), it is reported that most users use digital content and prefer the content
to print media. The researcher intends to investigate this assertion with their
  possible reasons.
The researcher has been a constant user of information in academic libraries and from the literature on licensing agreements it is clear that licences can inhibit access to certain types of users. This is because licensing agreements attempt to impose limitations on what users can do with the information. The researcher intends to investigate whether this is true in practice and if possible suggest solutions that may be implemented to curb this practice.

To investigate the practical impact of licensing agreements – i.e. whether the limitations imposed in the agreements are known, respected, and enforced by subscribers and end-users of the information.

To explore what level of awareness exists among the different categories of stakeholders.

From the secondary data obtained from the literature, it is clear that licences and digital rights management (DRM) systems are there to restrict unauthorised access to digital content. The researcher intends to investigate whether in practice the licences and DRM forbid unauthorised users access to digital content.

Certain authors in the literature have raised concern on the rights that rights holders command through licensing agreements – a right that is presumed to have emerged because rights holders draw up terms and conditions of licensing agreements and impose such agreements on subscribers and consequently end users of the information. With regard to this, the researcher intends to investigate whether subscribers are allowed to negotiate terms and conditions in licensing agreements.

From the literature, the researcher is conversant with the open access initiative that purports to serve as a new initiative against licensed digital content. The researcher intends to investigate whether the initiative can serve to replace licensed digital content.

The researcher is aware of the implicit fair dealing exemptions that are incorporated by rights holders in licensing agreements and intends to investigate whether such exemptions are not enough to serve users of the information.

The researcher is aware that when new methods of printing and new reprographic technologies emerged, it changed the social behaviour of users of information and because of the new technologies the content of the fair
dealing exemption changed. The researcher therefore intends to investigate whether it is proper to change the content of the fair dealing exemption as new reprographic technology of digitisation has emerged and whether such an analogy or equivalent to the fair dealing exemption would curb the supposed access inhibition caused by licensing agreements.

In order to investigate the above, the researcher in an empirical survey conducted in South Africa had to probe the respondents on the following issues:

1. How users perceive the advantages of digital content
2. Copyright and licensing agreements: perceptions and misconceptions;
3. Knowledge of measures to protect digital content;
4. The subscriber in a police role: views and perceptions;
5. Do licences inhibit access to digital content?
6. Perceptions about open access and other models;
7. Negotiations: are licences flexible enough?
8. Are licensing agreements violated?
9. What's the analogy or equivalent to fair dealing in the world of digital content?

In investigating the above uncertainties, the researcher used the qualitative research method to gather information. The qualitative method was used because the investigation had to reveal experience as it is lived, felt, or undergone (Makubela, 1998: 148) by respondents in their use of digital content. Hence, the qualitative method that comprised interviews from structured and unstructured questions was used. The information gathered from the qualitative method was tape-recorded and partially transcribed. This is because after the researcher transcribed the first interviews that were conducted completely, the amount of transcribed materials for the later interviews were limited as the researcher became more sensitively selective in what was to be transcribed by leaving out materials that did not address the issue that was investigated (Bogdan & Biklen, 1992: 131). The structured questions were a series of pre-established questions while the depth unstructured questions emerged from the responses of the respondents. Among the reasons for opting interviews, as we shall see in chapter five, was because the investigation had to reveal experience as
it is lived, felt, or undergone in the cause of using digital content. The qualitative method in the form of interviews allows those who are studied to speak for themselves. The full structured question is presented in Appendix D-H.

**THEORY AND REALITY: SOUTH AFRICAN PERCEPTIONS ABOUT CONTENT PROTECTION**

Following the responses from the respondents in the empirical survey, it was showed that while there are certain findings that confirm the views expressed by the authors in the literature, there are others that do not confirm the authors’ views. Furthermore, the survey demonstrated other germane issues that no author reported in their literature. With regard to the findings that confirm the views of the authors, the survey confirmed that most users use digital content and derive different satisfaction by using the information. Notwithstanding that those users get satisfaction, there is a high level of ignorance among most people about the laws of copyright. Other views that were confirmed in the investigation were:

- Licences protect and inhibit access to digital content;
- Rights holders use DRM to monitor access to digital content;
- Institutions that were found abusing digital content faced the risk of foregoing access to the information;
- Consortia can negotiate better subscription prices for licensed digital content.
- Corporate rights holders do not accept that licensing agreements inhibit access to digital content.
- To some extend, licences give more rights to corporate rights holders.
- If scholars and consumers decide to use only open access sources, licensed digital content will be affected.
- Custodians of digital information refuse to be regarded as policemen or women to monitor possible violators of the information;
- An analogy or equivalent to the fair dealing exemption is necessary in the digital environment, as the environment is different from print media. With regard to this, most respondents were of the view that as technology changes the law must also change in order to address concerns raised by new technologies; and
Most respondents in the survey said aspects of distribution, circumvention, reproduction, making of copies, as well as commercialisation should form the basis for an analogy to the fair dealing exemption.

On the other hand, in the empirical survey, there were findings that refused the views of authors as presented in international literature. The following declarations from international literature does match with the findings in the survey:

- In theory it is alleged that licences attempt to inhibit access to digital content but in reality it does not. Licensing agreements are violated.
- Licences are not being written to customize terms to the needs of the marketplace. This is because the survey shows that licensing terms and agreements are negotiable.
- Notwithstanding the alleged advantages of open access sources, most scholars and consumers of digital content prefer licensed digital content to open access sources.

The survey revealed certain issues that only an empirical study of this genus could divulge, as authors have not reported such findings in their literature. These findings that are explained in chapter six are as follows:

- Licensing agreements do not only inhibit access to unauthorized users but can equally inhibit access to authorized users of digital content;
- Authorized users of digital content can violate a licensing agreement among themselves;
- Open access sources have started having an impact on licensed digital content.

Furthermore, although it was revealed in the survey that licensing agreements are negotiable, the survey equally showed that rights holders do not accept negotiations when it comes to the price to be paid for the information. In this regard, this scenario is only possible where the demand for the product is greater than the supply. This is because when individual institutions engage in negotiating the prices for digital content, the demand for digital content would exceed the supply because of the weak market force. The situation may likely change when consortia carry out such negotiations as the market force would be stronger because the consortia is regarded
as negotiating for a number of institutions. This has been demonstrated in South Africa because when it is a consortium that negotiates the prices of digital content, rights holders accept to negotiate the prices because the market is bigger than when it is a single institution that is negotiating. This is corroborated by the negotiations that the South African Site Licensing Initiative (SASLI) undertakes for South African institutions (Veldsman, 2002).

The next chapter discusses the historical trajectory of modern copyright law and the fair dealing exemption, through its development in England and its subsequent codification in the copyright and intellectual property legislation of such nations as the United States of America, Australia and, of course, South Africa.
Chapter Two:
The origins and shifting meaning of the concept of fair dealing in the English speaking world

This chapter describes the history of copyright legislation in the English-speaking world over the last four or five centuries within a framework of long-term and fitful social, political and technological change, and locates the emergence and development of ‘fair dealing’ or ‘fair use’ exemptions in that context. The chapter furthermore seeks to show that although the vocabulary of copyright legislation has remained more or less constant, the referents of that vocabulary have changed significantly. For instance, the term ‘fair dealing’ as used in the pre-Xerox era often has a significantly different content and meaning from the same expression as used currently. This process seems to be continuing, and the transference of existing copyright terminology into the digital environment is creating a fresh set of ambiguities and misunderstandings, as we shall see.

The guild system and the English precursors of copyright to 1710

This period shows how printing was introduced in England and how the effects of the printing press culminated to the first copyright law in 1710. The licensing of printing in its original form served the interests both of the state, and of the early proto-publishers of printed materials in distinct ways. By examining this convergence of interests, we can see how the concept of copyright became entrenched in the English-speaking legal tradition, and begin to deconstruct some of the self-serving mythology surrounding the present intellectual property regime.

Modern copyright law was originally derived as a political and censorship mechanism from the common law or customary rights recognized by early modern courts. The emergence of the printing press in England in 1476 by William Caxton opened up the possibility for the large-scale reproduction of books for the first time (Leaffer, 1989: 2). The uncontrolled printing of potentially subversive material was immediately seen
as a threat to the Crown and to the dominant political and religious ideologies (Prime, 1992: 17; Phillips, Durie & Karet, 1997:3). The solution found was to place control of printing in the hands of a traditional London based trade guild, the Stationers’ Company, ‘who would not publish books that the Crown considered politically or religiously objectionable’ (Merges, Menell & Lemley, 2000: 345-346), in exchange for what was effectively a monopoly on book production. By as early as 1534 nobody was allowed to print without a guild licence. The Crown awarded letters patents and a publishing monopoly to the Stationer’s Company, and in return the Company acted to prevent the publication of objectionable monographs (Leaffer, 1989: 2-6).

From the point of view of the Stationers Company, this kind of control was appreciated as it enabled them to make profits. The Company of Stationers benefited immensely from the Star Chamber Decree of 1556 that granted it a Charter to practice the art of printing. In the interest of censorship that was the concern of government, it regulated the printing and importation of copies that was to be done expressly by members of the Company. By virtue of this Charter, the Company had a monopoly sanctioned by the Crown in all English printing. This monopoly was sustained through much of the 17th century with a series of Licensing Acts - 1662 and 1685 - that were devised to preserve state censorship (Phillips, Durie & Karet, 1997:3-4; Loewenstein, 2002:55-59).

Although the rules of the Stationers Company were being obeyed as from 1534 to 1709 they were overtaken by the massive social, political and economic upheavals that constituted the transition from late mediaeval to early modern English society. At the end of the seventeenth century, following agitations from religious, ideological, and provincial printers against the monopoly of printing in the hands of the Stationers Company, the House of Commons refused renewing the Licensing Act in 1694. These agitators wanted to enter the printing trade that was in the hands of the Stationers Company. Following the refusal to renew the Act, the House of Commons in the same year established a committee to draft a new Bill notwithstanding agitations for the Acts revival, that culminated to the first Copyright Act in 1710 popularly known as the Statute of Anne. The formation of the Statute of Anne created the conditions for the abolition of pre-publication censorship and the emergence of a free press. The superstructures of the protection that the Stationers’ Company had created were swept
away as there were no more restrictions on the number of printers, requirement to enter licences in the Stationers’ Register, nor restrictions of the import of books (Feather, 1994: 50-52).

Notwithstanding the promulgation of the Statute of Anne, the struggle for perpetual copyright did not end as the London guild continued to look for ways to protect their interest, as we shall see.

**THE ENLIGHTENMENT AND THE INVENTION OF MODERN COPYRIGHT, 1710-1774**

This period marks the beginning of copyright, its objective and the struggle by copyright holders to claim copyright in perpetuity. The overt objective of the Statute of Anne was for the ‘encouragement of learned men to compose and write useful work’ (Leaffer, 1989: 3) and not to protect commercial interest. This was made clear when the Statute stipulated, ‘copyright was no longer the privilege of the Stationers’ Company’ (Phillips, Durie & Karet, 1997: 6). In order for the act to encourage learning, it vested the copies of printed books in the authors or purchasers of such copies (Harrison, 1971: 34). However, notwithstanding the promulgation of the first copyright act in 1710, the act turned to reward publishers and not original creators of works as ‘by the middle of the seventeenth century it had become customary for publishers to offer honoraria to the writers whose works they agreed to print’ (Woodmansee, 1984: 434). As publishers bought the creators works, the publishers transformed themselves to copyright holders and enjoyed copyright on works they published for a limited period as the Statute of Anne instituted the concept of the public domain by setting limited terms for copyrighted works. This was twenty-one years copyright for books that had been produced before the promulgation of the Act (old books), and fourteen years with a possibility of an additional fourteen years for books that were produced when the Act had been promulgated (new books) (Ross, 1992: 2; Harrison, 1971: 35-36; Merges, Menell & Lemley, 2000: 346).

Following the rationale behind the Statute of Anne it was obvious that the entry into the business of printing was changing. Others who were not members of the central
London guilt could enter the trade. With the entering of new members into the trade, the market for books grew bigger and was appreciated by the leisure class who sat in coffee and teashops drinking coffee and tea while reading. Scholars such as John Locke assisted in the opening of the market for books as he created within the framework of emerging parliamentary democracy a new openness to change with a commitment to ‘concepts as freedom of speech and the press’ (Darch, 2003: 4). John Locke ‘argued that the Stationers’ monopoly made books too expensive, and that they merely made profits from the fruits of other people’s work’ (Feather, 1994: 50).

The dominant London booksellers did not however welcome the limited term for copyrighted works. The dominant London booksellers who had been enjoying the monopoly of the 1662 Act and had unsuccessfully petitioned for its renewal ignored the statutory limits imposed by the Statute of Anne. They claimed that ‘intellectual property, like real property, was recognized at common law and was therefore a right held in perpetuity’ (Ross, 1992: 1). This was corroborated in Millar v. Taylor¹ where it was held that common law rights had not been displaced by the Statute of Anne (Phillips, Durie & Karet, 1997: 7; Loewenstein, 2002: 60). Provincial booksellers however, who were eager to publish their own editions of canonical works, challenged this claim in ‘courts and in scores of tracts and pamphlets’ (Ross, 1992: 1). This struggle was finally resolved in 1774 by the House of Lords in Donaldson v. Beckett² where the House, Britain’s final court of appeal, rejected the arguments for perpetual copyright in common law and upheld the statutory limits that were set out in the Statute of Anne in 1710 (Ross, 1992: 1).

Following the judgment of the House of Lords in Donaldson v. Beckett, it became clear that the interest of rights holders could be quite sharply differentiated, a point that is often glossed over in modern discussions of these issues. Publishers keep shifting copyright limits in order to uphold their copyright. In the United States, it has been shifted from lifetime of the author plus fifty years to lifetime of the author plus seventy years (Blanke, 2004: 225). This shift came about because Disney’s copyright on Mickey Mouse was to expire in 2003. The owners – Disney - not willing to see

¹ Millar v. Taylor (1769) 4 Burr. 2303. (This method of footnoting which is principally used in legal writings has been used in this dissertation to give full references to the cases cited).
² Donaldson v. Beckett (1774) 2 Burr. 2408
Mickey Mouse copyright enter the public domain lobbied Congress extensively and in 1998, Congress passed the Copyright Term Extension Act (CTEA) extending the length of copyright to the life of the creator plus seventy years (Harper, 2001; Sprigman, 2002). The implications are that publishers are constantly aware of the financial loss involved when copyright materials enter the public domain. They keep fighting to maintain it and are succeeding in the print environment as well as in the digital environment as we shall see.

The goal of the Statute of Anne was adopted by English speaking nations. In the United States for instance, in 1789, Article 1 section 8(8) of the Constitution adhered to the objective of the Statute of Anne when Congress was assigned the power ‘to promote the progress of science and useful arts, by securing for a limited times to authors and inventors the exclusive right to their respective writings and discoveries’ (The United States Constitution, 1789). The Cape Colony - as South Africa was known then - in 1803 also adhered to the notion of the Statute of Anne although they had a form of Roman-Dutch common law copyright that stemmed from a copyright act that was by the Batavian Republic during the time when the Cape was an overseas province of the Batavian Republic (Dean, 1987: 3). Similarly, the Australians adopted the Statute of Anne for the obvious reason that Australia was a British colony in 1901 when it became the Commonwealth of Australia (Roberts, 1996: 425).

**GRANTS OF EXEMPTION:**

**THE ORIGINS OF FAIR DEALING IN 18TH CENTURY CASE LAW**

The concept of the fair dealing exemption emerged from early eighteenth century British case law (McDonald, 1999: 3), and from the specific technological and social circumstances of the time as printing technology had not changed in its essentials even at the dawn of the nineteenth century (Feather, 1994: 174).

The fair dealing exemption developed in the book publishing industry as from 1740 among publishers and was contested in court, as users in the modern sense of scholars and researchers were not involved and had no reason to be involved during this period. Scholars and researchers could only use derivative works, as there were no
periodical press, no book reviews, no quotations, nor copying devices that would have inspired them to use print information. Hence, in 1740 when publishers among themselves started testing the limits of the Statute of Anne on the question of making an abridgment of a copyrighted work, the courts started unveiling what subsequently became the fair dealing exemption. The raison d'être of publishers' was to prevent other publishers from making abridgments, as this would interfere with the sale of the first work.

The question of abridgment came before the court in the case of Gyles v. Wilcox.\(^3\) In this case the statutory right that was only given to copyright owners to make unconsented abridgments was reversed as the court ruled in favour of the defendant on the ground of fair abridgment. The court resolved that abridgments were considered as a 'new work'. Lord Chancellor Hardwicke in evaluating an asserted defence of abridgment clarified that where another publisher colourably - i.e. present an appearance that does not correspond with reality, or an appearance intended to deceive (Yogis, 1998: 50) - shortened books it could not be termed an abridgment. But an abridgment that was not colourably shortened was regarded as 'fair abridgment' as it 'involved invention, learning and judgment by the abridger' (Patry, 1995: 7). There was however 'no mention of competition between the original and the abridgment or of the effect the abridgement would have on the market for or value of the original' (Patry, 1995: 7).

From asserting fair abridgment, the publishers' contentions in 1752 were reverted to testing fair abridgment on reviews of copyrighted works. In Tonson v. Walker,\(^4\) the plaintiff had compiled 1,500 notes by various authors. He sued the defendant because the defendant wished to publish his own edition of poems, in which the defendant had added 28 original notes in which he had reproduced the plaintiff's notes. In the judgment the defendant's claim of using the plaintiffs notes for his edition under fair abridgment, as it was a public utility was refuted. The court found that the notes were colourably abridged with only twenty-eight new notes from the defendant (Patry, 1995: 7-8).

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\(^3\) Gyles v. Wilcox 2 Atk. 141, 143 (1740) (No. 130).
After the courts had ruled as to what constituted a fair abridgment and fair abridgment on reviews, in 1761 a case — *Doddsley v. Kinnersley* — was decided that mixed the questions of fair abridgment and review. In this case the court came up with the notion of rating the market value of the copyrighted work by stating, 'no certain line can be drawn, to distinguish a fair abridgment; but every case must depend upon its own circumstances' (Patry, 1995: 8). These phrases came to dominant the fair dealing exemption in the later part of its development when new technologies of copying were invented.

In *Doddsley v. Kinnersley*, the plaintiffs as assignees of Samuel Johnson published a two-volume work of Johnson's fiction from where they had on two occasions published large extracts. The defendant printed one-tenth of the work and claimed it was a fair abridgment because of the small quantity printed and because of the nature of the case that was believed to aid rather than interfere with the sale of the work. For an injunction before the court against the plaintiff, the defendant introduced evidence that it was useful to print extracts of new books without asking leave of the authors, and that the plaintiffs had themselves published large extracts of the work on two occasions. In considering the injunction, the court pronounced that no certain line could be drawn to distinguish a fair abridgment but that every case had to be depended upon its own circumstances. The judgment in the case went in favour of the defendant because the plaintiffs had previously published extracts of the work, which meant that the market for and value of the work was not affected by the defendant's publication.

Notwithstanding the decisions of fair abridgment, review and rating for the market value of copyrighted work, the limit of the Statute of Anne was tested in 1770 as to whether a review could displace the market for the original copyrighted work. In *Macklin v. Richardson* the defendant hired transcribers to attend a performance of the plaintiff's unpublished two-act play. The defendant afterwards published the first act of the play and gave notice that the second act would be published subsequently. The plaintiff sued the defendant to restrain further publication and for an accounting of

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4 Tonson v. Walker 3 Swans. (App.) 672 (1752).
5 Doddsley v. Kinnersley Amb. 403 (1761) (No. 212).
6 Macklin v. Richardson Amb. 694, 696 (1770) (No. 341).
profits on the first publication. The court rejected the defendant’s defence that his act was privileged as an abridgment or a review. This was because the defendant had printed the plaintiff’s work before the plaintiff could do so. This case provided the ‘foundation for the principle that a review may not supplant the market for the work itself’. (Patry, 1995: 9).

**Fair use and fair dealing respond to new technologies, 1800-1911**

Before showing how fair use and fair dealing exemptions respond to new technologies, it is necessary to give a brief account of the important differences between fair use and fair dealing. The United States of America, instead of ‘fair dealing’ uses the words ‘fair use’, while ‘fair dealing’ is used by the United Kingdom, Canada, Australia and South Africa. With regard to the differences between fair use and fair dealing, the former has a restricted area upon which an act of copying can be judged whether it is fair or not fair, while the latter does not have such a restricted area. The Supreme Court of Canada decision in *The Law Society of Upper Canada v CCH Canadian Limited* provides a good example of the unrestricted application of the fair dealing exemption.

In *The Law Society of Upper Canada v CCH Canadian Limited*, legal publishers brought an action for copyright infringement against the Law Society of Upper Canada for operating a photocopy and custom copy service at the Great Library of Osgood Hall. The photocopying service copied portions of CCH Canadian Limited, Canada Law Book Incorporated and Carswell materials on request for a fee. The service included the delivery of print and facsimile copies to its customers who were generally lawyers and law firms in Ontario. The Law Society of Upper Canada also provided free-standing photocopiers in the Great Library. The Law Society did not monitor the use of these photocopiers but did post notices disclaiming responsibility for infringing copies made by the users of photocopiers. The legal publishers declared that copyright subsisted in their material, and that the Law Society infringed those copyrights through its photocopying service and by making free-standing photocopiers available in the Great Library. They alleged that they were being

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deprived of licensing fees from more than 100 000 pages copied yearly at the Great Library by lawyers and students.

In the ruling the Supreme Court of Canada established a broad reading of the defence of fair dealing in respect of research undertaken at the Great Library. The counsel for the Law Society argued that the Great Library was a research library rather than a lending library. The counsel maintained that users needed access to photocopiers to make copies of works because they were unable to borrow the works. According to McLachlin CJ said, ‘the fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively ...’. The Supreme Court of Canada emphasised that the fair dealing exception is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. The Court accentuated that ‘research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. With regard to the counsel for the legal publishers refusing that the Great Library was a not-for-profit library, pointing out that its main patrons were lawyers engaged in commercial practice, the Supreme Court of Canada ruled that research was not limited to non-commercial or private contexts. The Court ruled that ‘lawyers carrying on the business of law for profit are conducting research within the meaning of section 29 of the Copyright Act’ (Rimmer, 2004).

One may therefore state that ‘fair dealing’ is not interpreted restrictively while ‘fair use’ is interpreted restrictively by being applied to certain set standards only. This is evident in the Copyright Law of the United States of America where a plea of fair use is treated within the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work (United States Copyright Act of 1976). These four guidelines must be satisfied before the court would accept a plea of fair use. Where any of these guidelines are not met, the courts do not accord a plea of fair use. For
example, in *American Geophysical Union v Texaco, Inc.*
8 a scientist made photocopies from the ‘*Journal of Catalysis*’ to support experiments he performed in his Texaco laboratory. The court ruled that corporate copying of a small number of scientific and medical journals was not fair use under United States copyright law, because systematic and archival copying of the journal articles had an adverse impact on the publisher’s market. The court also ruled that because he did not write a new article based on submissions to the journal, but simply made wholesale copies, his exploitation was not productive and hence the fair use plea could not be applied.

With regard to how fair use and fair dealing respond to new technologies, the period 1800-1911 was mainly dominated by print technology, as there was no other technology to reproduce printed materials. With the emergence of technologies of printing printed works, publishers among themselves continued to test the limits of the Statute of Anne on several grounds. These included the continuous testing of fair abridgment, quotations, competition, and the amount of creativity to qualify fair use or abridgment, as well as what would be accepted as criticism. The new printing technologies such as the linotype and monotype facilitated reproduction of copyrighted printed works among publishers most of whom were pirates. The consequences of these tests ultimately aided the courts in establishing the fair use exemption.

At the commencement of the nineteenth century, the production of books had barely changed in the 350 years since the invention of printing. Printing was the only mode of reproduction that could be used for text notwithstanding the letterpress process of copying introduced by James Watt in 1780 and the linked pens with which one could write two or more copies of the same document at once (Rhodes & Streeter, 1999: 7). By the late 1710s printing technology had completely taken over the hand written methods of copying information that did not call for copyright protection, as it was difficult to produce the hand written documents *en mass*. With the introduction of mechanical technology, genuine copies of documents were produced that served as business records and hence did not call for copyright protection, as its purpose was mostly to keep business records. The introduction of reprographic technology with

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8 *American Geophysical Union v Texaco Inc* 60 F. 3d 913 (2d Cir. 1994).
which printed materials could be copied brought together two technologies for copying printed materials and hence the necessity for copyright protection as there was the possibility for the printed materials to be reproduced *en mass*.

The invention of stereotyping that allowed an exact copy to be made of a page of type and commercialised as from about 1800 onwards; the paper making machine that displaced hand papermaking for commercial purposes after their first introduction in 1807; the revolutionary change of the application of steam power to printing from 1814 onwards; the emergence of the new technology of lithography that allowed detailed and accurate drawings and diagrams; the invention of the linotype and the monotype in the late 1880s and early 1890s; cumulatively advanced the method through which text could be reproduced easier, faster and cheaper (Feather, 1994: 174-175). These technologies ‘made it possible to produce long print runs rapidly at low prices’ (Feather, 1986: 170). With these new technologies publishers could through various ways of printing reproduce others works under the pretext of fair abridgments and reviews arguing that such abridgments or reviews did not displace the market for the original work.

The invention of various ways of cheaply reproducing text brought the price of books to unprecedented low levels and increased the market for the books. The commercial as well as the libraries created new markets for the book trade. The increase of books in the society uplifted literacy rates in the society (Altbach, 1998: 1; Feather, 1994: 177). There were scholars in different areas of specialisation that benefited through the new book market. Scholars who were interested in propagating the capitalist and socialist ideologies of the time, and those who were interested in scientific inventions got the needed literature to advance their ideas in their respective fields in the new market for books (Roberts, 1996: 384; 388).

Some of the effects of the new technologies of reproducing printed works were addressed by case laws as the amendments that were carried out in the copyright acts that came after the Statute of Anne failed to address the proliferation that already existed as early as the 1840s (Feather, 1994: 174). The amendments only dealt with engraving that was protected under the Engraving Copyright Act 1734, Sculpture that was protected under the Sculpture Copyright Act of 1814, British Parliament
legislated for authors in 1842, and in 1862 only aspects of paintings, drawings and photographs were legislated upon and protected by the Fine Arts Copyright Act 1862 (Prime, 1992: 17).

With the emergence of new printing technologies, the battle among publishers as to what constituted fair abridgment intensified. In an effort to further explain fair abridgment with the emergence of new printing technologies the court in Cary v. Kearsley⁹ implicitly established the origins of ‘fair use’ as opposed to fair abridgment as Lord Ellenborough did not use the words ‘fair use’ nor ‘fair dealing’ but asked whether the work was ‘used fairly’ (Patry, 1995: 10). In this case the plaintiff who was the author of ‘The Book of Roads’, sued the defendant for infringement for having used the same names of certain places and distances in his work. The defendant’s fault was aggravated as the mistakes that the plaintiff had in his work were also found in the defendant’s work. Lord Ellenborough remarked,

That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another; he may so make use of another’s labours for the promotion of science, and the benefit of the public; but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the animus furandi (good faith)...(Patry, 1995: 10).

Following the remark of Lord Ellenborough in Cary v. Kearsley, that ‘a man may fairly adopt part of the work of another . . .’, it was clear that fair use had to be made in good faith. Hence, notwithstanding that a work is for the promotion of science and benefit of the public, if such works were not in good faith, fair use would not be applicable. Thus, a work that is useful may be found to infringe copyright if it is composed with the purpose of depriving the first publisher of his or her copyright (Patry, 1995: 11).

After the emergence of the unreserved fair use decision in Cary v. Kearsley, issues of quotations, competition, and the amount of creativity essential to qualify fair use or

abridgment were decided in *Wilkins v. Aikin*\(^{10}\) (Patry, 1995: 13). This was germane because with the new printing technologies, reviews that started in the late seventeenth century were carried in the eighteenth and nineteenth centuries. These reviews took different dimensions among which were the general interest periodicals that started in the late seventeenth century with a few like the ‘*the Tatler*’ and ‘*the Spectator*’ stretching in to the eighteenth century. The periodicals reviews advanced in the nineteenth century when the American newspaper business was born with quarterly publications that covered learned articles and political commitment in Britain and reporting of contemporary events in the United States (Surowiecki, 2003: 1; Feather, 1986: 169; Reed, 1997: 50).

In *Wilkins v. Aikin*, the plaintiff published a work that contained several drawings and pages and claimed that the defendant had copied this drawings and pages in the work that the defendant published. The plaintiff rejected the argument that the defendant’s work was a fair quotation, a compilation, or an abridgment. This is because the defendant claimed that he had no intention of injuring or interfering with the plaintiff’s work, and that works were not in rivalry with each other as they addressed divergent spectators. Notwithstanding that the court settled with the defendant that there was such a right of fair quotation, on the contrary the court held that with cases of fair abridgment, good faith was a significant factor in rejecting the privilege (Patry, 1995: 13).

With the decision in *Wilkins v. Aikin*, it was decided that the aspect of *animus furandi* (good faith) was to be tested before the law. This materialized in 1826 in *Mawman v. Tegg*\(^{11}\) where it was stated that *animus furandi* would be judged with regard to the quantity of work quoted by another publisher from the original work. In this case it was said, ‘quotation, for instance, is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention’ (Patry, 1995: 15).

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\(^{10}\) *Wilkins v. Aikin* 17 Ves. (Ch.) 422 (1810).

\(^{11}\) *Mawman v. Tegg* 2 Russ. (Ch.) 385 (1826).
In deciding how much of such a quotation would be acceptable, the court in *Bramwell v. Halcomb*\(^\text{12}\) held that ‘when it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another’s book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to…’ (Patry, 1995: 16).

With regard to testing the limit of publishing certain portions of another publishers work on the basis of criticism, *Bell v. Whitehead*\(^\text{13}\) established that it was permitted to extract from another publication for the purposes of criticism provided it did not supplant the market for or value of the original work. The defendants were restrained from selling an edition of their weekly periodical that contained an extract copied from the plaintiff’s periodical in relation to the velocity attainable on railways. On appeal by the defendant, the court over turned the injunction on the basis that the extract was inserted for the purpose of criticism. The decision to accept the plea on the basis of criticism was not based on the loss in value of the copyrighted work but on the legitimacy of the use of the work (Patry, 1995: 17).

In 1839 after the testing of the limits of the Statute of Anne within the context of fair abridgement that started with the phrase of ‘a man may fairly adopt…’ in *Cary v. Kearsley*, there was a complete move away from all the appellations to an express use of the term ‘fair use’ in its current combination. In *Lewis v. Fullarton*,\(^\text{14}\) the plaintiff published a work partly composed of compilations and selections from other works and partly of original authorship. The plaintiff claimed that the defendant infringed his work by copying a considerable portion. The court refused the defendant’s defence that he had merely made a fair use of a former publication on the same subject. The court found that ‘the defendant had not made any productive, creative use of the plaintiff’s work; instead he had merely copied it’ (Patry, 1995: 17). In fair use the ‘communication of the same knowledge of the original’ is prohibited ‘ (Patry, 1995: 18).

\(^{12}\) *Bramwell v. Halcomb* 3 My. & Cr. (Ch.) 737 (1836).

\(^{13}\) *Bell v. Whitehead* 8 L.J. (N.S.) Ch. 141 (1839).

\(^{14}\) *Lewis v. Fullarton* 2 Beav. 6 (1839).
The principles of fair use exemption having been established through case law, courts in the English-speaking countries such as the United States Supreme Court in *Folsom v. Marsh*\(^1\) used the principles developed by the English judges to formulate the fair use exemption in 1841 (Patry, 1995: 3). Although the fair use exemption had been developed by case law, the test to qualify fair use with regard to the amount of quotation, selection, extraction or abridgment continued to dominate case law in the United States with inferences from English case law. This was evident in the ruling in *Folsom v. Marsh*, where the court in refusing the defendant’s claims that ‘an author has a right to quote, select, extract or abridge from another, in the composition of a work...’ (Patry, 1995: 20), said that had it been the case of a fair and bona fide abridgment of the work of the plaintiff, it might have admitted a very different consideration. This is because in England, such a right to make a fair and bona fide abridgment was judicially created (Patry, 1995: 23).

The United States references to English case law continued in the late nineteenth century as was evident in *Lawrence v. Dana*.\(^2\) In this case, to assert unconsented uses of a copyrighted work by a subsequent writer, the court referred to *Cary v. Kearsley* for the principle ‘that the primary criterion of determination was held to be the intent with which the person acted who is charged with infringement,’ and ruled that ‘evidence of innocent intention may have a bearing upon the question of fair use’ (Patry, 1995: 35).

Although the United States case law made inferences to English case laws in deciding copyright in the late nineteenth century, at the dawn of the twentieth century copyright issues took divergent directions with the revision by the United States and Britain of their copyright laws. In the first United States general copyright revision in 1909, the right to make unconsented fair abridgments was abolished. When America was not great producers of copyrighted works their publishers and printers supported unconsented fair abridgment because they reprinted non-American works and by so doing created thousands of jobs for American workers (Budd, 1994: 172). The United States was not among the world’s exporter of copyrighted works. When the United States became the world’s exporter of copyrighted works and there was the possibility

\(^{15}\) *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).
of an increase of organised international piracy of copyrighted works of American authors (Leaffer, 1989: 351), they advocated for consented fair abridgment as there was the possibility that American publishers and authors would lose if unconsented fair abridgment were practiced.

The British Copyright Act 1911 provided a statutory defence of 'fair dealing' that 'deviated in part from prior case law as it introduced the aspect of 'private study', while the American courts continued to develop the common law concepts of fair use derived from English judges' (Patry, 1995: 28), until 1976 when it revised its copyright law following the effects of the photocopier on copyrighted works as we shall see later.

FAIR DEALING EXEMPTIONS IN LEGISLATION IN THE ENGLISH-SPEAKING WORLD, 1911-1956

This period is equally dominated by print technology but shows how legislature in the English-speaking world codified the fair dealing exemption in their copyright acts. The codification of the act took account of the changes in the content of the exemption as new printing technologies emerged. The effects of the printing technologies—stereotype, paper making machine, steam power, lithography, linotype, and monotype—of the nineteenth century resulted in the establishment of the fair dealing exemption through case law. The case law fair dealing exemption was codified by statute law in Britain with the Copyright Act 1911. This Act for the first time introduced 'private study' fair dealing that became a point of contention when new reprographic machines became easily available and inexpensive (Patry, 1995: 28) as we shall see. Section 2(1)(i) of the Act stipulated that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary was permissible (United Kingdom Law Reports Statutes, 1911: 183).

Following the introduction of the fair dealing exemption in the English Copyright Act 1911, the Union of South Africa provinces as it was then, adhered to the British Copyright Act having effectively repealed the Roman-Dutch common law copyright

when the Union of South Africa was formed in 1910 (Dean, 1987: 3; Roberts, 1996: 426). In Australia, although the Act did not apply in self-governing dominions unless it was declared to be in force by the local legislation, the government adopted the British Act in 1912, as it had earlier agreed to this in principle, by participating in the Imperial Copyright Conference of 1910 (Ricketson & Creswell, 2001: 3.360).

In the early twentieth century the effects of the inclusion of 'private study' fair dealing had started having an effect on copyrighted works. When the small-format film – microfilm – technology in the 1930s emerged and was used for copying rare research materials and books that had long been in the public domain, the content of the fair dealing exemption did not change although it provided a potential cheap means of copying copyrighted materials. Individuals could not use this technology to copy copyrighted works, as the technology required both competent operators and laboratory facilities (Feather, 1994: 205).

The content of the British Copyright Act 1911 was however reviewed in the Copyright Act 1956. This review was necessary for scholars as they carried out quotations from copyrighted works. This act stipulated that 'no fair dealing with a literary, dramatic or musical work for purposes of research or private study shall constitute an infringement if it is for purposes of criticism or review, whether of that work or of another work, and it is accompanied by a sufficient acknowledgement …' (Burke, 1956: 74/6) although it did not define sufficient acknowledgement – a concern that continues to date as there is no universal definition.

While countries such as South Africa and Australia that had ties with Britain also adhered to the changes instituted in the British act, the United States maintained the Copyright Act 1909. This Act 'abolished the right to make unconsented fair abridgments' (Patry, 1995: 28).

