COPYRIGHT: REBALANCING THE PUBLIC AND PRIVATE INTERESTS IN THE AREAS OF EDUCATION AND RESEARCH

by
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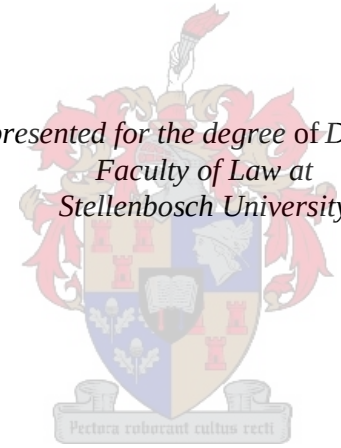

Dissertation presented for the degree of *Doctor of Law in the Faculty of Law at Stellenbosch University*

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Declaration

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December 2013

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Table of Abbreviations

ACTA: Anti-counterfeiting Trade Agreement, a multinational agreement that creates international standards for the enforcement of intellectual property rights.....74

ALI: American Law Institute, an institute established to clarify and simplify US common law, as well as make law adaptable to changing social needs.....104

ASCAP: American Society of Composers, Authors and Publishers, a non-profit organization that licenses and promotes its members and foreign affiliates' music copyrights.....124

CAVCA: China Audio-Video Copyright Association, a Chinese collective society approved by the National Copyright Administration that manages copyright and neighboring rights in video and audio works.....205

CC: Creative Commons Licenses, a series of public copyright licenses giving authors a simple and standardized way to grant copyright permissions for their works with "some rights reserved".....177

CCC: Copyright Clearance Center, a non-profit organization providing collective copyright licensing services for corporate and academic users of copyrighted materials.....203

CCMR: Collective Copyright Management Regulations of 2004, an administrative regulation implementing a provision of the PRC Copyright Law of 1990 that mandates the establishment of collective copyright management organizations.....203

CDPA: Copyright, Designs, and Patents Act 1988, a UK copyright act.....41

CIPR: Commission on Intellectual Property Rights, established by the British government in 2001 to investigate how intellectual property regimes might work better for the developing world within the international framework of intellectual property law.....167

CISAC: International Confederation of Societies of Authors and Composers, a non-government non-profit organization that promotes the protection of copyrights of authors and composers worldwide.....174

CLA: Copyright Licensing Agency, a UK collective copyright licensing body that licenses organizations to copy and re-use extracts from print and digital publications on behalf of the copyright owners.....173

CMO: Collective Management Organization, an organization that collectively licenses copyright and neighboring rights on behalf of right owners.....202

CPA: Consumer Protection Act of 2008, an act setting out the minimum requirements to ensure adequate consumer protection in South Africa.....153

CPC: Communist Party of China.....181

CSS: Content Scramble System, an encryption system used on almost all DVDs to prevent piracy and to enforce region-based viewing restrictions.....93

CTEA: Copyright Term Extension Act of 1998, a US act that extended copyright terms by 20 years.....33

CWWCS: China Written Works Copyright Society, a Chinese collective society that licenses written works to both individual and institutional users.....203

DALRO: Dramatic, Artistic and Literary Rights Organization, a South African collective copyright society.....174

DMCA: Digital Millennium Copyright Act of 1998. The Act implements the WIPO Internet Treaties and criminalizes certain activities circumventing measures used to protect copyrighted works.....34

DRM: Digital Rights Management, technologies used to protect the copyrights of digital content circulated via the digital media by ensuring secure distribution and/or preventing illegal data distribution.....5

DTI: Department of Trade and Industry.....156

EC: European Community.....35

Electronic Communications and Transactions Act of 2002, an act governing electronic commerce that deals with encryption, security, and cyber crime in South Africa.....158

EEA: European Economic Area.....35

EEC: European Economic Community.....34

EFF: Electronic Frontier Foundation, a US based non-profit organization fighting for citizens' digital rights.....16

ERA: Educational Recording Agency, a UK collective society that licenses copyrighted works for the educational sector when its members broadcast for non-commercial educational purposes.....173

EU: European Union.....9

FTA: Free Trade Agreement.....84

ICP: Internet content provider, whose major business is to provide materials to Internet users.....215

ICT: Information and Communication Technology, an integration of computers and other telecommunication equipments used to store, retrieve, transmit and manipulate data.....1

IFLA: International Federation of Library Associations and Institutions, a leading international body representing the interests of library and information services and their users.....16

IFPI: International Federation of the Phonographic Industries, the organization representing the recording industry worldwide.....224

IFRRO: International Federation of Reproduction Rights Organizations, the main international network of collective management organizations and creators' and publishers' associations of written works and images.....174

ISP: Internet services provider, a company or organization that provides services to users to access, store, transmit and manipulate information on the Internet.....8

KEWL: Knowledge Environment for Web-based Learning, an online learning management system tool available under a GNU license.....176

MCA: Ministry of Civil Affairs, a ministry under the jurisdiction of the PRC State Council responsible for social and administrative affairs.....204

MCSC: Music Copyright Society of China, a collective society licensing music works to both Chinese and foreign users.....208

NCA: National Copyright Administration, a state administrative agency responsible for copyright affairs in mainland China.....203

NCA: National Copyright Agency, China's largest institution established by the PRC State Council that specializes in general copyright and copyright-related public services.....204

NCC: National Consumer Commission, a state organ with jurisdiction throughout the Republic of South Africa that is responsible for carrying out the functions assigned to it by the Consumer Protection Act of 2008.....154

NCCUSL: National Conference for Commissioners on Uniform State Laws, a US non-profit institution that discusses which areas of law should be unified among the states and drafts uniform acts and model legislation.....103

NORM: National Organization for Reproduction Rights in Music, an association of Southern African music publishers and composers that issues collective licenses of music works.....174

NPC: PRC National People's Congress.....185

OCILLA: Online Copyright Infringement Liability Limitation Act, a US federal law and a part of the DMCA that provides a safe harbor for online service providers by promptly deleting content if it is alleged to be infringing.....127

OSS: Open Source Software, computer software with its source code having an open-source license making it freely available.....239

PASA: Publishers' Association of South Africa, the largest publishing body in South Africa.....167

PICC: Print Industries Cluster Council, now the South African Book Development Council, the representative body of the South African book sector.....137

PRC: People's Republic of China.....9

RAM: Random access memory, a form of computer data storage that saves ephemeral copies for processing and transmits information files.....71

RRO: Reproduction Rights Organization, a type of collective copyright society.....174

SAMRO: Southern African Music Rights Organization, a collective society for music works.....174

SAUVCA: South African Universities Vice-chancellors Association, now the Higher Education South Africa, a statutory representative organization that made recommendations to the Minister and Director-General of Education on matters it deemed important to universities.....147

TEACH ACT: Technology, Education, and Copyright Harmonization Act of 2002, clarifies what uses are permissible for distance education and sets requirements for university staff and students to follow in order to comply with the Act.....127

TRIPS Agreement: Trade-Related Aspects of Intellectual Property Rights Agreement, a multilateral agreement administered by the World Trade Organization that establishes minimum standards to protect intellectual property.....7

UBTV: University of Broadcasting and Television, the defendant in a famous Chinese copyright case in the 1980s.....191

UCC: Uniform Commercial Code, one of a number of uniform acts that harmonize the law of sales and other commercial transactions in all 50 states within the US.....103

UCC: Universal Copyright Convention, an alternative to the Berne Convention for states wishing to maintain some degree of multilateral copyright protection which is at odds with aspects of the Berne Convention.....36

UCITA: Uniform Computer Information Transaction Act, an uniform act drafted by NCCUSL that focuses on adapting current commercial trade laws to the modern digital era.....103

UK: United Kingdom.....2

UN: United Nations.....37

US: United States of America.....9

URL: Uniform resource locator, the unique address for a file accessible on the Internet.....118

WCT: WIPO Copyright Treaty, an international treaty providing additional protection for copyright as information technology advances.....8

WIPO: World Intellectual Property Organization, a UN agency dedicated to intellectual property protection at the international level.....8

WPPT: WIPO Performances and Phonograms Treaty, an international treaty specifically protects the rights of performers and producers of phonograms....8

WTO: World Trade Organization, the only global international organization dealing with the rules of trade between nations.....8

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Chapter One

Introduction

1 1 Background

Information and communication technology (ICT) and intellectual property law are increasingly interwoven as globalization advances. ICT enables the digital media to transfer and share knowledge. It provides for an unprecedented ability to disseminate information and knowledge inexpensively and ubiquitously on an international scale. This development provides very special benefits for developing countries.

Education and research has long been recognized as being of fundamental importance for sustainable development in any country, and even more so in countries such as South Africa and China. These two developing countries need to develop their education, research capacity and infrastructure in order to benefit from globalization. However, the cost of education and research in South Africa is regarded as prohibitive.[1] A significant portion of that cost can be attributed to the cost of educational and research materials. Producing paper versions of these materials is fairly expensive since it requires physical reproduction and distribution. Electronic educational materials seem to be an obvious part of the answer to South Africa's educational needs. However, they are not necessarily proving to be significantly less expensive than their paper based counterparts.

In order to promote education and research in a digital environment, copyright law must ensure that appropriate legal structures are put in place in order to gain access to education materials. In particular, copyright law needs to strike a balance between the interests of the copyright holders and the public. However, this balance is disturbed by legislative, technical and commercial developments in the modern era. The increasing use of technology-based protective measures and electronic licensing systems pose a serious challenge for access and its potential benefits. The limitations and exceptions for a variety of exclusive copyrights have also precipitated wide debate. Moreover, since national laws grant protection for copyright at different levels, to harmonize the subject matter and the exclusive rights within the framework of copyright law is crucial for the functioning of regional and global markets.[2]

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[1] E Gray & M Seeber *PICC Report on Intellectual Property Rights in the Print Industries Sector* (Cape Town: PICC, May 2004) 45, report commissioned by the Department of Arts and Culture, South Africa, through the Print Industries Cluster Council (PICC).

[2] G Westkamp “Convergence of Intellectual Property Rights and the Establishment of "Hybrid" Protection under TRIPs” in F McMillan (ed) *New Directions in Copyright Law* vol 1 (Cheltenham, UK: Edward Elgar, 2005) 108 111. For an

1 2 The research topic and its significance

The question posed by this thesis is whether copyright law should be reformed to fulfill its fundamental purpose of serving the public interest in the modern digital era? In dealing with this question, a related question is whether there is a need for substantial education and research in the developing world? This study's underlying assumption is that it is in the public interest to use copyright limitations and exceptions to reduce education and research costs in order to encourage societal creativity and learning. This is particularly important for less developed countries so they are better able to promote education for sustainable development. Thus, it is necessary for educational institutions, libraries,[3] researchers and students to have better access to copyrighted materials, but at the same time copyright owners need to have their interests protected.

To place the thesis research in a broader political context, two countries, South Africa and People's Republic of China (PRC), are selected as representatives of the developing countries for a comparative study. South Africa has the largest economy on the African continent while China is the leading economy in Asia. Both countries have a tradition of a communitarian culture in which the sharing of knowledge is regarded as paramount to the proprietary rights associated with literature and the arts. Thus, the significance of the communitarian culture is that it can substantiate and help to support alternative values to the current proprietary copyright system. The two countries' legal systems are very different for copyright law. South Africa inherited the United Kingdom (UK) copyright law tradition with its fair dealing provisions, while China modeled its legal system largely on the continental civil law system. Hence, the two countries are ideal for analyzing how developing countries of different legal traditions and with transplanted law features can develop copyright systems that will benefit their national economy. Finally, both countries with a relatively advanced information network infrastructure are facing the challenges of bringing their domestic law into the digital era. An examination of the legal reforms in both countries can provide other developing countries with useful guidance as to how to reform their copyright laws in order to

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Asia discussion, see C Antons "Harmonisation and Selective Adaptation as Intellectual Property Policies in Asia" in C Antons, M Blakeney & C Heath (eds) *Intellectual Property Harmonisation within ASEAN and APEC* (The Hague, Netherlands: Kluwer Law International, 2004) 109 109-121. For comments on the internal market of the European Union, see T Lüder "The Next Ten Years in EU Copyright: Making Markets Work" (2007-2008) 18 *Fordham Intellual Property Media & Entertainment Law Journal* 1 1-60, describes current copyright harmonization in the EU and calls for a further harmonization on various rights to facilitate the free flow of digital products within the internal market of the EU.

[3] Libraries now transcend their traditional practice of collecting paper copies of books and journals and have become providers of materials in alternative formats, such as audio books and digitized materials.

integrate them into the international legal framework.

This study primarily focuses on copyright limitations and exceptions, but within the context of the harmonization of copyright law in a digital era. Clearly, if copyright holders' interests are harmed it could easily lead to a reduction in the production and availability of quality learning materials for the public. Thus, copyright should ensure that copyright owners' proprietary rights are balanced with the public's reasonable access to such materials. However, since copyright law subtly favors copyright holders, the limitations and exceptions on copyright need to be reassessed. With countries having differing economic levels and diverse legal systems and traditions, this thesis argues there should be a broader range of limitations and exceptions. It presents a formula that has been developed for copyright exceptions that accommodates legal flexibility and creates certainty to ensure legal enforceability.

Within the framework of the copyright law system, the study considers other mechanisms that can be used to broaden access to information and knowledge. This includes establishing institutions that collectively manage a bundle of copyrights for individual right holders and open licenses which allow users more freedom than what copyright law prescribes.

1 3 Research purpose

The purpose of the research is to investigate the current state of copyright within both national and international legislative frameworks. It also seeks to determine whether such legal frameworks adequately address developing countries' educational and research requirements in light of the opportunities and restrictions posed by electronic communication media.

1 3 1 Justifications of copyright

Intellectual creativity has created countless literary and artistic works throughout history without copyright protection.[4] The concept of copyright originated in the West where the individual

[4] For example, in West Africa, Timbuktu was the most celebrated centre of learning that contributed to Islamic and world civilization. By the 14th century, important books were written and copied in Timbuktu, establishing the city as the centre of a significant written tradition , see O Rashid *Legacy of Timbuktu: Wonders of the Written Word Exhibit Storyline Walkthrough International Museum of Muslim Cultures* < http://archive.is/Eq7q0> (accessed 27-10-2013). In al-Andalus, consisting of the parts of the Iberian Peninsula governed by Arab and African Muslims, between the 8th and the 15th centuries, many tribes, religions and races co-existed with each contributing to the intellectual prosperity of Andalusia. Literacy in Islamic Iberia was far more widespread than any other country of the West. See CW Previté-

ownership of a property right was central. In civil law, the authorship of a work and the moral rights of an author are very important, whereas in common law copyright has great economic significance.[5] Nevertheless, copyright has never been a universal doctrine. For example, copyright was an alien concept in Asia where among intellectuals the enhanced reputation of the author who created an intellectual work outweighed its economic benefit.[6]

Copyright is composed of a bundle of entitlements which include both moral and economic rights. Moral rights, for example, the right of attribution and the right to the integrity of the work, are normally not assignable.[7] Limitations and exceptions affect authors' exclusive rights and affect their incomes. Therefore, justifications for copyright with economic concerns are found in the intellectual and academic works of western jurists and sociologists. More recently, economists also have begun to play a role in interpreting copyright law. The classic justification for copyright from a jurisprudential perspective is John Locke's labour theory which states a person who owns his own body, owns what he creates by his labour.[8] Copyright lawyers thus have deduced that copyright is a property right based on the Lockean property theory. Another justification is that copyright is a just reward and a stimulus for creativity. It is argued by a number of intellectuals that most authors would not pursue creative activities until their production costs are covered.[9] However, for the most

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Orton *The Shorter Cambridge Medieval History* vol 1 (Cambridge: Cambridge Univ Pr, 1952). In Europe, the Renaissance that began in Italy in the Late Middle Ages has had wide influence on literature, philosophy, art, politics, science, religion, and other aspects of intellectual enquiry. This is attributed to the rediscovery of the Roman and Greek classical works, see above 616-643.

[5] C Antons Legal Culture" and Its Impact on Regional Harmonisation" in C Antons, M Blakeney & C Heath (eds) *Intellectual Property Harmonisation within ASEAN and APEC* (Neitherlands: Kluwer Law Int'l, 2004) 29 31.