In South Africa, although the Copyright Act of 1965 repealed the 1916 Act, they based their legislation closely upon the British copyright Act of 1956 that repealed the 1911 Act (Dean, 1987:3-4). The Act of 1965 adopted the British Act of 1956 ‘... to ensure that authors may not on ideological or unreasonable grounds prohibit the performance of their works in the Republic’ (South Africa Parliament. House of
Assembly, (Hansard), 1965: 3423). This period being the height of apartheid in South Africa, the government at the time felt that by adopting the wordings of the British act would pave the way for the use of publications of those who boycotted the ideologies of the regime. This is because some whites mainly the English both abroad and in South Africa together with some Afrikaners were not in favour of the ideological views of some Afrikaners in establishing apartheid in South Africa (Breitenbach, 1974: 467-468).

The South African Act of 1965 thus stated that fair dealing with literary, dramatic or musical work for purposes of research, private study, personal or private use, criticism, reviewing shall be accepted provided the work is accompanied by a sufficient acknowledgement (South Africa, 1965: 1002).

With regard to Australia, after the British replaced the Act of 1911 in 1956, it nevertheless remained in force in Australia until the local Copyright Act 1968 repealed it. The Australian legislation of 1968 was largely based on the British law of 1956, as she was a British colony (Ricketson & Creswell, 2001: 3.360).

**THE PHOTOCOPIER REVOLUTION AND FAIR DEALING, MID 20 CENTURY TO 1988**

It is during this period that reprographic copying of copyrighted works emerged that again changed the content of the fair dealing exemption. In the 1960s when Xerox developed the photocopier that was invented by Chester Carlson, everyone could copy text although the machines were not ubiquitous in libraries and offices. When Chester Carlson became head of the patent office of the electronics firm P.R. Mallory in the 1930s, ‘his dealings with the many documents and drawings needed for patent application made him realize that there was always a shortage of copies’ (Wirtén, 2004: 58). The process of making duplicates was either through photography or through manual copying. Until the 1870s, the options of making numerous copies were either buying a small printing press or using the services of a commercial printer. In 1780, James Watt patented a copying press that could allow the production of writing on a damp sheet of thin but durable tissue paper that was placed under
pressure either by roller or in a screw-down form. Another means of copying was the polygraph. This was a multi-pen apparatus in which the writer would use one pen as a master pen, and with a set of mechanical arms another pen would concurrently copy the writing. After the polygraph, the stylograph with carbonated paper followed. Because the stylograph ‘was both messy and unreliable’ (Wirtén, 2004: 59), the use of carbon paper did not take off ‘until the typewriter became a fixture in offices and carbon paper came coated on one side only (Wirtén, 2004: 59). Towards the end of the nineteenth century, stencil duplicating machines were developed. The first self-inking stencil duplicating press was introduced by Gestetner in 1890, and in 1898 rotary duplicators first came on the market. Notwithstanding that these inventions appeared in the nineteenth century, the question of how to make single copies that would be of use to corporations and individuals had not been solved in the 1930s (Wirtén, 2004: 59). In order to resolve the problem of copying, Chester Carlson started reading scientific articles in 1935. He based his attention to the field of photoconductivity and set up his laboratory. In 1938, he managed to successfully complete an experiment in ‘electrophotography’. He first wrote a date and address

‘in ink on a glass slide, then a metal plate coated with sulfur was rubbed with a cloth to give it an electrical charge. He positioned the slide against the plate, placed both under a powerful lamp for a few seconds, removed the slide, and sprinkled power on the plate. His inscription appeared. To finish off the experiment, waxed paper was pressed against the plate, and the image transferred to paper’ (Wirtén, 2004: 59-60).

The largest U.S. companies turned Carlson down when he approached them with his invention between 1939 and 1944, but he finally succeeded in soliciting the interest of ‘the Battelle Memorial Institute’ who in 1944 agreed to help him develop his invention by extending $3,000 for research. In 1947, Battelle signed a licensing agreement with ‘Haloid’ – a Rochester company – giving them the right to the basic patents in return for an eight per cent royalty. Like the famous company from the same region as Kodak, Haloid also dealt in photographic products. Their investment in xerograph therefore was a gamble. The name ‘Xerox’ was trademarked in 1948, ‘and xerography – combining the Greek word xeros for dry and graphis for writing – replaced electrophotography as a description of Carlson’s process’ (Wirtén, 2004: 60). In 1949, the first of Haloid’s copiers known as the ‘Ox Box’ came on the market. The Ox Box took a total of thirty-nine manual steps to produce a copy. Although the Ox Box was a disaster, it could be used as a maker of paper masters for offset printing.
presses. As Haloid continued to improve on xerography, it realized that the eight per cent Battelle share might present an impediment to their chances of funding continued research in the future. Hence in return for stock that was to bring many millions to Battelle afterwards on 1 January 1956, Battelle conferred all rights to the basic xerography patents to Haloid. In 1958, Haloid officially changed their name to Haloid Xerox. In 1959 all patents on xerography were bought from Battelle, and in 1961 the company became Xerox (Wirtén, 2004: 60-61).

In the 1960s Xerox Corporation experienced a boom in the business of photocopying as it had the patents on the best photocopying technology. They held the record for reaching $1 billion in sales faster than any company in American history through photocopying (Kearns & Nadler, 1992: 14-30; Feather, 1994: 176; Jacobson & Hillkirk, 1986: 8; 330).

However, when in late 1974 Xerox made an estimated 1,700 patents available to its competitors after a series of suits from the Federal Trade Commission (FTC) in 1972 for illegally monopolizing the office of copier business, and SCM Corporation, office equipment company made up of Smith-Corona (typewriters) and Marchant (calculators) (SCM) in 1973 for antitrust violations, the advantages it enjoyed in the copier business were terminated. Xerox Corporation concentrated on besting Kodak and International Business Machines (IBM) who were competitors in the business and failed to concentrate on the Japanese threat of joining the business. The Japanese companies led by Canon, Konishiroku, Minolta, Ricoh, and Sharp produced a photocopier that was smaller and sold the machines for the cost that Xerox produced the same machines. With the entering of the Japanese in the market, between 1976 to 1982 Xerox’s shares of worldwide copier revenues dropped from 82 to 41 percent (Jacobson & Hillkirk, 1986: 3-8; 70; 124).

The worldwide drop of copier revenues that Xerox experienced was caused by the purchase and use of the cheaper Japanese photocopiers that replaced the Xerox machines in libraries and offices. With these new machines, everyone had the opportunity to copy any sort of document at a minimal rate. This was a relief to many people especially those at tertiary level and mostly from developing countries who with an urgent quest for information could copy information with relative ease. They
did not need to own the machines nor pay high prices for copying printed works. While the users enjoyed these advantages, rights holders (publishers and vendors) of copyrighted works saw these cheap photocopiers as a revenue threat to their trade. In order to address the plight of rights holders' schemes such as the Copyright Clearance Centres (CCC), the Reproductive Rights Organizations (RRO) were tried and are still being tried to directly appropriate revenues for rights holders (Liebowitz, 2002: 6) to no avail as uncontrolled photocopying still continues every minute throughout the world (Publishers’ Association of South Africa (PASA), [n.d.] that cannot be policed.

In order to address the possible effects of the reprographic technology of photocopying between publishers and copiers of copyrighted works, the content of the fair dealing exemption changed. This change was consolidated in countries copyright laws (Siggins, 2003). This change was necessary because the fair dealing exemption balances the rights of publishers and users of copyrighted material by allowing the copying and use of copyrighted material for research, criticism, as well as teaching, provided such activities do not interfere with the legitimate rights of the copyright holders (Amen, Keogh & Wolff, 2002: 24). The exemption allows content information to be copied without requesting permission from the rights holders if the cost of getting permission from the rights holders might be too great to allow copying to occur (Gordon, 1982).

The United States of America was the first among the nations that modified their copyright acts as the ruling in Williams and Wilkins Co. v. United States\(^\text{17}\) stated that there was 'a need for congressional treatment of the problems of photocopying' (Masciola, 2002) and publishers felt that since the United States of America had for some time been the world's largest producer of copyrighted works, the non-modification of the act to address the aspect of photocopies was detrimental as foreigners abroad could easily copy and market their works (Merges, Menell & Lemley, 2000: 348; Leafer, 1989: 351).

\(^{17}\text{Williams and Wilkins Co. v. United States, 487 F. 2d 1345, 1973}\)
In modifying the copyright act in the United States, the Copyright Act of 1976 repealed the Copyright Act 1909. The 1976 Act codified the existing judicial defence of ‘fair use’ in section 107 by expressly stipulating that:

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 (United States Copyright Act of 1976).

This United States Act of 1976 spells out the various conditions under which fair use will be applied in a case of copying or reproducing copyrighted works.

The English-speaking nation that followed the United States in modifying its copyright act was South Africa in 1978. When modern technological developments such as the photocopying machines, tape recorders, and video recorders that could be used to copy copyrighted works emerged, there were debates in the House of Assembly on whether to amend the 1965 Copyright Act or come up with a new Copyright Act for the Republic of South Africa. This debate took place in the second reading of the Copyright Bill where other copyright matters were discussed such as those dealing with copyright and design. The first reading of this bill was on how finances were to be raised for the debate and the third reading concentrated on Section 11 that dealt with copyright and design and not on reproduction of copyrighted materials. It was because of section 11 that this Bill was sent to the third reading because while patent agents and patent attorneys expressed the desirability of the 1965 Copyright Act to be replaced, some members of the committee believed that it would have been better to amend the 1965 act (South Africa Parliament. House of Assembly. (Hansard), 1978: 3642).
In the 1970s it was felt that modern technological developments have made it impossible to protect copyrights effectively, and the 1965 Copyright Act could not satisfy the requirements for particular protection. In the 1960s as compared to the 1970s no reprographic technologies were massively used to reproduce copyrighted works. In considering the possible revision of the 1965 Copyright Act, an ad hoc committee consisting of representatives of the film industry, record manufacturers, the South African Broadcasting Corporation, organizations that act on behalf of authors, composers, orchestras and publishers, the Association of Law Societies of South Africa, the Bar Council of South Africa and other interested parties, were selected to consider the problems that flow from the implementation and interpretation of the 1965 Copyright Act and to make recommendations (South Africa Parliament. House of Assembly, (Hansard), 1978: 3637-3638).

In revising the 1965 Copyright Act, the committee revealed in the second reading of the Bill that the biggest problem flowing from copyright protection was the ease with which works subject to copyright could be reproduced because of the advances in technological developments. There was the extensive use of the photocopying machines, tape recorders, as well as video recording that formed the source of complaints relating to the piracy of copyrighted works. The committee realising that a total prohibition of reproduction would have a negative impact on educational institutions such as schools, colleges and universities, research institutions and reproductions for personal and private use, made in the Bill a provision for the reproduction of all works on condition that when reproductions are made, there should not be in conflict with the normal exploitation of the work and the legal interests of the authors (South Africa Parliament. House of Assembly, (Hansard), 1978: 3640).

Hence, in the 1978 Copyright Act, it was stipulated in sections 12(1):

Copyright shall not be infringed if a literary or musical work is used solely, and then only to the extent reasonably necessary –
(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
(b) for the purposes of criticism or review of that work or of another work; or
(c) for the purpose of reporting current events –
in a newspaper, magazine or similar periodical; or
by means of broadcasting or in a cinematograph film:
Provided that, subject to the provisions of section 13, the expression 'used' shall
not be constructed as authorizing the making of a copy of the whole or a
substantial part of the work in question. Provided further, in the case of paragraphs
(b) and (c)(i), that the source shall be mentioned, as well as the name of the author
if it appears on the work (South Africa Statutes, 2000: 220; Copeling, 1978:
41).

Section 13 of the act provides, 'The reproduction of a work shall be permitted as
prescribed, but in such a manner that the reproduction is not in conflict with a normal
exploitation of the work and is not unreasonably prejudicial to the legal interests of

Following the wordings of section 12(1), scholars are legally authorized to copy
copyrighted works if they are to use the works for the purposes given in the section
without paying a fee or asking permission from the copyright holders. However, this
copying will not be regarded as fair dealing if it conflict with the normal exploitation
of the work by the copyright holders as section 13 explains.

Australia like South Africa also felt the need to revise their copyright act following
the impact of the reprographic technologies in the 1970s. This is because a total
prohibition of copying copyrighted works may have a negative impact on scholarship.
Hence, in revising their copyright act, the Australian Copyright Act of 1968 that
repealed the British Copyright act of 1956 provided fair dealing in four groups.
Section 40 was for research or study, section 41 for criticism or review, section 42 for
reporting news in a newspaper or similar periodical, or broadcasting, and section 43
was for the giving of professional advice by a legal practitioner or patent attorney
(Australia Copyright Act 1968; Sterling & Hart, 1981: 151). Although the fair dealing
exemption was given in these areas, the act did not list matters to which regard shall
be had in determining whether dealing should be considered fair or not fair. The
effects of the reprographic technology of the 1970s might have contributed to the
clarification being given when the 1968 Act was amended in the Copyright Act of
1980. Hence, section 7 of the 1980 Act listed matters to which regard shall be had in
determining whether a dealing is fair for the purpose of research or study. This included:

(a) the purpose and character of the dealing;
(b) the nature of the work or adaptation;
(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
(e) in a case where part only of the work or adaptation is copied – the amount and substantiality of the part copied taken in relation to the whole work or adaptation (Sterling & Hart, 1981: 151).

Following the provision of the 1980 Act, where copyrighted works are reproduced in connection to any of the above reasons, they are considered as fair dealing and no charge can be brought for an infringement of the work. In Australia, these ‘non-infringing acts are sometimes classified as statutory defences’ (Sterling & Hart, 1981: 142).

In the United Kingdom, the effects of the reprographic technologies in the 1970s also contributed to the revision of their 1956 Act in 1988. This is because publishers were concerned with the economic loss they will suffer if their works were copied, as they would experience loss of sales. Hence, the Copyright, Designs and Patents Act, 1988 that superseded the Copyright Act, 1956 was instituted to protect the economic rights of rights holders when applying sections 29-30, 32, 38-40 that refers to the fair dealing exemption (United Kingdom Copyright, Designs and Patents Act 1988 (c.48), 1998; Little, [2002?]; Prime, 1992: 17). Hence, where protected works are for private purposes and not for commercial purposes, there is no infringement (Laddie et al., 2000: 754).

CONCLUSION

Following the evolution of copyright law and the fair dealing exemption, it is evident that the fair dealing exemption changed in content as technology changed social
behaviours. With the emergence of other print technologies with which printed materials could be reproduced in the nineteenth century, the social behaviour of scholars changed. They made use of the proliferation of printed materials in the society as they read and achieved their goals through the numerous publications that publishers produced with the new technologies. The British legislature acknowledged the effects that the new technology had in the society by incorporating ‘private study’ fair dealing in the Copyright Act 1911.

In the 1970s when the photocopier technology was massively used in the latter part of the twentieth century, as it provided a much cheaper and easier way of copying printed works, the behaviour of scholars changed as this technology made it possible for anyone to copy any printed work with relatively little finance. To prevent the possible marketing of photocopied works, the content of the fair dealing exemption changed and was codified in countries such as the United States, South Africa, Australia, and British copyright acts. These countries in their copyright acts stipulated that fair dealing exemption was permitted for educational purposes, but not for commercial grounds. The marketing of the copied works negated the exemption.

Although the content of the fair dealing exemption changed as new technologies of printing and reproducing copyrighted works emerged before the mid twentieth century, in the print environment, it is possible for scholars as a way of keeping up with developments in their field to purchase copies of the books they need or subscribe to key journals of their interest. As from the late twentieth century with the emergence of digitisation, scholars need access to journal literature, which they can obtain through copying, as it is cheaper to copy than subscribe to the journal titles in the digital realm. However, the opportunity to copy journal articles seems impossible as licensing terms and conditions inhibit copying to a certain degree as we shall see in chapter three while evaluating some of the terms and conditions in certain licensing agreements. Hence, as it is evident that licences govern the use of digital content, it is worth investigating in the next chapter, what the impact of licences has on the fair dealing exemption in the digital realm. This is because the technology of digitisation does not only encompass copying of copyrighted works but includes aspects of access to copyrighted works.
Chapter Three:
Licences and copyright: how contracts govern access to digital content in academic libraries

This chapter asserts, first, that the availability of digital content has changed social behaviour among scholars and researchers in academic libraries. The technology functions by providing access, and the copying of information in multiple contexts has placed fair dealing exemptions in broader contexts than the simple photocopying of printed pages. The chapter argues, second, that the appearance of contractual licensing agreements to govern access to digital content, and the often implicit incorporation of the fair dealing exemption in such agreements has created ambiguity and misunderstanding among users of digital content.

Changes in scholars' social behaviour

Prior to the emergence of digital technology, time, inconveniences and cost factors may have been the factors that influenced the behaviour of scholars to copy information content. In order to copy content information one had to visit the library, locate the information, and physically use the photocopier to copy a required content information. This process of photocopying could be time consuming (Ou, 2003: 92). In cases where a needed content information could not be found in a particular library, such information had to be requested through inter library loan from another library or even overseas if the information could not be found nationally. This is because as no library “has been able to acquire and keep all the publications its parents need” (Williams, 1980: 58), they make use of the resources and collections of other libraries (Le Roux, 2004: 49). However, in the course of requesting the information, the requester had to sacrifice both time as well as money. The requester had to pay for the requested information, spend time to wait for when the information will arrive, all of which may be inconvenient to the requester of the information. The time, cost, and inconveniences may be fruitless when the requested information arrives, as the requester may have misjudged from a title for example, that seemed to contain the
type of information needed. Notwithstanding, the period that the information takes to arrive might be detrimental to the user. For instance, if the user needed the information to write an article, the user might have lost track of say an argument he or she wanted to put forth by using the requested information. Also, having spent time and money to obtain particular content information, factors such as inconvenience, time and cost would furthermore be escalated if the information were to be distributed to fellow scholars. The process of photocopying the information would entail cost, time and inconvenience. Furthermore, to distribute and possibly redistribute the content information would entail posting or visiting a particular scholar to deliver the information. This process could also be time consuming and costly since it entails physical or mechanical means of delivery (Ou, 2003: 92).

The ready availability of electronic information has changed the social behaviour of scholars. It is easy for scholars to distribute and duplicate information with the technology (Ou, 2003: 92). Also, while it may no longer be possible to make copies of information for personal use under the fair dealing exemption in the narrow sense, skilled users do, in fact, have many opportunities to copy digital content, because of the nature of the technology. In the digital environment, it is no more inconvenient and does not take any time to locate content information and distribute to other scholars, as the cost of distribution are marginal. Following the economics of scale that leads to over supply of the information, although digital information may be expensive to produce, digital technology has made it cheaper to reproduce and distribute the information (Noam, 2004). In the digital environment ‘documents can be copied and circulated worldwide with a few click of a mouse’ (McSherry, 2001: 26). All that is required of the distributor is to seat in front of a computer, locate any content information and distribute to as many scholars as possible that would instantaneously receive the content information in its original form. Digital copying is both virtually instantaneous and can be multiplied without limit because with the necessary instruments, everyone can ‘become a publisher’ (Litman, 2001: 19). In addition, the digital environment offers scholars the opportunity to manipulate, alter, reformat, or erase information at will (Neacsu, 2002: 111). Users no longer need to visit the physical site of the academic library for content information (Richey, 2002: 17; Khoo, 2002). Online systems require only a desktop, and increasingly provide access to literature that would, in earlier times, have needed trips to the library, use of
the inter-library loan system, or substantial effort in locating a source (Lawrence, 2001).

In the digital environment, scholars may need journal literature as well as books that are not available because their institution has not subscribed to the particular database that contains the literature or purchased a particular book. However, digital technology has given scholars the opportunity to legally copy digital journal information because the information is expensive to buy or subscribe to, as scholars appear to be chargeable through licensing agreements (Liebowitz, 2002: 17). Although scholars have the opportunity to copy digital information, it would be preferable if the copying were permitted by the licensing agreement, as licences may permit legal reproduction. The rationale for scholars wanting to legally copy digital content stems from the fact that the technology provides access to information anywhere and at anytime (Ferullo, 2004: 24), and new titles are increasingly published in electronic formats (Muir, 2003: 34; Loreman, 2002: 33; Germain, 2002: 90). However, where licences do not permit unauthorised users access to the information, the unauthorized users would not legally be able to use the advantages of the digital technology to copy the information.

**DIGITAL CONTENT IN ACADEMIC LIBRARIES**

Partly because of the advantages and convenience of digital information, access to content in this environment is, in practice, governed most directly by access licences (McCracken, 2004: 122), - a form of contract between library and vendors. With the introduction of licences, intellectual property rights holders, normally corporations rather than creators, have acquired much more control vis-à-vis end-users of information than they would normally have been granted by national copyright regimes. Corporate rights holders no longer sell copies of works, as they did throughout the centuries of dominance of print media, but rather provide access in exchange for a fee (Matheson, 2002: 157). In such a business model, of course, access can be time limited and subscribers who stop paying fees, for whatever reason, are likely to lose access altogether. When this happens, it endangers the archival role of libraries (Bowman, 2001). Furthermore, because corporate rights holders are selling
licences granting rights of access to large databases of journal titles, they are able to bundle individual titles in such a way that institutions may find themselves subscribing to long lists of journals that they neither want nor need (McCabe, 2002: 269). Libraries may be virtually coerced into accepting products, at heavily discounted subscription, that have little or no relevance to their users’ needs or that may be of poor quality. Since periodical costs constitute the major part of a library’s expenditure on content, such unwanted purchases may be made at the expense of valuable, relevant or much needed materials (Chapman, 1996: 146; Rowse, 2003: 1).

On the other hand, access licences typically incorporate a fair dealing exemption or an analogy to one, since they do nothing to prevent authorized users from downloading and printing copies of texts from scholarly digital content for research purposes. Academic libraries, ‘as centres of research and as major players in the digital information infrastructure’ (Ou, 2003: 89), has the duty to apply the incorporated fair dealing exemption that are in licences to provide its users the electronic reserves and collections that it subscribes for the users. This is because among the goals of academic libraries is to offer the users that use the library’s collection, a broad scope, depth and specialized assistance in the use of library resources, as it is a library that advances teaching, learning, as well as research (Boadi et al., 1987: 14; Fjällbrant & Schwarz, 1987:85). Unfortunately, academic libraries cannot exercise this duty because most licences that govern the use of the information refuse unauthorized users access to the information (BiblioLine Annual License and Subscription Agreement, 2004; EBSCO publishing product license agreement, 2005).

Hence, some scholars (Litman, 1996; Loundy, 1995; Samuelson, 1994) argue that digital technology raises new issues that cannot be addressed by current copyright law. Digital technology raises issues of electronic reproduction, scanning and electronic storage, transmission and distribution, manipulation and adaptation, as well as basic licence to browse (Baldwin, 2001). According to Trosow, (2003: 217) ‘contemporary advances in information technology have enabled the enhanced production, dissemination, use, and transformation of information resources to an extent unimaginable a quarter of a century ago’. Following the new issues that information technology has made possible in the digital environment, an analogy to the fair dealing exemption that would take in to account the new issues should be
instituted in the digital environment. This is because the technical characteristics of
digital media and the use of contractual licensing conditions can both restrict access to
the provision of fair dealing exemption (McCracken, 2004: 130). An analogy to the
fair dealing exemption in the digital environment seem to be logical as history has
shown that when new printing and reprographic technologies emerged the content of
the fair dealing exemption changed. Furthermore, since copyright law was developed
to deal with the products of the printing press (Hofman, 1999: 12) the fair dealing
exemption was also developed to deal with printed materials. But since contracts may
impose restrictions on privileges and exemptions granted under a particular copyright
regime, a licensing agreement may also limit the otherwise legitimate copying of
digital content. In some cases, specific clauses in licences may be ambiguous, and
end-users may be refused from making legitimate copies of texts that have been
subscribed to by their academic institutions (Hardy & Oppenheim, 2002: 100).

THE JUSTIFICATION FOR LICENSING AGREEMENTS

Corporate rights holders argue on several grounds in favour of the use of licensing
agreements to control access to digital content. First, digital technology permits users
to make perfect copies of texts quite easily, and to disseminate such copies as widely
as they please via electronic mail, through peer-to-peer system (P2P), or the World

In such a process, the distinction between authorized and unauthorized copies can
hardly be made or maintained. This is because a vast pool of digital information can
be accessed and used without decreasing the information or distributed without
necessarily limiting the information as it was in its original form (Trosow, 2003: 217-
218). In addition, perfect and indistinguishable digital copies are vastly preferable to
the messy and imperfect products of the cumbersome process of manual photocopying
(Ergas & Strasser, 2001:19; López, 2002: 9).

Given all these factors, corporate rights holders seem to believe that the copyright law
by itself provides inadequate protection against the threat of massive and universal
reproduction of texts in potential violation of the law (Bell, 2002). Corporate rights
holders argue that licences provide a more effective means of limiting the alleged damage done by unauthorized copying of digital texts. In part, this is because they are able to recover lost revenue from copying – amounts that they claim the corporations collectively endures billions of dollars a year in lost profits and jobs. Although this scenario may suit consumers, this does not suit corporate rights holders because the price for their information or distribution is dropping towards marginal cost and does not cover their cost (Noam, 2004). In this view, the greater protection for digital information provided by licensing agreements increases the corporate rights holders’ chances of recovering revenues and increases the incentive to create more content (Rogers et al., 2000).

Partisans of licence agreements also argue that, since no individual may waive his or her constitutional rights and freedoms through a contractual agreement, negotiated licences must bind the parties when they are openly negotiated. This applies if the parties to a negotiated agreement are informed persons who understand the nature of the rights they are granting and obtaining, including especially those rights that the licensee can and does in fact agree to give up (Elkin-Koren, 1997). According to corporate rights holders, the argument against the use of licences for access to digital content is based on unfounded fears, because if such agreements did contain unconstitutional provisions, the courts would provide the remedy by invalidating them. Nimmer (1998: 831) expresses a similar view as he argues,

Among the arguments based on the unfounded fear that contract will eliminate important facets of information policy is one that intellectual property law pre-empts contract law, precluding contracts that are inconsistent with the property rights created (or denied) under copyright law. There is virtually no support for this proposition nor should there be any acceptance of the argument […] When intermittent abuses are identified and courts act to prevent or minimize their effect, the methodology consists of developing and applying themes created in common law, in contract statutes, and in competition law […] that restrict enforcement of particular contract clauses in particular contracts. These principles indicate simply and correctly that, to the extent of abuse, the traditional solutions lie in particularized adjudication, rather than in generalized invalidation of the right to make contracts.
The logic of the arguments put forward by corporate rights holders in favour of contractual licences governing access to content information, seems to be based on a belief that the existing balance of interests that underpins fair dealing and fair use exemptions in many national copyright regimes in fact favours end-users. From this flows the idea that reform of copyright law is needed, to strengthen the rights of corporate rights holders in relation to digital content (Bygrave, 2002). Corporate rights holders appear in fact to believe that current contract law governing access licences to digital content works pretty well (Ginsburg, 1994: 2559).

**An analysis of rights holders’ arguments**

The arguments put forward by corporate rights holders in favour of using licences to control access to digital content need to be interrogated. Although it is true that digital technology inherently permits easy copying, it is not entirely clear how licensing agreements would or could restrict or limit the rate at which unauthorized digital copies are made. We know that with regard to printed materials, both unauthorized and illegal copying persists in spite of all the measures attempted by rights holders. One estimate claims that about 500,000 pages of printed works are copied without authorization per minute throughout the world, despite the efforts of the various national Reproductive Rights Organisations (RROs). These bodies are supposed to collect fees for copying on behalf of rights holders (Publishers’ Association of South Africa (PASA), [n.d.]). Indeed, the more restrictive the regime, and the more difficult it becomes to make what many users may see as legitimate copies, the more likely it is that these statistics will rise. Researchers with specialist needs will argue that they are being denied a legitimate opportunity to evaluate content information and to decide if it meets their requirements (Stallabrass, 2002: 143). Thus, the unauthorized copying of content information from online content may be increasing, not only because the technology permits it, but also precisely because it is prohibited.

The problem of creative incentive is even thornier. It seems unlikely that restrictions imposed in licensing agreements with corporations could increase levels of creativity among scholars, researchers or authors, who generally constitute an entirely different group. Indeed, academic content creators typically have a wide range of non-pecuniary motives for their creativity. In ancient times, and in the Middle Ages, few
authors were paid for their work (Liebowitz, 2002: 3; Landes & Posne, 1989). More recently, the Budapest Open Access Initiative of 2001 brought together scientists and scholars who agreed to make research available in free, open archives rather than in commercially published scholarly journal databases. They agreed not to use copyright regulations to restrict access to or the use of their published works (Fishman, 2002: 18).

With regard to the claim of lost revenue raised repeatedly by corporate rights holders and their organizations, there is no solid evidence that revenue is lost as a result of unauthorized copying of digital content. In the print environment, despite the quantity of photocopying that is carried out, some analysts believe that it is the copying that has led to the growth in the number of academic journals, and so has boosted revenue (Liebowitz, 2002: 7). By analogy, the introduction of the video cassette recorder (VCR), permitting individuals to make time-shifted private recordings of broadcast television shows, has had virtually no impact on the profitability of either television or movie entertainment corporations. Indeed, a United States Supreme Court ruling in the Sony Corporation of America v. Universal City Studios Inc\textsuperscript{18} — famously known as the Betamax case — predicted that ‘time shifting was unlikely to significantly lower the revenues that would be derived by television broadcasters’ (Liebowitz, 2002: 7). As for the Hollywood movie makers, they have benefited significantly from VCR technology, since ‘by lowering the price of popular pre-recorded movies from $100 to $20 they could sell far more of them. Today, the sale of videotaped movies generates more revenue than theatrical showing’ (Liebowitz, 2002: 8).

Similarly, in the early 1980s, when corporate rights holders claimed that severe financial damage was being done to the music recording industry by audio cassette taping, it was clearly demonstrated that ‘in a world with no copying, record producers might find that consumers would be unwilling to pay as much for CDs, which could lower revenues and profits’ (Liebowitz, 2002: 8). As a result, the United States passed the Audio Home Recording Act of 1992, a compromise between industry interests and consumers who used audio tape recorders. The Act allowed personal copying since it had no demonstrable negative effect on rights holders’ revenue (Liebowitz, 2002: 8).

The most recent technological threat identified by panicky corporate rights holders is the peer-to-peer ('P2P') file sharing over the Internet. In *A & M Records, Inc. v. Napster, Inc.* a group of record companies brought suit against the defendants, who had facilitated online peer-to-peer downloading of digital content that included copyright protected music files. The issue at the preliminary hearing was whether this activity was likely to depress or stimulate the commercial sale of recorded music, and whether it would damage a future market for the commercial sale of recorded music online. In an attempt to demonstrate harm, the plaintiffs examined the pattern of CD sales in stores near college campuses (the Fine report) and surveyed college students (the Jay report). The students were asked for their views on the defendant’s service and its impact on their musical habits. This was a fruitless procedure, as the survey was self-reported and most respondents were probably aware that the defendant was in legal difficulty. However, the Fine report found that the sales of music CDs fell near colleges and increased elsewhere; however, ‘Internet merchants such as Amazon and CDNOW increased their CD sales during the period of Napster’s growth’ (Liebowitz, 2002: 12). Given the difficulty in drawing firm conclusions from this contradictory sales pattern, Napster’s negative impact on the sale of CDs could hardly be considered to have been conclusively proven (Liebowitz, 2002: 13).

On the other hand, in order to assess the impact of unauthorized and even illegal copying of digital content, corporate rights holders might evaluate the ‘exposure effect’ of their products. This is a form of advertising or sampling of the digital content. Content samples are made freely available to libraries, and the impact on sales of legitimate versions of the protected works is subsequently measured. Libraries and end user-users might find some advantage in having access to manuals and technical support that are provided to authorized users of content (Liebowitz, 2002: 4).

Also, in order to eliminate the impact of unauthorized access and illegal access to digital content, corporate rights holders can use ‘indirect appropriation’ on digital content. This will entail charging higher prices for the originals from which the
Unauthorized access can be made. (Liebowitz, 2002: 4). On the other hand, where corporate rights holders decide not to charge for access of the information for say an academic year or semester but charges at the end of the academic year or semester, the corporate rights holder will capture part, all, or more of the revenue than might have been appropriate through ordinary sales of their services. Through these methods any user who uses the information pays the corporate rights holders (Takeyama, 1994: 155; Liebowitz, 2002: 6). Where this model is adopted, the measurement upon which the charges would be calculated will be the number of hits registered on the database.

Licences may well have little effect in limiting unauthorized access to content, or in increasing revenue. It is even harder to see how they could work as an incentive to authors to create more content. What licences do is to strengthen the hand of the corporate rights holders, and in that process inhibit in subtle ways free access to digital content. Many licences are considered ‘infringed where a person, without the consent of the owner of the right, ‘extracts’ or ‘reutilizes’ all of, or a substantial part of, the contents of the database’ (Bently & Sherman, 2001: 3003). Some licences actually prohibit libraries from performing the inter library loan (ILL) function using database content – a limitation that is of major concern as it widens the gap between the information ‘haves’ and ‘have nots’. Libraries that do not subscribe to particular databases cannot access database content from those who have (Rodriguez, 2001: 2). In this ways, licences work against the stated objective of the first modern copyright law of 1710 – the encouragement of learned men to compose and write useful work (Leaffer, 1989: 3) – not the protection of commercial interest.

**Licensing agreements and copyright**

Although copyright laws are Acts of Parliament that are primary sources of law (Blunt, 1980: 9), licences override copyright laws. This is because licensing agreements in digital content are legal agreements between the suppliers of digital databases and users that have conditions on use of the databases (Keenan & Johnston, 2000: 154). With regard to digital content, access is governed by the *express terms and conditions* contained in the signed agreement. Licensing agreements state what is

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19 A & M Record, Inc. v. Napster, Inc., United States Court of Appeals 239 F. 3d 1004 (9th
being licensed, the term of the licence, the contractual obligations to be honoured, and
can be contracted, assignment, termination rights, and applicable law should be handled (Davis, 1999:118-125). In a breach of the terms and conditions in the
licensing agreement, 'contract law rather than copyright law is paramount' (Cohen, 1998: 1090). Although copyright rules govern digital content as it permits the
originator of a piece of intellectual property to acquire a series of rights including
copying (Prytherch, 2000: 186), licences furthermore tighten up access to digital
content as it defines what the parties to an agreement can do (McCracken, 2004: 130).
Where for example, suppliers and users have conditions to be respected in a contract,
they are forced to do so because they have agreed to do so. Hence, contracts entered
into between corporate rights holders and users of content, licences can override
copyright rules and, for example, eliminate the activities of the fair dealing exemption

In South Africa, it is unknown if licensing agreements can override copyright law as
can be contracted, whether licensing agreements that are contracts overrides copyright. In the Anglo-
American legal system, licensing agreements can override the provisions of copyright
law. In the United Kingdom for example, since contracts are legal texts that contain
promises or set of promises giving rise to obligations recognized by law (Bebbington,
2004: 98), they can override copyright since the contractually defined terms and
conditions are what count in case of infringement. The courts have on several
occasions rejected copyright fair dealing exemption plea whenever the act of
accessing digital content contravenes a licensing agreement. In Kabushi Kaisha Sony
Computer Entertainment Inc. & Others v. Edmunds,20 the plaintiff claimed that an
importer of a 'mod chip' known as 'the messiah' had contravened the licensing
agreement. The defendant imported 'mod chips' that could enable CD-ROMs that
were counterfeit be substantially reproduced into the console's Random Access
Memory (RAM) and could play on a PlayStation 2 (PS2) console in the UK or from
other regional zones. The 'mod chip' also had the effect of modifying the PlayStation
console such that any CD-ROM inserted into the drive of the PS2 could be played

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20 Kabushi Kaisha Sony Computer Entertainment Inc. & Others v. Edmunds (t/a Channel
Technology) 2002 EWHC 45 (CH)(Chancery Division).
regardless of whether it was genuine or counterfeit. In passing judgment, the Court found that the ‘Boot Rom’ system and the embedded codes put into genuine CD-ROMs and Digital Video Disc (DVDs) by Sony constituted an act prohibited by the licensing agreement. The copying that was prevented was the loading of the game into the computer. Hence, following the terms and conditions of the licensing agreement that prohibited such activities judgment was passed in favour of the plaintiff.

In the United States just as in the United Kingdom, licences can override the provisions of copyright law. Contracts in the United States are legal text as they are agreements that guide the courts in the case of infringements. In *Universal City Studios, Inc., v. Eric Corley et al.* Corley posted a copy of the decryption computer program ‘DeCSS’ written by a Norwegian teenager that did not support any licensed Digital Video Disc (DVD) player at that time on his web site. This was designed to circumvent content scramble system (CSS), the encryption technology that motion picture studios placed on DVDs to prevent the unauthorized viewing and copying of motion pictures. Corley also posted on his web site links to other web sites where DeCSS could be found. The court granted an injunction on behalf of the plaintiffs barring Corley from posting DeCSS on his web site or from knowingly linking via a hyperlink to any other web site containing DeCSS. On appeal by the web site owners, the Court of Appeal held that an injunction did not unconstitutionally eliminate owners’ fair use of copyrighted materials. Lawful owners of licensed DVD players were not prevented from viewing and copying motion pictures with the content scramble system (CSS). The court failed to apply fair dealing exemption because the defendants posting a copy of the decryption computer program ‘DeCSS’ on the web, it breached the terms of the licensing agreement that interpreted such activities as an infringement.

With regard to Australia, its contract law is derived from English law. The Australian courts rely on English case law in commercial disputes. There is no statute codifying contract law (Carter & Harland, 2002: 16-17), and contract may override copyright. Contracts are regarded as a form of legally binding promise or recognized agreement (Carter & Harland, 2002: 3). Furthermore, the submission to the 2002 Copyright Law
Review Committee by the Australian Digital Alliance, the Australian Libraries’ Copyright Committee, the Australian Library and Information association, the Australian Vice-Chancellors’ Committee, the Council of Australian State Libraries, the Council of Australian University Librarians, the Department of Communications, Information Technology and Arts, the Federal Libraries’ Information Network, the Law Council of Australia, and Libraries argues that online licences are indeed a form of agreement that can undermine copyright exemptions, fortifies the assertion. The submission stated that access licences for online content are subject to agreements that exclude, modify, or undermine copyright exemptions, that in turn provided the historical balance between the interests of rights holders and the end-users of content (Copyright Law Review Committee, 2002: 118).

The Australian Digital Alliance has also shown that a substantial number of existing licensing agreements exclude or modify the fair dealing exemption for research or study, placing ‘restrictions on users printing or downloading or emailing copies of (parts of) the resource […]’ and restricting libraries from performing inter-library loan functions (Copyright Law Review Committee, 2002: 119).

As it is evident that licences override copyright law and some licensing agreements exclude or modify the fair dealing exemption in order to restrict access to the information, it is unclear as to who should monitor possible violations of the licensing agreements. Normally, librarians are the custodians of information in libraries. As custodians, their duties that had traditionally been limited to collecting, organizing, preserving research materials, providing reference services, teaching bibliographic instruction classes (Vinopal, 2002: 94), are no more limited to these activities. In an ideal world, librarians are suppose to be sensitive to issues involving copyright by familiarizing themselves with copyright laws and taking reasonable precautions against any inadvertent infringement, which may take place in the library (Kennedy, 2001: 31; Seadle, 2000: 208). This is because where they fail to take prevent inadvertent infringement of the materials in the library, corporate rights holders may withdraw access to the materials as some licensing agreements – as we shall see infra - allows corporate rights holders to do so. However, librarians refuse to be held liable

for all acts of infringement that occur on copyrighted materials in the library. This is because they believe ‘they are not, and should not be expected to be, copyright police’ (Norman, 1998).

**DO LICENCES ACT TO INHIBIT ACCESS TO DIGITAL CONTENT?**

Licences can have the effect of inhibiting access to digital content, since privately enforced arrangements through licensing agreements have the potential to upset the fair dealing or fair use exemption as embodied in copyright law and practice. This is because

Fair use principles in copyright legislation have been understood by users and have provided consistent guidance for users in respect of copying. Licences drafted by publishers have not been consistent in their approach to copying and have deterred research and studies by users (International Coalition of Library Consortia, 2001).

The use of access licences has the potential to offer corporate rights holders’ near-absolute control of content *even after its delivery to subscribers* (Cohen, 1998: 1090). Licences are increasingly being written to customize terms to the needs of the marketplace (Lindsay, 2002:4-5; Curry, 2002: 3). Lessig argues:

> Often a copyright work is sold or licensed subject to a set of terms imposed in a licence. Sometimes the terms imposed by the licence are inconsistent with the balance that copyright law aims for. If the balance in copyright law is important, then it should not be undermined by a different kind of law - contract law. While not every licence is in conflict with copyright law, many licences are in conflict with the limited protection copyright law is to give (2001: 257).

The establishment of when copyrighted materials should enter the public domain (Merges, Menell & Lemley, 2000: 346) is among the limited protection that copyright law give to users of the information. The public domain is ‘a sphere in which contents are free from intellectual property rights’ (Samuelson, 2003: 149). The advent of

licences on digital content has effectively provided corporate rights holders with a mechanism that ensures that the most useful forms of texts will in practice never fall into the public domain. The cherry on the top is that the question of the copyright term is not even a self-evident part of the licensing problem. Licensing agreements do not, of course, specify when, if ever, their contents as a constantly renewable collective work might be expected to fall into the public domain. Even when they do, there are certain clauses that would not allow the information to enter the public domain. Article 10 of the EU Databases Directive 1996 for example, corroborate this when it state that the term of protection of database

[...] shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion. In the case of a database which is made available to the public in whatever manner before expiry of the period provided [...] the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database including any substantial change resulting from the accumulation of successive additions, deletions or alterations which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection (EU Databases Directive 1996).

The last sentence in the quotation signifies that the database will not enter the public domain because when any substantial change is carried out the database will be considered as a new investment. This may be severely inhibiting, since it implies that access to the scholarly record in its technically most convenient form will always have to be paid for (Noam, 2004). The non-compliance by licences to the public domain concept is an indication that publishers of these databases have succeeded to establish for themselves a right in perpetuity that they are struggling to achieve in the print media environment. This is contrary to the statutory limits to copyright works that established exceptions to copyright infringement (Lindsay, 2002: 7).

Furthermore, the more licences govern digital content, the more they inevitably strengthen corporate rights holders' effective control over content, as there is no room
for negotiation through the market or through the law (Vaidhyanathan, 2002; Siggins, 2003). Licences govern the entire process of access to and use of – including copying – copyright material. In the end, this may inhibit end-users’ ability to exchange, test and refine ideas, for fear of being accused of infringement (Report of the Commission on Intellectual Property Rights, 2002; Samuelson, 2001:2029).

Licensing agreements expand the corporate rights holders’ control over the licensed content far beyond what is normally recognized under copyright law, since they tend to consider any use made of content without permission as being unfair (Samuelson, 1998; Bainbridge, 1999:5). Licensing agreements as opposed to copyright law permit corporate rights holders to terminate access to digital content when a clause in the agreement is breached. For example, JSTOR terms and conditions clearly and brutally states:

Any use of the JSTOR archive beyond the scope of the Licence, knowing use of the password of another, or any fraudulent, abusive, or otherwise illegal activity, may be grounds for termination of your account, or termination of access to JSTOR from your IP address, without notice and at JSTOR’s sole discretion (2005)

Furthermore, licensing agreements as opposed to copyright law does not allow communication of digital content in some cases notwithstanding that the information is a criticism that is permitted for scholarship. The case of Bjorn Lomborg corroborates this view. Scientific American attacked Lomborg when he published his book The Sceptical Environmentalist. In the book Lomborg wrote that ‘challenges widely held beliefs that the environmental situation is getting worse and worse’. Scientific American challenged this book with the title ‘Science Defends itself Against the Sceptical Environmentalist’. ‘The editorial declared the book a ‘failure’ and invited four prominent environmentalists to do their worst to discredit Lomborg and his analysis’. Lomborg was not given the opportunity to respond to his critics although he was given a copy of the editorial before it went to the press. Although Scientific American said they would allow Lomborg to reply to the attack in future, Lomborg wanted to publish the Scientific American article on his own website and intersperse it with a detailed response to every point raised by his critics. Scientific
*American* threatened to sue Lomborg over copyright on the premise that it is an infringement on their copyright (Moore, 2002). By *Scientific American* threatening Lomborg made him not to communicate a criticism that normally would be permitted for scholarship.

Where a licence agreement for example, forbids the users from downloading significant portions of a journal, a significant number of sequential articles, or multiple copies of articles (JSTOR terms and conditions, 2005), and the agreement does not quantify 'significant portion and numbers', the agreement may be said to inhibit access to digital content. This is because users of the information may be afraid to copy the information, as they will not be able to justify what the licensing agreement would quantify as a reasonable portion.

Although many access licences to online content implicitly allow for activities permitted by the print fair dealing exemption, they also inhibit - as oppose to the copyright law - access to content and services with embedded clauses. BiblioLine for example, is a metadata database service provided by the National Information Services Corporation (NISC). NISC subscriber rights under its agreement are limited to *authorized users* who can print or otherwise use the metadata content for scholarly purposes. But the agreement restrict unauthorized users and forbid authorized users from using the information fairly if the users are subsidiary corporations, institutions, associations, or organizations affiliated with or related to the subscriber. BiblioLine licence agreement says, 'subscriber rights do not extend to 'unauthorized users' including parent or subsidiary corporation, institutions, association, or organizations affiliated with or related to the subscriber' (BiblioLine Annual License and Subscription Agreement, 2004).

The above statement is contrary to the provision of the fair dealing exemption, as the exemption does not restrict any one from copying information where the copying is done fairly. The express fair dealing exemption permits free copying of information provided the copied information is used for research, criticism, teaching, and under certain circumstances that will not interfere with the legitimate rights of the copyright holders (Amen, McFadden & Hirshon, 2002: 24).
Some licensing agreements claim a series of sweeping rights that are not claimed by the copyright law. The South African Bibliographic and Information Network (SABINET) claims in its agreement a whole series of sweeping rights:

SABINET Online expressly reserves the right, in its sole and absolute discretion, to do any of the following at anytime without prior notice: change these terms and conditions; change the content and/or services available from the Sabinet Online web site; discontinue any aspect of the Sabinet Online web site or service(s) available from the Sabinet Online web site; and/or change the software and hardware required to access and use the Sabinet Online web site (SABINET Online Web Site Terms & Conditions, 2003).

LexisNexis Butterworth in its terms and conditions also claim certain extensive rights. It states in its agreement that, ‘LexisNexis Butterworths shall be entitled to vary the price of publications and or subscriptions without notice to the customer and at its sole discretion’. Also the agreement states, ‘LexisNexis Butterworths reserves the right to withhold further supplies in the event of any breach of these terms and conditions for any other reason which LexisNexis Butterworths considers warrants such actions’ (LexisNexis Butterworth – terms and conditions, 2002).

Corporate rights holders, it is argued, usually draw up licence contracts, and pretty much imposed on academic libraries, on the assumption that parties to a contract are free to negotiate its content, nature and scope within the bounds of public order (Lindsay, 2002: 8). Such licences do not often provide a clear fair dealing exemption, usually considered an essential part of the compromise between private and public interest (INFOethics 2000, 2001: 56). Such licences pretend to open up for the licensee but claim sweeping rights in the agreement. The Elton B. Stephens Company (vendors of the EBSCO Host database) states:

[...] EBSCO does not transfer any ownership, and the licensee and sites may not reproduce, transfer or transmit, in any form, or by any means, the database(s) or any portion thereof, without the prior written consent of EBSCO, (EBSCO publishing product license agreement, 2005).
Notwithstanding the rights that EBSCO Host database already imposes, it goes further by claiming sweeping rights when it states:

[...] If EBSCO becomes aware of a material breach of the rights of the LICENSEE under this AGREEMENT that EBSCO reasonably believes will cause immediate and severe economic injury, EBSCO will notify the LICENSEE immediately in writing and shall have the right to temporarily suspend the LICENSEE’s access to the Product(s). LICENSEE shall have the right to remedy the breach within thirty (30) days, upon receipt of written notice from EBSCO. Once the breach has been remedied or the breaching activity halted, EBSCO shall immediately reinstate access to the Product(s). If the LICENSEE does not satisfactorily remedy the breaching activity within thirty (30) days, EBSCO may terminate this AGREEMENT upon written notice to the LICENSEE [...] (EBSCO publishing product license agreement, 2005).

Some commentators regard this type of licence contract as authoritarian and morally wrong, as they prevent users from exchanging digital content, or using it in creative ways according to their needs (Stallabrass, 2002: 143). The rights abrogated by the corporate rights holders to themselves may in fact have the effect of inhibiting scholars’ ability to pursue ideas, borrowing from previous creators and exercising their right. This is because scholars borrow from earlier creations by copying what they found on their creative way from past and present (Williams, 2002: 143).

Licensing agreements as opposed to copyright law may restrain access to digital content because most agreements are not consistent in their approach to copying (International Coalition of Library Consortia, 2001). While some licences allow certain activities to be carried out such as Inter Library Loan (ILL), others do not. ScienceDirect subscriber licence allows ILL activities as it expressly says:

ScienceDirect hereby grants to Subscriber and its Authorized users [...] the right and licence to [...] grant interlibrary loans [...], with any exceptions for any publications or publishers identified therein, subject to changes or amendments to such Annex from time to time to add or delete publications or publishers not included in this grant of interlibrary loan privileges (ScienceDirect Subscriber Licence, 1999).
ScienceDirect subscriber licence also allows that users can print and download excerpts of reasonable quantity. The agreements states:

SD hereby grants to Subscriber and its Authorized users […] the right and licence to search Content […] on the Service, and search, view, and browse tables of content, bibliographic and similar data and the full text of Subscribed Content […] available on the Service; view, print and/or download from Subscribed Content excerpts of reasonable quantity, provided that use of such excerpts is personal, does not amount to or result in commercial distribution, and is limited to the Authorized User obtaining such excerpt (ScienceDirect Subscriber Licence, 1999).

Notwithstanding that ScienceDirect subscriber licence allows ILL, printing and downloading of excerpts, the agreement does not say what a reasonable quantity entails. The vagueness of the licence to clarify ‘reasonable quantity’ may restrain access to digital content. A user of digital content is left to decide what would or would not be a reasonable quantity. In a case for example, where digital content is to be sent by ILL and the requester wants the digital content in print format, it would be difficult to say what amount of printed format would be a reasonable quantity.

Also, where a licence agreement such as ScienceDirect subscriber licence allows ILL, printing and downloading of excerpts but fails to define the border where the licensing terms discontinues, the librarians and users who print and download for various purposes are confused. The librarians are not able to inform the users as to the limit of any agreement, as they do not know. In the print environment, librarians and users are aware that once a copy of a work is made, the fair dealing exemption applies. This is because the fair dealing exemption allows for the legal reproduction of copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship, or research although these purposes are not an exclusive list. In America, the courts also recognized fair use (fair dealing) for purposes of parody and satire (Ou, 2003: 91). Hence, in instances where information is converted from one format to another, as is the case with digital copying, those who copy the information cannot differentiate when the licensing agreement would apply and where it ceases to apply.
Given that access licences may in many cases have the practical effect of hindering access to digital content, it may seem reasonable to reconcile the content and purpose of the fair dealing exemption for digital content, rather than merely trying to adapt it, with great difficulty, to the new environment (Litman, 1996). Some scholars however disagree. Merrill & Smith for example, have argued that copyright laws are suitable for digital content, since they constitute a stable regime, and allow exemptions for fair dealing (2000: 58-68).

REVISITING THE FAIR DEALING EXEMPTION IN THE DIGITAL ENVIRONMENT

Historically, the content of the concept of fair dealing has changed as new copying technologies have become available to students and researchers. The most famous of these changes before the present period occurred in the 1970s, when plain paper photocopying became cheap and easy, and sets of rules were devised to try to control the uncontrollable. The introduction of contractually enforceable licences for digital content without any analogy to the fair dealing exemption seems to be inappropriate. In the United States of America, the Digital Millennium Copyright Act 1998 (DMCA) incorporate fair use into the digital environment without modifying the content. The act state that with respect to copyright protection and management systems, remedies, limitations, or defences to copyright infringement, including fair use shall not be affected (Digital Millennium Copyright Act. 1998). Similarly, the Australia Digital Agenda Act 2000 say, ‘...the fair dealing defence, as it exists in the Copyright Act 1968 before the amendments, will apply equally to copyright material in digital form ...’ (Lahore & Rothnie, 2004: 51,300). The inclusion of the print media fair dealing by the U.S.A and Australia in the digital environment without modifying its content is inappropriate. In the print environment where the fair dealing exemption originated, the exemption is extensively understood as a balancing point between the right of rights holders to control protected content, and the right of users to copy texts for socially approved purposes without having to ask for permission or pay (Harper, 2001). The fair dealing exemption 'encourage the flow of information essential to innovation, progress and democratic discourse, not simply to promote the right of the owner to exclude others (Trosow, 2003: 220). In the digital realm, where uses of
content appear to be chargeable (Liebowitz, 2002: 17), through the licensing agreements, it may be reasonable to introduce an analogy to the fair dealing exemption to act as a balancing point between corporate rights holders and users of digital content.

The print fair dealing exemption without a revision of its content may be unsuitable in the digital realm, as there is no permanent transfer of property in the digital realm. In print media, ownership transfer of copyrighted works is permitted as the copyright law from its inception, which embodies the fair dealing exemption embraces the common law of property that allows a purchaser of a copyrighted work to own such a work (Harrison, 1971: 34). Before journals became a means of scholarly communication, books were the principal area for scholarly literature. Since the copyright law accepted the common law of property, the owner of a particular copy of a book could dispose of 'that copy in any manner the owner chooses without violating the copyright owner's exclusive right' (Kamarck, 1997). Once somebody purchases a book, the property is transferred to the purchaser. The purchaser's right to dispose of the purchased book increases the role of that book in scholarly literature. The purchaser – who may be a library – may sell, lease, loan or give away the book (Kamarck, 1997). The process of selling, leasing, loaning or giving away the book allows others the opportunity to read the content of the book.

In the digital environment, the emergence of electronic books – e-books – is also playing a role in scholarly literature. An e-book 'is a literary work in the form of a digital object consisting of one or more standard unique identifiers, metadata, and a monographic body of content, intended to be published and accessed electronically' (Association of American Publishers, 2000: 31).

Although the effects of e-books are not felt in developing countries because the technology is not popular, e-books are faster to produce. The production of e-books 'replaces the traditional services of printing and binding, shipping, warehousing, and retail ... the e-book business produces a machine-readable rather than a human-readable product' (Coyle, 2001: 314-315).
Electronic books play a role in scholarly literature, as their contents are always available at any time and place to be read on personal computers (PCs) or portable e-book readers. It is possible to carry several titles at once on a portable e-book reader and so to build a digital library. Electronic books hardly go out of print as new editions can easily be created (Snowhill, 2001). Also, e-books like all other digital files allow Peer-to-Peer file sharing. With MPEG-3, abbreviated as MP3, peer-to-peer file sharing is possible. MP3 give users the opportunity to transfer files via the Internet and eliminates the cost of producing a perfect copy or copies from the original file as files are copied and distributed quickly, easily, cheaply, and instantaneously (Peters, 2003: 217).

Although books play a role in scholarly literature in the digital environment, in the digital realm, ownership of copyrighted works is not permitted as corporate rights holders only sell access to their work (Matheson, 2002: 157) to libraries and users that are the principal subscribers of the works. Since the libraries do not own the physical property, the libraries cannot lend, redistribute, give the property out as a gift, or resell the property as purchasers of printed works are allowed to do without the publisher’s permission (Miller & Feigenbaum [n.d.]; Ou, 2003: 90; Halpern, Nard & Port, 1999:79). As some licensing agreements make no mention of ILL, it infers that libraries are restrained from performing ILL activities, as licences sets out the terms of the agreement (McCracken, 2004: 130). In this light, it may seem reasonable for the content of the fair dealing exemption to be revisited to clarify matters that involve lending of digital works to other institutions. This is because lending through ILL entails redistribution of materials in the digital environment that is problematic, as any redistribution requires reproduction (Ou, 2003: 96).

Also, the print media fair dealing exemption seem to be unsuitable in the digital realm because when the exemption was being designed both the reproduced and original text from where the reproduction was done were in a physical format. This was necessary as there were no possibilities for the reproductive technologies to reproduce or copy texts that were not in hard copies. This is however contrary in the digital environment as digital works can be converted into hard copy text and vice versa. The use without modification of the fair dealing exemption in the digital environment may weaken the exemption (Pike, 2002: 13), as text can not only be converted in the
digital environment but can also be universally distributed and accessed in the digital environment (Ou, 2003: 89).

Furthermore, in the digital environment computers automatically carry out all kinds of copying. Any Internet user's personal computer makes copies of Web pages that it displays (Litman, 2001: 26-28), because it involves a substantial reproduction of the material (McDonald, 1999: 10; Litman, 2001: 91-92). Also, any use of the computer to view, read, reread, hear or otherwise experience a work in digital form requires reproducing that work in a computer’s memory (Litman, 1996). In Microsoft v. Business Boost\(^\text{22}\) it was held that loading material into a computer’s Random Access Memory (RAM) was a reproduction of a substantial part of the computer program. The material held in the RAM may be reproduced and distributed with ease. Following that digital technology is designed in such a manner that digital content is reproduced in the computers RAM, and the content can be reproduced and distributed, it is unlikely that the present fair dealing exemption would be suitable in the digital realm. In the case where the material in the RAM is of a Portable Document Format (PDF), any reproduction that is made of the material will be a replica of the original text. This is because PDF text are ‘designed to specify printable pages’ and their ‘content is optimised for letter-sized sheets of paper’ (Nielsen, 2001). PDF permits the printing of an entire document as a single entity and allows copying of digital content (Thomas, 1999: 52).

Furthermore, the present fair dealing exemption may be unsuitable because once digital content is released in the digital environment, there is nothing to stop scholars from reproducing and distributing the content through other channels such as electronic mails, or the World Wide Web or even through peer to peer (P2P) file sharing. Although scholars’ access to digital content is monitored by digital rights management (DRM) system (Bygrave, 2002), as is explained infra, there are several activities that DRM cannot monitor. Monitoring duplication of digital manifestations can be difficult. For example, DRM cannot monitor the number of people to whom access to digital content is being distributed if digital content is downloaded, placed in a file and distributed via electronic mail. According to the Technical Protection

Measures (2004) document, although copyright owners determine how DRM should be designed to monitor access to digital content, presently, this is not technologically feasible. When for example, a person buys a compact disc (CD), or videocassette, DRM cannot control how often the CD is heard, or how often the buyer views the videocassette.

Also, since there is no definition at a practical level of print media fair dealing exemption, it would seem inappropriate to use the exemption as it is, without modifying its content in the digital environment. The copyright acts of the United Kingdom, United States, and Australia do not give any adequate definition of fair dealing. In South Africa, the Copyright Act 98 of 1978 does not provide a definition of fair dealing in section 12(1). There is little guidance as to what factors or considerations should come to play when determining whether an action of copying falls within the scope of ‘fair dealing’. Section 12(1) does not expressly state in what circumstances a copy of a work can be made. The authority to make a copy could only be implied. The expression ‘used’ as it emerges in section 12(1) for example, does not expressly signify authority to make a copy of the whole or a substantial part of a work. Hence, where the copying of a work is not expressly provided, ‘the use of a literary (including dramatic) or musical work for any of the purposes mentioned in section 12(1), apart possibly from that relating to the reporting of current events in a broadcast, is pointless if such use does not extend to making of a copy’ (Copeling, 1978: 41).

In the United Kingdom since ‘it is impossible to lay down any hard-and-fast definition of what is fair dealing’ (Laddie et al., 2000: 754), the courts are left to interpret the legislature’s intentions when it comes to substantially reproducing copyright works under fair dealing. This is evident in the 1983 case of Sillitoe and others v. McGraw-Hill Book Co Ltd, where the courts were compelled to interpret substantial reproduction of copyrighted works under the fair dealing exemption as it related to such issues as study notes, substantial reproduction, private study, acknowledgement, and literary works. In this case, the court consolidated three actions for copyright infringement, one on Alan Sillitoe’s ‘The Loneliness of the Long-Distance Runner’,

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the second on Laurie Lee's 'Cider with Rosie'; and the third on Bernard Shaw's 'Saint Joan'. Study notes on these works were prepared by a Canadian company with extensive quotations to be used in schools and elsewhere. The defendant company imported and sold these notes in England. The plaintiffs alleged that their copyright in these works was being infringed. The defendant company denied having infringed any copyright because it had not substantially reproduced the works in a material form. It was held that copyright is infringed if a substantial part of the work is reproduced. Substantiality was a question of fact and degree determined by reference not only to the amount of the work reproduced but also to the importance of the parts reproduced. Hence, had the notes for all the three works been reproduced in England, they would have constituted infringement of copyright.

In the United States Copyright Act 1976, section 107 does not provide an adequate definition of fair use or fair dealing, as it is referred to in South Africa, United Kingdom and Australia. Section 107 of the United States Act simply provides all that will be applied automatically in deciding whether any particular copying is fair. Hence, the Act accepts fair use when the purposes are for criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research (United States Copyright Act of 1976). Also, section 107 of the Act provides no guidance on the relative weight to be attached to the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, as well as the effect of the use upon the potential market for or value of the copyrighted work. Each of these factors is defined only in the most general terms. Following this vagueness, the courts are left with the discretion to determine whether any given factor is present in any particular case (Nimmer, 1985: 368). The discretion given to the court to determine fair use makes the decision of the courts to be conclusive as far as fair use is concerned. For example, in *Campbell v. Acuff-Rose Music, Inc.* \(^{24}\) involving a rap-style parody of the Roy Orbison song, 'Oh, Pretty Woman', the court ruled that a parody could be fair under copyright law even if it was created for commercial purposes. The court accepted the fair use plea notwithstanding that the dealing had a commercial

connotation. However, in *Harper & Row Publishers, Inc. v. Nation Enterprises,* the court characterised a news magazine’s report of news about President Ford’s memoirs as commercial. The court ruled that even though the use of the memoirs was one of the statutory examples of uses that could be found fair, the commercial nature of the news reporting did not warrant the defence of fair use to be applied.

In the Australian Copyright Act 1968, although the insertion of section 7 of the 1980 Act sets out an inclusive list of matters to which regard is to be in determining fair dealing, the Act does not adequately define what an exclusive right is or what would constitute reproduction. Section 7 of the 1980 Amendment Act statutory guidelines for fair dealing exemption are the purpose and character of the dealing; the nature of the work or adaptation; the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; the effect of the dealing upon the potential market for, or value of, the work or adaptation; and in a case where part only of the work or adaptation is copied, the amount and substantiality of the part copied taken in relation to the whole work or adaptation (Sterling & Hart, 1981: 151). These are the guidelines for the courts to determine fair dealing in any particular case.

**DIGITAL RIGHTS MANAGEMENT (DRM) PROTECTION**

Technical protection in the form of various kinds of DRM, also known as automated rights management (ARM), is another layer of protection of digital content that possibly inhibits access to the information. This is because DRM systems seek to prevent unauthorized copies of copyrighted materials to be made and can restrict copying if payment is not made. DRM that is buried within the digital code of copyrighted material has the ability to allow copies of copyrighted materials to be made upon payments, or to charge ‘micropayments’ for each small use of the copyrighted material (Liebowitz, 2002: 16). Also, DRM regulate access to digital content (Muir, 2003: 34). This is because it controls access to digital content, prevents unauthorized copying of digital content, identifies digital content and those who own licences in them, and ensures that the identification data are authentic (Bygrave, 2002).

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Some examples of systems that perform DRM functions are the 'Serial Copyright Management Systems' (SCMS), which are used on CDs and are primarily to protect music by only allowing the making of digital master copies of CDs. There is also encryption such as the unique Digital Object Identifiers (DOI) that involves scrambling the content of digital material in some sort of a digital envelope to restrict access only to technology that employs an authorized decryption algorithm. There is the macrovision that is an analogue video copy protection system that distorts the quality of analogue recording, making the recording useless for commercial purposes (Commission of the European Communities, 2002: 18-19; Götze, 1998: 39). Another DRM technique is digital watermarking and other monitoring devices such as the Windows Rights Management Services and rights management databases. The former lets a company restrict which of its employees may access, download, print, or forward sensitive company-mail or web material, and the latter identify the content to which rights are attached through standard identifiers (Godwin, 2002; Commission of the European Communities, 2002: 10).

Following the functions of DRM, users of digital content view DRM as detrimental because DRM have the potential to prevent the users from using digital content as they use print material (Vinje, 2001: 197; Commission of the European Communities, 2002: 13). For example, while it is possible to buy and read or refer to a traditional printed book as many times as one wishes, the use of DRM might limit the number of times one could read an electronic book. Furthermore, DRM may prevent access to digital content because 'while DRMs are mainly concerned with preventing the illegal use of digital material, it is less clear how DRM solutions protect the lawful consumer' (Commission of the European Communities, 2002: 13). This means that it is possible for DRM to prevent lawful users of digital content from using the information. Hence, according to the Commission of the European Communities, (2002: 13) 'a concern that DRM solutions need to address is to ensure that the intended user of the content is not subject to any constraint on their lawful use' of digital content. Furthermore, DRMs nuance the boundaries of the fair dealing exemption (Norman, 1998). This is because as DRM technology does not think, it cannot interpret or apply the fair dealing exemption. DRM ' [...] cannot anticipate or interpret a user's intent in accessing content' (McCacken, 2004: 130). According to McCacken, (2004: 130):
[...] the impossibility of developing digital technology that will identify and recognize the intent behind access to a digital work (because intention is what determines the degree to which the fair dealing provision may apply) is a driver behind the argument that [sic] fair dealing provision does not apply in a digital environment.

Following the protection of DRM on digital content, some users of digital content are of the opinion that DRM has fortified the corporate rights holders. This is because users cannot make full use of the fair dealing exemption (McCracken, 2004: 129), as DRM has the potential of blocking access to certain legitimate users (Commission of the European Communities, 2002: 13). According to the Report of the Commission on Intellectual Property Rights (2002), in developing countries where Internet connectivity is limited and subscriptions to on-line resources unaffordable, DRM exclude users access to digital content and impose a heavy burden on countries participation in the global society. However, the DRM cannot protect themselves, they require anti-circumvention laws to silence researchers who discover their flaws, as we shall see infra.

**CONCLUSION**

The digital environment has changed the behaviour of scholars. Scholars have a wider and easier means of copying digital content as compared to the print media copying. The advantages of digital content have been counter-balanced by restrictive licences that govern access to digital content. The ambiguities of the fair dealing exemption when applied in the context of licensing agreements need to be resolved by revisiting the exemption, as was done when new printing and reprographic technologies emerged in the 1970s. At present, the introduction of licences by rights holders to govern the use of digital information without an analogy to the fair dealing exemption seems inapt.

In the next chapter, we examine how other protective mechanisms, in the form of anti-circumvention clauses, act to protect digital content. The chapter shows how countries like the United States of America, Australia, and the United Kingdom have endorsed
anti-circumvention clauses in their copyright acts and how the anti-circumvention laws have given corporate rights holders more rights vis-à-vis users of the information. Furthermore, the chapter explains alternative models introduced by scholars and consumers of digital content to get access to digital content.
Chapter Four:
Circumvention and new models: how scholars make use of digital information

This chapter analyses the ways in which digital information is increasingly protected by *multiple layers of intertwined legal and technological devices*—copyright law, licensing agreements, software and hardware management systems, and criminalising anti-circumvention laws on the top of everything else. In the digital environment, there are basically four types of protection. These are copyright, licences, DRM that has been discussed *supra*, as well as anti-circumvention laws. This chapter argues that the anti-circumvention clauses that are endorsed by legislative acts in the United States of America, Australia and the United Kingdom have given corporate rights holders more protection and rights over users of digital content. The chapter also discusses alternative models being developed by scholars and consumers for easy access to digital content.

**ANTI-CIRCUMVENTION CLAUSES ON ACCESS TO DIGITAL INFORMATION**

Although DRM by its own merit protect digital content and fortifies corporate rights holders, corporate rights holders are more secured with the DRM because nations such as the United States of America, Australia and the United Kingdom have, in addition, instituted anti-circumvention clauses that protect the DRM in their copyright acts. The anti-circumvention clauses prohibit breaking of a security arrangement to access digital content (Braunstein, 2000). The United States of America first introduced the anti-circumvention clause in the DMCA 1998 and nations such as Australia and United Kingdom followed suit. The new chapter 12 of the DMCA, section 1201(a)(1) prohibits the acts of circumventing a technological measure used by rights holders to control access to their works. Also, sections 1201(a)(2) and 1201(b)(1)(A) prohibits the manufacture, sale, distribution or trafficking of tools and technologies that make circumvention possible (Digital Millennium Copyright Act, 1998).
The incorporation by the United States of America of an anti-circumvention clause in the DMCA 1998 have given more protection to digital content and strengthened the rights of corporate rights holders. The Anti-Circumvention provisions forbids the act of gaining access to a technologically protected work without the authority of the copyright owner and forbids the manufacture and trafficking in any technology, product, serviced, device, component, or part thereof that is intended to be used in violation of section 1201(a)(1). Section 1201(a)(1) forbids the circumvention of technical measures that deny access to works that are available in tangible form like online databases (Junger, 2001: 11-13). In *Universal City Studios, Inc. v. Reimerdes*,26 motion picture studios brought action under Digital Millennium Copyright Act (DMCA) to enjoin Internet web-site owners from posting for downloading computer software that decrypted digitally encrypted movies on digital versatile disks (DVDs) and from including hyperlinks to other web-sites that made decryption software available. Among the ruling of the court, it held that posting decryption software violated DMCA provision prohibiting trafficking in technology that circumvented measures controlling access to copyrighted works as well as posting hyperlinks to other web-sites offering decryption software violated DMCA. Hence, the court issued an injunction barring the defendants from posting decryption software or hyper linking to other web sites that made software available.

Also, the anti-circumvention clause in the DMCA protects and strengthens the rights of corporate rights holders because it does not allow any type of circumvention. The DMCA does not allow circumvention despite that the circumvention would lead to activities that are permitted by the fair dealing exemption. In *Felten v. RIAA*,27 the court held that scholars were not allowed to access digital content by circumventing any technological measures that is prohibited by the DMCA irrespective that such circumvention was geared towards criticism. In *Felten v. RIAA*, the Secure Digital Music Initiative (SDMI) frightened the plaintiff and his team out of discussing their finding that the music industry's new security technology was not very secure. The music industry claimed that Felten and his team of researchers had violated the Digital

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27 Felten v. RIAA (2001) Case No. 01 CV 2669

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Millennium Copyright Act’s (DMCA) anti-circumvention provisions that did not allow the plaintiff to discuss their findings. For the plaintiff and his research team to present their findings, they filed a lawsuit to uphold their First Amendment right that gave them permission under fair use to circumvent technical protection measures. Although the plaintiffs were subsequently allowed by the court to present their findings, this presentation was only done at a latter stage.

Furthermore, the DMCA anti-circumvention clause give more protection to digital content and strengthen the rights of corporate rights holders as it has the potential to prohibit the cracking of DVD codes in the USA and abroad. In Norway, the economic and environmental crimes unit following a complaint filed by Motion Picture Association of America (MPAA) raided the home of Johannes a 16-year-old boy. Johannes and his father were accused of developing and disseminating the decryption computer program ‘DeCSS’ that cracks the DVD encryption code the content scramble system (CSS), possibly enabling users to illegally copy DVDs. Although Johannes performed the alleged act in Norway, the MPAA insisted that DeCSS violates the DMCA 1998. However, ‘[…] the events in Norway are significant as an escalation in the MPAA’s ongoing clampdown on ISPs, coders and Internet sites that design or disseminate the DeCSS code’ (Braunstein, 2000) both in the USA and abroad. In Universal City Studios, Inc., v. Eric Corley et al., the plaintiffs brought an action under the DMCA to enjoin Internet web site owners from posting for downloading computer software that decrypted digitally encrypted movies on DVDs and from including hyperlinks to other web sites that made decryption software available. Corley et al., were sued because they published a print magazine and maintained an affiliated web site geared towards hackers, (a digital-era term often applied to those interested in techniques for circumventing protections of computers and computer data from unauthorized access. Also, Corley posted a copy of DeCSS that did not support any licensed DVD player at that time on his web site. The DeCSS was designed to circumvent CSS, the encryption technology that motion picture studios placed on DVDs to prevent the unauthorized viewing and copying of motion pictures. Corley also posted on his web site links to other sites where DeCSS could be found. The court granted an injunction on behalf of the plaintiffs barring Corley from posting
DeCSS on his website or from knowingly linking via a hyperlink to any other website containing DeCSS. On appeal by the website owners, the court held that an injunction did not unconstitutionally eliminate owners' fair use of copyrighted materials. Lawful owners of licensed DVD players were not prevented from viewing and copying motion pictures with CSS. On the contrary, if they used the DeCSS they would be circumventing which is not allowed under the DMCA.