[6] A Gutterman & R Brown (eds) *Intellectual Property Law of East Asia* (Hong Kong: Sweet & Maxwell, 1997) 19; Antons "Legal Culture" in *Intellectual Property Harmonisation* 32-33. For example, in ancient China intellectuals enjoyed the reputation by creating an intellectual work. W Alford *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford, Cal: Stanford Univ Pr, 1995); Antons "Legal Culture" in *Intellectual Property Harmonisation* 32.

[7] Some jurisdictions allow for the waiver of moral rights. In the United States, the Visual Artists Rights Act of 1990 VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128 recognizes moral rights, but they only apply to works of visual art.

[8] J Locke "The Second Treatise of Civil Government" in *Two Treatises of Government* (UK: Awnsham Churchill, 1690) s 27.

[9] See GS Lunney Jr "Reexamining Copyright's Incentive-Access Paradigm" (1996) 49(3) *Vanderbilt Law Review* 483 485;NW Netanel "Copyright and a Democratic Civil Society" (1996) 106(2) *Yale Law Journal* 283 285 & 292 at 292 the author argues that: "This free rider problem ... would greatly impair author and publisher ability to recover their fixed production costs."; WM Landes & RA Posner "An Economic Analysis of Copyright Law" (1989) 18(2) *Journal of Legal Studies* 325 328 the authors here argue that when the market value of a creative work is reduced to the marginal cost of copying that work, the author and publisher will be unable to recover their costs in creating the work;

part, academic writers usually live on salaries rather than royalties. In turn, it is the derivative copyright holder and the copyright industry that favors the just reward theory. Bentham, the utilitarian, argued law was not established to foster superior morality, rather it was made to achieve optimal social welfare.[10] With this theory, limitations and exceptions are justified and lawmakers use them to balance the interests between copyright proprietors and the public. Contemporary economists tend to view copyright as a market tool to allocate investments and products.[11] However, none of the above theories address an unbalanced copyright system satisfactorily for all parties. More research is needed to explore this issue.

This thesis argues the interests of the education and research sectors are in themselves a public interest the copyright system should serve. Several philosophical schools with law and sociological points of view back this argument. For instance, Locke argued that if a resource is scarce, other societal members should have the right to ask for a fair share of it. Rawls' theory of distributive justice[12] and Drahos' discourse on informational justice,[13] with their concerns for human rights serve as pivotal elements in supporting a public interest argument.[14] Alternative African and Asian values are silent on evaluating copyright, but these values are explored alongside the dominant Western paradigm. Different cultures suggest copyright serves the public interest to promote education and research as well as to encourage the sharing of knowledge.

1 3 2 New challenges to the copyright system

Digital technology was seen as a serious threat to balancing interests since it presents unequal possibilities for the reproduction and distribution of copyright works with little if any reduction in quality. Copyright proprietors lobbied extensively for legislative measures to protect their interests against a possible digital onslaught. However, it is apparent the existing protection measures could lead to virtually limitless protection of rights holders' interests. They benefit from layer after layer of protection that includes copyright protection, technological protection, anti-circumvention

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WW Fisher III "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1659 1661 & 1700.

[10] J Bentham *Theory of Legislation* 2d rev reprint (MH, India: NM Tripathi, 1986) 49-52.

[11] Some leading articles in this field are RA Posner "Utilitarianism, Economics, and Legal Theory" (1979) 8 *Journal of Legal Studies* 103; Lunney (1996) *Vand L Rev* 483; H Demsetz "Information and Efficiency: Another Viewpoint" (1969) 12(1) *Journal of Law & Economics* 1 1.

[12] J Rawls *A Theory of Justice* (Cambridge: Harvard Univ Pr, 1971) 10-16.

[13] P Drahos *A Philosophy of Intellectual Property* (Dartmouth: Dartmouth Pub Co, 1996) 177.

[14] For example, the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4-11-1950) has affirmed the right to freedom of expression. This has implications for the defense of fair dealing for such acts as news reporting, criticism and review. See Art 10.

protection to protect the technological measures as well as contract law. However, each and every one of these limits users' ability to access copyright materials. Even worse, mechanisms to ensure continued access to copyright materials for legitimate purposes are neglected.

The cumulative layers of protection that right holders enjoy are, firstly, technological measures such as Digital Rights Management (DRM) systems limiting or preventing users' legitimate access to information. Legalizing "anti-circumvention" provisions grants additional protection to copyright holders by allowing them to employ access control measures to protect materials and to prohibit using devices to circumvent control measures, even if for legitimate purposes.

Secondly, increasingly contract law is used by way of a license between copyright owners and users to override copyright exceptions allowing greater usage of copyrighted materials.[15] These contractual limitations are possible because copyright law does not mandatorily stipulate the contents of a licensing contract. Licensors are generally not obliged by law to preserve the public interest in their contractual agreements. As increasingly more digital information is delivered by license, public policy considerations such as fair dealing for research and private study will likely be ineffective. Moreover, distributing information by license instead of transferring copyright ownership eschews an important copyright limitation that is found in many jurisdictions: the exhaustion of the right doctrine in Europe and the first sale doctrine in the US.[16] In contrast to the right of access allowed by the sale of a paper work, licensing allows users to access information only for a limited period or on a one time "pay-per-view" basis. Users are required to retain only that content and only make it available to others after the license period expires.

Thirdly, there is a notable trend internationally to increase the protection granted by copyright by extending the term and expanding the scope of protection with no increase in the limitations and exceptions to the copyright. As a recent example, a 20 year extension of copyright protection is stipulated in a number of international copyright instruments and has been enacted by many developed countries.[17] The ostensible reason for such an extension is undoubtedly because the

[15] For example, the restrictions can be a restriction on users' printing and downloading or emailing copies of the materials; restrictions on libraries' inter-library loan services; restrictions on libraries' copying the work for preservation purpose.

[16] The First Sale Doctrine is an exception to copyright that is codified in § 109 of the Copyright Act of 1976 17 U.S.C. §§ 101 et seq.. The Doctrine allows the purchaser to transfer a legally acquired copy of a protected work without permission once it has been obtained. That means the distribution rights of a copyright owner are terminated for that copy once the copy is sold.

[17] See Art 9 of the World Intellectual Property Organization Copyright Treaty (Geneva, 20-12-1996) *as amended by* Agreed statement concerning Article 1(4) of the WCT, Agreed statement concerning Article 10 of the WCT, Agreed

copyright has a growing international dimension. Many in the world's developing and poorer nations are being disadvantaged and have to continue paying royalties to access materials within countries the copyright holders are neither from or have never been. This postpones the flow of information into the public domain and restricts its use by the public. Such an extension with a retroactive effect brings little or no benefit to the public, but is purely for the benefit of right holders. It is arguable that if copyright had been national in scope such extensions would never have occurred. Very simply, the public interest in one country cannot be served by an extension that benefits merely a few right holders rather than the country's entire population.

Finally, developing nations have not made effective use of the flexibilities created by international law to legislate copyright limitations and exceptions. At the international level, the Berne three-step test[18] operates to constrain some copyright limitations and exceptions which individual nations might enact. However, governments of the Union members have little used the potential granted by the Berne Convention and failed to utilize the options provided to have limitations and exceptions limit copyright.[19] The extent of this underutilisation is of particular concern in the area of teaching and research in the developing nations. At the national level, lawmakers tend to favor restrictive exemptions for education and research. In addition, they underutilize the Berne Convention's special provisions for developing countries such as compulsory licensing for translating a work from a foreign language to a local language. While there have been a variety of problems in a number of states and regions in applying limitations and exceptions, a common problem is that the public interest defense is disproportionately weak and should be reconstructed.

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statement concerning Article 6 of the WCT & Agreed statement concerning Article 8 of the WCT; Art 17 of the World Intellectual Property Organization Performances and Phonograms Treaty (Geneva, 20-12-1996); European Parliament *Directive on harmonizing the term of protection of copyright and certain related rights* (29-10-1993) Directive 93/98/EEC. In the US, the Copyright Term Extension Act of 1998 (112 Stat 2827; Public Law 105-298) extended the terms from the death of the author plus 50 years or 75 years for a work of corporate authorship under Copyright Act of 1976 to death of the author plus 70 years and 95 years respectively; in the UK, the amendment of Copyright, Designs and Patents Act of 1988 (Ch 48) which was meant to comply with the Directive on Harmonizing Term of Protection extended the term for musical works from 50 years to 70 years beyond the author's death.

[18] The Berne three-step test imposes restrictions on exclusive copyrights under national copyright laws. Art 9 (2) of the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne, 9-9-1886) *as amended in* 1908, 1928, 1948, 1967, 1971 & 1979 provides that contracting parties of the Convention should permit reproduction of copyrighted works in certain special cases as long as the reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. The three-step clause first applied to reproduction right under the Berne Convention and then has been extended and adopted by many international and regional treaties such as the TRIPS Agreement and the EU Information Society Directive.

[19] C Geiger, J Griffiths & RM Hilty "Towards a Balanced Interpretation of the 'Three-step Test' in Copyright Law" (2008) 2008 *European Intellectual Property Review* 489 493.

1 3 3 Copyright law integration

Establishing copyright legal infrastructures occur at the international, the regional and the national levels. Internationally, the 1994 Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement)[20] is a watershed in the intellectual property rights protection field. It incorporates aspects of the Berne Convention and aspects of the Paris Convention[21] which formed the basis of the World Intellectual Property Organization (WIPO) and links intellectual property rights to a mechanism that can effectively settle disputes at the World Trade Organization (WTO). The WIPO Copyright Treaty (WCT)[22] and the WIPO Performances and Phonograms Treaty (WPPT)[23] administrated by WIPO provide a legal framework at the international level to solve the main problems caused by digital technology. In Europe there are two important directives.[24] They are the E-Commerce Directive[25] that deals with the liability of such intermediaries as Internet

[20]Trade-Related Aspects of Intellectual Property Rights Agreement (Uruguay, 1-1-1996) negotiated in the 1986-1994 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time.

[21] Berne Convention for the Protection of Literary and Artistic Works of 1886. Copyright entered the international arena with the Berne Convention. The Paris Convention for the Protection of Industrial Property (Paris, 20-3-1883), came into force in 1884 and was designed to help people in one country obtain protection in other countries for their intellectual creations in the form of industrial property rights, known as patents, trademarks and industrial designs.

[22] The WIPO Copyright Treaty was adopted by the World Intellectual Property Organization (WIPO) in 1996. It provided additional protections for copyright deemed necessary in the modern information era.

[23] The WIPO Performances and Phonograms Treaty was adopted 20 December 1996.

[24] Within the European Union, several directives relate to copyright and related rights in the digital era. They are the European Parliament *Directive on the legal protection of computer programs* (14-5-1991) Directive 91/250/EEC, granting them protection; the European Parliament *Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property* (19-11-1992) Directive 92/100/EEC 4, obliging Member States to introduce a rental and lending right for authors, performers, phonogram producers, and film producers and a series of rights related to copyright for performers, phonogram producers, film producers, and broadcasting organizations; the European Parliament *Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission* (27-9-1993) Directive 93/83/EEC , that introduces a broadcasting right for satellite transmissions and a clearance mechanism for cable retransmissions; the European Parliament *Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission* (27-9-1993) Directive 93/83/EEC ; the European Parliament *Directive on the legal protection of databases* (11-3-1993) Council Directive 96/9/EC that grants legal protection to databases; and the European Parliament *Directive on the resale right for the benefit of the author of an original work of art* (27-09-2001) Directive 2001/84/EC that introduces the artist's resale right.

[25] European Parliament *Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market* (08-06-2000) Directive 2000/31/EC . The purpose of this Directive is to improve the legal security of electronic commerce in order to increase the confidence of Internet users. It establishes a stable legal framework by making information society services subject to internal market principles and by introducing a limited

services provider (ISP) as well as the Information Society Directive[26] that implements the WIPO Internet Treaties.[27]

At the national level, civil law and common law systems limit copyright in very different ways. For instance, the United States employs an open system with a fair use tenet that provides judiciary guidance as to whether usage is fair case-by-case. European nations, on the other hand, stipulate limitations and exceptions exhaustively in their copyright legislation. There is a trend emerging that nations attempt to reconcile their diverse legal traditions by creating a three-step test as an international copyright rule. A number of national legislative experiences also show it is possible for late blooming countries to have a hybrid copyright law that combines features of different legal systems.

South Africa, a member of the WTO, reformed its copyright law to conform to the TRIPS Agreement.[28] China also modified its copyright law in order to follow the WTO and issued a number of laws and regulations to implement the WIPO Internet Treaties it acceded to in 2007. However, in China, these efforts are seen as less successful in implementing effective legal enforcement mechanisms to enforce laws.[29] Many argue that enforcement failure was not purely a legal problem but resulted from social economic discrepancies. Christopher May writes:

> "The final achievement of this 'one-size-fits-all' settlement has revealed the central problem for the globalisation of IPRs. Its effects already suggest that, without a well-developed global society, the notion of a global regime for IPRs is difficult (if not impossible) to justify."[30]

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number of harmonized measures.

[26] European Parliament *Directive on the harmonization of certain aspects of copyright and related rights in the information society* (22-5-2001) Directive 2001/29/EC. It adapts legislation on copyright and related rights to technological developments and particularly to the information society. The objective is to transpose at the community level the main international obligations derived from the WCT and the WPPT.

[27] The WIPO Internet Treaties consist of two treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both adopted in 1996 in Geneva and entered into force in 2002.

[28] For more details, see *Executive Summary*.

[29] L Luo "Legal Protection of Technological Measures — A Comparative Study of US, European and Chinese Anti-Circumvention Rules" (2005) *Global Law Working Paper 08/05*; EIPR 100 100-105; HX Zhao "Copyright Protection to Improve" *China Daily* (16-02-2006) http://www.chinadaily.com.cn/bizchina/2006-02/16/content_535146.htm (accessed 29-10-2013).

[30] C May "Why IPRs are a Global Political Issue" (2003) 25(1) *European Intellectual Property Review* 1 1-5.

1 4 Research methodologies

This study re-evaluates the role and the position of public interest relating to education and research in developing countries. The study revisits the philosophies related to copyright and examines copyright limitations and exceptions, particularly those applicable to education and research. These proposals suggest possible exemptions to copyright infringement in teaching and research.

When evaluating the current copyright laws in South Africa and China, this study engages in a comparative approach that compares copyright law in different jurisdictions in order to gain a comprehensive understanding of an open and a closed copyright law system. Besides the comparative law perspective, an interdisciplinary approach of law and economics is employed to observe and assess how copyright law boosts their national economies and benefits the education and research sectors. Last but not least, the study engages in case study to investigate how EMI releases its music products through a new cooperative model with Internet Service Providers (ISPs), and endeavors to suggest a new method of releasing research and educational materials.

From a comparative point of view, the laws of the United States of America (US), the United Kingdom, the European Union (EU), Australia, South Africa and People's Republic of China (PRC) are to be investigated, and comparisons between different legal systems are to be made where appropriate. These jurisdictions have been selected primarily on the basis of having different legal traditions and of having different legal systems. For copyright law, South Africa inherited the British copyright law tradition, while China modeled its legal system largely on the continental civil law system. Thus, the examination of the UK and EU laws has particular relevance to the study of South African and Chinese copyright laws. The development of copyright law in relatively advanced legal systems can provide South Africa and China with useful lessons when reforming their own copyright laws. Moreover, countries sharing the Roman law tradition usually adopt a closed system that stipulates limitations and exceptions, while the US employs an open-ended fair use doctrine to judge the use of a work. A comparison of the two systems leads one to a third approach, represented by the Australian copyright legislation, which this thesis suggests be considered for future developments of copyright legislation on limitations and exceptions in countries like South Africa and China.