Similarly, a United States court showed that the DMCA regarded as illegal any act of circumvention carried out legally in another country. In *United States of America v. Elcomsoft Co., Ltd. And Dmitry Sklyarov,*\(^{29}\) Sklyarov was arrested and charged in Las Vegas on July 16, 2001, for allegedly violating the DMCA anti-circumvention provisions by making and releasing software that could decode the weak encryption on Adobe Acrobat eBook files. Sklyarov, a Russian citizen who was visiting the USA, legally wrote the software (Advanced eBook Processor or AEBPR), in his native country, and the company he worked for allegedly distributed the software. Sklyarov and his company were criminally prosecuted for violating the anti-circumvention provisions of the DMCA. The AEBPR program allowed lawful buyers to exercise their fair use rights over eBooks that would not be possible with Adobe eBook format. Lawful purchasers could read the eBook on their laptops or computers other than the one on which the eBook was first downloaded; continue to access a work that they had purchased when the original version downloaded was not accessible; continue to access a work in the future, if the particular technological device for which the eBook was bought became outdated; print out an eBook so as to read it on paper; read an eBook on an alternative operating system; loan it to a friend; copy snippets of a work to be included in a school project, a critique, academic research, or a parody; as well as have a computer read the eBook out loud, which was germane for visually-impaired people. Basically, users were not allowed to use these aspects on Adobe eBook Reader as Adobe's eBook Reader did not allow users to make fair use of electronic books. Although Sklyarov was finally released and allowed to return to Russia, as part of an agreement between Sklyarov and the USA Attorney he was to


testify for the U.S.A. Government in its continuing case against Sklyarov’s employer, ElcomSoft.

The extension of the DMCA beyond the borders of the United States of America is testimony that the United States of America is reacting contrary to norms of international organization dealing with copyrighted works. The Berne Convention established in 1886 serves as ‘the oldest and pre-eminent multinational copyright treaty’ (Leaffer, 1989: 343). Although this convention was established to grant a reciprocal protection of copyright beyond national boundaries of members of the union (Phillips, Durie & Karet, 1997: 118; Prime, 1992: 289), it recognizes that the rights of authors’ of each nation ‘depend on the domestic laws enacted in each state’ (Prime, 1992:291). Although the United States of America did not join the Berne Convention from its inception, it joined the convention in 1989 when it had become ‘the world’s largest exporter of copyrighted works’ – these were American motion pictures (Leaffer, 1989: 351). Today, notwithstanding that ‘the Berne Convention is administered by the World Intellectual Property Organization’ (WIPO) (Leaffer, 1989: 348), and the United States is a member of WIPO, (Prime, 1992: 292), it is failing to recognize that the rights of authors’ of each nation ‘depend on the domestic laws enacted in each state’ by extending the DMCA across its borders. By arresting and charging Sklyarov for allegedly violating the DMCA anti-circumvention provisions by making and releasing software that could decode the weak encryption on Adobe Acrobat eBook files can be seen as unjust. This is because following the norms of WIPO, Sklyarov legally wrote the software in his native country and could not be arrested, as the copyright law of Russia did not treat Sklyarov’s act as illegal.

Furthermore, the protection and strength of the DMCA 1998 is not only felt beyond the borders of the United States of America because of litigations brought in the USA courts but because other countries have emulated the DMCA. The Australian Digital Agenda Act 2000 emulated the DMCA 1998 by instituting section 116A that forbid any form of circumvention. Section 116A:

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30 Most of the publishers and printers in the United States argued that the absence of the United States in the International Convention assured an abundance of literature at a low price for the United States readers. Furthermore, the trade of reprinting non-American works by American printers and publishers meant thousands of jobs for American workers and the potential for profit led to fierce competition among American publishers.
[...] gives copyright owners and exclusive licensees the right to bring an action against persons making, dealing in or distributing circumvention devices, importing them for commercial purposes, making them available online to an extent that will prejudicially affect the copyright owner or exclusive licensee, and providing, promoting or advertising circumvention services (Lahore & Rothnie, 2004: 51,615).

This clause just like that of the DMCA protects and strengthens the rights of corporate rights holders because it does not allow any type of circumvention. In Kabushi Kaisha Sony Computer Entertainment Inc. v. Stevens, the plaintiff argued that the 'Boot ROM' located on the circuit board of the PlayStation 2 (PS2) console that embodied a particular program designed to read, verify, and regionalize the access codes stored on the boot track of the PS2 CD-ROMS was a technological protection measure that was not to be contravened under section 116 of the Copyright Amendment (Digital Agenda) Act 2000. The PS2 CD-ROMs were designed such that the access codes would not be copied onto blank CDs.

The defendant sold and installed 'mod chips' for PS2 consoles that had the effect of modifying the PlayStation consoles and also sold counterfeit copies of PS2 games. The 'mod chip' had the effect of modifying the PlayStation consoles such that any CD-ROM inserted into the drive of the PS2 could be played regardless of whether it was counterfeit or genuine. In the hearing, the Court found that the protection measures identified by Sony in their PS2 console that were circumvented by a mod chip installed by the defendant were designed in the ordinary course of their operation to deter or discourage circumvention.

The anti-circumvention clauses are not only instituted by nations such as the USA and Australia that have promulgated digital acts but also other countries such as the United Kingdom (UK) have revived their copyright act by forbidding circumvention. In the United Kingdom, just as in USA and Australia, section 296 of the Copyright,
Designs and Patents Act 1988 forbid circumvention of digital content. Section 296 stipulates:

[... ] where copies of a copyright work are issued to the public, by or with the licence of the copyright owner, in an electronic form which is copy-protected, the person issuing the copies to the public has the same rights against a person who, knowing or having reason to believe that it will be used to make infringing copies makes, imports, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed, or publishes information intended to enable or assist persons to circumvent that form of copy-protection, as a copyright owner has in respect of an infringement of copyright (United Kingdom Copyright, Designs and Patents Act 1988 (c.48), 2000).

Hence, in the UK just as in the USA and Australia, the copyright act protect and strengthen the rights of corporate rights holders as it does not allow any type of circumvention. The courts enforce anti-circumvention rules notwithstanding that the effect of the circumvention will be felt out of the borders of the United Kingdom. In *Kabushikaiha Sony Computer Entertainment Inc. & Others v. Edmunds*, the court showed that although nations were free to practice free trade, the court will not sanction any trade that involve circumvention. In *Kabushikaiha Sony Computer Entertainment Inc. & Others v. Edmunds*, the plaintiff claimed that an importer of a ‘mod chip’ known as ‘the messiah’ had contravened section 296 of the Copyright, Designs and Patents Act 1988. The defendant imported 'mod chips' that could enable CD-ROMs that were counterfeit be substantially reproduced into the console's Random Access Memory (RAM) and could play on a PlayStation 2 (PS2) console in the UK or from other regional zones. The ‘mod chip’ also had the effect of modifying the PlayStation console such that any CD-ROM inserted into the drive of the PS2 could be played regardless of whether it was genuine or counterfeit. In passing judgment, the Court found that the ‘Boot Rom’ system and the embedded codes put into genuine CD-ROMs and DVDs by Sony constituted the type of copy protection referred to in section 296 – an act prohibited by the United Kingdom Copyright,

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32 *Kabushikaiha Sony Computer Entertainment Inc. & Others v. Edmunds* (t/a Channel Technology) 2002 EWHC 45 (CH)(Chancery Division).
Designs and Patents Act 1988 (c.48), 2000. This is because the copying that was prevented was the loading of the game into the computer.

The incorporation of the USA, Australia, as well as UK of anti-circumvention clauses in their copyright acts has further increased and strengthened the rights of corporate rights holders of digital content as the acts inhibit circumvention. Following the provision of the acts, the courts refuse to accept copying on the basis of fair dealing when any act of circumvention takes place. Although in South Africa, there are no case laws to indicate whether the courts prohibit anti-circumvention in the digital environment, and the copyright law has not been amended in this regard, this might inhibit scholars’ access to digital content as the foreign laws where the digital content emanates prohibit circumvention of any technological measures. Hence, because of the protections that digital content command, some scholars’ worldwide have engaged in new models in order to access digital content.

OPEN ACCESS INITIATIVE

Unsatisfied with the protective mechanisms that allegedly give corporate commercial rights holders’ monopolistic dominance over digital content, scholars and the consumers of digital content have introduce a number of alternative models that will give them free access to digital content. In the alternative models for users to gain free access to digital content, authors of articles operate within existing copyright laws but have agreed to open access before their works are published. Some of the alternative models that operate within existing copyright laws are self-archiving, open access journals, as well as the creative commons initiatives. In the self-archiving initiative for example, authors of pre-referred preprints own the copyright so can transfer them to e-print archives. The authors deposit their articles in open electronic archives often called e-prints archives that can either be institutional, subject-based, or personal. The technical support is provided by Open Archives Initiative (OAI), which has established standards to which e-prints should comply. When articles are deposited in compliance with OAI standards, all e-print archives are searched as though they constitute a single archive (Phillips, 2004). With the creative commons initiative, although it offers a flexible range of protections and freedoms for authors and artists,
the authors and artist own the copyright. The creative commons has 'built upon the all rights reserved of traditional copyright to create a voluntary some rights reserved copyright' (Creative Commons, [n.d.2]). Creative commons offer creators ways to protect their work by creators reserving some of their rights but also encouraging certain users to use the work. By doing this, it 'builds a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules' (Creative Commons, [n.d.1]). With regard to open access journals, these are electronic journals that are freely available on the Internet, and users can read, download, copy, print, or link to the full text of articles. Some of the open access journals will allow authors to retain their copyright while some will obtain copyright for them. But 'in either case the authors will have to agree to open access before the work can be published' (Phillips 2004).

The PubMed Central and the Budapest Open Access Initiatives that are examples of open access initiatives embrace copyright. Also, while 'PubMed Central is aimed at using copyright to provide free online access to the full text of life science research articles linked to bibliographical database to interested users (Roberts et al., 2001: 2318), the ‘Budapest Open Access Initiative’ uses copyright and ensures permanent open access to all articles they publish and do not charge subscription or access fees (Fishman, 2002:18). PubMed Central states:

Because journal articles should be disseminated as widely as possible, these new journals will no longer invoke copyright to restrict access to and use of the material they publish. Instead they will use copyright and other tools to ensure permanent open access to all the articles they publish. Because price is a barrier to access, these new journal will not charge subscription or access fees, and will turn to other methods for covering their expenses (Fishman, 2002: 18).

Although there are alternative models that are to provide users unrestricted access to digital content, finance is necessary in order to attain the objectives of these models. In an attempt to resolve the financial aspect, the Public Library of Science (PLoS) and BioMed Central (BMC) open access initiatives for example, places peer-reviewed bio-medical articles 'freely available electronically and the costs of the publication are paid for up-front with funds from the authors’ grants or institutions' (Doyle &
Hagemann, 2004: 10). Also, in order to promote the initiative, financial barriers for potential authors are reduced through Institutional Membership Programmes. The authors that are members of institutions such as the Open Society Institute (OSI) for instance, receive full publication charge waivers because OSI supports open-access publication and free sharing of knowledge. Furthermore, in order not to exclude authors that cannot pay publication fees, it is suggested that an open access publication pool be created from funds that universities save through the cancellation of expensive journal subscription in a specific discipline. This type of funds can be made available to an author whose article is accepted for publication in that discipline but has no funds to pay for the publication (Doyle & Hagemann, 2004: 10).

According to Suber, (2003), ‘open-access literature is defined by two essential properties. First it is free of charge to everyone. Second, the copyright holder has consented in advance to unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling’. The open access initiative (OAI) is to ensure the widest possible access to information for all peoples (IFLA Newsletter Africa section, 2004: iv). The initiative has attracted researchers, university administrators, and international organizations such as the International Federation of Library Associations (Van Orsdel & Born, 2003: 53). The Internet through which the articles are made available to potential users allows distribution of perfect copies of the articles at almost no cost to a worldwide audience because there are no barriers attached to the articles whatsoever (Suber, 2003).

The origin of alternative model initiatives such as self-archiving, open access journals, as well as creative commons stem from the fact that scholars and consumers of digital content believe that they are dependent on ready and unimpeded access to published literature, which is the only permanent record of their ideas, discoveries, and research results, upon which future scientific activity and progress are based (Roberts et al., 2001: 2318; Mayfield, 2002). Furthermore, scholars and consumers believe that as science belongs to the people, the fruits of science should not be owned or even transferred for profits. The fruits of research, which is publicly paid for, should be made available as widely and as economically as possible (Meek, 2001; Vergano, 2004). In order to encourage increased research usage of scientific works, scholars feel that the fruits of research should be placed in open access sources so that users
have a means of discovering and evaluating the research articles that have been produced (Hitchcock et al., 2003).

However, notwithstanding the aims of the various alternative models, the models do not mention or propose how the fair dealing exemption should be applied to digital content. This is because the models permit, just like the fair dealing exemption, the use of copyrighted information without having to ask for permission or pay a fee for accessing the information (Harper, 2001). The models permit information to be used freely, the authors of the articles have consented to unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling (Suber, 2003). BioMed Central for example, which is part of the Current Science Group of independent companies that provides full text access to all the peer-reviewed research papers that it publishes in all areas of biology and medicine does not revoke the fair dealing exemption. This may be because it state that access to papers was immediate and barrier free to potential users (Fishman, 2002:18; Van Orsdel & Born, 2003: 53). The Public Library of Science (PloS) that is among the prominent open access initiatives does not revoke the fair dealing exemption in digital content. The rationale for this may be that the PloS initiative upholds that journal records should be freely available through an international online public library ‘within 6 months of their initial publication date’ (Fishman, 2002: 18). Also, the Eldritch Press owned by Eric Eldred that is a commercial online publishing house does not say anything about the fair dealing exemption. The press simply expresses its willingness to provide free online access to information seekers (Sprigman, 2002). Similarly, the conceptual idea of ‘copy left’ developed by Stallman does not revoke the fair dealing exemption in the digital realm. The copy left idea is sometimes indicated with a reversed ‘c’ symbol that implies public ownership for software and documents (Stallabras, 2002:142). In instances where the reverse ‘c’ symbol appears on a piece of information, it indicates that the public has the right to use such information without fear of being accused of infringement. This implies that the creator of that piece of information has waved his or her copyright right on that piece of information. In a scenario of this sort, there would not be any need for the fair dealing exemption because the function that fair dealing exemption has to perform is already covered.
Following the emergence of new models aimed at giving free access to digital content, these new models most especially the open access initiative 'serve to increase competition and break the monopolies that larger publishers have, thereby increasing market efficiency and cost effectiveness to academia and its publishing' (Fishman, 2002:19). This is because by corporate rights holders knowing that they are alternative models for accessing digital content, may be thinking of ways to lessen the terms of their licensing agreements. Through open access archives, research that might otherwise be inaccessible because of financial barriers, is made globally accessible. Also, as more international institutes establish archives, more published research becomes available to many people with Internet access. Open access archives are valuable as they promote institutional research output. Through universities exhibiting their research output this reconnects local and international research thus providing a better image of a country’s research output and areas of specialisation. This might have implications for international collaboration, joint research collaborative, funding proposals, as well as possible recruitment of faculty members (Chan, Kirso & Arunachalam, 2005: 4-5). Furthermore, open accesses improve citation and research impact. There is 'evidence that citation and the impact of papers that are openly accessible are far greater than non-open access publications' (Chan, Kirso & Arunachalam, 2005: 5). This view is corroborated by Lawrence (2001: 521), as he has found that in computer science publications, an 'average of 336 per cent more citations of online articles compared to offline articles published in the same venue' are used. Also, Harnad and Brody (2004) measured the citation effect of the articles from non-open access journals that have been made open access by their authors through self-archiving. Their investigation showed 'that compared with articles that have not been made open access by their authors, archived articles are cited between 250-550 per cent more often'. Another advantage of open access archiving is that it allows improved access to subsidiary data. Many institutions use their archive to provide access to 'doctoral theses and dissertations, datasets, technical reports, instructional materials and other forms of electronic publications that can include multimedia objects' (Chan, Kirso & Arunachalam, 2005: 5). As most of these researches are not published, archiving their content on open access creates greater access to the research that has already been done (Chan, 2004: 292).
On the other hand, since the aims of the new models are to provide access to digital content as the fair dealing exemption does, chapter six reveals reasons obtained from an empirical survey as to why scholars and other consumers of digital content do not want to use these new initiatives. For, if scholars and other consumers use these initiatives there might not be any reason to revisit the content of the fair dealing exemption to make it appropriate with the digital environment as the new models perform the function of the fair dealing exemption. This is because the new models override the terms and conditions in licensing agreements, the DRM that regulates access to digital content (Muir, 2003: 34), and the anti-circumvention clauses that prohibit breaking of a security arrangement to access digital content (Braunstein, 2000), as it provides free access to digital content.

**ACQUISITION OF DIGITAL CONTENT THROUGH CONSORTIA**

The emergence of digital content database with the high cost involved to acquire it has constrained libraries to use networks like consortia to negotiate or acquire digital content databases to be shared by members of the consortia (Rowley & Slack, 1999:33; Kopp, 1998:11; Landesman & Van Reenen, 2001). Consortia are resource sharing organizations formed by libraries coming together to share resources, share and improve resources, achieve some single or broader purpose, reduce costs, as well as share the purchase of an automated system, giving users the ability to access a broader range of materials (Lucash & Updegrove, [n.d]); Payne, 1998:13). This is because, as libraries generally cannot attain the level of self-sufficiency towards the needs of their clients, they supplement certain services by making available to their clientele the resources and collections of other libraries through various cooperative programs (Le Roux, 2004: 49).

Through consortia, it is argued that libraries will have buying powers that will enable them to enter the digital market and collectively face the cost of digital information by benefiting in the overall reduction in the cost-per title of the information. This is because corporate rights holders have no stable prices for digital content and no single library can afford to face the technical or economic hurdle of purchasing the information alone (Bocher, 1993: 66; Helmer, 1998: 5; Allen & Hirshon, 1998: 36).
Hence, through consortia libraries believe they may improve the terms of use of digital content through negotiations with corporate rights holders that may allow the use of the content for say inter-library loan or the use of the materials in course packs between institutions (Rowse, 2003: 4).

Following the alleged function of consortia, consortia should be able to negotiate with corporate rights holders for scholars and other consumers of digital information to access-licensed digital content to their satisfaction. The negotiations may involve institutions paying lesser prices for the licensed databases; sharing the content of the licensed databases among members of the consortia; as well as negotiating for pre-configured licensed databases that correspond to specific disciplines. Consortia can perform these functions following the economics of scale that they are likely to enjoy while bargaining with corporate rights holders. Hence, with regard to consortia negotiating for institutions to pay lesser and share the content of the information, there has been some success worldwide. For example, in South Africa, it was revealed in 2002 that individual subscription on 4 of the most used EBESCOHost databases were R590,000. For 35 academic libraries, the cost was R20,065 000 but negotiating it through the South African Site Licensing Initiative (SASLI), that negotiates digital content databases at the national level for tertiary institutions in South Africa, the cost was reduced to R5,000. Furthermore, with regard to Beilstein/Gmelin, individual annual subscription was R182,696 but SASLI had it at R28,268 (Veldsman, 2002). In the United Kingdom, the National Electronic Site Licence Initiative established by the Joint Information Systems Committee (JISC) to initiate licensing of electronic journals on behalf of the higher, further education and research communities can be said to have reduced the price of digital product with the institution of a single national negotiated licence that eliminate the cost of handling multiple negotiations (NESLi2, 2005). In the United States, the Ohio Library and Information Network (OhioLink) - a consortia providing access to 31 million library items - (Drummond & Campbell, 2003), licensing digital content for all Ohio higher education, the cost of the information reduced tremendously. In 2001, OhioLink licensed reference databases at a cost of $ 4.4 Million that would have costed individual libraries $ 13.8 Million (Suddes, 2001). Also, in Australia, the Council of Australian University Librarians (CAUL) that is to improve access to digital content among staff and students showed that there were financial benefits for libraries in consortia buying,
either through direct reductions in price or through broader content for the same price (Costello, 2001: 176; 179). Corroborating this assertion, Costello, (2001: 178-179) state:

Since 1996, CAUL has finalized 32 agreements, 18 for full-text products, four for factual databases and the rest for bibliographic databases. Half the consortial subscriptions commenced in 2000 or later, reflecting the burgeoning of available electronic products, and the increasing willingness of publishers to deal with consortia. For 15 products, the billing is handled centrally via CAUL, often an indicator of whether or not the publisher has a local office or representing agent. The average number of participants in each agreement is 20, with highest number (40) subscribing to ProQuest5000

Notwithstanding that there are successful evidence in consortia negotiating for institutions to pay lesser and share the content of the information, the aspect of consortia negotiating for pre-configured licensed databases may be thornier. This is because it is difficult to say whether corporate rights holders will accept that scholars and consumers of databases dictate what should be included in licensed databases. The corporate rights holders may not allow scholars and consumers to select the content of databases because the corporate rights holders may be left with databases that no scholars and consumers has selected. On the other hand, the composition of pre-configured databases may be possible when corporate rights holders do the selection. This is because they would be able to bundle individual journal titles (McCabe 2002: 269) that may not be needed by scholars and consumers. This may have a negative reaction on scholars and consumers as the unwanted purchases may be at the expense of relevant materials (Chapman, 1996: 146; Rowse, 2003: 1). However, notwithstanding the disadvantages of this method, commercial publishers have begun to bundle their individual journal titles and provide to institutions. For example, ‘Elsevier’s database product, ScienceDirect contains articles from its more than 1,100 peer-reviewed journals in all science, technology, and medicine (STM) disciplines […] Recently, Elsevier has begun to offer smaller bundles of titles that correspond to broad disciplinary markets, such as biomedicine’ (McCabe 2002: 269).
CONCLUSION

Although anti-circumvention clauses furthermore protects licensed digital content and gives more rights to corporate rights holders as oppose to scholars and consumers of the information, some scholars and consumers have adopted new models that allow free access to the information. Notwithstanding the presence of the new models, scholars and consumers to negotiate better prices for licensed digital content use consortia. However, following the responses in the empirical survey in chapter six, it seem as if consortia has not also been able to resolve scholars and consumers access to licensed digital content. Hence, following the effects of copyright, licensing agreements, DRM, as well as anti-circumvention clauses on access to digital content an empirical survey was conducted in the Western Cape Province of South Africa. The survey was basically to investigate whether licences inhibit access to digital content and whether a revision of the content of the fair dealing exemption would allow better and easier access to licensed digital content. The next chapter shows a general theoretical framework and how the empirical investigation was conducted.
Chapter Five:
The view from the coal face: framing theories and conducting an empirical investigation

The purpose of this chapter is twofold. First, it is to present an outline of the digitisation of intellectual content and thereby adopt a theoretical framework for the study. Second, it is to test the idea of a crisis in fair dealing in the digital content against concrete South African acquisitions and reference librarians, consortia managers, informed users, as well as corporate rights holders. Building on chapter one that outlined the background and scope of the research problem, a useful theoretical point of reference with which to approach digital information protection is to view the information age from a perspective based on theories of scholars such as Bell and Castells. Bell in the 1970s and Castells in the 1990s were of the opinion that ‘the creative economy will be the dominant economic form in the twenty-first century’ (Darch, 2004: 490). Castells expressed this opinion when he introduced the concept of ‘information capitalism’ where he drew attention to the new relationships that information is likely to bring. Furthermore, when referring to capitalism, Castells (1998: 338) is of the opinion that profit seeking, private ownership as well as market principles are all present. Bell on the other hand, who came up with the theory of post-industrialisation had ‘foreseen the turmoil that computer communication technologies were bringing into being’ (Webster, 2002: 31) and how this would impact on scholars. It was made evident in chapter three that the availability of digital content has changed the social behaviour of scholars in academic libraries.

ADVENT OF DIGITIZATION

Before the emergence of digital content, print information was the principal source of information used for scholarship and this information was protected by copyright (Hofman, 1999: 12). Following the advent of information technology, rights holders introduced access-based information (Darch, 2001: 1), with other protections to control its use. These protections include copyright, licensing agreements, DRM that are equally protected by anti-circumvention clauses introduced by nations such as the
U.S.A., Australia, as well as the United Kingdom in their copyright laws. The rationale for the protections is that ‘rights holders believe that copies upon copies of digital information can be made at an alarming pace without being accounted for’ (Masango, 2005: 130). This is because the technology upon which digital content can be copied is ‘the most advanced device of reproduction the world has seen to date (Wirtén, 2004: 58).

The protection that rights holders of digital content claim, was originated by the US entertainment industry. Following the manner in which the new technology of digitisation operates, the US entertainment industry claimed that their industry needed more protection. They claimed that in the digital environment their industry would be losing billions of dollars from unauthorised Internet file sharing because the technology of digitisation permits easy copying or piracy. The industry therefore expanded copyright ‘to protect not just the business interests of large Northern corporations, but also their actual business plans’ (Darch 2004: 491). The rights holders of digital content capitalised on the arguments raised by the US entertainment industry to protect their digital content. Interestingly, in order to secure legislative protection, the rights holders were able to manipulate the US Congress to protect them in the digital environment as well. The US Congress did so when president Bill Clinton signed the DMCA on October 28, 1998 ‘which created a new crime of circumvention’ (Boucher, 2002).

The International Coalition of Library Consortia, (2001) are of the opinion that these protections, especially of licenses on licensed digital content, have deterred research and scholarship. Some scholars and consumers (Lindsay, 2002: 4-5; Curry, 2002: 3; Lessig, 2001: 257; Davis, 1999: 118-125) argue that many licences are in conflict with the limited protection that copyright gives to literary work. Although copyright protects literary works, it allows individuals to copy portions of work under certain circumstances, which will not interfere with the legitimate rights of the copyright holders (Amen, Keogh & Wolff, 2002: 24). It is argued that the introduction of the various protections in the new information environment without a substitute to the fair dealing exemption in the new environment is inappropriate. Some scholars and consumers (Litman, 1996; Loundy 1995; Samuelson, 1994) are of the opinion that digital technology raises new issues that cannot be addressed by current law. On the
other hand, although it is necessary to provide a substitute for the fair dealing exemption in the digital environment, a pertinent question to ask is what will happen to the fair dealing exemption as we move to more protection. If this exemption is totally discarded in the future, users of information will be left with no legal means of copying information.

Following that information has changed ‘from traditional paper and print resources to a mix dominated by digital resources’ (Darch, 2001: 1), leads us to the new information society. In this society, Bell in his post-industrial theory had envisaged certain characteristics that would dominate the society. On the other hand, Castells in his informational capitalism theory discusses the actual influence that digital technology has brought in the society.

RATIONAL FOR BELL AND CASTELLS THEORIES

Viewing information from the point of view of the information age provides us with the framework for understanding academic libraries as the entities in which various types of information are stored and copied for purposes of scholarship. However, in order to understand the different protections that govern the use of various materials in academic libraries, one needs to look at theories that view the technology of digitisation as introducing new forms of information. Since Bell’s post-industrial theory and Castells’s informational capitalism theory observe the technology of digitisation in this regard, these theories have been used to form the methodological framework of the study. Also, these two theories were combined for the study because Bell’s theory anticipates what would take place with the introduction of the new technology of digitisation, while Castells’ theory shows what is really taking place with the introduction of the new technology of digitisation. Other scholars, (Barnet & Muller 1994; Schiller, 1984), also view the actual effects of the new technology as Castells did.

BELL’S ANTICIPATORY MODEL

This model originated from the post-industrial theory of Daniel Bell who subscribed to the notion that a new sort of society was emerging in the last quarter of the
twentieth century. He labelled the new society the post-industrial society following ‘the explosive technological changes that hit advanced societies in the late 1970s and early 1980s’ (Webster, 2002: 30). Bell’s post-industrial theory forms part of the framework for this study as this theory views the post-industrial society as ‘the transition between the animal of the past and the superman to come’ (Bell, 1974: 54). The post-industrial society is the one in which rights holders are able to increase productivity in the information arena for profits. They are failing to recognise that information is fundamental to all productive activity, as their sole aim is to make profits.

Bell’s theory forms a framework for this study as in the early 1970s he contended that post-industrialism ‘will be a major feature of the twenty-first century, in the social structures of the United States, Japan, the Soviet Union, and Western Europe’ (Bell, 1974: x). This contention is however true as post-industrialisation is the major feature of rights holders of digital content. The rights holders have turned information resources and services into a game between persons (Bell, 1974: 127) as the rights holders impose clauses to developing nations as to how digital information should be used. The rights holders who produce digital content are equipped with professional technical services, as well as ‘scientists and engineers, who form the key group in the post-industrial society’ (Bell, 1974: 17). The information that these professionals manage, enables societies to undergo decisive changes. However, as rights holders restrict unauthorized persons to the information because of profiteering, the unauthorized persons are prevented from using the information. The only options that unauthorized persons are left with are to get the information either through ILL or privately pay for the information. This reasoning does not seem to be acceptable because ‘scholars are not concerned with the profit and loss’ (Webster, 2002: 40) that rights holders generate from the business of information. Scholars’ interest reside in allowing everyone access to information as they believe that access to published information reveals ideas, discoveries and results of research that has been carried out (Roberts et al., 2001: 2318; Mayfield, 2002).

On the other hand, post-industrial theory forms a framework for this study as it argues against rights holders’ profit oriented goals which were another crucial point of contention in this study as exposed in chapter three. In the post-industrial society,
persons should not be handled as in the age when concern was with machinery and money, 'but rather will benefit from the person-oriented services of professionals that are premised on the needs of the client' (Webster, 2002: 40). According to Bell (1974: 220), the post-industrial society should be treated as a 'communal society' that 'promotes the community rather than the individual'. In placing this in perspective, rights holders are to consider users of information and the influence that their use of digital content will have in the community. The rights holders of digital content as chapter three of this study shows, does not welcome this argument, as it treats information as machinery for making huge profits at the expense of their clients. These clients are mostly scholars from developing countries like South African who have no option but to use what is provided by the rights holders. The rights holders do not support the idea that 'the wealth-creating sectors of society must subsidise the wealth consuming realms' (Webster, 2002: 45). The rights holders view the industrial society as one that 'brings into question the distributions of wealth, power, and status that are central to any society' (Bell, 1974: 43). Hence, in the industrial society all that the rights holders are interested in is to make profits from the information they supply to developing countries. They are comfortable when every use of their information is paid for as they claim that the more their information is paid for the more they are encouraged to produce more information (Rogers et al., 2000).

Furthermore, the post-industrial theory forms a framework for this study as it lays emphasis on empirical survey. Bell is of the opinion that 'a post-industrial society is one in which there will necessarily be more conscious decision-making. The chief problem is the stipulation of social choices that accurately reflect the ordering of preferences by individuals' (Bell, 1974: 43). Since it is evident that decisions can only be made after carrying out an empirical survey and Bell's theory is to develop generalisations of information based on close analysis of the real world (Webster, 2002: 32), it forms part of a framework for this study, which carries out an empirical investigation that gives a close analysis of the real world with respect to the reproduction of information.

Taking into account the reasons for combining two theories for this study as discussed above, Bell's post-industrial theory can however not be applied in isolation in this study as his theory was on the conceptual aspects of the information age. In order to
show what is really taking place with the introduction of the technology of digitisation, this researcher deems it necessary to use, in addition, Castells informational capitalism theory. Castells discusses the actual effect of access to development, industrialization, and consumption in the last quarter of the century (1998: 70). This study therefore, combines the post-industrial theory with the informational capitalist theory to form the methodological framework of the study.

CASTELLS’S REALITY MODEL

This model is based on Castells informational capitalism theory. This theory forms part of a framework for this study as it is based on a capitalist mode of production that refers to the means of producing a given level of wealth. The capitalist mode of production also refers to a market economy, production for profit, as well as for private ownership. The mode of production provides wealth (Webster, 2002: 119). According to Webster, ‘Castells’s view the historical coincidence of capitalism in trouble in the 1970s and the information revolution has given birth to the informational capitalism’ of today’ (2002: 119. This is a view that pervades the present study, as it is shown that there are producers of information who want their information to be free for scholarship, while there are organisers – information capitalists - in the form of rights holders, who manage the information for profit. Castells observes that information capitalism ‘is an especially unforgiving, even rapacious, form of capitalism because it combines enormous flexibility with global reach … thanks to network arrangements’ (Castells, 1998: 338).

Writers such as Barnet & Muller (1994), and Schiller (1984), are of the opinion that the spread of information networks indicates a general trend towards the strengthening of transactional corporations in the world economy. This view continues to dominate in developed countries when we look at the political battles of globalisation of the world capitalist economy in the network society. The political battles are what determine the nature of the library of the future as opposed to the ‘technical issues as the relationship between print and digital media, or the extension of Internet access …’ (Darch, 2004: 490).
Furthermore, the ‘technological and organizational conditions of the Information Age, … provide a new, powerful twist to the old pattern of profit seeking taking over soul-searching’ (Castells, 1998: 70). In reality, the powerful twist of profit seeking is furthermore complicated because the area is ‘contested between lawyers, economists, sociologists and information workers, each of whom sees the issue primarily as a technical one, and many of whom view it as pretty much cut and dried’ (Darch, 2004: 490). This is because it is difficult to persuade certain role players to change their reasoning as everyone is threatened by the network society (Castells, 1996: 166), and as sociologists ‘lawyers and economists do not communicate easily with each other’ (Darch, 2004: 500).

As the power of profit seeking was being exploited by rights holders in the digital environment, the original purpose of the first copyright law of 1710 was reversed. The discourse of copyright in the English-speaking world has remained constant since the promulgation of the first Copyright Act in 1710 by the British Parliament, but the content and meaning of the raison d'être for the act has shifted significantly. This shift can be associated with the US entertainment industry, who while professing their concern for the well being of writers or composers, claimed that their industry was losing billions of dollars from unauthorised Internet file sharing in the digital realm. In order to restrain the purported loss of dollars, the US entertainment industry protected both their business interests and their business plans (Darch, 2004: 491). The rights holders of digital content also capitalised on the arguments raised by the US entertainment industry to protect digital content. With the implementation of protection by the US industry, and the extension such protection on digital content, it can be concluded that both the US industry and rights holders have stifled creativity and technological innovation, not encouraged it (Darch, 2004: 491). The original objective of the first copyright law had not been to protect business interests or plans, but was to encourage learned men to compose and write useful works (Leaffer, 1989: 3). The United States of America corroborated this ‘idea by assigning to Congress the power to promote the progress of science and useful arts, …’ (The United States Constitution, 1789).

In the digital realm, the stifling of creativity is intensified by rights holders of digital content, as they have been able to establish a monopoly over the creative works of
scholars by privatising these works and in the process lost ‘the long-established balance between public access to information’ (Darch, 2004: 491). The monopoly created by rights holders on digital content has been expanded to such an extent that they are allowed to claim copyright on

a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part evaluated qualitatively and/or quantitatively, of the contents of that database (EU Database Directive-text, 1996).

As a result of the monopoly that has been created in the digital environment, rights holders are able to assemble the contents of scholars’ works and dispatch them to developing countries, which mostly depend on such contents for scholarship. The dispatched content is usually accompanied by specific conditions that state how the information should be used. Countries such as the U.S.A promulgating the DMCA that forbids circumvention furthermore strengthen the conditions for the use of the information. The assembled and dispatched contents may not be appreciated in the developing countries because ‘what is good for Northern content industries may not necessarily be good for scholarly communication and knowledge production in the less-developed world’ (Darch, 2004: 491). The economic strength or purchasing power of the developed countries cannot be compared to the weak and unreliable economic situation of developing countries. The developing countries would prefer to purchase just that which is needed for scholarly communication and not an assemblage of unwanted scholarly materials.

However, since profiteering was not the rationale of the 1710 Copyright Law, and scholars like Castells have in reality been able to indicate ‘that the logic of the network is more powerful than the powers in the network’ (Castells, 1996: 193), which Webster, (2002: 104) translates by ‘saying that ICTs have reduced the effectiveness of global corporations and dramatically empowered those people and organisations who are entrepreneurial and effective in terms of networking’ this theory of informational capital forms part of the framework for the study. The rights holders of in the digital environment have been empowered through networking. Profiteering is the motive of rights holders as it provides a framework in which
copyrighted works can be put to economic use. In the digital environment, supporters of rights holders endorse this stance. Jack Valenti of MIAA for example, claims that ‘copyright protects not just the financial interest of people who create artistic or intellectual property, but the very existence of creative work’ (Darch, 2004: 493). The profit bearing mechanism that has been established by the rights holders and supported by scholars like Jack Valenti has left developing countries tertiary institutions ‘bobbing along … like corks behind an ocean liner’ (Darch, 2004: 501), because the institutions have no choice but to subscribe to the pre-assembled digital content. The rights holders lay down the rules for the use of digital content and all that the subscribers and consumers are to do are just to follow the rules.