With a strong link between copyright law and economics, the theory of law and economics and pertinent economic concepts assist in assessing current copyright law. In the foreseeable future economics will have an even greater impact on copyright.[31] Already a number of scholars have

[31] SP Samuelson "Should Economics Play a Role in Copyright Law and Policy?" in L Takeyama, W Gordon, & R

applied economics theories to understand and interpret copyright law and relevant policy.[32] In a number of economic theories the cost and benefit theorem is extremely useful in evaluating copyright laws. According to Ronald Coase,[33] transaction-cost theory implies that transaction cost determines whether a right is worth protecting or not. It relates to copyright in many ways. For example, by exempting the private use of a work reduces the cost of monitoring trivial uses of copyrighted works as well as enforcement. If the total cost, including the administrative and contractual costs for copyright protection are higher than the cost of the protection, then this part of copyright must be reduced. This allows more people access while at the same time it avoids transaction cost. In this way, the copyright benefit can be maximized. The theory of price differentiation, which means a product provider charges different prices to different social and geographic sectors in a market for the same product, is to be referred when analyzing certain copyright policies. Nevertheless, economics theories only play a limited role in this research, and then just as tools assisting policy assessment.

The case study approach provides the thesis with a solid grounding when proposing suggestions for copyright reform. Statistics are employed to ensure research suggestions are workable. The author has carried out a case study to seek possible alternatives to the all-rights-reserved copyright model. For example, a study shows that music corporations can profit by releasing music for free downloading by sharing their revenue generated by advertisements.[34]

1 5 Structural outline of the study

The thesis is organized into eight chapters. The first chapter is a foundation that lays out the research topic, the theoretical basis of the study and the research methodology. It also examines a number of challenges to the copyright system in this digital era. Following the introduction, the

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Towse (eds) *Developments in the Economics of Copyright: Research and Analysis* (Cheltenham, UK: Edward Elgar, 2005) 1 1-22.

[32] See, eg, WM Landes & RA Posner *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard Univ Pr, 2003); Y Benkler "Intellectual Property and the Organization of Information Production" (2002) 22(1) *International Review of Law and Economics* 81 81-107; Lunney (1996) *Vand L Rev* 483-485; MA Lemley "The Economics of Improvement in Intellectual Property Law" (1996-1997) 75 *Texas Law Review* 989 989-1084; WJ Gordon "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82(8) *Columbia Law Review* 1600 1600-1657.

[33] RH Coase "The Problem of Social Cost" (1960) 3 *Journal of Law & Economics* 1 1-44.

[34] Business Wire "EMI Music Launches DRM-free Superior Sound Quality Downloads across Its Entire Digital Repertoire" (02-04-2007) *Mobility Tech Zone* http://www.mobilitytechzone.com/news/2007/04/02/2457667.htm (accessed 27-10-2013)

second chapter scrutinizes philosophies related to copyright and examines key concepts and fundamental doctrines pertaining to copyright such as the public interest concept. This chapter also reviews the evolution of copyright law at the national and international levels. The chapter theme is that for the public good it is necessary to preserve limitations and exceptions to copyright so this dynamic culture will continue to flourish. Moreover, national legislators have to devise a copyright law that will accommodate their own social and economic needs.

The third chapter examines provisions dealing with copyright limitations and exceptions in a number of countries having copyright legislation as well as international copyright treaties. This chapter demonstrates there are two existing approaches, namely an "open" system and a "closed" system that have been used by different countries to define the contours of limitations and exceptions. The chapter shows a third way is feasible, an approach combining the features of the two systems in order to give copyright exemptions flexibility and certainty. This approach all comes together in the Australian Copyright Act.[35] Late blooming countries can learn from the Australian legislative experience and develop their copyright exemptions with more flexibility while ensuring they conform to basic international protective standards.

Chapter Four takes a look at the upcoming technological revolution and its possible impact on copyright law, particularly in the developed world with its more advanced copyright law. There is an examination of anti-circumvention laws in different jurisdictions. It then goes on to examine how legislators and the judiciary deal with contractual agreements used by copyright holders to exclude or restrict copyright limitations and exceptions. It also scrutinizes various copyright issues that have arisen in a digital environment, such as the right of temporary reproduction, the information network communication right and ISPs' liability. The chapter pays special attention as to how teachers, students, librarians and researcher are affected by digital technology and provides suggestions to make copyright law favor education and research in an electronic environment. Finally, someplace in the middle between the tight protection of copyright and the eradication of the copyright system, this chapter proposes a new model for copyright transaction that rewards copyright proprietors and encourages cultural prosperity.

Chapter Five deals with South African copyright law and the following two chapters focus on Chinese copyright law. The two countries' copyright laws are evaluated first with a brief review of each one's national tradition of copyright law and the status of education as well as research.

[35] Copyright Act of 1968 Act No. 63 of 1968 (1968) *amended by* Copyright Amendment Act No.158 of 2006 *(*2006) (Australia)

Following is then a thorough examination of the legislation and relevant case law on copyright limitations and exceptions with particular reference to education and research. The anti-circumvention rules, the laws regulating ISPs' liability in copyright infringement and contractual licenses restricting copyright exemptions are also examined. At last, there is an analysis of the *status quo* and the future outlook of collective copyright management, followed by an observation on the use of open licenses for copyrighted materials. Based on the above comprehensive examination, suggestions are provided for South African and Chinese lawmakers when they revamp copyright law so that their national need for quality education and research can be better accommodated.

The last chapter concludes that South Africa and China need to develop a more balanced and structured copyright law to promote education and research which are basic components of the public interest. Moreover, guidelines are provided for other developing countries to consider when they develop their copyright laws that are based on China's and South Africa's legislative experiences.

Chapter Two

An Overview of Copyright: Theories and Practice

This chapter provides a theoretical and historical background about copyright and examines relevant key concepts such as information and knowledge, as well as the public interest. It first examines major theories regarding copyright and then reviews the historic developments at the national, regional and international levels. This is followed by an analysis of the relation between copyright protection and the circulation of information. Finally, the public interest concept is examined for it is the framework employed to determine the basis on which copyright limitations and exceptions have been granted.

2 1 Background

2 1 1 The nature of copyright

Under civil law, moral rights are essential components of copyright, referred to as *droit d'auteur*, that is, authors' rights.[36] In common law, copyright has more economic significance.[37] The core rights protected by copyright are the copyright proprietors' right to reproduce a work, the right to distribute it in a physically tangible form and the right to disseminate it to the public, whether by performance, by broadcast or diffusion through a wire service.[38] Copyright also can be a negative right to prevent the exploitation of a work by others.[39]

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[36] D Lipszyc "New Topics in Copyright and Neighbouring Rights" in *UNESCO's Manual on Copyright and Neighbouring Rights* vol 2 (Paris: UNESCO, 2004) 525. The Manual was published in Spanish in 1993 and translated into English in 1999. Moral rights include the right of attribution, the right to remain anonymous, the right of integrity to stop a work from being distorted, mutilated or otherwise modified, and the right to control a work in association with a product, service, cause or institution. For additional details see D Vaver *Copyright Law* (Toronto: Irwin Law 2000) 158-168.

[37] P Torremans *Holyoak and Torremans Intellectual Property Law* (Oxford: Oxford Univ Pr, 2005) 172; HL MacQueen, C Waelde & GT Laurie *Contemporary Intellectual Property* (Oxford: Oxford Univ Pr, 2008) 41.

[38] S Ricketson & C Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* 2 ed (Sydney: Thomson/Law Book Co, 2002) 1.10.

[39] GP Cornish *Copyright: Interpreting the Law for Libraries, Archives and Information Services* (London: Library Ass'n Publishing, 2001) 13; H Laddie, P Prescott, M Vitoria, A Speck & L Lane *The Modern Law of Copyright and Designs* vol 1 3 ed (London: Butterworths, 2000) 1; F Mustafa *Copyright Law: A Comparative Study* (New Delhi: Qazi, 1997) 3.

Copyright is not an absolute monopolistic right since it is restricted by scope and time.[40] A distinct characteristic of copyright is it only protects expressions and does not extend to ideas beyond what has been written or otherwise expressed in material form.[41] Various limitations to curtail copyright may include duration limitations as well as exceptions enabling others to access and use the works and to develop derivative works. In the following chapters are discussions on such limitations and exceptions as fair use[42] and like principles,[43] all of which are facing unprecedented challenges in the electronic environment.

Comparing intellectual property with physical property is a way to understand the special nature of intellectual property. First, while physical property is tangible and visible, intellectual property is

[40] Ricketson maintains copyright protects authors and their assignees in their original literary, dramatic, musical, and artistic works, and grants similar but limited protection for a range of other subject matters of a more "industrial" character, such as sound recordings, films, television and sound broadcast, and the typographical arrangements of published editions of works. More recently, the rights of performers in their live performances have been given limited protection under copyright law. See Ricketson *The Law of Intellectual Property* 1.10. See also N Davenport *United Kingdom Copyright & Design Protection: A Brief History* (Emsworth: Mason Publishing, 1993) 57.

[41] It seems the higher the level of generality or abstraction an idea is, the less likely it is to be protected, see *Plix Products v Frank M Winstone* (1986) FSR 63 (High Ct of New Zealand) per Prichard J 92-94 (aff'd *Plix Products v Frank M Winstone* (1986) FSR 608 (Ct App of New Zealand)).

[42] Different terms are employed to describe limitations and exceptions of copyrighted works. For example, *fair use* in the US Copyright Act of 1976 (US) and *fair dealing* in the UK Copyright, Designs and Patents Act of 1988, Australian Copyright Act of 1968, Canadian Copyright Act of 1985 RSC 1985 c. C-42 (1985), and South African Copyright Act 98 of 1978. The term "exceptions and limitations" is used in the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (Information Society Directive). The fundamental function of limitations and exceptions is to ensure the public's access to information and emphasize that knowledge is in the public interest. See for example, *Meeropol v Nizer* 560 F 2d 1061 (2nd Cir 1977)1068 (US), which held:
"The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry."

[43] An example is that the first sale doctrine is a limitation on a copyright owner's distribution rights on a sold copy. It was recognized by the US Supreme Court in *Bobbs-Merrill Co v Straus* 210 U.S. 339 (1908) and codified in the Copyright Act of 1976. The first sale doctrine allows a purchaser to transfer, sell or give away a lawfully obtained copy without permission. The civil law system has a similar exhaustion of right principle. For example, in the Centrafarm BV and Adrian de Pejper v Winthrop BV Case 16/74, 1974 ECR 01183, the Court held that a national trade mark law could not be used to prevent the free circulation of trade-marked goods throughout the Community. In *Etablissments Consten SaRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* Joined Cases 56 and 58-64, 1966 ECR 00299, the European Commission held that the distribution arrangements between two companies could not be used anti-competitively.

non-tangible and invisible.[44] Its non-tangible nature makes intellectual property non-exclusionary and therefore its user causes no rivalry with other users.[45] For example, unlike reading a printed copy of a book when a reader has to exclusively possess the book until he/she finishes reading , a person viewing a digitized copyrighted book online does not preclude others from accessing the book's contents at the same time. In other words, the simultaneous use of the same book does not infringe on its use by other readers and so there is no rivalry among any of the readers.

Second, from an economics point of view, the marginal price of disseminating a copyrighted product is substantively low or even zero.[46] In other words, it is like a public good. The third characteristic of copyright is that it is difficult to monitor and control the unauthorized uses of a work once it is disseminated. Quite simply, the work becomes a public good that can be reproduced limitlessly.

In short, copyright has a dual nature for on the one hand it is a property right, but on the other hand it is much like a public good. Copyrighted works should be free in the sense of a free flow, not a free lunch.[47] Either an overly large amount of protection or too lax copyright regulation can be harmful to society's well-being.

2 1 2 Copyright in a global context

The global shift towards knowledge-based economies and the expansion of international trade as well as ICT poses significant legal and political challenges in regulating access to information and knowledge. Societal well-being is particularly impacted if quality education and research is

[44] Copyright as a type of intellectual property is described as "subsist" rather than "exist", see Cornish *Copyright* 17.

[45] Economists distinguish resources as rivalrous and non-rivalrous. A non-rivalrous resource cannot be exhausted, therefore, the issue is to maintain enough incentive for a producer to continue. For a rivalrous resource, first, sufficient incentive has to be provided and second, the consumption by a person should not deplete another's fair share. See G Hardin "Tragedy of the Commons" (1968) 162(3589) *Science* 1243 1243-1248, that describes a dilemma in which an individual acting independently carries out an act that greatly benefits him/herself but ultimately the act destroys a shared social resource even if it is not in anyone's long term interest to do so. See also Landes & Posner *Economic Structure of IP* 14.

[46] Marginal cost is the additional cost of producing one extra unit, see P Samuelson & WD Nordhaus *Economics* 16 ed (New Delhi: McGraw-Hill, 1998) 116.

[47] JN Druey *Information Cannot be Owned: There is More of a Difference than Many Think* (07-04-2004) *Harvard Public Law Working Paper* No. 96; *Berkman Center for Internet & Society Research Publication* No 2004-05 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=528663) (assessed 27-10-2013).

curtailed when information and knowledge networks have restrictive access.

Copyright plays an important part in regulating educational and research materials subject to its protection. One justification for granting exclusive copyright is to encourage and promote research and development for the benefit of all of society. However, the nature of copyright is that it is a double-edged sword that controls access to information and a knowledge network through exclusivity, while at the same time it promotes access to such networks. The dualistic nature of copyright creates a real danger since the "exclusivity" function may override the "public access" function and result in the curtailment of research and development. Therefore, the assessment of copyright law must necessarily be cognizant of the needs and the development of the society for which it is intended. As an example, for a developing country such as South Africa, copyright law's primary task is to foster national research and education, and to promote the economy. But for the EU where copyright law has been partially harmonized, it is expected to facilitate the free flow of goods within the EU internal market.

The property aspect of copyrights can only be assessed against a background of international trade and international treaties that establish and help to support global copyright regimes. As global trade increases, the control of knowledge and information becomes crucial national policy. Copyright law is tilting the balance to favor copyright holders.[48] This has happened both domestically and internationally. It is said the global copyright regime is often skewed to the detriment of the developing world.[49] It is worthwhile to examine copyright by evaluating both its scope and the factors that limit copyright as well as exceptions to copyright rules in differing countries at different stages in their economic and social development. Since copyright is universally recognized, national copyright laws should be reviewed taking into consideration international treaties, with particular reference to the impact of copyright on research and development in developing countries.[50]

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[48] For example, see J Boyle "A Manifesto on WIPO and the Future of Intellectual Property" (2004) 9 *Duke Law & Technology Review* 1 1-12; PB Hugenholtz "Copyright, Contract and Code: What Will Remain of the Public Domain" (2000-2001) 26 *Brooklyn Journal of International Law* 77 77-90; P Samuelson "The US Digital Agenda at WIPO" (1996) 37 *Virginia Journal of International Law* 369 369-439. A number of non-governmental organizations, public interest groups and civil society activists have expressed similar views. Such organizations are: The Communication Rights in the Information Society, the International Federation of Library Associations and Institutions (IFLA), the Electronic Frontier Foundation (EFF), and the Union for the Public Domain.

[49] May (2003) *EIPR* 1-5; M Ryan "Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World" (2000) 79 *Oregon Law Review* 647 661.

[50] S Walker *The TRIPS Agreement, Sustainable Development and the Public Interest: Discussion Paper: IUCN Environmental Policy and Law Paper* No 41 (Gland: IUCN & Geneva: CIEL, 2001) ix-x.

2 1 3 A linguistic note

The definition of education and research is sometimes vague in legislation.[51] In this work, education includes the educational activities in schools and higher education institutions, adult education and distance education, as well as non-profit activities conducted by educational institutions such as libraries and archives.[52] Research includes that which is carried on by institutions and individuals. It needs to be stressed that neither education nor research are commercial.[53]

Due to the different types of language employed in the very diverse legislative literature, "limitations and exceptions" is used as a general term referring to the legitimate unauthorized uses of copyrighted works.

2 2 Philosophical basis of copyright

The discussion of what philosophers and scholars have to say about major theories dealing with copyright is broken into: (i) natural law; (ii) expression of personality; (iii) just rewards to stimulate creativity; (iv) social development as a utilitarian goal; and (v) social planning theory. Careful analysis shows these theories provide sound justifications for copyright, but none fully accommodate copyright into their framework.[54] Last, there is a consideration of alternative values of copyright found in various civilizations that regard intellectual creation in a more communitarian way rather than as an exclusive property.