The informational capitalism theory is even more appropriate as a framework for this study as Castells (1998: 162) is of the opinion that ‘the universe of informational capitalism, … purposive human action can change the rules of social structure, including those inducing social exclusion’. In this study, it is evident that licences attached to digital content exclude certain persons’ access to the information. For example, the NISC agreement clearly stipulates that it is limited to authorised users (BiblioLine Annual License and Subscription Agreement, 2004). By the agreement not allowing unauthorised persons access to information, means that the rights holders have created a social exclusion among users of digital content.

Furthermore, Castells’s theory supports the basis for a theoretical framework for this study as he views politics as ‘the converging point of a vast array of ideological, economic, and social trends’ (Castells, 1997: 290). In chapter four, I have demonstrated that political protection by governments of the United States of America, United Kingdom, as well as Australia have been the basis of legal protection of digital content. The anti-circumvention clauses that these countries have introduced in their copyright laws give evidence that the governments are involved in informational politics in the digital environment. Following these anti-circumvention clauses, it can be said that these governments first view the existence of copyright laws as a mechanism to protect the business interests of rights holders, and regard all other consequences as secondary (Darch, 2004: 492). The fact that governments lay down rules to protect rights holders digital content, but do not lay down new rules or change the content of the fair dealing exemption to allow users to copy the
information without being accused of infringement, can be translated to mean that the
government is out to protect the business interests of rights holders.

Hence, as Castells's theory views the actual happenings of the information age and
the notion of copyright from two perspectives, which is to say that the original
rationale of copyright and how it has been turned into profit making, this theory forms
the core of the argument in the dissertation. Chapter two of the study discussed the
origin and why copyright law was promulgated; chapter three showed how
multinational corporations have changed the meaning of the copyright act in order to
make profits. Chapter four illustrated how governments of the United States, United
Kingdom, and Australia support the change of the first copyright law in their
respective copyright laws.

**CONDUCTING AN EMPIRICAL INVESTIGATION**

Taking into account the theoretical framework discussed above, the actual opinions of
the various scholars and consumers of digital content in South Africa, were
investigated. Informed respondents were identified, permission to conduct interviews
was obtained, interview questions were designed and piloted, as will be explained
below.

**IDENTIFYING POSSIBLE RESPONDENTS**

The Western Cape, Gauteng, Free State, Eastern Cape, and Kwa-Zulu/Natal Provinces
in South Africa were visited for this study. The principal businesses and/or their
representatives who use, supply and negotiate licensed digital content are located in
these provinces.
PRE-SELECTION PROCEDURE FOR THOSE TO BE INTERVIEWED

The study proposed to:

- Identify and interview librarians who are broadly representative of university libraries in South Africa;
- Encounter those who sign or negotiate licensing agreements for tertiary institutions (consortia);
- Meet those who are knowledgeable with the effects that licensing agreements have on scholarly communication (informed users);
- And to encounter those who supplied the digital content that is accompanied by licensing agreements to the tertiary institution (Corporate Rights holders: vendors).

ACADEMIC LIBRARIES SELECTED FOR THE STUDY

The academic libraries of the Universities of Cape Town, Stellenbosch and the Western Cape Province were chosen. The reason for limiting the research to these three university libraries is that they are broadly representative of university libraries in South Africa. The University of Cape Town (UCT) represents a formerly predominantly white institution library, the University of Stellenbosch represents a formerly Afrikaans institution library, and the University of the Western Cape represents a formerly black institution library.

With regard to the librarians who were interviewed, acquisitions and reference librarians from these three tertiary institutions were selected, as they are custodians of collections (print and digital) in the library. These librarians are supposedly well versed with the question of licences and the fair dealing exemptions that are implicitly incorporated in digital content licensing agreements. The acquisitions librarians liaise with corporate rights holders to acquire digital content, while the reference librarians interact with scholars and consumers of digital content.
To select the librarians in these institutions, the computerized database maintained by the universities that contained the names and positions held by each librarian was utilized and those librarians who should be knowledgeable in the subject were extracted. At the University of Cape Town, five acquisitions librarians were selected and four were interviewed. One could not be interviewed because of his/her absence. At the University of the Western Cape, seven acquisitions librarians were selected and four were interviewed. The three librarians who refused to be interviewed referred the researcher to the electronic resources and training librarian. At the University of Stellenbosch, nine librarians were selected, three accepted to be interviewed while six refused to be interviewed. Furthermore, two additional acquisitions librarians from the University of Witwatersrand to whom the researcher was referred were interviewed. This brought the number of acquisitions librarians interviewed to 13.

With regard to reference librarians, seven were selected from the University of Cape Town and six were interviewed. One was not interviewed because the librarian was on leave. At the University of the Western Cape, seven were selected but only one was interviewed. The other six refused to be interviewed and referred the researcher to the electronic and training librarian. At the University of Stellenbosch, three reference librarians were selected and they were all interviewed. Also, one reference librarian from the University of Witwatersrand to whom the researcher was referred was interviewed. This brought the total number of reference librarians interviewed to 11.

To make sure that other potential respondents in these categories were not left out, the researcher asked those who were selected for the interview if they knew other colleagues who were knowledgeable in the subject. This was how three additional librarians came to be selected and interviewed. Among 42 librarians that were selected for the study, 24 were interviewed.

**CONSORTIA PRE-SELECTION PROCEDURE**

The managers of consortia were identified for the interviews, as they are involved in negotiating licensing agreements for their individual consortia, although in South
Africa SASLI does the actual negotiations. The office of CALICO, gave the researcher a full list of all the consortia in South Africa together with the e-mail addresses and telephone numbers of all the heads of the various consortia. These were the Coalition of South African Library Consortium (COSALC), Cape Library Co-operative (CALICO), Gauteng and Environ Library Consortium (GAELIC), Free State Library and Information Consortium (FRELICO), South Eastern Association of Libraries (SEALS), Eastern Seaboard Association of Libraries (esAL), South African Site Licensing Initiative (SASLI). The researcher contacted all the heads of consortia, asking them for an interview.

Of the seven managers of consortia approached for an interview, five managers or their representatives were interviewed. An additional sixth interviewed respondent compensated for those managers who were unable to participate.

**INFORMED USERS PRE-SELECTION PROCEDURE**

The researcher identified those users who were presumed to be conversant with the problem under investigation. This was pertinent as most users who were first canvassed for the study, declared their ignorance over issues of copyright and the terms and conditions imposed on digital content licences. They said that they saw no problems vis-à-vis the use of digital content, as they got all that they needed in the digital content. They declared that they used digital content in the same manner that they used the print information. They thought that the only difference was that print information could be acquired on a hard copy through photocopying and digital content could be acquired in the hard form through printing. This ignorance was however not surprising as Malhotra, (1995: 37) said, ‘sometimes even editors and publishers are unaware of the laws of copyright, not to speak of the general public.’

In pre-selecting the informed users for the study, the researcher had read broadly around the subject and had identified scholars who questioned the aspect of licences on digital content and their proposed solutions. Among the solutions that these scholars brought forth was the open access initiatives that were aimed at providing users unrestricted access to digital content. Some of the open access initiatives are
PubMed Central, BioMed Central, Budapest Open Access Initiative and the Public Library of Science (PLoS) open access initiative. For these scholars to promote these initiatives, they prepared and circulated a letter on the World Wide Web (WWW) for other scholars around the world who identified the problem to sign. Among these initiatives, the ones that were signed were the Public Library of Science (PLoS) open access initiative and the Budapest Open Access Initiative. The total number of South African scholars who signed the PloS particular initiative was 134. Among this number, the researcher downloaded the signatories and sorted out those scholars from the Universities of Cape Town, Stellenbosch, and the Western Cape to be interviewed. Among these scholars the researcher identified 21 signatories from the University of Cape Town, 22 signatories from the University of Stellenbosch, and two signatories from the University of the Western Cape.

With regard to the signatories of the Budapest Open Access Initiative, among the 2421 individuals and 172 organizations who signed the initiative as of 6 September 2002, only one scholar was identified from the University of Cape Town and none from the Universities of the Western Cape and Stellenbosch.

During the process of sorting out the signatories of these initiatives it became clear that only scholars in tertiary institutions signed these letters; they are among those who make the most extensive and intensive use of the wider range of materials – print and digital – in a university collection. These sources form the basis where opinions are gathered for conferences, symposia, and training of graduates (Jaspan, 1982: 85).

Among the 45 presumed informed users that were to be interviewed from the three Universities, 16 were interviewed. An additional six respondents to whom the researcher was referred by the informed users, were also interviewed. Hence, a total of 22 informed users were interviewed for the study.
CORPORATE RIGHTS HOLDERS (PUBLISHERS AND VENDORS) PRE-SELECTION PROCEDURE

Publishers and vendors were identified to form part of the study. The exclusion of actual authors was justified on the grounds that:

The maker of a database is the first owner of the database right...the maker of the database is the person who takes the initiative in obtaining, verifying or presenting the contents of a database, and who assumes the risk of investing in that obtaining, verification or presentation. The implication of this is that the maker must take the initiative and the risk of the investment (Bently & Sherman, 2001: 302).

As the publishers are the makers of digital content who intend employ the vendors, the publishers enjoy the copyright of the database but not the moral rights. The moral rights are rights that belong to the author, and the author retains the right even after publication (Feather, 1998: 105).

In order to pre-select the producers and vendors of digital content in South Africa, the researcher visited the websites of the three universities and downloaded information about all the online databases used by each institution. With the list of the databases, the researcher found the contact details of those producers and vendors who were either in South Africa or whose representatives were in South Africa through the Internet and contacted all of them. These were SilverPlatter, Swets Blackwell, NICSC, SABINET, Buterworths LexisNexis, and Jutastat SA (PTY) Ltd. The selection was limited to South Africa, because they were accessible and available and represented most foreign digital content owners in South Africa. A total of six corporate rights holders were interviewed.

REQUESTING PERMISSION TO CONDUCT THE INTERVIEWS

In order to interview librarians and informed users from the tertiary institutions selected for the study, permission had to be sought from the authorities of the tertiary institutions. Responses with permission from the various ethics bodies are attached as Appendixes A-C. With regard to the managers of consortia, and corporate rights
holders, permission was obtained through personal contacts that were made with the aid of phone calls and e-mails.

**Designing the Interview Questions**

As there were five different groups to be interviewed, five different sets of questions had to be formulated for the groups. Some of the questions had to be different as each group has different ways of interacting with digital content and the fair dealing exemption.

**Designing the Interview Questions for Acquisition and Reference Librarians**

There were two sets of questions; the first for the acquisitions librarians and the second for the reference librarians. Acquisitions librarians interact with the corporate rights holders in acquiring digital content while the reference librarians interact with scholars and consumers of digital content.

**Questions for Acquisitions Librarians**

Eighteen structured questions were formulated. The questions are presented in Appendix D. In addition to the structured questions, a number of unstructured questions could develop during each interview. They were to probe other difficulties that were experienced as a result of the implementation of licensing agreements on digital content. The 18 structured questions were formulated to gather information on various aspects resulting from the acquisition and use of digital content. Some of the questions explored the same aspects covered in the questions to the other respondent groups.

The first question as to the nature of the relationship between copyright law and digital licensing agreements was to establish whether librarians were aware that copyright governed both print and digital content, but that licences were an extra protection that corporate rights holders introduced to further protect digital content.
The intention was to understand how the relationship affected their work and to gain an idea of the experiences they had in dealing with copyright law and digital licensing agreements while acquiring and using digital content.

The purpose of question two, which asked about the responsibility for informing others about the terms and conditions in a licensing agreement, was to ascertain the pattern of control. Questions three and four that asked whether the terms and conditions in a licensing agreement were adequately communicated among librarians were to establish the effectiveness of communication. Questions five and six asked if their institutions have an acceptable use policy and whether persons are required to sign the policy; to find out if institutions altered certain clauses that were found in the original licensing agreements.

Questions seven, eight and nine as to whether institutions take any precautions to prevent unauthorized use of digital content, and if each library has a copy of the site licence, was to establish what further precautions are undertaken by institutions to check for possible violators of the agreement and to ascertain whether it is the responsibility of librarians to monitor violators of digital content.

Questions 10, 11 and 12 were to detect whether the terms and conditions in a licensing agreement are scrutinized to give room for negotiations on those clauses that libraries consider may inhibit their users’ effective use of the information.

Question 13 aimed to find any problems caused by licensing agreements in digital content, and how such problems could be overcome. Questions 14 and 15 were to establish whether their institutions supported and used the open access initiative and any reasons, which prevented them from continuing to use the open access initiative, if they were using it at all.

The purpose of questions 16, 17 and 18 was to elicit their position on an analogous process that will permit access to digital content as the fair dealing exemption has done in print information, and for them to pronounce what this should be and how they thought it would work.
Questions for reference librarians

Questions one-nine 13, and 16-18 that were addressed to the acquisitions librarians were also presented to the reference librarians. The questions are presented in Appendix E.

Reference librarians were asked three different questions. Questions eight and nine were asked to establish if they had observed users violating the licensing agreements and to explain how the agreements were being violated. Question 13 explored whether they felt that authorized users of digital content could possibly violate licensing agreements among themselves, for example by authorized users giving access to unauthorized users to use the information.

Designing the interview questions for managers of consortia

To collect information from the managers of consortia, a series of 13 structured questions were posed. The questions are presented in Appendix F.

Of the 13 questions that were posed, all but question four were analogous to the questions that were presented to the acquisitions librarians. Consortia and acquisitions librarians both act as go-betweens to acquire or negotiate digital content for libraries. Furthermore, consortia were specifically requested to respond to question four, to ascertain whether they actually signed or only negotiated digital content for libraries.

Designing the interview questions for informed users

To gather information from informed users, 13 structured questions were asked. The questions are presented in Appendix G. Some of the questions were the same as those addressed to the librarians and consortia in order to get different perspectives on the issues.

There were also specific questions that were only destined for end users. Question one that asked if the users regularly used licensed digital content and whether the information was advantageous was for the users to reveal whether advantages were
provided by licensed digital content. The second question as to why they signed the ‘Open Access Initiative’ was to probe the inhibition if any, that licensed digital content presented to users and to seek possible solutions.

Question eight was to verify whether digital content licences inhibited academic and research capabilities. Question 13 that requested referral to other informed users was to expand the number of users to be interviewed.

**Designing the interview questions for rights holders (publishers and vendors)**

Eighteen structured questions were asked from corporate rights holders (publishers and vendors) who produce and sell digital content information. The questions are presented in Appendix H. Some of the 18 questions that were asked were similar to those to the other groups, in order to gather their different viewpoints.

Some questions were only destined for the corporate rights holders. Question two relating to the fair dealing exemption in print media explored whether corporate rights holders had or intended to have this analogy in digital licensing agreements. Question five discovered the mechanism that was used to detect licence violations. Question six asked whether licensing agreements were in place to protect copyright to establish whether corporate rights holders were aware that copyright governed both print and digital content but that licences were an extra protection that they introduced to further protect digital content.

Question 10 referred to their opinion of the open access initiatives, to detect whether these initiatives were a threat to their business and if so, how they could deal with such a threat. Question 11 that asked if technological measures and licensing agreements were both needed to protect digital content was to establish if corporate rights holders effectively relied only on these for the protection of digital content. Question 12 was to probe the minds of the corporate rights holders with regard to the evolution and effectiveness of the digital rights management systems (DRMS) to curb unauthorized use of digital content. The aim of question 13 was to confirm within licensing agreements, technological measures, or copyright law, which mechanism
effectively protected digital content. Question 14 was intended to portray where copyright would be applied as all digital content are governed by dissimilar licensing agreements.

**PILOTING THE QUESTIONS**

Before proceeding to the interviews, a pilot study was conducted, to test the validity of the structured questions. In the pilot study, one person was chosen from each of the respondent categories and asked to make suggestions and comments on the various questions. The pilot exercise was useful as it generated useful comments and criticism – most of which suggested the inclusion of similar questions to the other groups – that allowed the researcher to refine and improve the original questions. After the pilot study, the questions were finalized and the interviews commenced.

**RATIONALE FOR USING QUALITATIVE METHOD IN COLLECTING INFORMATION**

Although Busha & Harter (1980: 62) argue that quantitative method of research in the form of questionnaire allows a wider range and distribution of sample than the qualitative interview method, this investigation took the qualitative approach. The qualitative method was used, to explore a particular phenomenon at length that could only be obtained through the collection and analysis of subjective data from a selected participant that are involve in the process under investigation (Shenton & Dixon, 2004: 1).

Furthermore, the qualitative method was used because experience cannot be measured quantitatively but qualitatively. In a given investigation, it is the questions that can be formulated for inquiry that count and not the quantification of human events. Qualitative research method offers context, discoveries that leads to new insights, allows those who are studied to speak for themselves; focuses on the perspective of those being studied, does not superimpose a general method on experience. Qualitative research lights up how contradictory attitudes and incentives are resolved with specific options made and reports on the various prototypes, or clusters, of stances that emerge from the interviews (Sherman & Webb, 1988: 5-8).
While using the qualitative approach, the researcher used interviews in collecting information as qualitative approach gives way to a broader set of techniques including interviews (Prasad, 1992: 86). The interviews build upon prior capabilities that had already been strongly developed in societies (Vulliamy, Lewin & Stephens, 1990: 25; 21). Furthermore, interviews give an intense and prolonged contact with the everyday life of individuals, groups, societies, and organizations involved in digital content. Through the interviews, the researcher was able to gather information on the perceptions of the various respondents 'through a process of deep attentiveness, of empathic understanding, and of suspending or 'bracketing' preconceptions on the topic under discussion' (Punch, 1998: 149).

The interviews comprised structured and depth unstructured questions. The interview started with a series of pre-established questions. The unstructured questions emerged from the responses that the respondents gave in the interview. Although 'in structured interviews the respondent is asked a series of pre-established questions, with pre-set response categories' (Punch, 1998: 176), the researcher did not attach any pre-set response categories in the questions. The researcher wanted to establish a non-standardized, open-ended, in-depth interview (Punch, 1998: 178), which would emerge from the process by which the content of the conversation has come into being (Babbie & Mouton, 2001: 291).

**INTERVIEWS**

The researcher himself administered the questionnaires for the interviews, making an effort to keep to the questions as they appeared on the questionnaire, as a prior justification for the questions had earlier been e-mailed to the respondents. As stated above, other questions emerged during the interviews - a key characteristic of using interviews in qualitative research. This was not surprising, as the researcher needed to probe questions from the respondents in order to extract more information for the study.
PROBLEMS EXPERIENCED

Broad categories of problems can be grouped according to the groups that were interviewed; viz librarians, managers of consortia, informed users, and corporate rights holders.

Librarians

There were difficulties in scheduling the interviews. After the librarians had officially accepted a particular day and time for the interview, some of them e-mailed or phoned to reschedule the interviews because of certain unforeseen commitments. It was not always easy to track down particular librarians because of their busy work program. In these instances the researcher went to the librarians and requested just fifteen minutes of the librarians' time for the interview. This method worked and the researcher was able to interview some of the elusive librarians.

During the interview, the researcher experienced further problems. Some of the librarians who were believed to be knowledgeable could not answer many of the questions. One of the librarians said, 'I have never thought of this issue with the implications that I now foresee following the type of questions you are asking. I will strongly recommend that you come and give us a talk on these issues.'

Notwithstanding that some of the librarians could not answer some of the questions, those who could answer, sometimes raised other issues, which were not directly related to the questions asked. Some of them became so emotional about corporate rights holders policies, especially with regard to issues of ILL as certain licensing agreements did not allow ILL. The fact that the researcher was believed to be a channel through which some of their feelings could be publicized could have been behind the respondents' openness.
**Consortia**

In arranging the interviews with this group, the researcher also experienced scheduling difficulties. Since all the heads of these groups were not in Cape Town the researcher had to find out when some of them will be visiting Cape Town to meet them for the interview. While some of these arrangements succeeded others did not, as some of the heads did not come to Cape Town. During the interviews, some of the heads of the consortia also became emotional about the manner that corporate rights holders were dealing with access to digital content. They must have felt relaxed to release these feelings because they believed that the final thesis will say exactly what they considered unacceptable and some corporate rights holders may want to read the thesis once it is completed.

**Informed user**

The informed users were the most difficult people to track down even after they had accepted to participate in the interview. Some informed users after accepting the invitation and arrangements were made, later e-mailed the researcher that they did not believe they were the right people to be interviewed because they knew nothing about the subject. In order to make these users comfortable, the researcher e-mailed the questions to them. After reading through the questions, some of them accepted to be interviewed.

During the interview, the researcher furthermore found that some of them could not answer some of the questions. In the process of not being able to answer the questions they tried to divert the researcher into those areas they were more familiar with. When an informed user was doing this, the researcher allowed the user to express his/herself to the fullest before the researcher redressed the situation by asking the question again. This procedure made the interview lengthier than originally imagined.

**Rights holders**

One of the problems experienced with rights holders was that one of the representatives of the corporate rights holders refused to answer most of the question
on the basis that she was not the competent person to answer the types of questions that were asked. She advised the researcher to e-mail the questions to her so that she could forward them to their head office abroad for the attention of the competent person. The researcher did so and after a few days the researcher received an e-mailed answered questionnaire from the competent person abroad. The researcher however wanted to avoid this method of receiving e-mailed answered questionnaires in the study, because he deemed it necessary to interview the persons concerned so that he could probe more into the questions during the interview in order to get more from the person interviewed.

**METHODS USED IN RECORDING INFORMATION**

The information collected during the interviews with the respective respondents was tape-recorded with the interviewees’ permission. This was germane because all the questions were open-ended questions – a situation that warrants recording as the study involved extensive interviewing (Punch, 1998: 149). The recording of the interviews was furthermore justified as Bogdan & Biklen (1992: 128) say, ‘when a study involves extensive interviewing or when interviewing is the major technique in the study, we recommend using a tape recorder.’ After the recording, the researcher transcribed the recorded information.

**CONCLUSION**

This chapter discussed how the researcher gathered information from the different respondents who sign and acquire, negotiate, use, and produce digital content for scholars and consumers. The succeeding chapter will present the summary and analysis of the different respondents gathered in the field. The summary reveals the minds of the respondents’ as to how they perceive the role of licences to govern the use of digital content and whether they believe that the fair dealing exemption as it is presently used in the digital content is appropriate.
Chapter Six:
The view from the coal face: what librarians, consortia, informed users, rights holders actually believe

This chapter presents the opinions of South African librarians, managers of consortia, informed users, and rights holders about the licences that govern the use of digital content. The chapter also presents the views of interviewees on the question of whether an analogy to the fair dealing exemption is needed in the digital environment. Following international literature, there are two extreme views expressed by scholars and rights holders on the question of licences on digital content. One of the views are that licences on digital content deter research and studies as it is written to customize terms to the needs of the marketplace. Licences give more rights to rights holders as compared to the limited protection that copyright gives to copyrighted works as it dictates how digital content should be used. The other view is the one that argue that licences works well in governing digital content. With regard to the views expressed internationally, this chapter summarises and analyses information gathered in the field. The chapter uses the grounded theory in analysing the information. Of course, the responses from the field revealed that in many cases users and librarians alike hold false beliefs or unsupported perceptions about the nature and extent of copyright, the role of the license, and other matters. I have already demonstrated in chapter two that the content of the fair dealing exemption changed over time, as new

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33 The findings presented in this chapter are responses from 58 interviewed respondents among 106 pre-selected respondents. Originally 94 respondents were pre-selected for the investigation. Among the 94 pre-selected respondents, 46 respondents were interviewed. An additional 12 respondents whom the researcher was referred to were interviewed. This brought the total number of pre-selected respondents to 106 and the total number of respondents interviewed to 58 i.e. 55%. The other 45% were not interviewed.

34 The theory '[...]' analysis emphasizes the conceptualisation of the data, and the generation of conceptually abstract categories grounded in the data, working towards a condensed, abstract and emerging interpretation of what is central in the data. It uses the power of abstract theory to transcend the empirical data, and to connect seemingly disparate phenomena. [...] the outcome of grounded theory analysis is an abstract but grounded concept (the core category) the development of which constitutes a substantive theory of the phenomenon being studied' (Punch, 1998: 218).
technologies of printing and reproducing copyrighted works emerged in the print environment.

**HOW USERS PERCEIVE THE ADVANTAGES OF DIGITAL CONTENT**

Most users were able to identify specific advantages to using digital content. It eliminates the need for users to walk to the library, the information is available at any time, and the technology of digitisation provides quicker access to the information. One user commented that

Yes, I regularly use licensed online information. [...] It provides much quicker access than the print information. You don’t have to store documents physically. The information is always available when ever you need it. (Informed user ‘K’).

Of course, these advantages are not specific to the South African context, but apply to users worldwide. The responses also expose a false dichotomy between ‘the library’ (meaning printed materials) and ‘digital information’, as if organized libraries have nothing to do with digital content. This arises from the idea that the technology relieves users of the need to go to the library, since the information is always available. One user said:

Yes, I use licensed digital information. I’m happy using it, as it is better than walking to the library and looking through so many materials on the shelves. (Informed user ‘U’).

and another added

[...] The information offers advantages [...] it is always available after hours, as you don’t have to wait for the library to open its doors before getting information [...] (Informed user ‘Q’).

Although some respondents attributed a negative image to libraries with the advent of digitisation, one user revealed the importance of libraries. The user may have recognised the library as an important storehouse of knowledge, where qualified staff...
select, organise and make materials easily available to the users. In the words of the user:

Yes, I regularly use licensed online information for my research and for my students as I assume that everything that comes from the library is good. I am happy using the information as we all rely on the library for information and assume that what the library provides is good for both the students and staffs [...]. (Informed user ‘N’).

While most users stated that they regularly use licensed online information, one respondent commented that despite the advantages of online information over print information, there were still problems in mastering the technology:

Yes, I regularly use licensed online information for my research and for my students. Technologically, I am still struggling with it as I find it difficult to get into the digital information. It is sometimes easier for me to get into the library to get a printed material than to get digital information [...]. (Informed user ‘O’).

Some users did not use versions of specific articles contained in licensed digital resources, because they could get them free of charge from open access web sites:

I do not use licensed online information for my research and for my students. [...] I get all the information for my research from the Los Alamos website that has moved to Cornell University in the United States. This is an open access web site that doesn’t require passwords to access the information. [...] though the articles are not peer reviewed most of the articles are submitted after words to a journal where they go through the normal peer review and copyright channels [...]. (Informed user ‘S’).

It is possible that some of these respondents preferred to use open source resources because they believe that it is undesirable to licence scientific works that could otherwise be used freely by scholars for the promotion of science.
COPYRIGHT AND LICENSING AGREEMENTS: PERCEPTIONS AND MISCONCEPTIONS

It emerged from the fieldwork that most acquisitions and reference librarians, managers of consortia, and informed users and a handful of rights holders wrongly believe that there are different laws governing print and digital information. The reason for the failure to recognise that copyright governs all forms of information may be the idea that licences apply to digital resources and copyright therefore only applies to printed sources. This is not entirely surprising. In South Africa, the Human Sciences Research Council (HSRC) report of 1987 revealed that most teaching staff were not familiar with copyright restrictions (HSRC Education Research Programme, No. 8. 1987). Several acquisitions and reference librarians, users, and managers of consortia showed their ignorance when asked about the nature of relationship between copyright law and digital licensing agreements:

Copyright law and licensing agreements are two different laws. Copyright law deals with print information while the licensing agreements deals with digital information. (Acquisitions ‘F’; Reference ‘C’; Informed user ‘E’; Consortium ‘E’).

One acquisitions librarian put it even more bluntly and incorrectly:

There is no link between copyright law and licensing agreement. Copyright law covers print material and licensing agreement cover electronic resources. (Acquisitions ‘D’).

Rights holders were no better informed. One gave an ambiguous response, going some way towards confirming the suspicion that at least some rights holders are unaware that copyright governs digital content:

The copyright laws should be incorporated or reflected in the licensing agreement. (Rights holder ‘A’).
However, although most librarians, users, managers of consortia and some rights holders were unaware that copyright exists in the digital content, most rights holders and a handful of librarians and users knew this. Such a key belief was held by those rights holders who had read their own licences, since most such agreements conclude that any person who defaults on the agreement in defined ways may be in contravention of copyright law. This is clearly the reason why some respondents felt that the present fair dealing exemption is in fact applicable to digital content.

Most rights holders showed a good knowledge of how copyright exists in digital content, when they were asked whether there is a future for copyright. Most of them substantiated their arguments when answering questions on the need for technological measures as well as licenses to protect digital content, and which one would best protect it. They may have wanted to justify the application of these different measures to reap the benefits of their endeavours:

Yes, I see a future for copyright law, as it is always there to protect intellectual property rights of persons and organizations. In my view licensing agreements are in place to guide the use of the databases that have been subscribed by the institution and not to protect copyright. This is because copyright already exists in the digital information, as it is an intellectual property of an organization or persons. (Rights holder 'C').

Another rights holder also saw

a future for copyright. Some combination of the licensing agreement, technological measures, and copyright law best protect digital information. While the licensing agreement help the technology to monitor what should and what should not be done with digital product, the copyright law helps to cover those aspects that the licensing agreement has not covered or been able to cover. (Rights holder ‘A’).

Although most rights holders knew that copyright exists in digital content, several were unaware of digital rights management (DRM) systems – a technology used to monitor possible violations of copyright in digital content. Since many rights holders
are ignorant of the technologies that can detect possible violation of digital content, they might easily jump to false conclusions:

I don’t follow the developments in DRM. May be this development is followed by the parent organization in America. (Rights holder ‘C’).

Of course, copyright law applies to digital content, and it might be argued that the rights holders were better aware of this because they were out to protect their interests. The few users and librarians, who knew that copyright law applies to digital content, might be said to know the types of protection that copyright offers. As one user put it:

I assume the same copyright law applies to digital information. [...] There may be a difference between copyright law and licensing agreement but as far as intellectual property is concern, there is no difference. This is because they all deal with work that must be protected. The medium where the information is placed does not matter. (Informed user ‘L’).

Another respondent said:

 [...] Copyright is applicable in both print information and digital information. This is because copyright guides the ownership of the materials in digital information and print information. Licensing agreement incorporates copyright, as it is to guide ownership of the material. The licensing agreement simply tells you what you may do and not do with the materials. Copyright still applies because the format does not matter as it all relates to information. (Reference ‘J’).

**Knowledge of measures to protect digital content**

As we have just seen, opinion was divided as to what copyright protects and does not protect. On the other hand, there was overwhelming consensus among all categories of respondent that licensing agreements do protect digital content. In fact, rights holders go much farther and demand contractually that subscribers put in place precautions to control access. The obvious reason for these measures is that rights
holders want to guarantee at no cost to themselves that unauthorised users do not have access. In addition, rights holders use Digital Rights Management (DRM) systems to track how access is handled. Rights holders commented on the usefulness of DRM in curbing unauthorized access:

Through the DRM we have been able to curb the use of digital information. E.g. by controlling the number of concurrent users of the information. (Rights holders ‘A’).

It is clear that precautions to control access are determined by rights holders, but implemented by subscribers. Rights holders were asked about other precautions to prevent unauthorized access:

The precaution that the organization takes to prevent unauthorized use of digital information is that the persons to use the information must be an authorised person who is given either an IP number or a password from the institution that subscribes to the digital information. (Rights holder ‘D’).

THE SUBSCRIBER IN A POLICE ROLE: VIEWS AND PERCEPTIONS

Another interesting theme that emerged from the field was the question of the common requirement that licensees take active precautions to prevent unauthorized access to digital content. At one level, of course, it is quite reasonable to control access to a paid service through a system of passwords or other mechanisms. One reference librarian, for instance, explained that:

The vendors usually demand that libraries should choose either IP numbers or passwords to block unauthorized users from using the information. With [...] IP numbers are used as against password. These as IP numbers are easy to control. With passwords any authorized user can give his/her password to any person. (Reference ‘A’).

Users understand this need as well, and seem to accept it as reasonable:
All institutions take precaution to prevent unauthorised use of digital information because the licensing agreements require them to take the precaution. The precautions will include using IP, passwords, etc. (Informed user ‘T’).

Most librarians and users agreed that subscribers must implement precautions in order to avoid any consequences that might result from non-compliance. The few who could not identify these precautions, seem to have been unaware that passwords and IP number identification are in fact measures taken by institutions to block unauthorized access to content:

We are not aware of any precautions that our institution is taking to prevent unauthorized use of digital information. (Reference ‘G’).

The precautions that the institutions do are that they send out warning to those abusing the use of the electronic resources. (Informed user ‘G’).

Subscribers certainly implement precautions to prevent unauthorized access to digital content because they are contractually obliged to do so, and do not want to break the terms and conditions of the license agreement. Such a breach can have serious consequences—a fine or the loss of access altogether if rights holders withdraw from the contract. Some subscribers also try to ensure that users are well informed about the terms and conditions of the license. How is this done? The librarians and one head of a consortium identified people who are responsible for spreading information about licensing agreements and for the communication channels for such information.

The main channel used in communicating licensing information passes from the acquisitions librarians to the reference librarians, who are supposed to communicate the information in turn to users. This seems logical, as acquisitions librarians are directly in contact with rights holders. However, all acquisitions librarians identified electronic resources librarians as responsible for communicating information about licensing agreements:

The e-resource librarian is responsible for information about terms and conditions in a licensing agreement. The type of information the e-resource librarian […]
gives out pertains to the terms and conditions in the licensing agreement. (Acquisitions ‘F’; ‘D’).

The e-resource librarian is responsible for information about the terms and conditions in a licensing agreement. Ask him the type of information he provides and to whom. (Acquisitions ‘G’).

One of the consortium managers also acknowledged that the e-resources librarians are those in charge of information about terms and conditions in the licensing agreement, and she herself channels such information to institutions through electronic resources librarians:

I communicate through the electronic resources librarian who intends passes the information to others giving details of the licence agreement that has been negotiated with the rights holders. (Consortium ‘A’).

The use of a communications channel via electronic resources librarians also seems quite rational. E-resources librarians are close to the vendors and know the digital content well.

However, the type of information that the electronic resources librarian communicates to reference librarians may not always be the same information that is communicated to the library director:

I read the terms of the licensing agreements and inform the library director who signs the agreement. The information to the director is more detailed. In general the details given to the director is not the same as those given to subject librarians. The details to the director include the implication of the clauses when we subscribe to the digital information. (Acquisitions ‘C’).

Thus, electronic resources librarians and library directorates first discuss the implications of the various clauses in proposed agreements, before the agreements are signed. Both electronic resources librarians and directors know the licence agreement
in detail. Electronic resource librarians especially are well placed to explain the licensing agreements to librarians or users.

Librarians discuss licensing terms and conditions among themselves, via electronic mailing list such as e-mail, on Websites and through electronic mailing list:

Librarians communicate information about terms and conditions by putting the terms and conditions on the web site (Acquisitions ‘K’).

We convey information to librarians through an electronic group such as e-mail. (Acquisitions ‘D’).

Consortia communicate information about licensing agreements to its members by e-mail. (Consortium ‘C’).

Despite the active discussion that goes on among librarians, it was surprising that so few librarians felt that users might be included in the debate. The few librarians, who did, said the information was only passed on in response to request, or occasionally through notices placed on web sites. This implies that users are left to their own devices to find out about the terms and conditions in a licensing agreement:

Yes, in the ILL the librarians inform users why the requested information cannot be supplied. For the primary and walk-in users they are only told the terms and conditions if need arises. E.g. the Juta database, the librarian will tell the users why they are not allowed to use the sources. (Reference ‘G’).

The users are only informed of a particular licence agreement by putting the terms and conditions on the web site. We assume that every one reads the notices on the web site. (Acquisitions ‘K’).

Such procedures are clearly more reactive than proactive. In certain circumstances, users may make unwarranted assumptions, since nobody has told them anything to the contrary. Some users in this survey held views on the way that the relationship
between copyright and licensing agreement affected their work, and even claimed certain rights that they do not in fact have:

It should affect my work but it does not because I treat electronic information in the same way that I treat print information. I am not aware of the licensing agreement and no body has ever brought this to my attention. [...] It could have affected my work if I had to first read the licence terms and conditions before going into what I want to get from the digital resource. (Informed user ‘F’).