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[51] R Burrell & A Coleman *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge Univ Pr, 2005) 116-117.

[52] For example, Bainbridge presents concepts of education, educational establishments and schools based on British copyright law and other relevant laws, see DI Bainbridge *Intellectual Property* (London, UK: Peason Longman, 2009) 216-219.

[53] Subject to the three-step test of the Berne Convention, contracting parties
"shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".
This concept is also included in several international copyright treaties and the TRIPS Agreement. It first appeared in Art 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967. It is contained in Art 10 of the WIPO Copyright Treaty and Art 16 of the WIPO Performances and Phonograms Treaty of 1996 as well as Art 13 of the TRIPS Agreement.

[54] L Zemer "On the Value of Copyright Theory" (2006) *Intellectual Property Quarterly* 55 57.

2 2 1 Natural law

The Lockean theory of property rights asserts that labour gives one a right to property.[55] A common resource mixed with a man's labour becomes a product exclusively belonging to him.[56] Copyright theorists relate the natural law right to copyright to justify it as a private property right by making facts and concepts analogous to raw materials in the physical world.[57] Because an author has an exclusive right to his or her labour in creating a work, the author should have control over the publication and unauthorized modification of an original work.

Notably, Locke points out that the appropriation of a part of a common resource "does not lessen but increases the common stock of mankind".[58] Locke's example is a man enclosing a piece of uncultivated land, cultivating it and increasing its productivity.[59] This is analogous to copyright where authors create artistic works that enrich the public domain.

While Locke acknowledges the reasonable privatization of a common resource in which a man has invested his labour, he also considers reserving a fair share of a scarce resource as essential to sustainable social development. Privatization is only justifiable when there are enough resources left for others.[60] Thus, a property right should be limited when private appropriation might lead to substantial impoverishment and depletion of a common resource. Limiting property rights can be justified on the basis of a societal common need and on the basis that a fair proportion of the common resource is due to other social members.

The natural law theory of property rights provides a sound basis to justify copyright as a property right. Nevertheless, the Lockean theory cannot address all questions related to copyright since it predates even the birth of copyright. Two questions arise when applying Lockean theory to copyright. First, what would be the the appropriate kind of raw material that is owned by no one or should be held in common when dealing with copyright? Here, raw materials could perhaps be facts

[55] J Locke *The Second Treatise of Government and a Letter Concerning Toleration* (T Crawford ed, US: Dover Publications, 2002) 21 ch V para 45.

[56] 12-13 ch V para 27.

[57] WW Fisher "Theories of Intellectual Property" in S Munzer (ed) *New Essays in the Legal and Political Theory of Property* (Cambridge, UK: Cambridge Univ Pr, 2001) 168 170; J Hughes "The Philosophy of Intellectual Property" (1988-1989) 77 *Georgetown Law Journal* 287 299-330.

[58] Locke *Second Treatise of Government* 17 ch V para 37.

[59] 17 ch V para 37.

[60] Locke *Second Treatise of Government* 12-13 ch V para 27.

and ideas. Expressions in a work also could be considered as raw materials.[61] Second, given that facts and ideas are common resources, to what extent should they be retained for public use? For example, if an author comes up with a special plot for a novel, can other writers borrow the plot and write novels with similar themes or not?[62] These issues have been explored in detail, but no final accord has ever been reached.[63]

2 2 2 Expression of personality

According to Hegel, to supersede a thing and transform it into an intellectual creation through free will is the way human beings relate to the external world.[64] Since with Hegel individual will is an "objective in property" and intellectual creation is a thing,[65] he further claimed "[a]ll things [*Dinge*] (added by the translator) can become the property of human beings".

Therefore, human beings have a right to own their intellectual creations as a means of self-development.[66] For Hegel, property is closely linked to a free person as well as others' recognition that the person is free.[67] Thus, one should be allowed to own the fruits of one's mental activities as property. Unlike Locke's conception, this property right is entirely a legally constituted right. This

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[61] JD Litman "The Public Domain" (Fall 1990) 39(4) *Emory Law Journal* 965 996; JC Ginsburg "Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoehling v Universal City Studios" (1981-1982) 29 *Journal of the Copyright Society of the USA* 647 658. Fisher offered a detailed discussion on this issue, see Fisher "Theories of Intellectual Property" in *Legal and Political Theory of Property* 180-181.

[62] For example, a best-seller novel was involved in a copyright infringement dispute, see *Baigent v Random House Group Ltd* [2006] EWHC 719 (Ch). The author borrowed ideas and plots from two previous works employing the same theme, and was accused of plagiarism by the two authors. The Court held there was no ground for plagiarism by comparing the authors' works with the language and the general theme of the work in question.

[63] For a discussion, see WJ Gordon "A Property Right in Self-expression: Equality and Individualism in the Natural Law of Intellectual Property" (1992-1993) 102 *Yale Law Journal* 1533 1533-1609; EC Hettinger "Justifying Intellectual Property" (Winter 1989) 18(1) *Philosophy and Public Affairs* 31 31-52; SE Sterk "Rhetoric and Reality in Copyright Law" (1995-1996) 94 *Michigan Law Review* 1197 1234-1240; LL Weinreb "Copyright for Functional Expression" (1998) 111(5) *Harvard Law Review* 1149 1218.

[64] GWF Hegel *Elements of the Philosophy of Right* (AW Wood ed, HB Nisbet tran, Cambridge: Cambridge Univ Pr, 1991) 74-75 s 43.

[65] 77 s 46.

[66] Hegel *Philosophy of Right* 78 s 46; Drahos *A Philosophy of Intellectual Property* 73-94; C May *A Global Political Economy of Intellectual Property Rights: The New Enclosure?* (London: Routledge Chapman & Hall, 2000) 26-28.

[67] May *Global Political Economy of Intellectual Property Rights* 26.

approach puts forth the notion of property as a protection of individual freedom from interference by others or by the state. This personality approach prevails in Continental Europe and arms copyright with a moral force.[68] Moral rights are justified on the ground that a work embodies its creator's personality and will.[69] Moreover, people's intellectual creative activities contribute to a flourishing culture.[70] Continental Europe has for many years recognized and promoted moral rights to ensure that even if authors' economic rights are transferred, the original works remain unchanged.[71] In the last two decades, the moral right philosophy has gained increasing recognition in the US.[72]

2 2 3 A just reward for labour and creativity stimulus

In addition to the moral incentive of copyright, a just reward and a stimulus for creativity are considered as two economic incentives that further creative activities. Most authors are only willing and able to pursue creative activities when their production costs are covered.[73] Since it is commonly acknowledged that their labour should be rewarded,[74] there is a "the sweat of the brow"

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[68] Fisher "Theories of Intellectual Property" in *Legal and Political Theory of Property* 172-173.

[69] 173.

[70] MJ Radin *Reinterpreting Property* (Chicago: Univ of Chicago Pr, 1993); J Waldron *The Right to Private Property* (NY: Oxford Univ Pr, 1988).

[71] MacQueen et al *Intellectual Property* 42. For example, it is still the primary justification for copyright in Germany, see G Davies *Copyright and the Public Interest* 2 ed (London: Sweet & Maxwell, 2002).

[72] A legislative example is the 17 USC s 106A that is known as the Visual Artists Rights Act of 1990. There are comments on this changing trend, see TF Cotter "Pragmatism, Economics, and the Droit Moral" (1997) 76 *North Carolina Law Review* 1 6-27; GJ Yonover "The 'Dissing' of Da Vinci: The Imaginary Case of Leonardo v Duchamp: Moral Rights, Parody, and Fair Use" (1995) 29 *Valparaiso University Law Review* 935 935-1004.

[73] See Lunney (1996) *Vand L Rev* 485; Netanel (1996) *Yale LJ* 292 the author argues that:
"This free rider problem ... would greatly impair author and publisher ability to recover their fixed production costs."
Landes & Posner (1989) *J Legal Stud* 328, the authors argue that when the market value of a creative work is reduced to the marginal cost of copying the work, the author and publisher will not be able to recover their costs of creating the work; WW Fisher III "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1659 1700.

[74] Reed J held in *Mazer v Stein*:
"[T]o grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."
347 US 201 219. See also the testimony of Elizabeth Janeway at "Copyright Law Revision: Hearings before Subcommittee No 3 of the Committee on the Judiciary House of Representatives Eighty-Ninth Congress First Session on HR 4347, HR 5680, HR 6831, HR 6835" (1965), reprinted in GS Grossman ed *Omnibus Copyright Revision Legislative History* volume 5 (Buffalo: Hein, 1976) 100. For comments on the testimony see Sterk (1995-1996) *Mich L*

doctrine in US copyright law.[75] Besides a just reward for labour, it also meets a social requirement to stimulate innovation and creativity with a pecuniary stimulus.

Two issues come out of the pecuniary incentive argument. First, throughout human history there has been abundant artistic works prior to the development of copyright.[76] Thus, the justification for a just reward for labour and a stimulus for creativity are inadequate to explain the creativity that takes place beyond pecuniary considerations.[77] Second, since exclusive property rights are granted to authors, they can control the reproduction and distribution of their works by charging royalties.[78] In this way an artificial scarcity is created to access their work.[79] This enables copyright owners to manipulate price in a monopolistic market and charge a higher price than in a competitive market.[80] At some point, unduly harsh copyright protection will lead to a decrease of new works as authors are deterred by the high cost of access to previous works that they very often use as source material. Creative activities also may be stifled by copyright monopolistic protection.[81] Therefore, the issue is how to balance the interests between copyright owners and users.[82] The justification for using pecuniary incentive theory is to a degree to protect authors and other copyright proprietors, but a pecuniary incentive is of limited use in inducing new works created on the basis of previous

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Rev 1197-1249; AC Yen "Restoring the Natural Law: Copyright as Labor and Possession" (1990) 51 *Ohio State Law Journal* 517 517-559; Weinreb (1998) *Harv L Rev* 1211-1214.

[75] J Davis *Intellectual Property Law* 3 ed (Oxford: Oxford Univ Pr, 2008) 29-30. Sweat of the brow doctrine requires a lower level of a work's originality, see *Feist Publications v Rural Tel Service* 499 US 340 (1991), the Court of Appeals affirmed that telephone directories were copyrightable as a compilation.

[76] For China, see Alford *To Steal a Book*; K Shao "An Alien of Copyright? A Reconsideration of the Chinese Historical Episodes of Copyright" (2005) 4 *Intellectual Property Quarterly* 400 400-431. For the West, see R Weiner *Creativity and Beyond: Cultures, Values, and Change* (Albany, NY: State Univ of NY Pr, 2000); D Burkitt "Copyrighting Culture — The History and Cultural Specificity of the Western Model of Copyright" (2001) *Intellectual Property Quarterly* 146 146-186.

[77] See DR Johnson & D Post "Law and Borders — The Rise of Law in Cyberspace" (1995-1996) 48 *Stanford Law Review* 1367 1384; Ryan (2000) *Or L Rev* 652 & accompanying note 25.

[78] Netanel (1996) *Yale L J* 292.

[79] Drahos *Intellectual Property* 171-175.

[80] Lunney (1996) *Vand L Rev* 494-495; Ryan (2000) *Or L Rev* 653-655.

[81] Sterk (1995-1996) *Mich L Rev* 1207; Lunney (1996) *Vand L Rev* 485-495; PN Leval "Toward a Fair Use Standard" (Mar 1990) 103(5) *Harvard Law Review* 1105 1109-1110; Landes & Posner (1989) *J Legal Stud* 342-343, the authors argue that as the number of copyrighted works increases, the amount of valuable works in the public domain falls. Therefore, it is expensive for authors to acquire raw materials to create new works.

[82] Netanel (1996) *Yale LJ* 285; RA Kreiss "Accessibility and Commercialization in Copyright Theory" (1995-1996) 43 *University of California at Los Angeles Law Review* 1 4.

works.[83]

2 2 4 Utilitarian goal to social development

Bentham's theory of utilitarianism often serves as a guideline to policymaking. Bentham rejected Locke's natural law theory by maintaining that law was made pursuant to achieving the greatest happiness.[84] He believed that utility meant property in general tended to produce benefits or other forms of happiness, or it could prevent mischief or other unpleasant events.[85] He believed that "[t]he business of government is to promote the happiness of the society, by punishing and rewarding".[86]

Therefore, government intervention into a great many economic activities is necessary.[87] This utilitarian approach accepts inequities in certain circumstances for aggregate interests should outweigh a small group's pain.[88] This utilitarian approach is explicitly embodied in the US copyright law. For example, there is a host of copyright and other legislation and cases to further public access to information and knowledge.[89] A utilitarian goal of facilitating learning and science

[83] In *Computer Associates Intern Inc v Altai Inc* 982 F 2d 693 (2nd Cir 1992) the Court held that copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection for authors as an incentive to create, but on the other hand, it must limit the extent of that protection so as to avoid monopolistic stagnation. In applying a federal act to new types of cases, courts must always keep this symmetry in mind, see 693. See also Ryan (2000) *Or L Rev* 655; Lunney (1996) *Vand L Rev* 483. See *Sony Corp v Universal City Studios* 464 US 417 (1984), the Court held that defining limitations on copyright "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand" at 429. Also see Copyright Law Revision (HR No 94-1476) *reprinted in* 1976 USSCA 5664, 5749 that discusses the incentives-access balance in determining a copyright's appropriate term; see *Wildlife Exp Corp v Carol Wright Sales Inc* 18 F 3d 502 (7th Cir 1994) 507, the Court held it necessary to balance authors' rights to their original expression in order to allow others to build freely upon the ideas conveyed by a work.

[84] Bentham *Theory of Legislation* 49-52; J Bentham *An Introduction to the Principles of Morals and Legislation* (JH Burns & HLA Hart eds, Oxford: Clarendon Pr, 1996) 12 ch I para 3.

[85] Bentham *Principles of Morals and Legislation* 12 ch I para 3.

[86] 74 ch VII para 1.

[87] EG West "Property Rights in the History of Economic Thought: From Locke to J S Mill" in Anderson & McChesney (eds) *Property Rights: Cooperation, Conflict and Law* (Princeton, NJ: Princeton Univ Pr, 2003) 30.

[88] GJ Postema *Bentham and the Common Law Tradition* (Oxford: Clarendon Pr, 1986) 148.

[89] SK Stadler "Forging a Truly Utilitarian Copyright" (2006) 91 *Iowa Law Review* 609 609-672. The US Supreme Court prioritizes the goal of promoting intellectual works when interpreting copyright and patent statutes, see, for example,

is found in the US Constitution.[90]

Contemporary economists have turned the broad concept of happiness into economic analysis. William Landes and Richard Posner who build their arguments on positive analysis lead in scholarship on copyright. Their major argument is that one distinctive characteristic of copyright, like other intellectual properties, is its public nature. Once a work is created, it is difficult to stop free riders who enjoy the work. Copyists can easily reproduce the work at low cost.[91] Moreover, with digital technology their cost may be trivial or almost nothing. Therefore, certain property rights are granted to authors to cover the cost of creation and provide an incentive to create new works.[92] However, unlike a physical property that can be used exclusively by just one party at a time, many people can use a copyrighted product simultaneously. Therefore, it is vital to balance the interests among stakeholders. Landes and Posner in their well-cited article state that "[s]triking the correct balance between access and incentives is the central problem in copyright law."[93] Thus, positive analysis justifies fair use tenet since it works to balance two competing interests, that is, an earlier creator who requires maximum copyright protection, and a latter creator who may have built his or her work on seminal early work and thus requires only minimum copyright protection.[94]

Quite different from the public interest approach is neoclassical economic scholarship on intellectual property that justifies copyright expansion.[95] With the neoclassical scholarship, the maximization of a society's total wealth demands that all commodities be directed to their best

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Fox Film Corporation v Doyal 286 US 123 (1932) 127-128; *Kendall v Winsor* 62 US 322 (1858) 327-328. A host of lower courts agreed and followed this approach, for example, *Hustler Magazine Inc v Moral Majority Inc* 796 F 2d 1148 (9th Cir 1986) 1151; *Consumers Union of US v General Signal Corp* 724 F 2d 1044 (2nd Cir 1983) 1048. For comments, see Leval (Mar 1990) *Harv L Rev* 1108; Kreiss (1995-1996) *UCLA L Rev* 2.

[90] Art 1 s 8 cl 8 of The Constitution of the United States of America 1787 empowers Congress:
"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

[91] Sterk (1995-1996) *Mich L Rev* 1197-1249; Netanel (1996) *Yale LJ* 308; Lunney (1996) *Vand L Rev* 581.

[92] Landes & Posner (1989) *J Legal Stud* 325-364.

[93] 325-364.

[94] Zemer (2006) *IPQ* 60-61; JB *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard Univ Pr, 1996) 38; P Samuelson "Should Economics Play a Role in Copyright Law and Policy" (2003-2004) 1 *University of Ottawa Law and Technology Journal* 1 5. She argues that economic effects are almost always important to judges in a fair use dispute.

[95] P Goldstein *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (NY: Hill and Wang, 1994) 178-179; Fisher "Theories of Intellectual Property" in *Legal and Political Theory of Property* 174-175; Ryan (2000) *Or L Rev* 657.

values in the market,[96] regardless of how they are distributed.[97] Thus, creative works are treated as commodities instead of as freely flowing information.[98] It is argued that broad copyright protection allows a market to develop for creative works. Thus, investors are able to assess the value of a work and invest accordingly.[99] For neoclassical economists, the goal of copyright is to allocate either current or future creative works at their best values as determined by the market.[100] Consequently, copyright owners should be granted broad ownership rights to extend the valuable use of a work.[101] Thus, the neoclassical theory supports copyright expansion and results in a shrunken public domain.[102]

Questions arise as to whether adopting this approach will impede disseminating creative works to the public. If it does, how can copyright law ameliorate the problem? Proponents address the question with several solutions including relying on the market to direct the flow of intellectual goods to those willing and able to pay, or devising a privilege such as using fair use or compulsory licensing to direct the distribution of such works. The solutions are applicable when transaction cost is high.[103] However, these solutions are far from optimal. One concern is that a market function is limited. On the one hand, the extension of copyright owners' entitlements can lead authors and investors to rely on market signals and consumers' preferences to decide future investment or what

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[96] Posner (1979) *J Legal Stud* 119, 124. This article defines wealth as the value in dollars/dollar equivalents of everything in a society. The value of a pertinent item is measured by what people are willing to pay for it or, if someone owns the item, the minimum amount of money the person(s) will accept to give up the rights and ownership of the item.

[97] Ryan (2000) *Or L Rev* 649.

[98] As one commentator writes:

"Wary of unreliable value judgments about art and incapable of predicting which of even the most successful authors' future works will capture or recapture the public's fancy, the mature copyright paradigm embraces all literary and artistic works simply by virtue of their being creations and leaves the assessment of merit entirely to the market."

See Reichman "JH Reichman "Design Protection and the New Technologies: The United States Experience in a Transnational Perspective" (1989) 19 *University of Baltimore Law Review* 6 142-143.

[99] Lunney (1996) *Vand L Rev* 489.

[100] For example, Demsetz (1969) *JL & Econ* 1-22.

[101] Netanel (1996) *Yale LJ* 286.

[102] Ryan (2000) *Or L Rev* 658.

[103] Fisher "Theories of Intellectual Property" in *Legal and Political Theory of Property* 175-176; WJ Gordon "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory" (1989-1990) 41 *Stanford Law Review* 1343 1439-1449; RP Merges "Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright" (1993) 21 *AIPLA Quarterly Journal* 305 306-307. Merges argues that private organizations such as collective rights management ones are likely to be superior to any government instituted compulsory licensing system.

they will do next. This could result in an over-investment in certain types of media products, such as fiction, movies and software, but neglect such things as education and primary research.[104] On the other hand, those who need knowledge but are unable to pay for copyrighted works are disadvantaged under this copyright regime. In other words, relying purely on the market discriminates against the people who do not own and cannot afford copyright.

2 2 5 Social planning theory

Social planning theory is a loose cluster of legal and political thoughts that aim to foster a "just and attractive culture".[105] It is similar to utilitarianism in its willingness to contribute to social development, but dissimilar in the sense that it focuses on social cultural prosperity rather than utilitarianism's social welfare.[106]

When employing social planning theory with copyright, Neil Netanel argues democracy can be achieved by all citizens' participating in shaping their social and economic environments, provided there is a vibrant and diverse civil society.[107] He then argues that copyright law can assist in fostering a participatory society. He first maintains that a participatory society provides incentives for creative activities. Secondly, it sustains relatively independent creative activities unpolluted by either a state subsidy or elite patronage. He further argues that copyright regimes could be more effective in supporting the above two functions with the following prerequisites: 1) more works falling into the public domain to facilitate even more creation with a shorter copyright term; 2) limiting copyright owners' authority to control "derivative works", and 3) a compulsory licensing system that can be frequently used to balance the interests between copyright owners and users of their work.[108]

However, caution needs to be exercised since this approach is loosely constructed and less well established. Nonetheless, there are legal scholars that approach intellectual property law from

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[104] Fisher "Theories of Intellectual Property" in *Legal and Political Theory of Property* 174-176.

[105] Examples of such theorists are *F Michelman "Law's Republic" (1988) 97(8) Yale Law Journal 1493* 1493-1538 and WW Fisher, MJ Horwitz & TA Reed (eds) *American Legal Realism* (NY: Oxford Univ Pr, 1993).

[106] WW Fisher III"Property and Contract on the Internet" (1997) 73 *Chicago-Kent Law Review* 1203 1212-1218.

[107] Netanel (1996) *Yale LJ* 283.

[108] Netanel (1996) *Yale LJ* 283. See also NW Netanel "Asserting Copyright's Democratic Principles in the Global Arena" (1998) 51(2) *Vanderbilt Law Review* 217 217-329.

similar perspectives, such as Rosemary Coombe,[109] Niva Elkin-Koren,[110] Michael Madow,[111] William Fisher,[112] and Laurence Lessig.[113]

2 2 6 Alternatives to copyright

An individual's exclusive control over intellectual creations is rare in societies with a predominantly communitarian culture. The intellectual property right was a completely alien concept to Africans.[114] The same was true in early North America and Australia for indigenous people's intellectual creations were not considered to be commodities but a source of pleasure for all community members or the preservation of faith.[115] When dealing with ownership, it is important to realize indigenous societies in North America and Australia are organized around a clan or other extended family unit.[116] Consequently, exclusive ownership is rare. Although intangible goods such as dances and songs are recognized as property, people other than the creator are not excluded from using such intellectual creations.[117] Rather, creative expressions are considered to be owned by a group as a whole.[118] It has to be realized that for many indigenous societies, protection is meant to preserve the sanctity of an idea or the sacredness of an object.[119]

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[109] RJ Coombe "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue" (1990) 69 *Texas Law Review* 1853 1853-1880.

[110] N Elkin-Koren "Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators" (1994) 13 *Cardozo Arts and Entertainment Law Journal* 345 345-411.

[111] M Madow "Private Ownership of Public Image: Popular Culture and Publicity Rights" (1993) 81(1) *California Law Review* 125 125-242.

[112] Fisher (1988) *Harv L Rev* 1659.

[113] See L Lessig *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (NY: Penguin Pr, 2004); L Lessig *The Future of Ideas: The Fate of the Commons in a Connected World* (NY: Random House, 2001).

[114] A Adewopo "The Global Intellectual Property System and Sub-Saharan Africa. A Prognostic Reflection" (2001) 33 *U Toledo Law Review* 749 753.

[115] See above*v* 755. See also F Yamin & D Posey "Indigenous Peoples, Biotechnology and Intellectual Property Rights" (1993) 2(2) *Review of European Community and International Environmental Law* 141 143.

[116] RL Gana "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 *Denver Journal of International Law and Policy* 109 132.

[117] HE Driver *The Indians of North America* (Chicago: Univ of Chicago Pr 1961) 221 & 263.

[118] Gana (1995) *Denv J Int'l L & Pol'y* 135.

[119] *Milpurrurru v Indofurn Pty Ltd (1990) 130 ALR 649; [1995] European Intellectual Property Review D-61* Federal Court of Australia 13-12-1994 (reported in 1995 17(3) *EIPR* D-61). Indofurn was a company that imported carpets from Vietnam to Australia. The imprints on the carpets had been copied from the works of some local indigenous artists

In a comparative study of property concepts in a number of geographic areas including indigenous societies residing in Africa, Rahmatian noted the concept of property may not be fundamentally different among nations, but its allocation or disposition can be quite different.[120] People's attitude towards intellectual property resonates with differing views of property in different cultures and legal systems. Creations and products of intellectual wisdom are sometimes recognized as property. Nevertheless, they are shared in a more communitarian way than when individuals exclusively create, control and own them.

In addition to property and pecuniary factors undercutting a communitarian community, the dynamic dialectical relationship between individuals and a creative community could be undermined by an exclusive copyright.[121] With a dialectical relationship individuals can use, develop or reflect upon dominant cultural images.[122] Many consider access to knowledge and participation in the cultural life of a community essential.[123] Asian countries such as China and Japan did not have copyright protection in the past during their long pre-industrial period.[124] Imperial China did not have systematic intellectual property protection, especially copyright

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in Australia. The aboriginal artists sued Indofurn for infringing on their copyright by importing their Vietnamese carpets into Australia. The Court ruled that any inaccurate reproduction of their painting was an offense to the artists because it insulted their faith.

[120] A Rahmatian "Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions" in F Macmillan (ed) *New Directions in Copyright Law* vol 6 (Cheltenham, UK: Edward Elgar, 2007) 199 220-223. Rahmatian argues that an unlimited individualistic property right is an oversimplification of the "western" property concept and "non-western" communal ownership is uncertain. A communal right to land such as the Gusii in Western Kenya is a far more sophisticated network of legal relations for each individual community. Von Lewinski indicates in an earlier work that collective rights are a part of indigenous culture. Nonetheless, this does not mean that every group member at the same level has equal status. See PT Stoll & A von Hahn "Part II: Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law" in S von Lewinski (ed) *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (The Hague: Kluwer Int'l Law, 2004) 5 14-15.

[121] F Macmillan "Copyright, the World Trade Organization, and Cultural Self-determination" in F Macmillan (ed) *New Directions in Copyright Law vol 6* (Cheltenham, UK: Edward Elgar, 2007) 307 317.

[122] 317.

[123] United Nations Educational, Scientific and Cultural Organization , *Report of the World Commission on Culture and Development: Our Creative Diversity* 2 ed (Paris: UNESCO, 1996). For comments see F Macmillan "Copyright and Culture: A Perspective on Corporate Power" (1998) 10 *Media and Arts Law Review* 10 71.

[124] T Mitsui "Copyright and Music in Japan: A Forced Grafting and its Consequences" in S Firth (ed) *Music and Copyright* (Edinburgh: Edinburgh Univ Pr, 1993) 125 141-142.

protection.[125] While many reasons have been brought forward to explain this,[126] it has been argued that the most significant one is the prevailing Confucianism philosophy.[127] Confucianism regarded the link between the past and the present as vital for cultural development.[128] The ancient classical works were derived from Nature, and art and literature were reflections of the past. Thus, the intellectual works were all of the Chinese people's common heritage. Money was of little importance to intellectuals who believed an outstanding reputation was a just reward for morality and skills.[129] Therefore, having their works imitated and reproduced by others was a manifestation of the success of the one's who created them.[130]

Now there is a need to revisit the justifications of copyright and reconsider alternative values that accentuate the sharing of intellectual creations and keep a society creative. The ICT and the Internet provide an unprecedented opportunity for people to associate in a virtual world. The link between the past and the future among different cultures should be emphasized, not hampered, by copyright law and digital technology. A communitarian culture sharing copyright works is worthy of more attention and appreciation in its battle against an ever-expanding copyright regime.

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[125] Alford *Steal a Book* 9-20.

[126] Some scholars argue that the printing technology was so underdeveloped that imperial Chinese authorities did not have to engage in copyright protections, see CS Zheng & MD Pendleton *Copyright Law in China* (North Ryde, Australia: CCH International, 1991) 14. Adelstein and Peretz express a similar view in "The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective" R Adelstein & S Peretz "The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective" (1985) 5 *International Review of Law and Economics* 209 210-238. Another argument, an economic one is that the market of printed materials was small in China because most of the Chinese were illiterate until the early twentieth century, therefore, there was no need for copyright protection. See D Berman *Words Like Colored Glass: The Role of the Press in Taiwan's Democratization Process* (Boulder, CO: Westview Pr, 1992) 201.

[127] Alford *Steal a Book* 24-29.

[128] See the Confucius Classical compilation of *Lun Yu* (Analects) . On the pursuit of scholarship, Confucius said: "I am a raconteur and not a writer, a seeker and follower of ancient history and culture ..."
Confucius The Analects of Confucius: A New-millennium Translation (D Li tran, Bethesda: Premier Publishing, 1999) 81 bk 7 ch 1.

[129] Alford *Steal a Book* 29.

[130] W Fong "Problems of Forgeries in Chinese Painting. Part One" (1962) 25(2/3) *Artibus Asiae* 95 95-140.

2 3 The evolution of copyright law

2 3 1 The trend of copyright evolution

Copyright has expanded in the digital age. The WIPO Internet Treaties exemplify a trend of international legislative responses to the challenges of digital technology. Two new rights, namely the "right of access"[131] and the "right of employing technological measures to protect and control the copyrighted works",[132] are recognized in the Treaties. The WIPO Internet Treaties extended the scope of Article 9(2) of the Berne Convention to make it applicable to all authors' rights and not merely the reproduction right.[133] The expansion of these rights enables copyright authors to protect their works more effectively against rampant acts of piracy, although the public still has restricted access to their works.[134]

Copyright law legislators need to reflect on the challenges of advanced technology. Therefore, it is necessary to review the history of copyright to understand what is driving the evolution of copyright law. Along the way, one may question whether current copyright policy that tilts more to helping copyright owners is indeed beneficial or whether adjustments need to be made to rectify this unbalanced situation.

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[131] Art 8 of WCT and Arts 10 & 14 of WPPT respectively; also s 1201 of Digital Millennium Copyright Act of 1998 (DMCA) Pub L No 105-304, 112 Stat 2860 (28-10-1998). The right of access grants authors exclusive rights to authorize any communication with the public about their works in such a way that members of the public may access these works from a place and at a time individually chosen by the authors. For example, authors can control user's access to their works in interactive on-line systems. See *LA Times v Free Republic* 2000 US Dist LEXIS 5669 (CD Cal 05-04-2000) 67-68; J Ginsburg "From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law" in H Hansen (ed) *US Intellectual Property Law and Policy* (Cheltenham: Elgar, 2006) 39-58; S Olswang "Access right: An Evolutionary Path for Copyright into the Digital Era?" (1995) 17 *European Intellectual Property Review* 215 215-218; ALAI 2001 Congress "Adjuncts and Alternatives to Copyright: Programs and Presentation" (20-09-2001) *AIAI 2001 USA* http://www.alai-usa.org/2001_conference/1_program_en.htm (accessed 27-10-2013). However, some scholars argue the control of access is not a right but merely an author's power. See T Heide "Copyright in the EU and United States: What 'Access Right'?" (2000-2001) 48 *European Intellectual Property Review* 469 469-477.

[132] Art 11 of WCT and Art 18 of WPPT.

[133] Art 10 of WCT and Art 6 of WPPT.

[134] P Patrick "Why DRM Should be Caused for Concern: An Economic and Legal Analysis of the Effect of Digital Technology on the Music Industry" (November 2004) *Berkman Center for Internet & Society at Harvard Law School Research Publication* No 2004-09 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=618065 (accessed 27-10-2013).