The truth is that librarians do not find it necessary to communicate information about licenses to the users of the information:

Librarians do not inform users about licensing agreements except on request by the users or where the librarian wants to inform the users that certain licences are for particular users. Where this is the case only those users or department who need to use the particular digital information are given the password for that particular digital information. This is so because the licensing agreement is between the university library and the vendors. (Acquisitions ‘L’).

No, librarians don’t inform users about licensing agreements. Its only when non-members come into the library that librarians inform them that they cannot use the electronic resources because the licensing agreements don’t permit them to use it. We know this type of users because when they come they need a password to log into the machine. (Reference ‘E’).

It remains an open question as to whether librarians’ failure to communicate terms and condition to users can be viewed as dereliction of duty. Not only are users unaware of the terms and conditions in licensing agreements, the texts of the agreements are not made available to be read. All librarians agreed that copies of the agreements were filed away centrally, and some held false beliefs as well:

Each library does not have a copy of the site licence for each electronic resource used by the university. All the licences are centrally housed and the departmental libraries send their queries to the central library if any clarification is needed on the use of particular electronic information. (Reference ‘G’).
DO LICENCES INHIBIT ACCESS TO DIGITAL CONTENT?

Most librarians and managers of consortia agree that licensing agreements actually inhibit access to digital content. They agreed in addition that the relationship between copyright law and digital licensing agreements also had an inhibitory effect. Many claimed that the interface between copyright law and licensing agreements affected their work because unauthorised users were not allowed to access digital content in general. Other reasons cited were the lack of uniform rules on licence agreements; the extra work involved; the prohibition on the disposal of information; and the extra funding needed:

In digital information, the rules are not uniform. Each licence has its own rules. (Acquisitions ‘A’).

It affects my work, as one has to check on people who come in and use digital information. (Reference ’B’).

It affects my work in the sense that digital information needs money to subscribe to the journal. With no money, and no current journals to work with, my work is retarded. (Informed user ‘G’).

The relationship between copyright law and licensing agreement does not directly affect my work but it indirectly affects my work. This is in respect that it affects the users as the vendors will not accept that those who are not authorized to use the information be given access to this information. (Consortium ‘B’).

In general, perceptions about the inhibitory effect of licences on access to digital content diverged widely. Overwhelmingly, librarians of all categories believed that licences do indeed inhibit access to digital content. Rights holders, on the other hand did not believe this. Of course, acquisitions and reference librarians, and managers of consortia are out to protect the users’ interest, while corporate rights holders are out to make their businesses profitable. In fact, one might go further and argue that corporate rights holders might not be expected to acknowledge any negative effect from licences, given that the traditional enlightenment discourse of copyright holds its

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purpose to be the 'encouragement of learned people to compose and write useful work' (Leaffer, 1989: 3).

Licensing agreements are not designed to limit access and are not supposed to limit access to digital information. They don’t limit access. The general expectation for users is that everything should be made free. Because everything is not made free they say licensing agreements limit access to information. (Rights holder ‘A’).

Generally, licensing agreement is not to limit access to information. The aim is not to limit access to information but to control access to information. (Rights holder ‘B’).

On the other hand, licences do demonstrably limit access to digital content in some ways. They place restrictions on simultaneous use of digital content, and limit unauthorised users by not allowing copies to be made from digital content:

Licensing agreements limit the use of digital information. Licensing agreements always come up with restricted amount of persons who could use the information simultaneously. (Acquisitions ‘A’).

[...]. Licences restrict users from making a copy from a digital resource and giving the copy to a friend or making multiple copies [...]. Librarians [...] are afraid to make from digital information copies of information to place on short loan. The licensing agreements don't allow that this be done (Reference “D”).

In supporting that licensing agreement are suppose to restrict unauthorised users from accessing the information, an acquisitions librarian irrationally gave reasons why unauthorised users are to be excluded from accessing the information. The librarian said:

Licences limit use to unauthorised users. But this limitation is fine because an institution pays for the product to be used by members of the institution. (Acquisitions ‘B’).
This statement can be said to be illogical because if the goals of institutions were to purchase materials just to be used by members of the institution, scholarship would not advance. This is because those institutions that can purchase most of the needed materials for their users would not loan to those institutions that cannot afford most of the materials for their users. This might imply that institutions refrain from executing ILL.

Corroborating the limitation of licences vis-à-vis requesters from other institutions that are not supposedly permitted to use the information because they are considered unauthorized users, a reference librarian said:

Licensing agreements limit the use of digital information. Other universities send reference questions that can only be resolved by using digital licensed resources but this is not done because the requesters of the information are considered as unauthorized users who are not supposed to use the information because they are not in the institution. (Reference ‘C’).

Although most librarians testified that licences inhibited access to digital content, a reference librarian acknowledging the view placed this in perspective because most of the information presently requested by users is found in both print and digital formats. The librarian said:

Licensing agreements as of now don’t limit the use of digital information because most of the requests that come to the library are contain in hard copy and we photocopy and send the material to the requester in hard copy. In the future when there will be mostly digital materials it would inhibit if the agreement does not permit delivery. (Reference ‘F’).

This statement implies that although some users may not be realising the inhibition caused by licensing agreements, it is likely that most users will recognize the inhibition caused by licences when most of the information would only be found in digital format.
PERCEPTIONS ABOUT OPEN ACCESS AND OTHER MODELS

Motivated at least partly by the notion that licences inhibit access to digital content, some scholars and users of digital content have introduced open access initiatives. Some people have signed public documents promoting such initiatives, but it is clear that they had a wide range of different reasons for signing. Users who have signed the open access manifests seem to believe that licensing agreements do not grant enough access, in the way that the fair dealing exemption has traditionally done in the print environment. Hence in the digital environment, they want:

- To eliminate the notion of information rich and poor in the society;
- To make information accessible to everyone;
- To promote free information;
- To counter the payments levied on digital information;
- To promote the spread of knowledge; and
- To allow more scholars read new developments that will help open up new fields of knowledge.

Thus, one user said that he had

Signed the open access because I feel that we are at a similar kind of jointure in our social development as it was in the print era. The open access brings to the forefront the debate that needs to be taking place within the society, i.e. to try to eliminate the process of the information rich and poor in the society. The developing countries have been hit heavily as the price of digital information has risen in the last decade. (Informed user ‘C’).

I signed the open access initiative because I want information to be free and not be restricted by the willingness to pay. The free access will lead to more scholars reading new developments and help open up in new fields of knowledge. (Informed user ‘B’).

Librarians of all categories and some managers of consortia overwhelmingly support open source initiatives, mainly because they believe in the free flow of information to
everyone. Open source provides information to those who cannot afford to pay for it. This may indicate that librarians in general and some managers of consortia are unhappy with licensed digital content and access to it. Put more fittingly, an acquisitions librarian and manager of consortium said:

Yes, I support the open access initiatives. These initiatives make more information free to the world as oppose to the rights holders licensed information where the rights holders make a lot of money out of others research information. (Acquisitions ‘C’).

Yes, [...] supports open access initiative because it does not have a limiting factor for authors to use their own information. With the information that come in digital format, although it is the authors who wrote the articles, they are forbidden from using it once published by a right holder except they are authorized by the licensing agreement to use the information. (Consortium ‘C’).

Although librarians and managers of consortia supported open access initiatives in principle, they did not seem all that keen to use the actual content available. Asked why they have not recommended open access content, their responses were diverse. Their reasons included the following arguments:

- The contents do not support the needs of the users;
- Institutions request accredited journals;
- The content is not peer reviewed;
- The government does not approve.

One acquisitions librarian commented, and others agreed:

[...], the open access products do not cover all that the users need. If they do not cover all that the users need, we must still buy licensed digital journals if the users insist that they need them. This may be because the licensed digital articles are peer review. (Acquisitions ‘D’).
It seems that the government's system of accrediting research from pre-compiled lists for subsidy and the institutional demand that academics publish in accredited journals favours commercially available journals over open source. However, one consortium manager felt that this could change:

[...]. But [...] has to sensitisate government to acknowledge open access journal information. (Consortium 'C').

Elaborating on the content of the open access sources, an acquisitions librarian said:

[...]. The institution cannot continue using only these open sources because the open access sources do not provide the type of contents that the licensed journal provide. Secondly, institutions insist on the use of accredited journal that are all under the licensed journals. (Acquisitions 'G').

It seems that librarians generally believe, rightly or wrongly, that most open source content is not peer-reviewed, and therefore authors gain little if they publish in such sources. Alongside this is the perception – again, right or wrong – that open source content does not contain information that users need. Since much open source content is not accredited in government-approved lists such as the International Bibliography of the Social Sciences (IBSS) and the Institute of Scientific Information (ISI) list, and so we remain trapped in a vicious circle.

**THE RIGHTS HOLDERS’ OPINIONS ON OPEN SOURCE**

When corporate rights holders were asked about the open access initiatives, they overwhelmingly responded that the people who want information to be free are the supporters of the initiative. The different perceptions of librarians on one hand, and rights holders on the other, seem to be based on the fact that the former want to protect users' interests and the latter want to promote their business interests. This is especially evident in the responses to questions about the impact of open source on business:
The opinion on open access initiative is that people think that these products are free meanwhile they are not free. Somebody somewhere is paying for it although it is not the user. Generally, the idea is brilliant but the idea will hardly work. It may be working now but in the future it will not work, as there must be somebody to cover the expensive cost that will follow. My guess is that this is not going to work in the long run. But if somebody accepts to pay the cost of the initiative, it will be a threat to my products, as people will prefer the free product to a product that comes with cost. E.g. the local African databases on health produced by [...] that was produced for Africa is in competition with the free MedLine products from Europe and America. Since Europe and America cannot sell their products in Africa, MedLine that is a medical journal is being made free to African institutions and they expect [...] to do the same. [...] cannot, as it has no funding for the products that it produces for the Africans. Presently, [...] is having difficulties with this product, as it cannot be sold outside Africa and selling it to those that the product was made for is difficult because of the free MedLine products that were not originally made for African markets but are given free in the African markets. (Rights holders ‘C’).

Thus, it is clear that open access sources will be a threat in the future to corporate rights holders if subscribers decide to switch.

SIGNING A LICENSING AGREEMENT

One might expect that acquisitions librarians and managers of consortia would be out to serve the interests of users of digital content. But the licensing system seems to inhibit access to this content in certain ways, promoting the business interest of rights holders. The librarians and the rights holders were therefore asked what they look for before signing an agreement. The main points that emerged were:

- The number of simultaneous users allowed;
- Whether the content can be used for Inter-Library Loan (ILL);
- Whether copies can be made;
- If free training is provided;
- If archiving is catered for;
- If walk-in users are allowed;
- How often the content is updated;
- Conditions for terminating the contract;
- Ease of use;
- Price.

The representative of the South African Site Licence Initiative (SASLI), a body that negotiates licensing agreements on behalf of groups of institutions commented:

What SASLI looks for when negotiating licensing agreements for institutions are that the licence gives access rights to the information; aspects of archiving and preservation are well spelled out; that the licence would grant access to authenticated users from any location; licence will grant rights for research, study, instructional, educational or administrative use; […] ; functionality including accessibility is included in the agreement; the methods for the enforcement of the licence are well spelled out. The pricing strategies for the licences; the provision for ILL to third party usage; terms and termination rights; support and training. (Consortium ‘E’).

These responses may be seen as confirmation that librarians defend the users’ interests. This is further shown in the fact that some licensing agreements have been renegotiated to better suit users’ needs. As one acquisitions librarian said:

[…] we somehow try to modify what the vendors say in the licensing agreement.
(Acquisitions ‘H’).

On the other hand, rights holders do seem to be out to protect their own business interests, as one would expect. The following main points emerged that showed what rights holders look for in a licence agreement:

- Number of concurrent users;
- Price;
- No repackaging and reselling;
- By passing the use of the licence for other purposes other than what it is intended for;
Avoidance of abuse.

What we look at when preparing or signing a licence agreement is the number of concurrent users to use the product. The number of users will determine the price that is going to be fixed on the licence agreement. (Rights holder ‘A’).

Since price seems to be largely determined by the number of concurrent users, the prohibition on repackaging or reselling content and other stipulations seem to confirm that rights holders want to maximise revenue.

**Negotiations: Are licenses flexible enough?**

Opinion differ between librarians and managers of consortia on one side, and corporate rights holders on the other about whether licences inhibit access to digital content is a consequence of their inflexibility. Members of these categories were therefore asked whether they had ever actively negotiated particular clauses in a licensing agreement. Most librarians and rights holders had in fact negotiated actively over clauses in agreements. Some librarians had never negotiated with rights holders, because they lacked institutional authority. The librarians said they had negotiated over the following issues:

- Restriction of digital information to certain staff and students;
- Replacement of withdrawn subscribed journals found in the database;
- Extension of a network resource to other buildings in the institution that the original agreement did not allow.

The managers of consortia added the following issues to the list of negotiated topics:

- The inclusion of new titles at no extra cost;
- Using digital content for Inter Library Loan (ILL);
- Electronic course packs for digital information; and
- Availability of content to walk-in users.
The rights holders for their part had negotiated over the following:

- Extension of a network resource to other buildings in the institution that the original agreement did not allow;
- Inclusion of certain wordings in the agreements that were not original in the agreement;
- Using digital content for Inter Library Loan (ILL).

Some clauses in licensing agreements are open to negotiations, although there is no guarantee that a desired outcome will be achieved. One consortium manager commented that vendors are generally unwilling to negotiate prices, although they may be flexible about other issues. This buttresses the argument that rights holders want to get the best deal.

Yes, we have had negotiations. The negotiations were centred on a producer of digital information who came and wanted to sell their product but the negotiations could not be carried out because the price that the producers were willing to give to the product could not be met with. (Consortium ‘B’).

Supporting the negotiations that were successfully carried out, an acquisitions librarian said:

Yes, I have had to negotiate with rights holders on clauses in the agreement. This negotiation was with the Institute for Scientific Information (ISI) for the use of their citation resources. In the first agreement ISI only allowed the institution to network their resources only in one building. After negotiations they cancelled the clause that allowed the networking of their resources on one building and the agreement allowed that the resources could be networked on several buildings in campus. (Acquisitions ‘E’).

Another acquisitions librarian said:

Yes, we have had to negotiate on certain terms and conditions in an agreement. [...] The resource supplied by Butterworth was to be limited to certain students
but after negotiations Butterworth allowed that the resource should not be limited as stated in the agreement […]. (Acquisitions ‘G’).

And another said:

Yes I have had disagreements on clauses in the licensing agreements with vendors. The disagreements pertained to a clause that said that they would inform us in time if they remove any journals in what has been subscribed by the institution. But they did not say what would happen on the payments for the removal of such titles. This is dangerous because it can result in the removal of journals that are the most needed by our institution. If on the other hand they say they will replace the removed journals, they may replace it with journal titles that are not needed by the institution. By just signing this type of contract may be opening one up for unprecedented consequences. The negotiations came out well as some vendors removed the clause although others refused to change the clause. The one that refused to negotiate, we decided not to take it. (Acquisitions ‘K’).

With regard to an inclusion of new titles without an extra cost being borne, a manager of consortium said:

We have been able to renegotiate certain clauses with rights holders, e.g. the addition of new titles without additional cost. Here rights holders accepted giving new titles without increasing the cost. (Consortium ‘A’).

With the question of ILL, a rights holder said:

The clauses we had to negotiate related to the fact that subscribers wanted to make use of the information for ILL; also […] subscribers did not want to be held liable for the misuse of information […]. All these have been addressed in the various clauses by […] accepting ILL and not being liable for the misuse of the information. But the aspect of misuse will only apply if the precautions are taken as prescribed in the agreement. (Rights holder ‘D’).
Following the various negotiations that have been carried out in the licences that govern digital content, it is not clear whether the alleged inhibition to digital content is a consequence of the licences that govern the use of the information.

**ARE LICENSING AGREEMENTS VIOLATED?**

Are the prohibitions laid down in licensing agreements actually enforceable? Do users of digital content violate the conditions of use? A majority of librarians and users believe that this is happening.

This seems to imply that no matter what legal mechanisms are put in place to govern content, users will normally do exactly what they want. Technology has changed the behaviour of the users only insofar as it has given them the opportunity of exploring further. The behaviour of users of digital content is influenced primarily by what can actually be done with the technology, rather than by the licensing agreement. The technology offers the opportunity to manipulate, alter, or reformat information; users can make copies and disseminate them via electronic mail, peer-to-peer (P2P) file sharing, or Web. The users and librarians consulted listed the following violations that they believe to be common:

- Downloading articles and e-mailing them;
- Sharing passwords or IP numbers with unauthorized users;
- Unauthorized users accessing content;
- Making multiple copies.

Yes, users are violating licensing agreements. This is by printing, downloading digital articles and e-mailing the articles to others. In the digital environment, if a licensing agreement does not stipulate that you do some of these things and you do them, you are violating the agreement. (Informed user ‘U’).

There is no direct evidence but I will be surprised if it was not violated. For instance, an unauthorized user might find him/herself in the library using such information and will do this without anyone noticing. This is because there is no one placed there to monitor the use of the information. (Informed user ‘V’).
 [...] violations are possible because an authorized user can give an unauthorized user his/her password and such a user will use the information. Where this happens both the authorized and unauthorized users have violated the licensing agreement. This is by the authorized user giving out his/her password and the unauthorized user using the information. (Reference ‘C’).

Users may be violating the agreements by making multiple copies from the digital information. (Reference ‘J’).

Respondents were also asked whether authorised users could theoretically violate a licence agreement among themselves. Opinion was divided on this issue:

Authorized users cannot violate a licence agreement among themselves. This is because they have authorized access to digital information being registered members of the institution that has subscribed to the information. (Informed user ‘T’).

[...]. I suspect that most people will not violate the agreements as the agreements allow you to download, print, e-mail, as the electronic resource provide means of doing all this things. (Reference ‘D’).

Other users, librarians and rights holders believed that authorized users can break licensing agreements among themselves, and suggested the following as ways in which this could happen:

- Systematic downloading of complete journal issues;
- Copying and allowing others use the copy;
- Sharing of downloaded articles;
- Converting articles into other formats;
- Making copies from a copy (secondary copying).

The main problem is systematic download of complete, or large amounts of journal issues either for sale or just for local, private storage. (Rights holder ‘F’).
Authorized users can violate the agreement in some way. If one authorized user copy and allows others to make use of the copied version, it is a violation. This is because the amount of persons who will go back to copy from the main source of the digital information will be less because they have already used another persons authorised copy. (Rights holder ‘D’).

[...] Also two authorized users can violate a licensing agreement if one of them prints an article in an electronic source and gives to the other. This will be a violation of the licensing agreement, as the agreement does not permit this type of activities among authorized users. (Reference ‘C’).

Yes authorized users are likely to violate the agreements in some ways. [...] I believe that the licensing agreement does not permit me as an authorized user to download an article or put an article obtained from the digital format into a PDF file and send to another authorize user. (Informed user ‘H’).

Interestingly, the one group of respondents who were unanimous in believing that authorised users can violate a licensing agreement among themselves, were the rights holders. This may be the reason for their belief in Digital Rights Management Systems (DRM) to monitor access to digital content. But DRM’s cannot monitor all activity, such as secondary copying, and consequently rights holders believed that subscribers had a duty to monitor violations.

Many librarians however disagree. The arguments that they advance for refusing to monitor the use of digital content seem to be based on moral grounds, and clauses requiring monitoring may be rejected for this reason. Corporate rights holders may therefore be well advised to rely more on DRM or independent policing than librarians.

Librarians advanced the following concrete reasons for non-compliance:

- Ineffectiveness or impossibility;
- It might be seen as censorship;
It is improper to snoop around people;

- It amounts to an invasion of privacy;
- It is not the librarians’ role to act as police.

It is difficult to monitor if users are violating digital information. If one has downloaded an article, it is difficult to say what that person does with the article. I have not observed that students are violating, as my colleagues or I don’t go around watching people to see what they are doing on various PCs. (Reference ‘E’).

This will be a sort of censorship. (Reference ‘C’).

Librarians are not policemen or women. If users are given access to use digital information, no one is later suppose to police them. This may be regarded as an invasion of their privacy. (Acquisitions ‘D’).

Interestingly, a reference librarian who felt that information should be monitored based his argument on moral grounds. This is interesting because this librarian considered that rights holders had rights to protect and enjoy the fruits of their labour through the custodians of the information.

Librarians on a personal reason should be monitors. It is moral on ethical sense to make sure that people don’t violate agreements. (Reference ‘I’).

An acquisitions librarian believed that monitoring was necessary, for fear that vendors might withdraw from a contract if access to content was abused. (Acquisitions ‘A’) In such an event the end-users would suffer. Many agreements do have a clause that permits the vendor to suspend or withdraw access if they have evidence of unauthorised activity.
WHAT IS THE ANALOGY TO FAIR DEALING IN THE WORLD OF DIGITAL CONTENT

As we have seen, most librarians and users of digital content in the Western Cape Province of South Africa - Cape Town - believe that the system of licences effectively inhibits access to digital content. Corporate rights holders hold the opposing view. In light of this division, I asked all the respondents in the survey whether there is a need to develop an analogy to the fair dealing exemption in the digital environment.

It is assumed that such an exemption, whatever it looked like, would change perceptions of the inhibitory effects of licensing agreements. It would help to restore a balance of interests between the corporate rights holders and the users of digital content, as it has done in the print environment. Most respondents including few rights holders wanted to see a fair dealing type of exemption in the digital environment. They indicated reasons why a different type of fair dealing should be in the digital environment, which included:

- There has been a shift from ownership of property, to access contracts;
- These are now two different types of content;
- Licences give publishers too much power to restrict access to digital information.

Yes there is a need for an analogy in the digital environment as the print environment and digital environment are different environments. This is because in the digital environment if you have a copy of a document, it is as good as the original. In print, it cannot be as the original. The terms in the digital information should be worked upon to allow others make use of the information. Areas around reproduction and making of copies should be worked upon in the digital licences. (Informed user 'G').

The fair dealing exemption in the print environment cannot be carried to the digital environment. These are two different environments that must be treated differently. The fair dealing should be worked upon or modified to embrace the digital realm. Aspects such as copy should be clarified in the digital realm. (Rights holder 'E').
The above opinion is surprising as it was unexpected that a rights holder will favour an analogy to the fair dealing exemption in the digital realm. It is assumed within negotiators and consumers of digital content that the absence of an express fair dealing exemption in the digital environment gives rights holders much more rights than they could have had if the exemption existed expressly in the digital environment. Hence, a rights holder relinquishing the advantages that they enjoy by proposing an analogy to the fair dealing in the digital environment is surprising.

I think the fair dealing exemption in print media should not be applicable in the digital environment. An analogous fair dealing that suit the digital environment should be patterned. I don't see why digitisation of information should give the publishers all the powers to restrict its use. (Reference 'D').

What would such an analogy look like? Some users, librarians, and rights holders believed that some aspects of the existing and pertinent fair dealing exemption should be retained. Such issues as distribution, circumvention, reproduction, the making of copies, and commercialisation should form the basis of a new exemption for digital content. One informed user commented:

Yes, there should be an analogy to the fair dealing exemption in the digital environment. Taking some aspects of print fair dealing such as not to be used for commercialisation but for academia and introduce into the digital environment can do this. (Informed user 'V').

An acquisitions librarian also said:

The same fair dealing exemption in print cannot apply in digital environment. New methods should be brought in that will take care of unauthorized users. Aspects such as copying, reproduction must be clarified in the digital environment. (Acquisitions 'E').
Surprisingly, a corporate rights holder said:

Yes, there should be an analogy to the fair dealing in digital environment. One cannot carry the fair dealing in the print environment into the digital environment. We can take what is good in the fair dealing of print media that can be applicable in the digital environment and use in the digital environment and modify others to suit the digital environment. The aspect of distribution should be revisited even among authorised users, circumvention should be eradicated, reproduction be modified, then parliament should pass a legislation to make the provision binding on both parties. (Rights holder ‘D’).

This is considered surprising as all that this rights holder suggest is going to work against their interest if it is applied.

Other respondents of all categories believed that there was no need for a new kind of exemption in the digital realm. Their reasons were that:

- The present fair dealing exemption remains appropriate;
- Fair dealing already exist;
- The present fair dealing exemption has been tested in court (although not in South Africa);
- There is no major difference between printing digital information and making photocopies;
- Following the advantages that the new technology offers to consumers, fair dealing is irrelevant;
- Fair dealing is being abused constantly without publishers objecting.

The fair dealing exemption that operates in the print media should apply in the digital environment. All that applies in print media should apply in digital environment. (Rights holder ‘C’).

Since copyright law encroaches into digital information, the fair dealing exemption is already there. (Acquisitions ‘L’).
The above opinion is interesting as the acquisitions librarian argues that since copyright law governs digital content, it is reasonable to assert the existence of the fair dealing exemption in the digital realm.

[...] We should still use the fair dealing exemption in the digital environment [...] as the present fair dealing exemption has already been tested in court. (Acquisitions 'D').

Interestingly, this response was advanced in South Africa where seemingly the fair dealing exemption has never been tested in any court of law.

Another informed user intelligently analysed the behaviour of users of the information as a reason why he felt there was no need for an analogy to the fair dealing exemption in the digital realm. He was of the opinion that the introduction of fair dealing exemption in the digital realm was not relevant. This is because it is not guaranteed that the introduction of the fair dealing exemption would change the behaviour of users of digital content as digital technology allows users to use the information as they wish without being detected.

[...] Whether the clause is there or not people will behave in the same way. [...] (Informed user ‘U’).

[...] The fair dealing exemption has been abused over the years and publishers have turned a blind eye to it while it remains in paper. [...] Since it has been constantly abused on paper media, I don’t think it will be proper for an analogy to appear in the digital realm. (Acquisitions ‘G’).

It is clear that opinion is divided over the usefulness and feasibility of a type of fair dealing exemption for digital content. Those who value the fair dealing exemption seem to believe that it would balance the interest of the corporate rights holders and those of the end-users, just as it does in the print environment. It is also likely that these respondents have not yet felt any negative effects from licences, which implicitly incorporate aspects of the present fair dealing exemption.
On the other hand, those respondents who do not value the fair dealing exemption are those who see how technology influences behaviour. In practice, it may mean nothing to users whether there is fair dealing exemption in the digital environment or not. Consumers of digital content may have little regard for either licensing agreements or exemptions that allow them access to content within a legal framework. In the end, the only thing researchers and other consumers of digital content are interested in, is how to get access to the content that they need, when they need it and at minimum cost to themselves.

**CONCLUSION**

It is clear from the analysis of the information gathered in the field, that in the Western Cape Province of South Africa – Cape Town - at least, many respondents hold false beliefs, are unaware of important aspects of copyright and fair dealing in digital content, and are unconcerned with the niceties of what is legal and what is not. Nevertheless, respondents see the licensing system, which implicitly incorporates a fair dealing exemption, as still having an inhibitory effect on free access to digital content. Corporate rights holders do not, unsurprisingly, hold such a view.

In order to balance the interests of users of digital content with those of vendors and rights holders, it is clear from the survey that some new sort of exemption rule is necessary for the digital environment. The next chapter tests the findings of the survey against the views developed elsewhere in the world as found in the international literature.
Chapter Seven:
Theory and practice: comparing South African perceptions with the international literature

The aim of this chapter is to test the major findings in the empirical survey as presented in chapter six against international literature as represented in chapters two, three and four. This chapter emphasises the prominent features of the study and discusses the theoretical implications of the research findings. The main issue of this study has been principally twofold. First, it has been to investigate whether database access licences have the effect of actually inhibiting access to digital content, as licences terms and conditions have a strong tendency to favour corporate rights holders. Following the international literature, scholars and consumers require full disclosure of the (increasingly digitally stored) scientific record for scholarly communication, and sometimes cannot have this because of the terms and conditions that are imposed on the use of commercially-available digital content. The reasons for scholars and consumers wanting full disclosure of digital content is because no institution ‘[…] has been able to acquire and keep all the publications its patrons need’ (Williams 1980:58), and scholars cannot purchase all that they need. In order therefore to access needed information, the terms and conditions in licensing agreements should be such that they support full disclosure of digital content to the maximum. Second, the research sets out to investigate whether some kind of analogy or equivalent to the fair dealing exemption needs to be developed for digital content, in support of full disclosure and effective scholarly communication. This is because the exemption, in practice, balances the rights of powerful corporate rights holders with those of relatively powerless users of digital content. The crucial problem is the incorporation by nations such as the United States of America, Australia, or the United Kingdom of the print media fair dealing exemption in the digital environment without any substantive or theoretical revision of its content. The literature review in chapters three and four shows that many experts believe that there either already is a crisis between scholars and consumers with corporate rights holders with regard to digital content, or that there soon will be. The mission of the research was to test
librarians, end users, managers of consortia, vendors and corporate rights holders’ perceptions and see how and to what extent the crisis has played out in practice in the Republic of South Africa—and most specifically in Western Cape Province and Cape Town. In order that the mentioned respondents give valid opinion as to the core research question, they were guided through a series of questions, which led to the major findings that are here compared with international literature.

The discussion in this chapter centres around the major findings on the perceived advantages of digital content; perceptions and misconceptions about copyright and licensing agreements; whether licences inhibit access to digital content; knowledge of measures to protect digital content; views and perceptions of subscribers in a police role; perceptions about open access and other models; whether licences are flexible enough; whether licensing agreements are violated and views and perceptions of subscribers in a police role; and what should be the analogy of fair dealing in the world of digital content. In testing major findings against international literature, this chapter shows what tallies in both the international literature and the field study and what does not tally and brings out findings that could only be obtained through an empirical survey of this nature. Hence, having reviewed international literature and conducted the field study, the following assertions match international literature with the field study:

- Digital content give advantages to users.
- Most scholars, consumers of digital content and rights holders are ignorant about the laws of copyright.
- Licences protect and inhibit access to digital content.
- Institutions found abusing digital content face the risk of foregoing access to the information.
- Consortia can negotiate better subscription prices for licensed digital content.
- Corporate rights holders do not accept that licensing agreements inhibit access to digital content.
- To some extent, licences give more rights to corporate rights holders.
- If scholars and consumers decide to use open access sources, licensed digital content will be affected.
- Custodians of digital information refuse to be regarded as policemen or women to monitor possible violators of digital content.
An analogy to the fair dealing exemption is necessary in the digital environment. Most respondents were of the view that digital environment is different from print environment, and that as technology changes the law must also change in order to address concerns raised by new technologies; and

Most respondents in the survey said aspects of distribution, circumvention, reproduction, making of copies, as well as commercialisation should form the basis for an analogy to the fair dealing exemption.

On the other hand, the following declarations from the international literature does not match with the findings in the survey:

- In theory it is alleged that licences attempt to inhibit access to digital content but in reality it does not. Licensing agreements are violated.
- Licences are not being written to customize terms to the needs of the marketplace. Licensing terms and agreements are negotiable.
- Notwithstanding the advantages of open access sources most scholars and consumers of digital content prefer licensed digital content to open access sources.

Furthermore, the following are findings that are not reported in the literature but that have been obtained from the survey:

- Licensing agreements do not only inhibit access to unauthorized users but can equally inhibit access to authorized users of digital content.
- Authorized users of digital content can violate a licensing agreement among themselves.
- Open access sources have started having an impact on licensed digital content.

**Perceived advantages of digital content**

In testing the advantages of digital content, the major findings in the study showed that most users use digital content and derive different satisfactions by using the information. This means that digital information is highly used and appreciated. However, although most respondents acknowledged that they regularly use digital content, a few were not happy using the information because they have difficulties in mastering the technology, while others did not use the information because there is a
substitute to the licensed digital content that does not require payment for access to the information. Notwithstanding that there were certain informed users who for different reasons did not find licensed digital content advantageous, there is a belief that digital content give advantages to users. Whether users are using licensed or unlicensed digital content, or are having difficulties with the technology, in the cause of accessing digital content, the users do not need to visit the physical site of a library, or use the inter library loan system to get needed information. This resonates Richey’s (2002: 17), Khoo’s (2002), and Lawrence’s (2001) beliefs that users no longer need to visit the physical site of the academic library or use the inter library loan system while using digital technology to access digital content.

With digitisation all that users need is a desktop that is connected onto the Internet that permit them to make perfect copies of texts that they can possibly distribute as widely as they please. This corroborates Gasaway (2000: 194) and Peters (2003: 217) views when they say that digital technology permits users to make perfect copies of texts quite easily, and to disseminate such copies as widely as they please via electronic mail or the World Wide Web (WWW).

The findings also revealed that some informed users wrongfully believed that the value of the library decreased when information is accessed digitally. This pattern of reasoning does not however take into cognisance the fact that the library still plays a predominant role in serving various users. The effective use of digital content that the library plays entails among others training and showing users how to use the systems. Also since digital content entails the payment of fees and possible withdrawal of the information by corporate rights holders when the fees cannot be paid, the library still has the possibility of serving users with print materials that is the library’s property (Ou, 2003: 90). Although licences entails the payment of fees, the agreement forbids unauthorised users access to digital content, and permits corporate rights holders to incorporate titles that may be of limited value to the users (McCabe, 2002: 269). Hence, as licences forbid certain users access to digital information, the importance of the library cannot be ignored. This is because the library is a storehouse of print information and does not discriminate the use of the material against authorized and unauthorized users (Ou, 2003: 90). In instances where subscribers of digital content stop paying fees and lose access to digital content, it may affect the archival role of
the library. This confirms Bowman (2001) view when he says this would endanger the archival role of libraries. However, where a scenario of this sort occurs, users may want to use the print sources that the libraries store as libraries often play an archival role with the resources they own. When they purchase print sources they own the property following the common law of property and the first sale rule that allows the libraries to lend out or resell such materials at second-hand book sales (Moahi, 2004: 6).

The comparative literature within the advantages of digital information points to the fact that although many users derive satisfaction by using digital content, it is germane to train those who are having difficulties in mastering digital technology. The librarians should administer the training, as it is evident from the survey that among the most important demands of subscribers of digital content is training from corporate rights holders. Where for example, the aspect of training does not form part of the agreement, the court can invalidate such an agreement. This requirement is confirmed in the literature as Nimmer, (1998: 831) says that if an agreement did contain unconstitutional provisions, the courts would invalidate the agreement. As it is presumed therefore that librarians get training from rights holders, the librarians are in a better stead to train users of the information.

Furthermore, the reporting in this section shows that unlicensed digital content and print media information are highly rated and used by consumers. The survey showed that scholars in the physics discipline prefer unlicensed to licensed digital content. In this vein, considerations should be given to both unlicensed digital content and the print resources that the library stores for posterity. While the unlicensed digital content may be there to provide free information to unauthorized consumers, the print resources are in place to serve both licensed and unlicensed consumers when need arises.

**PERCEPTIONS AND MISCONCEPTIONS ABOUT COPYRIGHT AND LICENSING AGREEMENTS**

The opinions that emerged from the issue about knowledge of copyright and licensing agreements in this study support the view of Malhotra, (1995: 37) on the ignorance
among most people about the laws of copyright. Failure by most respondents to identify that copyright laws govern digital content may have been because licensing agreements dictate terms and conditions on access to digital content. McCracken, (2004: 122) corroborates this opinion with the statement ‘when physical books are replaced by works presented in soft copy and delivered by digital readers or via digital networks, then access to such works is determined by rights licensing and trading’. The researcher can draw conclusions about the common thread running through this response. The findings from the study and the literature are both responsive to the practical manner in which licences are judged between the corporate rights holders and subscribers of digital content in South Africa.