In the following section, a review of the evolution of copyright law in the UK, the US and Europe is carried out. Worth noting is that although the Anglo-American and Continental European legal systems have adopted different approaches,[135] the differences should not be overly exaggerated.[136]

2 3 2 Historical development of copyright law

2 3 2 1 The United Kingdom

The first important copyright legislation was the English Statute of Anne of 1709.[137] The primary motive, as gleaned from the preamble, was the provision of protection and remedies for copyright owners. To encourage learned men to compose and write useful books was also important.[138] The Statute of Anne adopted a utilitarian view of copyright with particular emphasis on the public interest. The most significant contribution of the Statute of Anne was recognizing the author's need for protection and the adoption of a limited term of protection for published works.[139] Furthermore, the Act included the origin of the underlying principles on which the modern international copyright system is founded.[140]

The scope and time of copyright began to expand. During the 19th century, the protection term for books and sheet music[141] was extended twice. In 1814, it was extended to 28 years from the day a

[135] The system of *droit d'auteur* (authors' rights) predominant in the civil law tradition generally only affords protection to individual authors. This system leaves others such as performers, producers of phonograms and broadcasting organizations under the protection of related neighboring rights. In contrast, copyright grants protection for both individuals (natural persons) and corporate bodies (artificial persons).

[136] Historically and contemporarily, there has been, and there is a common basis for copyright in common law and in civil law. For example, see G Davies "The Convergence of Copyright and Authors' Rights — Reality or Chimera?" (1995) 26 *International Review of Intellectual Property and Competition Law* 964 964-966.

[137] An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.

[138] Ch XIX of Statute of Queen Anne of 1710 (Ch 19). This was the first parliamentary English Copyright Act. It is important to note it was not the first English statute to deal with copyright but was the first to be adopted by Parliament rather than by royal decree and the first to be unannounced with censorship.

[139] M Vitoria "Patents and Registered Designs" in *Halsbury's Laws of England* 4 ed vol 9(2) (Lord Hailsman of St Marylebone *ed*, 1974) 20 para 16.

[140] Davies *Copyright and the Public Interest* 13. The principles are natural law, just rewards for labour, stimulus for creativity and social requirements. See also S Stewart *International Copyright and Neighboring Rights* 2 ed (London: Butterworths, 1989) para 1.02-1.05. Stewart justifies copyright from the views of natural justice and economic, cultural and social considerations.

[141] Books and sheet music were treated like printed books, see *Bach v Longman* 98 ER 1274, (1777) 2 Cowp 623, 1

work was produced or for the author's life. In 1842, it was extended to 42 years from the day a work was produced or for the author's life. New enactments extended protection to new categories and new uses of rights such as protecting sculptures and public performances.[142]

Copyright extended outward from domestic law to international law. In the early 20th century, British copyright law had its first intake of the Continental European copyright law tradition. After the ratification of the Berne Convention reformed in Berlin in 1908,[143] the Copyright Act of 1911 included a whole range of *authors' rights* as subject matter for protection. It also extended the protection of copyright works to 50 years to satisfy the minimum standard adopted at the Convention. The common law copyright for unpublished works was explicitly abolished — as is the case in most Continental European countries, copyright became an exclusive statutory right. The end of the dual system in copyright represented the termination of the timeless common law copyright and established an overall statutory copyright system. The supranational significance is that the 1911 Act "formed the basis of copyright law throughout the British Empire".[144]

Nevertheless, copyright law is closely related to national interest despite its international relevance. It is noteworthy Britain was reluctant to recognize copyrighted works produced in other countries even after the accession to the Berne Convention.[145] In the 1911 Act, protected works were only works first published in the British Empire where the Act was applicable. Unpublished works[146] were protected only if the author was a British subject or an Empire resident producing the work. American copyright law went through a similar situation.[147]

Chit 26.

[142] *S Stromholm International Encyclopedia of Comparative Law vol XIV (E Ulmer & G Schricker eds, Leiden: Martinus Nijhoff)* XIV 13 para 2-25.

[143] The Europeans saw the Berne Convention as a compromise among Continental European nations, see A Dietz *Copyright Law in the European Community: A Comparative Investigation of National Copyright Legislation, with Special Reference to the Provisions of the Treaty Establishing the European Economic Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978) 159.

[144] Bainbridge *Intellectual Property* 35.

[145] The UK ratified the Berne Convention in1887, according to the WIPO record http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id (assessed 02-08-2012). However, it only abolished the requirement to register copyright with the Stationers Hall in the Copyright Act of 1911.

[146] Only works with issued copies were held to be published.

[147] HC Hansen "International Copyright: An Unorthodox Analysis" (1996) 29 *Vanderbilt Journal of Transnational Law* 579 579-593

From lax copyright lawmakers to stringent ones, the conversion of such countries as the UK and the US is thought provoking.[148] Nationally and internationally a high standard of copyright law became a part of international conventions. The countries wanting to be members of the Conventions had to amend their copyright laws or create a new law to meet relevant standards. In reality, developed countries were dominant in promoting and pushing for the establishment of an international copyright framework.[149] The core power behind the tight copyright protection is an inter-mix of national benefits and transnational corporation benefits.[150]

The Copyright, Designs and Patents Act of 1988[151] is the UK's most recent intellectual property legislation. One of the major characteristics of the 1988 Act is a focus on paying more attention to technological developments.[152] It predated almost the same provisions of the more recent WIPO Internet Treaties[153] and Information Society Directive[154] which provided an international level of legal framework to solve the principal problems caused by digital technology. One such problem was the possible transmission of protected copyright through digital networks.

2 3 2 2 The United States of America

The American copyright law[155] was developed utilizing utilitarian theory.[156] The Constitution explicitly states in the copyright clause that it authorizes Congress "to promote the progress of Science … by securing for limited times of authors … the exclusive right to their respective

[148] Above 594.

[149] S Sell *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge Univ Pr, 2003) 8-10; D McCullagh "Copyright Lobbyists Strike Again" *CNET* (01-08-2005) http://news.cnet.com/Copyright-lobbyists-strike-again/2010-1071_3-5811025.html (accessed 27-10-2013).

[150] TC Vinje "Should We Begin Digging Copyright's Grave?" (2000) 22(12) *European Intellectual Property Review* 551 558-559; M Heins & R Beckles *Will Fair Use Survive?: Free Expression in the Age of Copyright Control* (NY: Brennan Center for Justice at NYU School of Law, 2005) 61.

[151] Copyright, Designs and Patents Act of 1988.

[152] For more details, see Davis *Copyright and the Public Interest* 49.

[153] WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

[154] European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization on certain aspects of copyright and related rights in the information society.

[155] The term *American copyright law* means federal law. The laws of several states reflect a variety of natural law influences, including John Locke's natural rights in property, see LR Patterson *Copyright in Historical Perspective* (Nashville, Tenn: Vanderbilt Univ Pr, 1968) 183-192.

[156] Stadler (2006) *Iowa L Rev* 609-672; Sterk (1995-1996) *Mich L Rev* 1203; DS Karjala "The Term of Copyright" in LN Gasaway (ed) *Growing Pains: Adapting Copyright for Libraries, Education, and Society* (Littleton, CO: Fred B Rothman & Co, 1997) 33 40.

writings".[157]

The first Copyright Act[158] in 1790 embodied the same fundamental ideas that prevailed in the Statute of Anne. The paramount goal of copyright was to stimulate learning and an author's reward was secondary.[159]

The copyright law has been revised or rewritten significantly four times since 1790.[160] Every substantial modification of copyright law reflected a development in technology, particularly when the technology brought immense profits for developing a new form of expression.[161] Shortly after the invention of printing technology in Britain, there were copyright statutes. Printing also spurred the US Congress in 1802 to add prints to works subject to protection.[162] An 1831 law added musical compositions to the protected list[163] and an 1870 revision added paintings, statues and other fine arts to it.[164] In the 1976 Act, computer programs and databases also became copyrightable.[165]

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[157] Art 1 s 8 cl 8 of the US Constitution.

[158] 2nd Sess Ch XV, Copyright Act of 1790 (1 Statues At Large 124) *as amended in* 1802, 1870, 1909 & 1976.

[159] *Eldred v Ashcroft* 537 US 186 (2003) 245-248; *Harper & Row Publishers v Nation Enterprises* 471 US 539 (1985) 546; *United States v Paramount Pictures* 334 US 131 (1948) 158. See also *Feist Publications v Rural Tel Service* 499 US 340 (1991) 349. Here the Court held that the primary objective of copyright is not to reward the labour of authors, but "[t]o promote the Progress of Science and useful Arts". *Twentieth Century Music Corporation v Aiken* 422 US 151 (1975) 156, in which the Court held a creative work was to be encouraged and rewarded, but private motivation must ultimately promote broad public availability of literature, music, and other forms of art. For comments, see Kreiss (1995-1996) *UCLA L Rev* 7; P Goldstein "Infringement of Copyright in Computer Programs" (1985-1986) 47 *University of Pittsburgh Law Review* 1119 1123.

[160] They were revised or rewritten in 1831, 1870, 1909 and 1976.

[161] JC Ginsburg "Copyright and Control over New Technologies of Dissemination" (2001) *Columbia Law Review* 1613 1614-1615. See *Teleprompter Corp v Columbia Broadcasting Sys Inc* 415 US 394 (1974) 411-414 (cable transmissions); *Fortnightly Corp v United Artists Television* 392 US 390 (1968) 399-402 (cable transmissions); *White-Smith Music Pub Co v Apollo Co* 209 US 1 (1908) 17-18 (piano rolls).

[162] The 1802 Amendment to the Copyright Act of 1790, enacted by the Seventh Congress on 29 April 1802.

[163] Copyright Act of 1831 (First General Revision of US Copyright Law), enacted by the Twenty-first Congress on 3 February 1831.

[164] Copyright Act of 1870 (Second General Revision of US Copyright Law), enacted by the Forty-first Congress on 8 July 1870.

[165] There are other notable expansions of copyright. For example, common law provides an author perpetual copyright no matter whether the person's work is published or not, while statutory copyright law provides that the publication date is the day copyright commences. However, the Copyright Act of 1976 abolished the dual system of copyright and shifted the inceptive day of copyright to the day a works had a tangible form. The substantive examination and registration of copyright also experienced a decline after the Copyright Act of 1909.

There are similarities between the developments of US copyright law and its British counterpart. The 1790 Act resembled British copyright law before 1911 in that protection was only affordable to citizens or US residents and their executors, administrators or assignees.[166] The protection term of copyrighted works was also extended. The 1909 Act granted an initial term of 28 years' protection from the date of the first publication, followed by a possible renewal for another 28 years.[167] The 1976 Act, however, generally grants a protection term for the life of the author plus an additional 50 years after the author's death.[168] The scope of the subject matter also was expanded granting broad protection to a variety of works.[169] A House of Representatives Report stated:

> "Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent."[170]

The intent of the 1976 Act was to balance granting protection to copyrightable technology and maintaining the public domain.[171] It employs general principles along with a list of rigid permitted usages. It enshrines a fair use test that can be applied flexibly on a case-by-case basis.[172] The 1976 Act's expansiveness is balanced by the fair use test. However, it is not easy to have an equilibrium with private rights and the public interest evenly balanced on one side in an age of rapid

[166] S 1 of Copyright Act of 1790.

[167] Ch 1 s 24 of Copyright Act of 1909.

[168] S 302 of Copyright Act of 1976.

[169] The subject matter expanded from books, charts and maps to a variety of objects that were literary works and musical works which included any accompanying words as well as dramatic works with any accompanying music. Also included were pantomimes and choreographic works, pictorial, graphic, sculpture works, motion picture and other audiovisual works, and sound recordings. Compare s 3 of the Copyright Act of 1790 and see P Goldstein *Goldstein on Copyright* 3 ed (NY: Aspen, 2005) 1:49-1:50.

[170] Copyright Law Revision (HR No 94-1476) to the 94th Congress 2nd Session (1976) 51.

[171] Anonymous "Righting Copyright" *Time Magazine* (01-11-1976) 92.

[172] For example, see *Cardtoons v Major League Baseball Players Ass'n* 868 F Supp 1266 (1994) 1271, the Court opined: "[T]he factors contained in Section 107 are merely by way of example, and are not necessarily an exhaustive enumeration. This means that factor other than those enumerated may prove to have a bearing upon the determination of fair use."
See also B Beebe "An Empirical Study of US Copyright Fair Use Opinions, 1978-2005" (2008) *University of Pennsylvania Law Review* 549 report of Initial Findings for Boalt Intellectual Property Scholarship Seminar 19-10-2006 http://www.law.berkeley.edu/institutes/bclt/students/Beebe.pdf (accessed 07-05-2010).

technological development. Jessica Litman points out that if definitions of copyright works dealing with new media are interpreted broadly, copyright owners will get extensive rights without exceptions.[173] Lawrence Lessig colorfully points that it is a battle of "old versus new",[174] meaning "those who prospered under the old regime are threatened by the Internet".[175] Therefore, they endeavored to erect technical barriers and exercised their influence lobbying for new protectionist legislation.

After the 1976 Act, a number of other acts came into force. The two most important pieces of legislation are the Copyright Term Extension Act[176] (CTEA) and the Digital Millennium Copyright Act (DMCA).[177] To conform with other countries, particularly EU Member States, the CTEA retroactively extended protection from the life of the author to 70 years after the author's death or even longer.[178] The DMCA's main feature is that it equips copyright owners with legal protection so they can employ technological measures to protect and control their works in digital form. Its provisions are similar to those contained in the WIPO Internet Treaties that empower copyright authors to monitor and control access and consecutive copying. It has sparked wide debate in the US and the rest of the world for its eroding effect on fair use.[179]

2 3 2 3 Continental Europe

The details of copyright laws are quite diversified among European countries. However, respecting

[173] JD Litman "Copyright, Compromise, and Legislative History" (1986-1987) 72 *Cornell Law Review* 857 895-896.

[174] Lessig *Future of Ideas* 6.

[175] 6.

[176] Copyright Term Extension Act of 1988 Pub L No 105-298, 112 Stat 2827 (27-10-1998). Also known as the Sonny Bono Copyright Term Extension Act.

[177] Digital Millennium Copyright Act of 1988 Pub L No 105-304, 112 Stat 2860 (28-10-1998).

[178] The legitimacy of CTEA was challenged in *Eldred v Ashcroft* 537 US 186 (2003). The plaintiff Eldred argued that the extended copyright protection term prevented the free flow of information and violated the US Constitution. The passage of CTEA only occurred because of the extensive lobbying from media giants and recording and motion picture corporations such as the Disney Company.

[179] S Dusollier "Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work" (2005) *European Intellectual Property Review* 201 203; N Braun "The Interface between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community" (2003) 25(11) *European Intellectual Property Review* 496 497; Ginsburg (2001) *Colum L Rev* 1613; ND Nimmer "A Riff on Fair Use: in the Digital Millennium Copyright Act" (2000) 148(3) *University of Pennsylvania Law Review* 673 702-725; P Samuelson "Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to be Revised" (1999) 14 *Berkeley Technology Law Journal* 519 537-544.

authors and their moral rights is common among all countries. This section examines the history of regional copyright law harmonization within Europe.[180] It starts with a brief review of several European countries' copyright laws. Among the nine European Economic Community (EEC) members, Belgium and France allow use of protected works without authors' permission or compensation. However, the scope of allowed use is limited and the application narrowly defined.[181] Quite differently, the UK, Ireland, the Federal Republic of Germany, Denmark, and the Netherlands are relatively generous about copyright exceptions. The applicable circumstances and the scope of arrangements are broader. In return, authors are granted compensation for works that are used.[182]

Limitations and exceptions are found throughout Continental Europe. Most relevant are the exceptions for educational purpose[183] and for one's own use.[184] The Berne Convention with its Stockholm and Paris revisions is regarded as a compromise as different European countries have different copyright traditions.[185] The European Community (EC) takes the Berne Convention as a parallel international framework for EC copyright law harmonization.[186] Despite the rudimentary progress of harmonization within the Berne Convention, commentators still suggested excluding the limitations and exceptions from harmonization if the EEC started to harmonize copyright law.[187] Nevertheless, the need to harmonize the limitation and exceptions to copyright became so urgent when the European Economic Area (EEA) came into being in 1994 that lawmakers could no longer avoid the issue.[188] The EC was determined to have a pan-EC copyright regime to replace the large

[180] This section focuses on the regional copyright laws of the EC and EU. The EC was created under the Treaty of Rome on 25 March 1957. The Treaty hoped to build a European Economic Community (EEC) based on a common market. The EEC expanded from six members to nine members in 1973. The Treaty of Maastricht established the EU in 1993. Ten more countries from the former Soviet-bloc countries joined the EU in 2004, and another two countries joined in 2007.