On the other hand, most corporate rights holders and a minority of informed users, managers of consortia and librarians rightly indicated in the survey that copyright governed digital content as it protect intellectual property rights of persons and organizations. This opinion may be the rationale why corporate rights holders propose reforms of copyright law in the digital environment. In the literature, corporate rights holders are of the opinion that a reform of copyright law is needed to strengthen their rights in the digital environment (Bygrave, 2002). The conclusion that can be drawn from this opinion is that since these set of respondents rightly believe that copyright applies to digital content, this may be the reason why some of them wrongly believe that the fair dealing exemption as it exists in the print environment is applicable in the digital environment. This is improper because from the literature, it is evident that print and digital contents are two different formats of information. In the print environment, property is owned by the purchaser (Ou, 2003: 90), while in the digital environment access to the content is governed by access licences (McCracken, 2004: 122). Following that print and digital content are two different formats of information, it is inappropriate to apply the print media fair dealing exemption in the digital environment without revisiting its content. Literature has revealed that the content of the fair dealing exemption changed as new technologies of reproduction emerged (United Kingdom Law Reports Statutes, 1911: 183; Burke, 1956: 74/6). The latest occurring in 1974 when Xerox was forced to relinquish its monopoly on photocopying and the Japanese flooded the market with cheaper and better copiers than those produced by Xerox, making it cheaper for users to photocopy a book than buy one (Jacobson & Hillkirk, 1986: 3-8; 70; 124).
Whether licences inhibit access to digital content

In the literature it is argued that licences protect and inhibit access to digital content and this is confirmed in the survey. These protection and inhibitions include both unauthorized and authorized users, as there is a restriction when it comes to authorized users to the number of simultaneous users to access digital content. The significance of this inhibition is that respondents have discovered that in practice corporate rights holders have much more control over users of the information as they control digital content even after its delivery to subscribers (Cohen, 1998: 1090). Corporate rights holders no longer sell copies of works, but provide access to digital content in exchange for a fee (Matheson, 2002: 157). Following the terms and conditions of licensing agreements, even authorized users are not allowed to make copies out of copies while accessing digital content. With regard to the inhibition on unauthorized users, the respondents have observed that in practice unauthorized users are not allowed to access digital content. The rationale for this may be that subscribers are implementing the terms and conditions in licensing agreements for fear of the outcome when the agreements are not respected. For example, some licensing agreements stipulate that ‘subscriber rights do not extend to ‘unauthorized users’ including parent or subsidiary corporation, institutions, association, or organizations affiliated with or related to the subscriber’ (BiblioLine Annual License and Subscription Agreement, 2004). Others licences allow corporate rights holders to terminate subscribers’ access to the information when the information is abused (JSTORE terms and conditions, 2005). The insinuation that can be drawn from this term and condition is that this type of inhibition may be averted if a revision of the content of the fair dealing exemption is carried out to suit the digital environment. This is because users would be allowed to use the exemption to access information that access was not allowed.

However, certain respondents in the survey justified why they felt that it was right for licensing agreements to inhibit access to unauthorized users. The reasons advanced by some of the respondents to justify such inhibition were that institutions pay for the information that is to be used by authorized and not unauthorized users. This type of reasoning can be said to mean that these respondents did not totally believe in full disclosure of digital content. They seem to believe like rights holders that any access
to digital content must be paid for. Although these respondents justified their opinion on the basis that institutions pay to subscribe to digital content for their authorized users, this reasoning can be seen as one that does not advance scholarship. This is because no institution 'has been able to acquire and keep all the publications its patrons need (Williams 1980:58). However, the reasoning of these respondents corresponds with those of corporate rights holders. Corporate rights holders justify the inhibition of digital content on unauthorised users on the basis that anyone who wants to access digital content must pay. Where every user pays, corporate rights holders believe that this would increase their chances of recovering revenues and would further increase their incentives to create more digital content (Rogers et al., 2000). This view has however been interrogated in chapter three and proven that there is no evidence that an increase in revenue will give rise to an increase in rights holders’ incentives to create more content.

However, although international literature and respondents other than rights holders believe that licences inhibit access to digital content, rights holders both in the literature and in the survey did not accept that licences inhibit access to digital content. This argument by corporate rights holders is based on the premise that they do not want to be seen as not encouraging ‘learned men to compose and write useful work’ (Leaffer, 1989: 3), and hence not encourage scholarship. This may be the reason why rights holders are of the opinion that if licences did contain unconstitutional provisions, the courts would invalidate them (Nimmer, 1998: 831).

On the one hand, the conclusion that can be drawn from this finding is that licensing agreements inhibit both authorized and unauthorized users access to digital content. For example, although NISC subscribers rights are limited to authorized users, the agreement restrict unauthorized users and forbid authorized users from using the information if the users are subsidiary institutions (BiblioLine Annual License and Subscription Agreement, 2004). Hence, as a possible remedy to licences not inhibiting access to digital content, a revision of the fair dealing exemption to suit the digital environment may restore the rights of restricted users of the information. When the fair dealing exemption is amended the inhibited consumers may be allowed to use duplicated or reproduced digital information for particular purposes. This is because the fair dealing exemption provides a consistent guidance for users in respect of
copying (International Coalition of Library Consortia, 2001). On the other hand, the assertion that licences inhibit access to digital content is a theoretical conception. This is because in practice and following the responses from the respondents when answering whether licences were violated, contradicts the theoretical framework of licences inhibiting access to digital content. Hence, by the respondents agreeing that licences are violated means that notwithstanding the provisions of licensing agreements, the respondents access the information in a manner that is not allowed by the agreements. This is commented further while examining whether licences are being violated.

**Knowledge of measures to protect digital content**

In order to restrict unauthorized users access to digital content and possibly recuperate enough revenue, the finding in the study showed that corporate rights holders demand that subscribers of digital content take the necessary precautions to protect digital content. Where subscribers do not take such precaution, corporate rights holders can withdraw a subscriber's access to the information on the basis that the subscribers has not followed the terms and conditions of the agreement (JSTOR terms and conditions, 2005). This implies that corporate rights holders impose upon subscribers to effectuate the terms and conditions in licensing agreements. In order to guarantee that licensing terms and conditions are carried out, corporate rights holders use DRM to monitor access to digital content. This is because DRM controls access to digital content, prevents unauthorized copying of digital content, identifies digital content and those who own licences in them, and ensures that the identification data are authentic (Bygrave, 2002). The conclusion that can be drawn from this finding is that corporate rights holders do not only impose measurers that should be in place to guarantee effective compliance with the terms and conditions in licensing agreements, but also imposes measures that would be applied if the imposed measures are not implemented. Some of the measures are that institutions risk forgoing access to the information (JSTOR terms and conditions, 2005). However, if the content of the fair dealing exemption is modified, questions of monitoring the use of digital content may not arise as consumers may be given certain rights of access that might not warrant monitoring.
Perceptions about open access and other models

The finding in the study showed that notwithstanding the advantages of open access sources, most scholars and consumers of digital content preferred licensed digital content to open access sources. This means that most scholars and consumers of digital content prefer using licensed digital content notwithstanding that it has terms and conditions that inhibit access to the information. The findings in the survey agrees with international literature that open access initiative is to make information accessible to everyone, promote free information, spread knowledge, and counter the payments levied on digital content by corporate rights holders (Roberts et al., 2001: 2318; Mayfield, 2002; Meek, 2001; Vergano, 2004). The reasons advanced by most scholars and consumers of digital content for preferring licensed digital content are that open access sources do not meet with the criteria of information needed in scholarly milieu; articles in open access sources are not peer review articles that most users presumably would like to use in South Africa; the contents of the open access sources are discriminated upon in scholarly milieus in South Africa because the sources are not accredited sources that attract government subsidies. In order for the government of South Africa to give subsidies to tertiary institutions for published works, such works must have been published in accredited journals. Since most of the open sources are not accredited sources, the findings in the survey showed that scholars were not enthusiastic to submit their articles to be published in these sources for fear presumably of not being qualified for government subsidies on published works. Fishman, (2002: 18) corroborates this finding as she reveal that authors do not want to contribute their work to open access sources because the authors would loss recognition.

Notwithstanding that the effects of the open access initiatives are not fully felt by corporate rights holders because of the negative stands on the articles that appear in the open access sources, the survey showed that some corporate rights holders had started experiencing the effect of open access sources. This means that when most scholars and consumers of digital content decide to start using open access sources fully, it will affect corporate rights holders of licensed digital content. The survey showed that an African database on health produced specifically for the African market by one of the corporate rights holders was in competition with a free MedLine
database on health that was not specifically produced for the African market. Because consumers in Africa prefer to use the free MedLine database notwithstanding that the database was not produced specifically for the African market, the corporate rights holders whose database was specifically meant for the African market is having difficulties because consumers are not willing to subscribe to the database as they prefer to use the free database.

The conclusion with regard to the open access initiatives is that notwithstanding that the open access sources may serve the purpose of providing access to digital content – as in the survey it is shown that scholars in the physics discipline use the open access sources, most users do not use the open access sources. Most scholars prefer licensed digital content to open access sources. However, as the survey shows, the open access sources may in the long run have an effect on licensed digital content if consumers decide to use them or if scholars are sensitised and well informed on the types of materials that open access sources publish. Some open access sources publish peer review articles that are recognized by government. The PloS and BioMed Central that are open access sources publish peer-reviewed bio-medical articles (Doyle & Hagemann, 2004: 10). On the other hand, since most open access sources are yet to be recognized and used, it may seem logical to revise the content of the fair dealing exemption to suit the digital environment. Where the content of the fair dealing exemption is revised, it may enable consumers of digital content to better access digital content without corporate rights holders being disadvantaged financially.

**Flexibility of licensing agreements**

The findings in the survey demonstrated that licensing agreements are flexible. This finding may be said to refute the claim in international literature that licences are increasingly being written to customize terms to the needs of the marketplace (Lindsay, 2002:4-5; Curry, 2002: 3). The opposing views held in the literature and in the survey imply that the aspect of licences being conceived as written to the needs of the marketplace may have been inappropriately generalised. Since it has been proven in the study that licences are negotiated, it is wrong to conclude that rights holders write the agreements to meet the needs of the market. This may not be possible because it cannot be said that during licensing agreement negotiations the subscribers
waive their rights to negotiate the best deals for their users. This is because in licensing negotiation while the corporate rights holders are out to protect their business interest, subscribers on the other hand are out to protect the interest of the users.

In the survey, it was shown that certain clauses in licensing agreements were negotiable. Both the subscribers of digital content and rights holders confirmed having successfully negotiated clauses in licensing agreements. More specifically, negotiation had been effectuated with regard to:

- Restriction of digital information to certain staff and students;
- Replacement of withdrawn subscribed journals found in the database;
- Extension of a network resource to other buildings in the institution that the original agreement did not allow;
- The inclusion of new titles at no extra cost;
- Using digital content for Inter Library Loan (ILL);
- Electronic course packs for digital information;
- Availability of content to walk-in users;
- Inclusion of certain wordings in the agreements that were not original in the agreement.

Logically, if negotiations have been carried out in the above stated areas, it is likely that both corporate rights holders and subscribers of digital content could carry similar negotiations to adopt a fair dealing exemption that would be suitable in the digital environment. On the other hand, since the findings in the survey showed that subscribers and corporate rights holders negotiated terms and conditions in licensing agreements, it may be argued that when parties sign digital content agreements, they sign such agreements in good faith. Once the parties have therefore signed the agreements, the parties are expected to abide by the terms and conditions of the agreements. This is because what is stated in the agreement is what the parties have agreed upon as the agreement will only state what is being licensed, the term of the licence, the contractual obligations to be honoured, and how legal terms such as assignment, termination rights, and applicable law should be handled (Davis, 1999:118-125). It may be ridiculous for parties to complain after consenting and
signing an openly negotiated agreement on the pretext that they were misled to consenting and signing what they never intended to sign. Elkin-Koren, (1997) corroborates this reasoning as the general belief among parties who sign-licensing agreements is that no individual may waive his or her constitutional rights and freedom through a contractual agreement. The parties to a negotiated agreement are informed persons who understand the nature of the rights they are granting and obtaining, including especially those rights that the licensee can and does in fact agree to give up.

However, notwithstanding that the results from the survey confirmed that the terms and conditions in licensing agreements are not static as some of the terms and conditions are negotiable, the findings in the survey also showed that not all terms and conditions are negotiable in the agreements. In the survey it was shown that corporate rights holders/vendors are not willing to negotiate on the price of digital content with subscribers. Corporate rights holders/vendors may accept to negotiate on other terms and conditions in agreements but not on the price of digital content. This finding may be the rationale that licensing agreements are being written to customize terms to the needs of the marketplace. Furthermore, this finding demonstrates that while the librarians and managers of consortia bargain for the interest of consumers of digital content, the corporate rights holders/vendors bargain to protect their business interest. This is because corporate rights holders/vendors base the price of the digital content on the number of concurrent users and prohibit repackaging or reselling digital content. The raison d'être for corporate rights holders protecting their business interest through licensing agreement is to make profits from the sale of digital content. Rogers et al. (2000) corroborate this view as they argue that licences provide an effective means of limiting the alleged damage done by unauthorized copying of digital texts. According to Rogers et al. (2000), corporate rights holders are allegedly able to recover lost revenue from copying—amounts that they claim the corporations collectively endures billions of dollars a year in lost profits and jobs.

However, although the survey showed that corporate rights holders do not negotiate on the price of their product, this revelation contradicts the literature. It was argued and proven in the literature that consortia negotiated prices of digital content with corporate rights holders. According to Veldsman, (2002) in South Africa, the
purchasing power of consortia saw some corporate rights holders reducing the price of digital content.

The conclusion that can be drawn from this section is that, notwithstanding that corporate rights holders/vendors and subscribers of digital content can negotiate certain clauses in the licensing agreement, vendors of digital content are yet to negotiate on any clause that would jeopardize their business interest. However, some vendors of digital content are willing to negotiate and reduce their price when negotiating with consortia. This may be because their products are going to be used by many scholars and consumers via consortia, thereby enjoying economies of scale through the number of possible consumers of the information. Hence, although it may imply that in the cause of reviving the content of the fair dealing exemption for the digital realm, there is no guarantee that some corporate rights holders would be willing to agree on a fair dealing exemption that would affect the price of digital content as this would affect their business interest, there are guarantees that such negotiations may succeed through consortia.

Violation of licensing agreements: views and perceptions of subscribers in a police role

Following the result from the survey it was established that consumers of digital information violate licensing agreements notwithstanding the terms and conditions in the licensing agreements that instructs consumers of what they can and cannot do with digital content and DRM that enables the corporate rights holders to monitor possible violators of digital content. This finding means that although it is alleged that licences inhibit access to digital content, this is only in theory and not in practice. This is because in practice it is possible for consumers to violate licensing agreements. Once the information is out it is difficult to control because the technology of digitisation allows consumers to access the information and possibly use it in the manner in which they please. The findings in the survey showed that consumers could violate licensing agreements by:

- Downloading articles and e-mailing them;
- Sharing passwords or IP numbers with unauthorized users;
Unauthorized users accessing content;

Making multiple copies.

These findings are similar to those expressed in the literature by Gasaway, (2000: 194); Peters, (2003: 217); Ergas & Strasser, (2001:19); López, (2002: 9); and Neacsu, (2002: 111). These scholars rightfully say that digital technology permits users to make perfect copies of digital texts as well as manipulate, alter, reformat, or erase text and possibly disseminate such text as widely as they please via electronic mail or the World Wide Web (WWW).

There may be reasons why users of digital content violate licensing agreements. In the survey it was shown that one of the reasons why consumers may find themselves violating licensing agreements was lack of enough information about the agreements. In the survey, it was exposed by most librarians that licensing agreements were not communicated to users and the few librarians who said the information is communicated said such communication is only done when a consumer request for a particular digital content licensing agreement information. Also the survey showed that the electronic acquisitions librarian centrally keeps the licensing agreements. The agreements are not placed where a user or a reference librarian who interacts more with the users of the information can quickly and easily consult the agreement. Following the negligence exhibited by those who are supposed to communicate information about licensing agreements to consumers of digital content, it is possible for the users of the information to perform acts that are forbidden by the agreements on the pretext that they are ignorant about the terms and conditions of licensing agreements.

Furthermore, although the survey approved that subscribers protect digital content by giving authorized users either IP numbers or passwords to access digital content, custodians of digital content refused being engaged in monitoring possible violation of digital content. In the survey, it is shown that librarians refused to be regarded as policemen or women to monitor possible violation of digital content. This is a similar view expressed in the literature as Norman, (1998) states that librarians ‘ are not, and should not be expected to be, copyright police‘. The implications of custodians of digital content refusing to be involved in monitoring possible violations of the
information means that the information is left to be accessed on the good faith of the consumers. But since it may be difficult to rely on good faith for the effective utilization of the information, it may be befitting to revisit the content of the fair dealing exemption in order to lessen the problem of monitoring possible violators of the information. This is because the exemption may authorize certain access that would be considered fair while accessing the information.

The conclusion that can be drawn from this section is that notwithstanding the type of terms and conditions imposed by corporate rights holders on digital content, and the precautions taken to protect the information, consumers still violate the agreements. The technology of digitisation is such that once the information is placed outside, the information can hardly be monitored. The technology of digitisation has changed the behaviour of consumers, as it is possible for consumers to access digital content as they please. Consumers with the aid of the new technology are given the opportunity to manipulate, alter, reformat, or erase digital content at will (Neacsu, 2002: 111). In order therefore for the consumers not be regarded as violators of licensing agreements, it may seem logical to revisit the fair dealing exemption where consumers will be made to understand the type of concessions that they have been awarded in the technology of digitisation. Following international literature in chapter two, similar measures was carried out when new technologies of reproducing information emerged.

In the nineteenth century, when the stereotype, paper making machine, steam power, lithography, linotype, and monotype technologies emerged case law fair dealing exemption was codified by statute law in Britain with the Copyright Act 1911. This Act for the first time introduced 'private study' fair dealing exemption that stipulated that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary was permissible (United Kingdom Law Reports Statutes, 1911: 183). When the dry photocopier technology emerged in the 1940s that allowed large-scale copying of copyrighted works, the content of the fair dealing exemption was extended by the inclusion of 'sufficient acknowledgement' in the exemption (Burke, 1956: 74/6). In late 1974 when the Japanese flooded the market with cheap photocopiers as a result of Xerox relinquishing its monopoly on the copier business and it became cheaper to photocopy a book as oppose to buying the book
(Jacobson & Hillkirk, 1986: 3-8), the content of the fair dealing exemption was modified by forbidding the commercialisation of photocopied materials.

Because the content of the fair dealing exemption was revived when new technologies of reproducing information emerged, consumers of the information were able to access and use information without being regarded as having violated the rights of the corporate rights holders. Similarly, if this procedure is carried out in the digital environment, consumers may access digital content without infringing on licensing agreement, as there would be a consensus of what is considered as fair dealing between corporate rights holders and users of the information in the new environment.

**Perceptions about an analogy to the fair dealing exemption**

Most of the responses from the survey supported that an analogy to the fair dealing exemption was necessary in the digital environment. This means that both the international literature and most respondents agree that this is important. The reasons that most respondents advanced and agreed with international literature were that in the digital realm, there is no ownership of property, information is being presented in a different format, and licences has given corporate rights holders much power as compared to the users of digital content. These reasons are supported in the literature by Litman, (1996); Loundy, (1995); Samuelson, (1993); and Miller, (1993). Litman, (1996) is of the opinion that since digital information is different it may need a separate legal treatment. Loundy, (1995); Miller, (1993); and Samuelson, (1993) believe that as technology changes the law must also change – as has been the custom in the past - in order to address concerns raised by new technology.

Those who support an analogy to the fair dealing exemption in the survey and in the international literature are of the opinion that aspects of distribution, circumvention, reproduction, making of copies, as well features of commercialisation should form the basis of an analogy to the fair dealing exemption in the digital environment. Aspects of distribution and reproduction should be defined in the digital environment. These views are shared by Litman, (2001: 26-28; 91-92) and McDonald, 1999:10) as they are of the opinion that Internet user's personal computer makes copies of Web pages that it displays and this copies made involve a substantial reproduction of the material.
Aspects of circumvention should be removed as it inhibits access to the information as scholars and consumers are not allowed to crack any digital device. This is corroborated in the literature as section 296 of the United Kingdom Copyright, Designs and Patents Act 1988; section 1201(a)(1) of the United States DMCA 1988; as well as section 116A of the Copyright Amendment (Digital Agenda) Act 2000 forbids circumvention of digital content. Furthermore, the aspect of commercialisation being proposed for consideration is in conformity with Siggins, (2003) view. This is because when it became cheaper to photocopy a book than buy one because the photocopier was omnipresent in the 1970s following the cheaper Japanese photocopiers that replaced the Xerox machines in libraries and offices, the content of the fair dealing exemption changed. The fair dealing exemption allowed photocopying that was for particular purpose and not for commercial purposes. It is thus reasonable when the content of the fair dealing exemption also changes in the digital environment and forbid commercialisation of digital content.

The conclusion that can be drawn from those who favour an analogy to the fair dealing exemption in the digital environment is that although they opt for the exemption, they are conscious of the types of issues that should be addressed. It is obvious that these respondents are aware that although an analogy to the fair dealing exemption may be necessary in the digital realm, such an exemption must not be used to jeopardize the business interest of corporate right holders. This is because the exemption balances the rights of rights holders and those of consumers by allowing copyrighted material to be copied for particular purposes that do not interfere with the legitimate rights of the copyright holders (Amen, Keogh & Wolff, 2002: 24).

On the other hand, there were some respondents who did not believe that an analogy to the fair dealing exemption is needed in the digital environment. Their reasons being that the present fair dealing exemption was appropriate as it has been tested and confirmed in court –although not in South Africa. This view is a reflection of the ignorance that certain respondents have about copyright in the digital environment. This is because it is inappropriate to apply print media fair dealing exemption in the digital environment without visiting its content. International literature in chapter two informs us that this is wrong. Furthermore, some of these respondents were of the opinion that there was no need for the present of the fair dealing exemption in the
digital environment because it would not change the behaviour of consumers of digital content. This reasoning corroborates the view that digital technology has changed the behaviour of consumers of digital content. Following the nature of digital technology, scholars are no longer expected to make copies of digital content for personal use under the fair dealing exemption in the narrow sense, but can possibly copy in a broader context by possibly distributing and duplicating information (Ou, 2003: 92). Skilled users of digital content have the opportunity to locate content information and distribute to other scholars, as all that is required of the distributor is to seat in front of a computer, locate any content information and distribute to as many scholars as possible who would instantaneously receive the content (Lawrence, 2001).

The conclusion that can be drawn from these sets of respondents is that while some of the respondents are knowledgeable enough to see that the present fair dealing can only be suitable in the digital environment when its content is revived, others are not knowledgeable enough. Also, while some respondent believe that the print fair dealing exemption is appropriate in the digital realm others do not value the presence of the fair dealing exemption as it will not change the behaviour of consumers of digital content. However, both international literature and most respondents in the survey believe that the present fair dealing exemption in the digital environment is not appropriate. The literature on the evolution of the fair dealing exemption in chapter two confines the reasoning of these respondents. The implementation therefore of the print media fair dealing exemption by countries such as the United States of America, Australia, and United Kingdom in the digital environment is inapt. It is reasonable to suggest that if the fair dealing exemption is to be applied in the digital environment, its content should be revived. This is because digital technology is different from print technology (Litman, 1996), and it is reasonable that as the technology of reproducing information changes the law must also change to address the concerns raised by new technology (Louny, 1995; Miller, 1993; Samuelson, 1993).
CONCLUSION

Following the discussion of the major findings, the study has shown that notwithstanding the incorporation of the print media fair dealing exemption in the digital environment consumers still access digital content. The access that is carried out by consumers is either legal or illegal. The survey showed that whether licences are in place or not and there are mechanisms such as DRM to monitor access to digital content, digital content could still be illegally accessed. This is because once digital information is released it is impossible to monitor. The technology of digitisation has changed the behaviour of consumers of digital content as it does not only offer consumers the opportunity to manipulate, alter, reformat, or erase information at will (Neacsu, 2002: 111), but also the opportunity to make and disseminate perfect copies of texts quite easily via electronic mail or the World Wide Web (Gasaway, 2000: 194; Peters, 2003: 217). Following the advantages that the technology of digitisation confers on consumers, it seem sensible to revisit the content of the fair dealing exemption to introduce an analogy to the fair dealing that will satisfy both corporate rights holders and consumers of digital content. It is likely that for an analogy to the fair dealing exemption to be implemented aspects of distribution, circumvention, reproduction, making of copies, and forbiddance to use the information for commercial purposes should be considered. Furthermore, an analogy to the fair dealing exemption may need legislative backing for the exemption to be accepted generally.

The succeeding chapter summarizes the answers to the request question and delineates needed further research.
Chapter Eight:  
Summary and conclusions

The raison d'être of this chapter is to reflect back on the research questions in order to establish to what extent the questions have been answered, so as to draw out the major conclusions that emerge from the study. Following the main findings, it is possible to say that consumers of digital content do derive satisfaction from the use of digital content; most respondents are not particularly knowledgeable about copyright and licensing issues; access licences and contracts in theory but not in practice have the effect of inhibiting access to digital content; in theory licences inhibit access to digital content for both authorized and unauthorised users; authorized users of digital content can and presumably do violate the terms of licensing agreements among themselves; licences are not written to customize terms to the needs of the marketplace but nevertheless terms and conditions in licences are negotiable; consumers of digital content violate licensing agreements notwithstanding the DRM systems intended to monitor access to digital content; many of the custodians of digital content effectively refuse to police or monitor possible unauthorised or illegal uses of digital content; to some extent, licences give even more rights to corporate rights holders than they had in the print environment; institutions found violating digital content face the risk of foregoing access to the information; corporate rights holders do not accept that licensing agreements inhibit access to digital content; consortia can negotiate better subscription prices for licensed digital content; although scholars and consumers have emerged with open access sources that allow free access to digital content, most scholars and consumers of digital content prefer licensed digital content to open access sources; if scholars and consumers decide to use only open access sources, licensed digital content will be affected; most respondents are of the opinion that it is necessary to establish an analogy to the fair dealing exemption in the digital environment.

The above findings emerged from the responses gathered in the survey as to the perceive advantages of digital content; perceptions and misconceptions about
copyright and licensing agreements; whether licences inhibit access to digital content; knowledge of measures to protect digital content; perceptions about open access and other models; flexibility of licensing agreements; whether licensing agreements are violated; and perceptions about an analogy to the fair dealing exemption. Notwithstanding the major findings from the survey, this chapter concludes and raises suggestions for future research.

The focal aim of this study however was to examine whether licences effectively inhibit access to digital content and whether it was germane to establish an analogy or equivalent to the fair dealing exemption in the digital environment. The literature and survey in the study has attempted to present the advantages that users have in the digital environment and how these advantages are limited through terms and conditions embodied in licensing agreements. Although there is a need for scholars to have access to information, this need is being hampered in the digital realm by licensing agreements that states how information should be used. One of the ways to overcome the inhibition caused by licensing agreements is to apply the fair dealing exemption. The exemption frees users of information from the obligation to ask permission or pay a fee for the copy and use of copyrighted works (Harper, 2001). The exemption permits the copying of copyrighted materials for purposes such as research, criticism, teaching, and under certain conditions that will not interfere with the legitimate rights of rights holders (Amen, Keogh & Wolff, 2002: 24).

The researcher nonetheless contends that although users may apply the fair dealing exemption, the impact of applying the exemption without changing its content should not be overlooked. It has been shown in the literature that applying the fair dealing exemption in the digital realm whose content has not be changed is inappropriate. This is because the digital environment is a different environment to the print environment. International literature in chapter two has shown that the content of the fair dealing exemption changed in the print environment as new technologies of reproducing copyrighted material emerged. Hence, a fair dealing exemption whose content is revived may be appropriate in the digital environment although there is no guarantee that such an exemption will succeed in the digital environment as there is no clear definition of the exemption (Copeling, 1978: 41; Laddie et al., 2000: 754; Nimmer, 1985: 368; Sterling & Hart, 1981: 20). Nonetheless, since it has been proven
that the digital environment is a new and different environment, an analogy to the exemption will be appropriate. This is one of the dilemmas that this study attempts to resolve.

The setting for this study is South Africa and is based on the use of digital content in academic libraries. This is germane as these libraries are meant to serve not only their immediate higher education and research community, but also external users from industrial enterprises, non-academic organizations, and the general public (Boadi et al., 1987: 14). Furthermore, academic libraries are best for this study because their users make the most extensive and intensive use of both print and digital resources. The users use these resources to gather information for conferences, symposia, as well as teaching (Jaspan, 1982: 85).

The empirical component of this study was based on an interview survey from a selection of librarians, end users, managers of consortia, and corporate rights holders – mostly vendors – in South Africa. Apart from the views of the selected interviewers, the views of those not pre-selected for the interview were also got. This is because at the end of each interview with the pre-selected respondents, the researcher requested to be referred to other respondents who could contribute to the study. Those that the researcher was referred to were contacted and interviewed.

**OVERVIEW OF THE STUDY**

The study has shown that:

- Most users of information use digital content but derive different satisfaction while using the information. This can be understood given that not all users of information have mastered the technology of retrieving the information and not all users use licensed digital information because of the terms and conditions imposed by the corporate rights holders on the information.

- Most users were able to identify specific advantages to using digital content as the technology relieves users of the need to go to the library. This however exposed a false dichotomy between ‘the library’ (meaning printed materials)
and 'digital information', as if organized libraries have nothing to do with digital content.

- Most users of digital content are ignorant about the laws of copyright.
- Licences in theory protect and inhibit access to authorised and unauthorised users of digital content. This is attributed to the fact that rights holders control digital content even after it has been delivered to subscribers as rights holders do not sell copies of works but provide access in exchange for a fee.
- In practice licences do not inhibit access to digital content. Notwithstanding the terms and conditions in licensing agreements or mechanisms to monitor access to digital content, both authorised and unauthorised users violate the agreements. The technology itself makes it easy for the information to be violated and another reason for its violation may be because consumers are not aware of the terms and conditions of the licensing agreements.
- Corporate rights holders do not accept that licences inhibit access to digital content. They hold this view because they do not want to be accused of putting an obstacle on scholarship.
- Rights holders enjoy certain extensive rights that they have incorporated in the licensing agreements. Rights holders demand that subscribers of digital content take the necessary precautions to protect digital content. Where this is not done rights holders can withdraw subscribers' access to digital content.
- Although the open access sources provide free access to digital content, scholars and consumers prefer licensed digital content to open access sources. The rationale being that the quality of information contained in the open access sites does not seem to meet with the criteria of information needed in scholarly milieu.
- If open access sources are mostly used, it will have an impact on licensed digital content.
- Certain clauses in licensing agreements are negotiable – a revelation that refutes the claim that all terms and conditions in licensing agreements are written by rights holders and imposed on consumers of digital content.
- Most respondents believe that an analogy to the fair dealing exemption is germane in the digital environment. In promulgating the analogy to the fair dealing exemption aspects of distribution, circumvention, and reproduction,
making of copies, as well features of commercialisation should be taken in to consideration.

**REVIEW OF RESEARCH QUESTIONS AND FINDINGS**

The major aim of this study was to use South African respondents and academic libraries in verifying whether licences inhibit access to digital content and whether it is necessary to establish an analogy to the fair dealing exemption in the digital environment. As Chapter One demonstrates, the study was based on a number of research questions that the empirical investigation attempted to answer. The following section summarises the manner that the research questions were resolved, or not.

**How users perceive the advantages of digital content**

It is generally agreed that digital content is highly appreciated by users, as it is easier, quicker, and more convenient for users to access and use. However, it is clear from the study that although digital content is widely used, the main motivation for the use of digital content was for scholarly purposes.

Only one respondent acknowledged having problems in accessing digital content and using licensed digital content. In this regard, the majority of the users of digital content have no difficulties in accessing the information and are happy using licensed digital content. This implies that few users have problems in mastering digital technology but most enjoy licensed digital content. Also, most users access licensed digital content for educational purposes. It is suggested that a number of factors could have contributed to why most users in South Africa and worldwide access digital content for scholarship. It eliminates the need for users to walk to the library, the information is available at any time, the information is peer reviewed, and the technology of digitisation provides quicker access to the information.
Copyright and licensing agreements: perceptions and misconceptions

It is generally known that although most South African librarians, users, managers of consortia and some rights holders wrongly believe that copyright does not exist in digital content, most rights holders, a handful of librarians, and users know that copyright exist in digital content. It is suggested that a number of factors could have contributed to this wrongful belief. For example, they are unaware of the laws of copyright as there are no formal lessons or courses offered to enlighten them on what copyright covers and does not cover. Most of them are not versed with the content of the licensing agreements. Normally, the main channel in communicating licensing information is from acquisitions librarians to the reference librarians to the users of digital content. Unfortunately, not all acquisitions librarians are versed with licensing agreements, as in the survey the acquisitions librarians identified the electronic resources librarians as the persons who were knowledgeable in licensing agreements, as they are the custodians of the agreements. Furthermore, the survey showed that users of digital content are unaware of the terms and conditions of licensing agreements. The users can only be told about the terms and conditions in a licensing agreement on request – this allow users to claim certain rights on how they can use the information. On the other hand, it is suggested that the group of respondents that rightfully recognise that copyright law operates in both print and digital content knew this because they had read the terms and conditions in the licensing agreement as the agreements conclude that any person who defaults on the agreement in defined ways may be in contradiction of copyright law.

In view of the rightful recognition that copyright law exist in both print and digital content, and the appearance of the copyright emblems that appear at the end of a licensing agreement may be the raison d'être why some respondents wrongfully felt that the fair dealing exemption is applicable to digital content.

Knowledge of measures to protect digital content

It is generally accepted that licensing agreements do protect digital content. In the literature, it is clear that rights holders demand contractually that subscribers put in place precautions to control access at no cost to themselves. These precautions are
implemented as subscribers institute IP numbers or passwords for fear of serious consequences that might follow.

Furthermore, in order to track how access is handled, rights holders use Digital Rights Management (DRM) systems. In the survey, rights holders showed that the use of DRM was successful because they have been able to curb unauthorised access to digital content.

**The subscriber in a police role: views and perceptions**

The results of the survey indicate that librarians discuss licensing terms and conditions among themselves, via e-mail, on Websites and through electronic mailing lists. Despite the active discussion that goes on among librarians, it was surprising that so few librarians felt that users should be included in the debate. The few librarians, who did, said the information was only passed on in response to request, or occasionally through notices placed on websites. The survey indicate that librarians do not find it necessary to communicate information about licenses to the users of the information:

However it remains an open question as to whether librarians’ failure to communicate terms and condition to users can be viewed as dereliction of duty. Not only are users unaware of the terms and conditions in licensing agreements, the texts of the agreements are not made available to be read. All librarians agreed that copies of the agreements were filed away centrally.

**Do licences inhibit access to digital content?**

This study has shown that most librarians and managers of consortia accept that licensing agreements actually inhibit access to digital content. Licensing agreements place restrictions on simultaneous use of digital content, and limit unauthorised users access to the information. A librarian saw this type of inhibition as germane because institutions pay for the product to be used by members of the institution. This statement is however considered illogical because if the goals of institutions were to purchase materials just to be used by members of the institution, scholarship would
not advance, as there is no institution that can say that it has got funds to purchase all that its users need. Furthermore, scholarship would be affected because those institutions that can purchase most of the needed materials for their users would not loan to those institutions that cannot afford most of the materials for their users.

The librarians and managers of consortia also agreed in addition that the relationship between copyright law and digital licensing agreements also had an inhibitory effect. Many claimed that the interface between copyright law and licensing agreements affected their work because unauthorised users were not allowed to access digital content in general. Other reasons cited were the lack of uniform rules on licence agreements; the extra work involved; the prohibition on the disposal of information; and the extra funding needed.

Notwithstanding that librarians and managers of consortia acknowledged that licences inhibit access to digital content, this study on the other hand showed that some librarians placed such inhibition in perspective. This is because since most of the information presently requested by unauthorised users of digital content is found in both print and digital formats, the unauthorised users are served with the print sources. If for example, the requested information is only in digital formats the unauthorised users will not be served. This revelation however serves as a food for thought as it may come a time when most institutions may prefer to subscribe only for digital content and not both because of budget constraint. Furthermore, in practice, the question of licences inhibiting access to digital content does not exist. This is because users of digital content violate licences. This will be discussed fully in the section that deals with whether licences are violated or not.

This study has furthermore shown that rights holders do not believe that licensing agreements inhibit access to digital content. The rationale behind this believe being that rights holders are out to make their businesses profitable. However, rights holders might not be expected to acknowledge that licences inhibit access to digital content, given that the traditional enlightenment discourse of copyright is to encourage learned men to compose and write useful books. If therefore it is agreed by rights holders that licensing agreements inhibit access to digital content, the objectives of the first
copyright law will not be achieved as learned men will not be able to access information to create new works.

**Perceptions about open access and other models**

The result of the survey shows that librarians and some managers of consortia overwhelmingly support open access initiatives because they believe in the free flow of information to everyone. Open source provides information to those who cannot afford to pay for it. However, although librarians and managers of consortia support open access sources they are not keen to use the content of the sources. Their reasons being that the contents do not support the needs of their users; the sources do not form part of their accredited journals; the contents of the open sources are not peer reviewed; and the sources do not form part of a pre-compiled lists of accredited sources for government subsidies.