[181] Dietz *Copyright Law in the European Community* 153.

[182] 153.

[183] France and Belgium did not have this exception.

[184] Belgium and Luxembourg did not have this exception.

[185] The revised text includes limitations and exceptions for the use of quotations, the use of works for teaching, and private use, see Dietz *Copyright Law in the European Community* 159.

[186] 158-159.

[187] 160.

[188] The EC did not have a "pan-EC" copyright law after the establishment of the European Economic Area (EEA). The copyright laws remained national. However, all EC Member States were signatories to both the Berne and the Universal Copyright Convention. By virtue of Protocol 28 to the Agreement on the European Economic Area (OJ No L 1, 3.1.1994), all Contracting Parties were obliged to accede to the Paris Revision of the Berne Convention before 1

number of diverse national systems.[189] Limitations on reproduction rights contained in the Berne Convention appeared "vague" to the EC[190] for it wanted a more "precise" way to stipulate limitations and exceptions.[191] Finally, an itemized list of exceptions came to appear in the Information Society Directive. This list provides for a degree of harmonization among the Members States.[192] This provision has one mandatory exception to temporary reproduction[193] and several optional exceptions to copyright owners' exclusive rights.[194] It also contains a three-step test that places the Directive in line with the Berne Convention and the TRIPS Agreement.

This summary shows that the limitations and exceptions to copyright are often prescribed precisely and exhaustively in the tradition of civil law. The scope of limitations and exceptions to copyright varies widely among European nations. Despite a great deal of diversity, most national copyright laws have exceptions for using copyrighted works for teaching and personal uses.

2 3 3 Copyright protection within an international framework

As Christopher May points out:

> "[t]he history of international recognition of intellectual property is considerably shorter than any of its national history."[195]

The Berne and Paris Conventions were established in the end of the 19th century to address the protection of literature and artistic works and industrial-related works. One of the great successes of

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January 1995 and to ensure their national laws complied with its substantive provisions before 1 January 1994. For more details see J Brown & G Robert "Intellectual Property Rights in the European Economic Area" in C Bright (ed) *Business Law in the European Economic Area* (Oxford: Clarendon Pr, 1994) 27 39.

[189] 44.

[190] Speech delivered by Reinbothe at the ALAI Conference in Amsterdam 4-8 June 1996, see J Reinbothe "The European Union's Approach to Copyright regarding the Global Information Infrastructure" in M Dellebeke (ed) *Copyright in Cyberspace: Copyright and the Global Information Infrastructure* (Amsterdam: Otto Cramwinckel, 1997) 35 37.

[191] 38.

[192] Commission of the European Communities *Copyright in the Knowledge Economy* Green Paper of the Commission of the European Communities Brussels COM (2008) 466/3.

[193] Art 5(1) of the Information Society Directive.

[194] Arts 5(2)-(4).

[195] May (2003) *EIPR* 1-5.

the Berne Convention was that it built a bridge between common and civil law systems.[196] The Berne Convention adopted the principle of reciprocal treatment and established a minimum standard for protection.[197] Quite simply, it provided systematic protections for copyrights.[198]

The Universal Copyright Convention[199] (UCC), led by the US, one of its original members, laid down a copyright protection framework and improved reciprocity of protection between the countries that ratified the Convention. One focus of the UCC was to narrow the gap between the European concept of *droit d'auteur* and the common law notion of copyright. The importance of this Convention is its recognition of developing countries' need to gain access to information.[200] Two international regulating bodies of intellectual property play an important role in copyright regulation. WIPO and the TRIPS Council, both endeavor to establish global organizations to promote better national protection for intellectual property and to promote international cooperation. In 1974, WIPO became a specialized agency of the United Nations (UN) with a mandate to administer intellectual property matters recognized by the UN Member States.

Despite WIPO's leadership in international intellectual property legislation, it is unable to enforce copyrights effectively and to resolve conflicts by employing formal procedures.[201] Therefore, at the Uruguay Round[202] the TRIPS Agreement established a procedure that incorporated several WIPO administered treaties so they would be subject to the WTO dispute settlement mechanism.[203] The powerful dispute resolution system makes the treaties enforceable. This newly-formed WTO and WIPO cooperative arrangement was a turning point for copyright protection in the digital era.[204]

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[196] Stewart *International Copyright* 26.

[197] GE Evans "Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights" (1994) 18(2) *World Competition Law and Economics Review* 137 161; TF Cottier "The Prospects for Intellectual Property in GATT" (1991) 28(2) *Common Market Law Review* 383 386.

[198] For example, it defines the subject matter of copyright and the term of protection. It also limits authors' exclusive rights, see SA Fitzpatrick "Prospects of Further Copyright Harmonisation" (2003) 25(5) *European Intellectual Property Review* 215.

[199] Universal Copyright Convention of 1952 as revised at Paris on 24 July 1971.

[200] SA Norman *Copyright: A/V and Electronic Media an International Dimension* (2004) conference paper of *60th IFLA General Conference*, August 21-27 1994 http://www.ifla.org/IV/ifla60/60-nors.htm (accessed 28-10-2013).

[201] SA Mort "The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights" (1997) 8(1) *Fordham Intellectual Property, Media & Entertainment Law Journal* 173 180.

[202] The Uruguay Round consisted of a series of negotiations between 1986 and 1993 that led to the revision of GATT. 125 countries signed the revision on 15April 1994.

[203] Art 3 of the TRIPS Agreement.

[204] Mort (1997) *Fordham Intell Prop Media & Ent LJ* 177.

The TRIPS Agreement doubled the Berne membership by providing that its members complied with Articles 1 to 21 of the Convention, except for Article 6*bis*.[205] Article 6*bis* contains authors' moral rights including a right to authorship and a right to object to their works being modified. They also had a right to object to any derogatory remarks made about them.

Clearly, the establishment of a global copyright regime does not occur as naturally as does the spread of international trade. Copyright legislative historians have shown that only like-minded countries are willing to sign and adhere to a treaty.[206] For example, the US refrained from joining the Berne Convention mainly because its copyright law required authors to comply with such formalities as registration for the subsistence of copyright, while the Berne Convention did not have such requirement. Once again, an attempt to extend copyright protection for databases in Europe failed because the countries disagreed over the rights of copyrightability of databases. Countries sharing the same legal tradition and at a more or less equal economic level are more likely to join a copyright treaty.[207] This is an important caveat to copyright legislative history.

With expanding global communication systems employing satellite broadcasting and the Internet, commentators have suggested a common approach must be found between the common law system and the civil law system in order to have true international copyright protection.[208] A "combinative application" of the two legal systems can improve the international regulation of copyright.[209] This would be the way to internationalize copyright law.

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[205] Art 9(1) of the TRIPS Agreement. For details, see EH Smith "Worldwide Copyright Protection under the TRIPs Agreement" (1996) 29 *Vanderbilt Journal of Transnational Law* 559 561.

[206] DJ Gervais "The Internationalization of Intellectual Property: New Challenges from the very Old and the very New" (2002) 12(4) *Fordham Intellectual Property, Media & Entertainment Law Journal* 929 936.

[207] Fitzpatrick (2003) *EIPR* 215.

[208] JAL Sterling *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (London: Sweet & Maxwell, 1998) 590.

[209] 590. An International Copyright Code and an International Copyright Protection Agreement have been drafted by copyright scholars. See also 1295-1299.

2 4 The nature of information and knowledge

2 4 1 Characteristics of information

Information has diverse meanings in a digital age where information is disseminated widely and swiftly. Now even what seems to be common sense concept of *information* is questioned. A fundamental question is whether it is justifiable or not to make information artificially scarce like a commodity?[210] The implication is that information access is greatly valued when information itself is thought of as being within the public domain, but when information is treated as an economic commodity, its exclusive protection is greatly emphasized.[211]

When exploring the nature of information, one comes up with diverse answers. Drahos holds the view that information is both a primary good and a social resource. He believes that initially information is not scarce when it is produced. However, because of its non-exclusionary and inconsumable nature, information is artificially made scarce to create an economic market for it.[212] After establishing its scarcity, information is marketable like a commodity. With this in mind, information is often accumulated to create a database for commercial purposes.[213]

Druey believes that information is unlike a tangible property but nevertheless it has a "chameleon-like quality".[214] This means the potential values of information depend on the diverse purposes of its recipients. As an example, entertainment news may be interesting to some but unattractive to others. Another characteristic of information is its indivisibility. Information can be neither isolated from its context with other information nor cut off from previous or subsequent information. This feature is particularly relevant for derivative works because they are based on previous works. Druey suggests that information is an act, not a message and that it is barely a movement or a flow.[215] Therefore, he argues ownership is an inept legal institution to deal with information because it grants too much exclusivity to the information. He explains:

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[210] GB Ramello "Private Appropriability and Sharing of Knowledge: Convergence or Contraction? The Opposite Tragedy of the Creative Commons" in LN Takeyama, WJ Gordon, & R Towse (eds) *Developments in the Economics of Copyright: Research and Analysis* (Cheltenham, UK: Edward Elgar, 2005) 120-141.

[211] WJ Gordon & S Postbrief "On Commodifying Intangibles" (1998) 10 *Yale Journal of Law and the Humanities* 135 143.

[212] Drahos *Intellectual Property* 171-175.

[213] 171-175.

[214] Druey *Information Cannot Be Owned* 12.

[215] 2.

> "If no mouse could be drawn and no joke on Mr. X be told without violating a copyright, this copyright is blocking the movement of information, because a price is to be paid beyond the performance to be rewarded by the copyright."[216]

2 4 2 The relationship between information and knowledge

Firstly, the idea behind having a free flow of information is derived from the basic human right of having freedom of expression.[217] It is thought that the free movement of information contributes to a democratic culture and democratic governance.[218] Traditional economic theories often explain the role of information from a static perspective and regard it merely as an input. Copyright is the result of a static view of information and its atomization. It is argued that information should not be dealt with solely as an input but also should be considered simultaneously as an output. This is because information has a collective nature that is part and parcel based on the necessary connection that one piece of information has with other pieces of relevant information.[219]

Secondly, information is regarded as a subset of knowledge while knowledge is categorized into codified knowledge and tacit knowledge.[220] The former means the knowledge that can be codified into language, writing or in other ways such as software. The latter means knowledge that is not expressed in codes but rather is communicated within a social group or community such as a class of adults with a teacher having a pedagogical manner befitting the students. Since codified knowledge is available to all, it can be communicated and also can be turned into a commodity. Therefore, copyright is to protect codified knowledge but has little importance for tacit knowledge that is found in relatively smaller groups. The advantage of codified knowledge is that it can be fixed and mulled over repeatedly which in itself can facilitate the education process. For instance, a teacher can efficiently convey knowledge with a textbook containing codified knowledge. However, this part of knowledge also can be commodified. However, there are times the dichotomy of idea

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[216] 15.

[217] The freedom of expression is found in Art 19 of the Universal Declaration of Human Rights and Art 10 of the European Convention on Human Rights.

[218] Netanel (1996) *Yale LJ* 283.

[219] Ramello "Private Appropriatbility and Sharing of Knowledge" in *Developments in the Economics of Copyright* 125.

[220] The view that information is a subset of knowledge and cannot be completely owned by a single person is widely accepted by social science, see C Geertz *The Interpretation of Cultures: Selected Essays* (NY: Basic Books Inc, 1973) and E Durkheim *On Morality and Society: Selected Writings* (Chicago: Univ of Chicago, 1973).

and expression are rendered in vain when copyright owners employ technological measures to protect digitized content. Although copyright only protects expressions of a work, technological measures can effectively prevent users from accessing both a work's form and its content.[221] The content, of course, constitutes the knowledge.[222]

Finally, a transnational innovative group is increasingly being described as "innovation commons".[223] They are the people who employ the ICT and the Internet to share information and engage in creative activities. A number of examples are found in the "copyleft movement",[224] the Wikipedia community[225] and the Creative Commons licensing schemes.[226] These examples are far from exhaustive. Unlike the tragedy of the commons construed by Hardin,[227] the innovation commons' creative activities do not deplete others' fair share because the resources they consume are inexhaustible and non-rivalrous. Consequently, the public domain is enriched instead of being exhausted by their creative activities.

Above it was mentioned that although copyright does not strictly speaking restrict access to information, from a dynamic perspective, almost all intellectual creations are derivative works built upon previous information and/or existing knowledge. An expanding copyright will make creative activities legally cumbersome and more expensive, and a combination of copyright and

[221] For example, see TB Cohen "Anti-circumvention: Has Technology's Child Turned Against Its Mother?" (2003) 36 *Vanderbilt Journal of International Law* 961 988-992.

[222] R Hilty "Copyright Law and Scientific Research" in PL Torresmans (ed) *Copyright Law: A Handbook of Contemporary Research* (Cheltenham, UK: Edward Elgar, 2007) 315 331.

[223] Lessig *Future of Ideas* 23.

[224] Copyleft is a practice that uses copyright law to remove restrictions on distribution of copies and modified versions of a work and requires the same freedom be preserved in modified works. Copyleft is based on an author's right to impose copyright restrictions with a copyright license on users. It is implemented by a license defining specific copyright terms applied to such works as software, documents, music and art. A widely used copyleft license is the General Public License.

[225] Wikipedia is an internationally web-based cooperative free-content encyclopedia that allows free access and edition of its content. It is carried out by the non-profit Wikimedia Foundation. The word Wikipedia is a portmanteau of wiki and encyclopedia, where "wiki" is a term originally from a web called *wiki wiki* and derived from the Hawaiian *wiki wiki* which means quick. It is a multilingual web of 200 languages and editions.

[226] Creative Commons is a non-profit organization. It offers different types of licenses to enable copyright holders to grant a number of rights to the public while retaining other rights. The project provides several free licenses that copyright holders can use when they release their works on the web. They also provide RDF/XML metadata to makes the automatic process and the locating of licensed works easier.

[227] Hardin (1968) *Science* 1243-1248.

technological measures effectively nullifies the dichotomy of idea and expression which functions to restrict the application of copyright protection. Again, a balance is needed in copyright law making.[228]

2 5 The nature of public interest

2 5 1 Public interest from a jurisprudential and political perspective

Public interest has been an important consideration since the inception of copyright.[229] The public interest defense in copyright law began being incorporated into legislation in the latter part of the 20th century such as was done with the CDPA.[230] Prior to codification, English judges generally accepted the concept of public interest as being legitimate in copyright infringement cases.[231] The fair use tenet also evolved from a common law tradition to a statutory copyright infringement defense. The public interest defense in copyright law is also a concern of civil law countries.[232] Although public interest has long been a goal in policymaking, it remains a somewhat ambiguous concept that suffers from political and legal diversities.[233]

The jurisprudential origin of the public interest concept can be traced from the school of social-legal studies.[234] American social-legal theorists promoted this scholarship to serve the needs of emerging liberalism. Social-legal theory generally defines public interest as representing the interests of the state, but it also seeks to reconcile and balance the competing individual, social and public interests.[235] The term public interest now is used loosely and freely as it came to be any kind of

[228] Lemley (1996-1997) *Tex L Rev* 989-1084.

[229] Davies *Copyright and the Public Interests* 28-50.

[230] S 171(3) of CDPA 1988.

[231] *Beloff v Pressdram Ltd* [1973] 1 ALL ER 241; *Lion Laboratories Ltd v Evans* [1984] 2 ALL ER 417. For comments, see G Dworkin "Judicial Control of Copyright on Public Policy Grounds" in JJC Kabel & JHM Mom (eds) *Intellectual Property and Information Law* (The Hague, Kluwer Law Int'l, 1998) 142-143.

[232] Davies *Copyright and the Public Interest* 155-159, describes the evolution of French copyright law that was accompanied by debates about public interest and the legislative response to the debates. Also see 202-221 on the same theme involving German copyright law.

[233] Bainbridge *Intellectual Property* 200-202.