In the study, it seem that librarians generally believed, rightly or wrongly, that most open source content is not peer-reviewed and does not contain information that users need. As a consequence of these, authors gain little if they publish in such sources as the open source content is not accredited in government approved lists such as the International Bibliography of the Social Sciences (IBSS) and the Institute of Scientific Information (ISI).

The study also show that rights holders believe that those who support the open access sources are those who want that all information be made free – a scenario that rights holders believe is impossible as there must be some one to pay for information to be made free. However, rights holders seem to believe that open source could be a threat to their business in future if subscribers decide to switch to open sources.
NEGOTIATIONS: ARE LICENCES FLEXIBLE ENOUGH?

This study has shown that licences are flexible. Most librarians and rights holders had negotiated particular clauses in licensing agreements. Librarians had negotiated on restriction of digital information to certain staff and students; replacement of withdrawn subscribed journals found in the database; extension of a network resource to other buildings in the institution that the original agreement did not allow. It was shown in the study that the librarians who had never negotiated in licensing agreements lacked institutional authority. The managers of consortia had negotiated on the inclusion of new titles at no extra cost; use of digital content for Inter Library loan (ILL); electronic course packs for digital information; availability of digital content to walk-in users. The rights holders had negotiated on the extension of a network resource to other buildings in the institution that the original agreement did not allow; inclusion of certain wordings in an agreement that were not originally in the agreement; using digital content for Inter Library Loan (ILL).

However, although there are negotiations in licensing agreements, the study showed that some clauses in licensing agreements are not open to negotiations. One consortium manager commented that vendors are generally unwilling to negotiate prices, although they may be flexible about other issues. Although this may buttresses the argument that rights holders want to get the best deal in the business, it can be said that rights holders may not want to negotiate prices when the negotiations involve individual institutions. On the contrary, where consortia carry out such negotiations, rights holders do negotiate prices.

ARE LICENSING AGREEMENTS VIOLATED?

A majority of librarians and users of digital content believe that the prohibitions laid down in licensing agreements are not actually enforceable. Users of digital content violate the conditions of use of the information as technology has changed the behaviour of the users. Technology has given the users the opportunity of exploring information further as it offers users the opportunity to manipulate, alter, or reformat information; make digital copies and disseminate them via electronic mail or Web.
Once digital material is released, it becomes impossible to monitor. The librarians and users believe that common violations of digital content include downloading articles and e-mailing them; sharing passwords or IP numbers with unauthorized users; unauthorized users accessing content; making multiple copies. Some users, librarians and rights holders believe that even authorized users can violate licensing agreements among themselves by systematically downloading complete journal issues; copying and allowing others use the copy; sharing of downloaded articles; converting articles into other formats; making copies from a copy.

Interestingly, the one group of respondents who were unanimous in believing that authorised users can violate a licensing agreement among themselves, were the rights holders. In order to curb this type of violation, rights holders believe that subscribers have a duty to monitor violators as the Digital Rights Management (DRM) systems cannot monitor all activity, such as secondary copying. Many librarians however refuse monitoring violation because they believe it is impossible or ineffective; it might be seen as censorship; it is improper to snoop around people; it amounts to an invasion of privacy; it is not the role of librarians to act as police.

**WHAT'S THE ANALOGY TO FAIR DEALING IN THE WORLD OF DIGITAL CONTENT?**

It became apparent from the study that most respondents and surprisingly a rights holder felt the need for an analogy to the fair dealing exemption to be developed in the digital environment. The rationale for the fair dealing exemption is that it would balance the interest of rights holders and end users just as it does in the print environment. These respondents felt that there was a need for a different type of fair dealing in the digital environment as there has been a shift from ownership of property, to access contracts; there are now two different types of content; licences give rights holders too much power to restrict access to digital information. The rights holder based his argument for an analogous fair dealing exemption on the fact that the print and digital environments were different. This was however not surprising as the rights holder could not be expected to say that licences give rights holders the rights to restrict access to digital content. By saying this could have meant that rights holders
were out to impede scholars accessing digital content with licensing terms and conditions.

In order to establish an analogy to the fair dealing exemption in the digital environment, the study showed that some users, librarians, and rights holders believed that aspects of distribution, circumvention, reproduction, making of copies, as well as features of commercialisation should be considered. Aspects of distribution and reproduction should be defined in the digital environment as in the Internet, user’s personal computers make copies of Web pages that it displays and these copies made involve a substantial reproduction of the material. Circumvention should be removed as it impedes access to the information; and aspect of commercialisation should be restrained so that it does not interfere with the legitimate rights of corporate rights holders.

Although some respondents wanted a different type fair dealing in the digital environment, other respondents believed that there was no need for a new kind of exemption in the digital realm. They believe that the present fair dealing exemption remains appropriate; fair dealing already exist in the digital environment; the present fair dealing exemption has been tested in court although not in South Africa; there is no major difference between printing digital information and making of photocopies; following the advantages that the new technology offers to consumers, fair dealing is irrelevant; fair dealing is being abused constantly without publishers objecting. These respondents were far less convinced that a different type fair dealing exemption would be able to change the behaviour of users of digital content. This is because in practice consumers of digital content have little regard for licensing agreements as it has been proven that they violate the agreements.

The overall view that emerged from the study was that most of the respondents were of the opinion that the positive effects of establishing a different type fair dealing exemption in the digital environment would outweigh the non-establishment of the fair dealing exemption. This is because with an analogy to the fair dealing exemption in the digital environment users of digital content would be able to access digital content within a legal framework.
It has appeared plainly that:

- The respondents value digital content and like to use it;
- Digital content is mainly used for scholarship which is not surprising seeing that most people who use the information use it in an academic environment;
- The majority of respondents were not happy with the terms and conditions in licensing agreements that govern the use of digital content;
- The information is violated notwithstanding the conditions for the use of information;
- A new fair dealing exemption is necessary to balance the rights of corporate rights holders with those of users of the information as these are two different types of environment;
- Most of the respondents were in support of a new type fair dealing exemption in the digital environment.

The empirical study has clearly shown that the fair dealing exemption remains a difficult problem in the digital environment. In the subsequent section, the researcher will advance recommendations based on the interpretation of the empirical information gathered and the pertinent points derived from international literature.

The results acquired from the analysis of the information gathered during the empirical survey produced some contradictory results from what the literature says, and hence does not provide clear solutions to assist in stopping both the inhibition caused by licensing agreements and violations on digital content. The technology of digitisation is such that once the information is out, it becomes almost impossible to monitor it as end users rightfully or wrongfully have the opportunity of using the information in the manner they want without being noticed. Nonetheless, it emerged clearly in the survey that:

- Most of the respondents are not well informed with the type of information that copyright governs;
- In theory licences imposed on digital content inhibit access to digital content;
- Users of digital content are not exposed to the terms and conditions of the agreements;
Terms and conditions in licensing agreements are negotiable with the exception of the prices of digital content that can reasonably be negotiated by consortia;

Notwithstanding the existence of licences to govern digital content together with the DRM that help to curb unauthorized access of digital content, both authorised and unauthorised users can still violate the agreements;

Notwithstanding the alleged advantages of open access sources, most scholars and consumers of digital content prefer licensed digital content to open access sources;

The fair dealing exemption used on digital content is not apt;

There is no guarantee that a different type fair dealing exemption in the digital realm would change the way users would access digital information.

However, many significant issues and germane suggestions came to the forefront that could provide a possible resolution to the findings in the survey. Based on the findings of the survey, the researcher would like to put forward recommendations that will address the following: (a) the framework that would have to be put in place by academic institutions in South Africa to sensitise users about copyright protection, (b) appropriate methods of exposing terms and conditions in licensing agreements, (c) terms and conditions that should be included in licensing agreements in order to curb violation of digital content, (d) prospects of open access sources (e) an appropriate model for a fair dealing exemption that would incorporate various clauses that could be adopted to generate a new fair dealing exemption in the digital environment.
THE COPYRIGHT FRAMEWORK

Academic institutions in South Africa are subject to copyright norms as stipulated by the 1978 Copyright Act. Although section 2(1) of the Act states that copyright protects original works, the Act does not stipulate that institutions should make sure that users are versed with aspects of copyright. Notwithstanding, it may be the duty of institutions to educate its users on the laws of copyright as stipulated in the copyright act. This is because institutions may be held liable for copyright infringement committed by faculty and staff, and perhaps students if it is proven that the institution did nothing in addressing copyright issues among its users (Harper, 2004). In view of this, the researcher recommends that:

- Institution should set up short courses on copyright related issues to be taught by either legal experts, librarians and other stakeholders who are versed with copyright issues in the institutions.
- Institutions should lobby and convince members of institutional committees to believe that knowledge of copyright through short courses is germane within the institutions because it may curb possible infringement of copyright and suit from rights holders when a copyright infringement is committed. In this way, proposals for knowledge about copyright could be expected to receive serious attention from prominent members of committees.
- Institutions should work closely with the convenors of the short courses in order to ensure that practical problems related to copyright issues are dealt with in the short courses.

EXPOSURE OF LICENSING TERMS AND CONDITIONS

As indicated in Chapter Six, most librarians do not find it necessary to communicate information about licenses to the users of the information but discuss licensing terms and conditions among themselves via e-mail, on Websites and through electronic mailing lists. The users who want to know about licensing terms and conditions get such information on request or occasionally through notices placed on web sites. The non-communication of licensing terms and conditions to users of digital content is a
gross mistake on the part of subscribers of the information. Where users of digital content are left to find out about terms and conditions in licensing agreements, they may find the process inconveniencing or tedious thereby might be tempted to use the information as they please on the pretext that they have not been told how to use the information. Where this type of scenario takes place, subscribers who are contractually obliged to implement precautions to prevent violation of digital content and who do so by implementing passwords and or IP numbers to authorized users are doomed to fail. The researcher thus recommends that:

- Licensing agreements should not be filed away centrally. Reference librarians must have copies of licensing agreements and must be abreast with the conditions. This would avoid them giving out false information about licensing agreements. This is because while the literature on licences in chapter three shows that some licensing agreements allow ILL, in the empirical survey most librarians stated that all licensing agreements did not allow ILL on digital content.

- Brochures should be prepared and placed at the entrance of the library informing users to be aware of terms and conditions of licensing agreements on digital information and possible punishments for those who infringe the agreements. This might inspire users to look for notices that carry specific information about particular licensing terms and conditions in the library for accessing the digital content.

- Notices should be placed in front of computers that contain digital content indicating that only authorized users are to access digital content and if any user needs to know more about the licensing agreements, the user should contact the reference librarian. This automatically informs unauthorised users that they cannot access digital content.

- Subscribers should not allow authorised end users to request information about terms and conditions in a licensing agreement. The terms and conditions can be made known to the end users by placing such conditions on websites, i.e. at the front pages of databases. The terms and conditions should be placed and made in such a manner that any one who wants to use the digital content must first read and click on an icon that reads ‘I accept the terms and conditions’ before the user is allowed access into the real digital content. Where this is
done, there may be some degree of certainty that whoever is using a digital content must have passed through the terms and conditions and it will be assumed that such a user must have read the conditions.

**NEGOTIABLE TERMS AND CONDITIONS IN LICENSING AGREEMENTS**

There is no doubt that in theory licensing agreements inhibit access to digital content notwithstanding the diverged views held by librarians and managers of consortia on one side, and corporate rights holders as exposed in Chapter Six. In order to possibly curb the inhibition caused by licensing agreements, subscribers and rights holders must arrive at consensus on the clauses in licensing agreements. This is pertinent as the survey show that negotiations are possible and the literature show that such negotiations extend to the prices of the digital content when it is done through consortia. Furthermore, negotiations are germane in order to legalise access to the information. This is because both international literature and survey results show that no matter what mechanisms are put in place to govern digital content, practically users are capable of illegally accessing digital content. in order to avoid illegal accessing of digital content, the following negotiable clauses are therefore proposed between subscribers and rights holders of digital content:

- Negotiate clauses that would not restrict certain authorised users from accessing the information. The agreements should be negotiated to allow all authorised users access to digital content.
- Negotiate clauses that would not restrict unauthorized users of digital content. The two parties may negotiate to use *indirect appropriation* on access to digital content. The corporate rights holders may decide not to charge for access of the information from the beginning of the academic year or semester but charge at the end of the academic year or semester. The measurement upon which the charges will be calculated will be the number of hits registered on the digital content database. With this method, institutions would be able to allow both authorised and unauthorised users access to digital content and rights holders will not be accused of inhibiting access to digital content through their licensing agreements.
Negotiate clauses based on the network effect. This is by agreeing that corporate rights holders charge higher prices on their digital content based on the number of individuals who would use the information. For example, if the corporate rights holders are told that the number of individuals to use the information is 10, and the price for 10 persons accessing the information is R15,000, the corporate rights holders can charge R16,000 for the information. The extra R1,000 is charged for the unforeseen user who was not considered when the contract was negotiated.

Insertion of a clause that compels rights holders to replace any withdrawn subscribed journal found in the database and the inclusion of new titles at no extra cost.

A clause that allows where possible the extension of a network resource to other buildings in the institution.

A clause that expressly permits the use of digital content for Inter Library Loan (ILL).

Insertion of a clause that allows availability of electronic course packs and training for digital content.

A clause that allows digital content to walk-in users.

**Open Access Sources**

As indicated in Chapter Six, there is certainty that subscribers of digital content support open access initiatives as it provides free information to everyone irrespective of whether one can afford or not afford for the information. Notwithstanding that subscribers support open access sources they are not keen to use the sources because the contents do not support the needs of their users; the initiatives do not form part of their accredited journals; the contents of the open sources are not peer reviewed; and the sources do not form part of a pre-compiled lists of accredited sources for government subsidies. In order that the open access sources flourish in the digital realm, the researcher proposes the following:

Most open access sources should be accredited in government-approved lists such as the International Bibliography of the Social Sciences (IBSS) and the
Institute of Scientific Information (ISI) that command government subsidies. When this is done, users will be encouraged to use the sources especially if the sources meet their needs.

- Scholars and consumers of digital content should be sensitised through workshops, colloquiums, conferences and educational policies to publish and use open access sources. Most of these sources subsequently end up in accredited journals after having undergone the normal peer review process. This is corroborated by the fact that scholars mostly in physics departments claim in the survey that they do not use licensed digital content but use open access sources that subsequently end up in peer review journals.

- Governments should be sensitised by scholars and consumers of digital content on the merits of articles that are published in open access sources. Where such sensitisation is taken on a positive note, the government might increase subsidy for the open access sources. On the other hand, if governments were to attach more importance to publications in subsidised journals, the governments can sign into law that authors deposit a digital copy of the final version of a peer reviewed journal article in an open access source no more than six months after the article has been published in a paid-subscription journal.

There is no doubt that while most of the respondents in the survey were of the opinion that a new fair dealing exemption for the digital environment was necessary, a minority believed that there was no need for an analogy to the fair dealing exemption in the digital environment. The latter’s rationale being that the present fair dealing exemption is apt as it has been tested in court; there is no major difference between printing digital information and making photocopies. On the other hand, those who believed that a new type fair dealing exemption was necessary justified their believes by stating that there has been a shift from ownership of property to access contracts; there are presently two different types of content; licensing agreements give rights holders too much power to restrict access to digital information. These arguments seem to be reasonable and are corroborated in international literature. Furthermore, it is inappropriate to apply the present fair dealing exemption in the digital environment because as chapter two show, the content of the exemption changed in the technology where the exemption was adopted when new technologies of reproduction emerged.
Hence, in the advent of a new fair dealing exemption, it would change perceptions of the inhibitory effects of licensing agreements as it would help to restore a balance of interests between the rights holders and the users of digital content. In response to an analogy to the fair dealing exemption in the digital environment, the researcher therefore recommends that:

- Certain aspects should be considered while developing a new type fair dealing exemption. Aspects such as distribution, circumvention, reproduction, the making of copies, and commercialisation should form the basis of a new type fair dealing exemption.

All these aspects must be clarified in the new type fair dealing exemption. Based on the responses obtained in the survey with those in international literature, aspects of distribution should be revisited, circumvention clauses should be eradicated, aspects of reproduction must be modified, the amount of copies that will be accepted a reasonable portion should be clarified, as well as aspects of commercialisation should not be accepted. When all these aspects have been dealt with, the new type fair dealing exemption should be passed by legislation to make the provision binding on both rights holders and users of digital content.

**SUGGESTION FOR FURTHER INVESTIGATION**

The researcher hopes that the issue of access to digital content and most importantly the rationale for developing an analogy to the fair dealing exemption will provide adequate stimulus for further research. Scholars with the advent of digital information have always debated the necessity for an analogy to the fair dealing exemption in the digital environment. However, the development of an analogy to the fair dealing exemption in the digital realm is likely to spark a variety of reactions. Opinion is divided over the usefulness and feasibility of fair dealing exemption for digital content. There is no guarantee that the introduction of an analogy to the fair dealing exemption will have any influence on the behaviour of users of the information. This is because the technology allows users to make many more unauthorised or illegal uses of the information than they could with printed content, and with a
correspondingly small chance of being detected. Theoretically, it seems as if an analogy to the fair dealing exemption may be useful as it is evident that—also theoretically—licensing agreements have the effect of inhibiting access to digital content. In practice, and especially in the developing world, very few end-users indeed care about or obey the laws that govern the use of information. Once digital information is released, once the cat is out of the bag, users make use of it with few scruples, not caring whether they are legally or illegally using the information. Hence, further research is required to unveil how a fair dealing exemption—in effect a recognition that some uses cannot be policed—might operate practically with regard to the digital content. The further research can build on the results of this research as this study has proven that theoretically there is a need for an analogy to the fair dealing exemption in the digital environment. Further research is required which will expose whether practically there is a need for any type of fair dealing exemption in the digital environment. The new study will investigate how an analogy to the fair dealing exemption proposed in this research functions practically and whether the exemption is needed in any case in the digital realm.

**CONCLUSION**

The intention of this research was to make a contribution to an emerging field in information studies. As demonstrated in Chapters Two, Three, and Four, the topic has been methodically investigated and reported on, but almost exclusively from a developed world perspective. It is clear that it would benefit academic libraries in the developing countries to be abreast of the developments in this area so that they can bring to the fore their plight as they mostly depend on the developed countries for digital information.

It is hoped that this study will provide a useful guideline that could be used by South African academic library users and other libraries that use digital content to widen their knowledge of the problems in accessing digital content and argue their case for a less content protection and fewer layers of it, from corporate rights holders.
In closing, the point which this study seeks to advance is that, although licensing agreements may seem to inhibit access to digital content, and the fair dealing exemption seem unavoidable in theory, users should not depend on the exemption as the only method that provides uninhibited access to digital content. Users and subscribers of digital content should convince rights holders and their political representatives that fewer restrictions on access to digital content through the archetypal licensing agreement is advantageous to both users and rights holders. Rights holders can minimise the economic impact of lesser protections by using such mechanisms as indirect appropriation or the network effect. This effectively amounts to the collection of revenue from unauthorized copiers of digital content by charging higher prices for the originals from which the unauthorized copies are made (Liebowitz, 2002: 4). Where this is done, rights holders will be able to lower the inhibitory barriers attached to the use of digital content while at the same time being able to recover revenue from both authorized and unauthorized users.

The research has shown that there are no easy ways to limit the violation of the terms of access to commercial digital content. It has shown that although there are licensing agreements and the DRM that monitor the use of digital content, users still violate licensing agreements. Also, that although a substantial proportion of the respondents have no objection to an analogy to the fair dealing exemption, there is no guarantee that such an exemption would practically change the behaviour of users of the information. Hence, introducing an analogy to the fair dealing exemption may not be worth the effort in practice since the technology of digitisation in effect and at the present time permits users to use information as they wish. Furthermore, practically an analogy to the fair dealing exemption may impact negatively on users, as there is no clear definition of the fair dealing exemption. However, since licensing agreements theoretically inhibit access to digital content, there may be a need for an analogy to the fair dealing exemption to return to the traditional balance between the rights of corporate rights holders on the one hand and consumers of digital content on the other.
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APPENDICES
APPENDIX A

Endorsement to interview UCT respondents

Original Message ----
From: "Wegerhoff" <aweger@humanities.uct.ac.za>
To: <cmasango@chec.uct.ac.za>
Sent: Thursday, June 26, 2003 8:45 AM
Subject: Re: [Fwd: Ethical Clearance for Research Project!!!]

Dear Mr Masango
Please see the response from the Chair of the Ethics Committee below.
Regards
Anne

Cochrane wrote:

Dear Anne,

I have looked at the two questionnaires from Masango. Neither are in any way controversial or invasive. They are in fact standard kinds of questionnaires used by social scientists all the time (in polls, for example) which have no particular reason to come to the Ethics Committee (Departments should clear these things first, and send them on only if there is a contentious, sensitive, or difficult issue involved).

Please refer him back to his supervisor, and HoD if the supervisor feels unsure about anything. Only if they have problems, should it come to us.

Thanks,
Jim

Wegerhoff wrote:

More for the Ethics Committee. Let me know who I should circulate it to?

Cheers
Anne

Original Message -------
Subject: Ethical Clearance for Research Project!!!
Date: Wed, 25 Jun 2003 11:57:05 +0200
From: UCT Staff Member - cmasango <cmasango@its_main.uct@mail.uct.ac.za>
Reply-To: cmasango@chec.uct.ac.za
Organization: University of Cape Town
To: aweger@humanities.uct.ac.za

Dear Anne, my name is Charles Masango. I'm a staff with the dept. of Information and Library Studies, Centre for Information Literacy. Here attached are the research questions for clearance.
While hoping that the committee will respond favourably, I wish to extend my regards to all in this committee.

Charles Masango
CIL

Prof. James R Cochrane
Dept of Religious Studies/Director of RICSA
University of Cape Town
Private Bag, Rondebosch 7701
Rep. of South Africa
Tel: +27 21 650 3461 / 3452
Fax: +27 (21) 689 7575
e-mail: cochrane@humanities.uct.ac.za

Anne Wegerhoff
Postgraduate Programmes Officer
Graduate School in Humanities
University of Cape Town
Tel: 650 4414
Fax: 650 5751
Professor Hennie Viljoen,
Senior Director of Library Services,
Stellenbosch University,
Private Bag X1,
Matieland
7602

Dear Hennie,

Introduction and application for research access

I should like to introduce a member of the staff of the Centre for Information Literacy, Mr. Charles Akwe Masango. He is studying the nature of the licensing agreements entered into by the constituent members of CALICO, with a view to determining to what extent these agreements are fair and just, given that they seem to include no clause as to how information could be fairly used without infringing copyright. This is part of his research for a PhD on the development of intellectual property rights legislation and conventions in South Africa.

As a starting point, he wishes to study these contracts so as to assess the nature of the agreements. In a subsequent phase, he intends to interview and administer questionnaires to those who sign these contracts on behalf of their institutions, the rights holders and the users of the information.

I strongly believe that research of this nature will help both academic libraries, and users of digital information, in understanding the exact nature of the law and the degree to which a convention of "fair dealing" should be enshrined within.

I hope that you will be able to assist Mr. Masango, or direct him to the person in your institution best able to assist. Mr. Masango may be contacted at cmasango@ched.uct.ac.za

Should you require any additional information please do not hesitate to contact me.

Yours sincerely,

Peter G. Underwood
Director and Head of Department of Information and Library Studies
Ms Ellen Tise,
Director of Library Services,
University of the Western Cape,
Private Bag X17
Bellville
7535

Dear Ellen,

Introduction and application for research access

I should like to introduce a member of the staff of the Centre for Information Literacy, Mr. Charles Akwe Masango. He is studying the nature of the licensing agreements entered into by the constituent members of CALICO, with a view to determining to what extent these agreements are fair and just, given that they seem to include no clause as to how information could be fairly used without infringing copyright. This is part of his research for a PhD on the development of intellectual property rights legislation and conventions in South Africa.

As a starting point, he wishes to study these contracts so as to assess the nature of the agreements. In a subsequent phase, he intends to interview and administer questionnaires to those who sign these contracts on behalf of their institutions, the rights holders and the users of the information.

I strongly believe that research of this nature will help both academic libraries, and users of digital information, in understanding the exact nature of the law and the degree to which a convention of "fair dealing" should be enshrined within.

I hope that you will be able to assist Mr. Masango, or direct him to the person in your institution best able to assist. Mr. Masango may be contacted at cmasango@ched.uct.ac.za

Should you require any additional information please do not hesitate to contact me.

Yours sincerely,

Peter G. Underwood
Director and Head of Department of Information and Library Studies

29 April 2003
APPENDIX D

Acquisitions librarians

SURVEY ON LICENCES FOR DIGITAL INFORMATION

Before the advent of digital information, libraries collected print information and the ordinary law of property and the copyright laws governed this. With the advent of digitization, libraries can offer information in other formats, including access to digital information, which is governed by licensing agreements. The purpose of this interview is to explore whether librarians and end users are experiencing difficulties resulting from the introduction of licences to govern the use of digital information.

Please note that the information you will give in the interview will be used for the partial completion of a PhD degree, and will not be attributable but regarded as confidential.

The information obtained from these interviews will be useful to academic libraries, and users of digital information, in understanding the exact nature of the legal system and the degree to which a convention of "fair dealing" should be enshrined in it. So, please respond to the best of your knowledge and ability.

Thank you in advance for devoting your valuable time in responding to the interview.
Questions

1) What in your view is the nature of the relationship between copyright law and digital licensing agreements? Does this relationship affect your work? If “yes”, how? If “no”, why not?

2) Who in your library is responsible for information about the terms and conditions in a licensing agreement? What kind of information does he/she provide and to whom? How detailed is the information?

3) How do librarians communicate information about licensing agreement to each other and to users?

4) Do librarians inform users about licensing agreements conditions? If “yes”, which aspects? If “no”, why not?

5) Does your institution have a policy on acceptable use of digital information? Is it adequate in your opinion? If not, why not?

6) If “yes”, are persons required to sign that they have read and understood the policy, or that they agree to abide with the policy as a condition of use of digital information?

7) What precautions does your university take to prevent unauthorized use of digital information?

8) Does each library have a copy of the site licence for each database used on the university computers? Who maintains such a file?

9) Should librarians be monitors for possible violations of the use of digital information? If “yes”, why? If “no”, why not?

10) What do you look for when preparing or signing a licensing agreement with rights holders?

11) Have you ever had disagreements with rights holders (vendors) on clauses in the licensing agreements?

12) If “yes”, the disagreements pertained to what aspect of the agreement? How was the disagreement/s resolved?

13) In your view, do licensing agreements limit or not limit the use of digital information?
14) Does your institution support the open access initiative? These are initiatives aimed at providing users with unrestricted access to digital information. If “yes”, why? If “no”, why not?

15) Do your institution use the open access digital journals, e.g. journals in the life sciences literature of PubMed Central? If “yes”, which ones? Why do you recommend that these be used? Why does your institution not continue to use these open access sources? If “no”, why do you not use the open access journals?

16) Copyright law has the fair dealing exemption that permits users of print information to copy information without being accused of copyright infringement. This is fundamental to modern scholarly communication. Do you think therefore that there is a need for an analogous process to permit access to digital information, as the fair dealing exemption permits in print information?

17) What do you think such an analogy might look like?

18) How do you think this might work?
APPENDIX E

Reference librarians

SURVEY ON LICENCES FOR DIGITAL INFORMATION

Before the advent of digital information, libraries collected print information and the ordinary law of property and the copyright laws governed this. With the advent of digitization, libraries can offer information in other formats, including access to digital information, which is governed by licensing agreements. The purpose of this interview is to explore whether librarians and end users are experiencing difficulties resulting from the introduction of licences to govern the use of digital information.

Please note that the information you will give in the interview will be used for the partial completion of a PhD degree, and will not be attributable but regarded as confidential.

The information obtained from these interviews will be useful to academic libraries, and users of digital information, in understanding the exact nature of the legal system and the degree to which a convention of “fair dealing” should be enshrined in it. So, please respond to the best of your knowledge and ability.

Thank you in advance for devoting your valuable time in responding to the interview.
Questions

1) What in your view is the nature of the relationship between copyright law and digital licensing agreements? Does this relationship affect your work? If "yes", how? If "no", why not?

2) Who in your library is responsible for information about licensing agreements? What kind of information does he/she provide and to whom? How detailed is the information?

3) How do librarians communicate information about licensing agreements to each other and to users?

4) Do librarians inform users about licensing agreements? If "yes", which aspects? If "no", why not?

5) Does your institution have a policy on acceptable use of digital information? If not, why not?

6) If "yes", are persons required to sign that they have read and understood the policy, or that they agree to abide with the policy as a condition of use of digital information?

7) In your view, do licensing agreements limit or not limit the use or access of digital information?

8) Have you observed that users are violating licensing agreements?

9) If "yes" in what way/s is/are users violating licensing agreements?

10) Are you aware of any precautions that institutions take to prevent unauthorized use of digital information? What are they?

11) Does each library have a copy of the site licence for each database used on the university computers? Who maintains such a file?

12) Should librarians be those to monitor possible violations of the use of digital information? If "yes", why? If "no", why not?

13) Licensing agreements restrict access to authorized users only. Are such users likely to violate the agreements in some way/s? If "yes", how? If "no", why not?

14) Copyright law has the fair dealing exemption that permits users of print information to copy such information without being accused of copyright infringement. This is fundamental to modern scholarly communication. Do you think therefore that there is a need for an analogous process to permit access to digital information, as the fair dealing exemption permits in print information?

15) What do you think such an analogy might look like?
16) How do you think this might work?
APPENDIX F

Consortia

SURVEY ON LICENCES FOR DIGITAL INFORMATION

Before the advent of digital information, libraries collected print information and the ordinary law of property and the copyright laws governed this. With the advent of digitization, libraries can offer information in other formats, including access to digital information, which is governed by licensing agreements. The purpose of this interview is to explore whether consortia most of which negotiate licences for libraries and their users felt that librarians and end users are experiencing difficulties resulting from the introduction of licences to govern the use of digital information.

Please note that the information you will give in the interview will be used for the partial completion of a PhD degree, and will not be attributable but regarded as confidential.

The information obtained from these interviews will be useful to academic libraries, and users of digital information, in understanding the exact nature of the legal system and the degree to which a convention of “fair dealing” should be enshrined in it. So, please respond to the best of your knowledge and ability.

Thank you in advance for devoting your valuable time in responding to the interview.
Questions

1) What in your view is the nature of the relationship between copyright law and digital licensing agreements? Does this relationship directly affect your work? If "yes", how? If "no", why not?

2) Who in your consortium is responsible for information about the terms and conditions in a licensing agreement? What kind of information does he/she provide and to whom? How detailed is the information?

3) How do consortia communicate information about licensing agreements to their members and or to users?

4) Do consortia sign or negotiate licensing agreements for libraries to sign?

5) Whether consortia sign or negotiate licensing agreement, what do you look for when signing or negotiating a licensing agreement with vendors?

6) Have you ever had disagreements with vendors or rights holders on clauses in the licensing agreements?

7) If "yes", the disagreements pertained to what aspect in the agreement? How was the disagreement/s resolved?

8) In your view, do licensing agreements limit or not limit the use of or access to digital information?

9) Do you support open access initiatives? In these initiatives users are provided with unrestricted access to digital information. If "yes", why? If "no", why not?

10) Do you actively recommend that institutions should use open access journals, e.g. journals in the life sciences literature of PubMed Central? If "yes", what measures have you taken to promote such a use? If "no", why not?

11) Copyright law has the fair dealing exemption that permits users of print information to copy such information without being accused of copyright infringement. This is fundamental to modern scholarly communication. Do you think therefore that there is a need for an analogous process to permit access to digital information, as the fair dealing exemption permits in print information?

12) What do you think such an analogy might look like?

13) And how do you think this might work?
APPENDIX G

Informed users

- Signatories to the Public Library of Science (PloS) Open Access Initiative.
- Signatories to the Budapest Open Access Initiatives.

SURVEY ON LICENCES FOR DIGITAL INFORMATION

Before the advent of digital information, libraries collected print information and the ordinary law of property and the copyright laws governed this. With the advent of digitization, libraries can offer information in other formats, including access to digital information, which is governed by licensing agreements. The purpose of this interview is to explore whether librarians and end users are experiencing difficulties resulting from the introduction of licences to govern the use of digital information.

Please note that the information you will give in the interview will be used for the partial completion of a PhD degree, and will not be attributable but regarded as confidential.

The information obtained from these interviews will be useful to academic libraries, and users of digital information, in understanding the exact nature of the legal system and the degree to which a convention of “fair dealing” should be enshrined in it. So, please respond to the best of your knowledge and ability.

Thank you in advance for devoting your valuable time in responding to the interview.
Questions

1) Do you regularly use licensed online digital information, (databases that your institution has subscribed to) for your research and for your students? Are you happy using it? Does the information offer you and your students advantages?

2) Why did you sign the Open Access Initiative?

3) What in your view is the nature of the relationship between copyright law and digital licensing agreements? Does this relationship directly affect your work? If “yes”, how? If “no”, why not?

4) Does your institution have acceptable use policy vis-à-vis digital information? Is it adequate in your opinion? If “yes”, how? If not, why not?

5) Are persons required to sign that they have read and understood the policy, or that they agree to abide with the policy as a condition to use digital information?

6) Are you aware of any precautions that institutions take to prevent unauthorized use of digital information? What are they?

7) Are licensing agreements being violated by users? If “yes”, how? If “no”, why not?

8) Is your academic and research responsibilities inhibited in any way by the implementation of licensing agreements on digital works? If “yes”, how? If “no”, why not?

9) Licensing agreements restrict access to authorized users only. Are such users likely to violate the agreements in some way/s? If “yes”, how? If “no”, why not?

10) Copyright law has the fair dealing exemption that permits users of print information to copy such information without being accused of copyright infringement. This is fundamental to modern scholarly communication. Do you think therefore that there is a need for an analogous process to permit access to digital information, as the fair dealing exemption permits in print information?

11) What do you think such an analogy might look like?

12) How do you think this might work?

13) Can you refer me to any other informed person?
APPENDIX H

Rights holders (Publishers and vendors)

SURVEY ON LICENCES FOR DIGITAL INFORMATION

Before the advent of digital information, libraries collected print information and the ordinary law of property and the copyright laws governed this. With the advent of digitization, libraries can offer information in other formats, including access to digital information, which is governed by licensing agreements. The purpose of this interview is to explore whether rights holders are aware of the real and perceived problems created by this massive behavioural change.

Please note that the information you will give in the interview will be used for the partial completion of a PhD degree, and will not be attributable but regarded as confidential.

The information obtained from these interviews will be useful to rights holders of digital information in understanding the exact nature of the legal system and the degree to which a convention of "fair dealing" should be enshrined in it. So, please respond to the best of your knowledge and ability.

Thank you in advance for devoting your valuable time in responding to the interview.
Questions

1) What do you look for when preparing or signing a licensing agreement with either individual libraries or consortia?

2) In print media there is the fair dealing exemption. Is there any analogy to the fair dealing exemption in your licensing agreement? If "yes", which? If "no", why not?

3) Who in your organization is responsible for information about licences and copyright law? What kind of information does he/she provide and to whom? How detailed is the information?

4) What precautions does your organization take to prevent unauthorized use of information?

5) Does your organization attempt to detect licence violation? If "yes", how? If "no", why not?

6) In your view, are licensing agreements in place to protect copyright? If "yes", why don't you just rely on copyright? If "no", why do all your licensing agreements carry the "©" i.e. copyright emblem and not just the licensing terms and conditions?

7) In your view, do licensing agreements limit or do they not limit the use of or access to information?

8) Have you ever had disagreements with librarians or consortia on clause/s in your licensing agreements?

9) If "yes" what clause/s and how was it resolved?

10) What is your opinion of the "Open Access Initiatives"? Are these initiatives a threat to your business? If "yes", how? If "no", why not?

11) Do you believe technological measures as well as licensing agreements are needed to protect your rights in the digital domain?

12) To what extent do you follow developments in Digital Rights Management Systems (DRMS)? Have they been able to curb unauthorized use of digital information? If "yes", how? If "no", why not?

13) What do you believe will best protect your digital information? Is it the licensing agreement, technological measures, copyright law, or some combination of the above?
14) Do you see a future for copyright?

15) Is there a contradiction in invoking copyright when licensing agreements have been violated?

16) Licensing agreements restrict access to authorized users only. Are such users likely to violate the agreements in some way/s? If “yes”, how? If “no”, why not?

17) Copyright law has the fair dealing exemption that permits users of print information to copy such information without being accused of copyright infringement. Do you think there is a need for an analogous process to permit access to digital information, as the fair dealing exemption permits in print information?

18) What do you think such an analogy might be? And how do you think this might work?