[234] R von Ihering *Law as a Means to an End (translation of Der Zweck im Recht volume I (1877) & volume II (1883)* (Husik trans, Boston: Boston Book, 1913) ; EW Patterson *Jurisprudence: Men and Ideas of the Law* (Brooklyn: The Foundation Pr, 1953) 459-464; R Pound *Jurisprudence* vol I & vol III (St Paul, Minn: West, 1959) 127-142. From the 1960s, the term *sociological jurisprudence* is less used as the term *social-legal studies* increasingly has replaced it.

[235] Pound *Jurisprudence III* (1959) 327-334.

interest that benefits the public.[236] Some public interest law scholars have pointed out that:

> "In other branches of law, it is synonymized with notions of the 'public good'".[237]

The public interest defense is a wide-ranging set of law-based activities focused on protecting and promoting the public interest. The notion of public interest has two levels when copyright is involved. Its first level is that it is a horizontal public good reaching beyond the domestic area. This means a copyright system should benefit most citizens domestically as well as advance international communication and circulation of information and knowledge. With such cross-border communication, other nations are able to enjoy and cultivate creative products. Its second level is a vertical public good that exists not only for the present generation but also for future generations.[238]

According to social-legal studies, law serves as an adjustor and a reconciler of conflicting interests.[239] That is, law is a social force. Pound suggests that every society has basic assumptions upon which order rests. Thus he maintains the success of any society depends on the degree of its integration and its acceptance of basic social assumptions.[240] Copyright law is only enforceable and thus has fewer violations when ordinary citizens accept the values underlying copyright statutes.[241] Moreover, the interests of all societal groups are presented to the legislative body to be weighed by legislators to reach a final balance.[242] Therefore, copyright law, as a reconciler of interests amongst stakeholders, has to weigh competing interests and strike a balance.

In a global context, less developed countries suffered from the inequities between developed countries and themselves.[243] It is a crucial time for such countries to take advantages of ICT and the

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[236] Pound *Jurisprudence III* 235-236; R Dhavan "Whose Law? Whose Interest?" in J Cooper & R Dhavan (eds) *Public Interest Law* (Oxford: Blackwell,1986) 17 20.

[237] Dhavan "Whose Law? Whose Interest?" in *Public Interest Law* 20.

[238] A general analysis on intergenerational public goods can be found in T Sandler *Economic Concepts for the Social Science* (Cambridge: Cambridge Univ Pr, 2001) 161-167.

[239] MDA Freeman *Lloyd's Introduction to Jurisprudence* 7 ed (London: Sweet & Maxwell, 2001) 659-672.

[240] R Pound *An Introduction to the Philosophy of Law* rev ed (New Haven: Yale Univ Pr, 1954) 42-47.

[241] Only in this way is a law not just a law on paper but also is a law in action. One example is China's disjointed copyright legislation and enforcement that is criticized for merely paying lip service to its international obligations, see Hansen (1996) *Vand J Transnat'l L* 579.

[242] Pound *Jurisprudence III* 328-331 *cf* G Sawer *Law in Society* (Oxford: Clarendon Pr, 1965) 156-160.

[243] Less developed countries have gone through three stages: 1) the colonial stage when European power was dominate; 2) after the Second World War when colonized nations endeavored to regain political independence and sovereignty

Internet to catch up with the developed world. However, Stover argues:

> "The present order of world communication combines with the phenomena of concentration and transnationalization with the global disparities in person-to-person and mass media communication means. As observers from less developed countries examine this order, they see a system of imbalance with the rich in positions of power and influence over the poor. Instead of an order designed to help the majority of the world's population living in poverty, the order of the world communication seems designed to perpetuate the disparity and profit the rich. As a result, many spokespersons from the less developed countries have criticized the existing order as unjust and inequitable."[244]

Concentration and transnationalization are the two factors that affect less developed countries' communication industries. Hollywood films are an example. The films became popular and were marketed like a commodity, flowing from a country financially strong and experienced in producing entertainment productions to countries that simply supplied audiences. These films made additional profits from foreign distribution. A society's learning materials for education and research certainly are more important than its entertainment. Also analogous is that most teaching materials are only available from more developed and richer countries.[245] Therefore, as May has suggested, until a global economic regime is established, policymakers are not justified to simply devise a uniform template for copyright protection that will invariably be inequitable and invariably rests on an unstable economic foundation.[246]

2 5 2 Public interest from a legal perspective

From a legal perspective, public interest is a defense for certain lawsuits[247] and an exemption from

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and; 3) the post-colonial stage when less developed countries tried to establish independent nationhood and national development. See Stover *Information Technology in the Third World* (1984) 43.

[244] 42.

[245] *W Stover Information Technology in the Third World (Boulder, CO: Westview Pr, 1984)* 41. A Similar view is found in HL Waelde & C MacQueen "From Entertainment to Education: the Scope of Copyright?" (2004) 3 *Intellectual Property Quarterly* 259 259-283.

[246] May (2003) *EIPR* 3.

[247] For example, *Initial Services Ltd v Putterill* [1968] 1 QB 396 (CA) 405G-406B Lord Denning MR held that it was in the public interest to disclose information in a confidential status. For more details, see JB Bowers QC, M Fodder, J Lewis & J Mitchell *Whistleblowing: Law and Practice* (Oxford: Oxford Univ Pr, 2007) 256-315.

certain laws and regulations.[248] Disclosure of information and a concomitant breach of fidelity are justified if the disclosure is in the public interest. Thus, the public interest defense is derived from the social requirement of having information transparency.[249]

Cases from a number of jurisdictions illustrate how judges measure the weight of public interest with a modicum of statutory guidance. In the US, one telling case is *United States v Paramount Pictures*,[250] in which the Court considered a copyright proprietor's financial return was secondary to the public interest. *Harper & Row Publishers v Nation Enterprises*[251] reached a similar conclusion in favor of the public interest. While there is no explicit reference to the public interest defense in Canada, the Court affirmed in *R v James Lorimer & Co*[252] that the principle was in operation in the country.[253] Neither does Australia have a statutory public interest defense. Nevertheless, the judiciary displays a degree of acceptance of the public interest defense in several cases. In *The Commonwealth v John Fairfax & Sons Ltd*,[254] the case of *Beloff*[255] was cited as an authority to uphold the public interest defense.[256]

In addition to judicial activities, legislation also reflects a society's consensus on common values and assumptions. The legislative intent of several particularly relevant international treaties and national laws are examined to determine the amount of weight given to the public interest. At the international level, the WCT Preamble states:

> "*Recognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the

[248] An example is the freedom of information laws in the United Kingdom.

[249] *A-G v Guardian Newspaper* (No 2) [1990] 1 AC 109; *A-G v Blake* [1996] FSR 727; *Hyde Park Residence Ltd v Yelland* [2000] 3 WLR 215 (CA). For comments on *Hyde Park*, see R Burrell "Defending the Public Interest" (2000) 22(9) *European Intellectual Property Review* 394 394-404; A Sims "The Public Interest Defense in Copyright Law: Myth or Reality" (2006) 28(6) *European Intellectual Property Review* 335 335-343; RA Browes "Copyright: Court of Appeal Considers Fair Dealing Defence and Rejects Common Law Defence of Public Interest" (2000) 22(6) *European Intellectual Property Review* 289 289-292.

[250] 334 US 131 (1948).

[251] *Harper & Row Publishers v Nation Enterprises* 471 US 539 (1985) 546.

[252] [1984] 1 FC 1065.

[253] 27.

[254] (1980) 147 CLR 39.

[255] *Beloff v Pressdram Ltd* [1973] 1 ALL ER 241.

[256] (1980) 147 CLR 39 56-57.

> Berne Convention …"[257]

The Treaty's motif emphasizes education and access to information and the importance of achieving a balance among the interested parties. The WPPT provides a similar statement in its Preamble.[258]

At the national level, the public interest is embodied in the national legislation of a number of Commonwealth countries.[259] Apart from the western legal tradition on copyright, China's copyright law provides an example as how a country less experienced in copyright legislation endeavors to accommodate the public interest defense into its national copyright law. The PRC Copyright Law of 1990 states:

> "Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests."[260]

In China's Constitution, the public interest is referred to as *the interests of the people*.[261] They are encouraged to engage in scientific research, literary and artistic creation and other cultural pursuits.[262]

2 6 Conclusions

At its inception, copyright tried to strike a balance between copyright proprietors and copyright users. Under the onslaught of the ICT and information networks, there has been unprecedented debates on how to preserve and develop limitations and exceptions to copyright in the digital age. In addition to economic considerations, there was major concern over other values that should play a role in shaping a copyright regime. For example, in a communitarian culture that regards artistic works as a common heritage, artistic works and other copyright works are not only private property

[257] Preamble of the WCT 1996.

[258] The preamble of the WPPT 1996 states that it attempts to maintain a balance particularly with "education, research and access to information".

[259] S 225(3) of New Zealand Copyright Act of 1994 Public Act 1994 No 143, which is identical to s 171(3) of CDPA 1988.

[260] Art 4(2) of Copyright Law 1990, as revised in 2001.

[261] Constitution of the People's Republic of China of 1982 *amended in* 1988, 1993, 1999 and 2004.

[262] Ch 2 Art 47 of Constitution 1982.

but also expressions of personality in a dialectic world. It is these artistic works that play a key role in maintaining a creative society.

A review of the evolution of copyright law in different jurisdictions shows that the protection of copyright has tended to tighten when there is an increase in buying and selling of literary and artistic works. Moreover, an examination of copyright laws in the UK, the US and in continental Europe demonstrates that common values are found among jurisdictions, notwithstanding the different approaches common law and civil law systems use to regulate copyright. For example, it is commonly recognized there is a need to curb copyright owners' exclusive control over copyrighted works and promote social access and uses of the works. Legislators and policymakers are somewhat prone to take the public interest into consideration. Although a few jurisdictions have codified the public interest defense in copyright laws, it virtually operates in the legislative policymaking process and the judiciary. It is in the interest of the public good to preserve limitations and exceptions to copyright so a dynamic culture flourishes.

Despite common values, economic discrepancies among nations play a significant role in affecting national copyright lawmaking and enforcement. Although harmonizing copyright law is necessary, a one-template-for-all recipe for copyright legislation is neither practical nor fair, especially for less developed countries. Therefore, national legislators have to come up with a copyright law adaptable to their own social and economic needs.

Chapter Three

Copyright Limitations and Exceptions for Education and Research: Unite in Diversity

The internationalized copyright norms established by treaties represent the compromises of competing political and economic interests.[263] With harmonization, copyright limitations and exceptions led to unprecedented debates. This is because common law and civil law countries have very different legal traditions in dealing with copyright limitations and exceptions. Developed and developing countries with diverse economies also need differing limits on copyrights in order to promote their particular educational institutions and academic research.[264]

This chapter focuses on copyright limitations and exceptions specifically relating to education and research within an international framework. It commences with the ever-increasing digital gap at both the national and international levels as background for international copyright legislation. The subsequent sections briefly discuss why copyright limitations and exceptions are in urgent need of review, and examine the limitations and exceptions included in major international instruments such as the Berne Convention, the EU Information Society Directive, the WIPO Internet Treaties, as well as the WTO TRIPS Agreement.

The chapter examines both the general and specific exceptions for education and research. Emphasis is placed on the fair use doctrine and the associated approaches followed in common law as well as the continental civil law systems. Following is a close look at the fundamental elements of copyright limitations and exceptions in different jurisdictions. It is concluded that despite jurisprudential differences, it is possible to formulate a minimal standard for limitations and exceptions that contain basic fundamental elements. Since the minimal standard consists of bits and pieces found in different legal systems, legislators putting together a copyright law can incorporate

[263] May (2003) *EIPR* 1; Sell *Private Power, Public Law* 8-10; JM Finger "The WTO's Special Burden on Less Developed Countries" (1999) 19 *Cato Journal* 425 432-434.

[264] See WIPO Standing Committee on Copyright and Related Rights *Proposal by Chile on the Analysis of Exceptions and Limitations* SCCR/13/5 (2005). The proposal requested the WIPO Standing Committee to investigate national models of copyright limitations and exceptions and urged it to establish an agreement on limitations and exceptions for public interest. WIPO Provisional Committee *Provisional Committee on Proposals Related to a WIPO Development Agenda* PCDA/1/2 (2006). In this proposal Chile requested WIPO to appraise the importance of the public domain where users can use works without copyright restrictions. Chile also requested the WIPO to investigate such complementary measures as open licensing systems that can stimulate creativity.

this minimal standard into their national law without abolishing its own legal tradition. An examination of Australian copyright legislation exemplifies the integration of diverse limitations and exceptions approach. It shows that it is feasible for a country to have hybrid copyright legislation while preserving its own tradition. This is particularly illuminating for countries wishing to follow others' copyright legislation. The final section concludes that although there is a degree of harmonization at the international level, there is not one template for universal copyright legislation. Lawmakers always need to take their nationals needs into consideration when harmonizing the copyright law they are writing with other countries' established copyright law.

3 1 The digital divide

The concept of digital divide first came about in the US National Telecommunications and Information Administration's report entitled "Falling through the Net II: New Data on the Digital Divide".[265] The digital divide refers to the very different levels of access that diverse groups of people have to ICT.[266] Studies have since shown that there is a digital divide among ethnic groups, people of different income levels and people who live in different geographic areas.[267] The digital divide not only exists within a nation, but extends outward regionally and internationally.[268] For example, people in the US have a much higher rate of Internet access than do people in Columbia. Crossing borders, the digital divide is found between technologically developed and technologically under-developed countries.[269]

More importantly, the digital divide extends beyond the infrastructure and hardware level. The Digital Opportunity Task Force (DOT Force)[270] indicated that a "lack of locally created content"[271]

[265] National Telecommunications and Information Administration *Falling through the Net II: New Data on the Digital Divide* (Washington: NTIA, 28-07-1998) http://www.ntia.doc.gov/report/1998/falling-through-net-ii-new-data-digital-divide (assessed 27-10-2013).

[266] BJ Monroe *Crossing the Digital Divide: Race, Writing, and Technology in the Classroom* (NY: Teachers College Pr, 2004) 5.

[267] National Telecommunications and Information Adminstration *Falling through the Net II*; Monroe *Crossing the Digital Divide* 8-14.

[268] LJ Servon *Bridging the Digital Divide: Technology, Community, and Public Policy* (Malden, MA: Blackwell Publishing 2002) 43.

[269] P Norris *Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide* (Cambridge: Cambridge Univ Pr, 2001) 45-47.

[270] The DOT Force was created at the G8 Heads of State Kyushu-Okinawa Summit in 2000 and consisted of 43 teams from governments, private sectors, non-profit organizations and international organizations, representing developed and

and "uneven ability to derive economic and social benefits from information-intensive activities"[272] also causes a digital divide. Therefore, the digital divide is not only about access and the application of technology, but covers the content that technology transmits.

In summary, the digital divide is found at three levels. First, developing countries usually suffer from underdeveloped technology and an inadequate budget for infrastructure construction. Second, they just do not have the institutional capability to manage an information infrastructure. Third, and most importantly, it is a financial burden for people in developing countries to pay copyright royalties for material stored or transmitted in digital form. Moreover, a relatively large portion of royalties may end being paid to foreign copyright holders. This does not significantly benefit any developing country's national economy.

Copyrighting foreign, not domestic, material and having an inadequate infrastructure has had a particularly negative impact on copyright importing countries. Jessica Litman categorizes countries as copyright "haves" and "have-nots".[273] Copyright-haves are almost always developed countries with most of the copyrights controlled by giant publishing, software and entertainment conglomerates. In contrast, copyright have-nots are usually developing countries greatly dependent upon foreign publications.[274] An example is African universities. Since most countries do not have an adequate national Internet infrastructure, a large number of universities and institutions still do not have adequate Internet access.[275] Beset with financial crises, many educational institutions have been unable to catch up or stay up with technological development.[276] More importantly, there is little material without copyright restrictions that African universities can use.[277] The pay-per-view format has worsened the universities' access to copyrighted materials.[278]

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developing countries.

[271] Digital Opportunity Task Force *Digital Opportunities for All: Meeting the Challenges* DOTF (DOTF, June 2001) 4.

[272] 4.

[273] JD Litman "Revising Copyright Law for the Information Age" (1996) 75 *Oregon Law Review* 19 19-48.

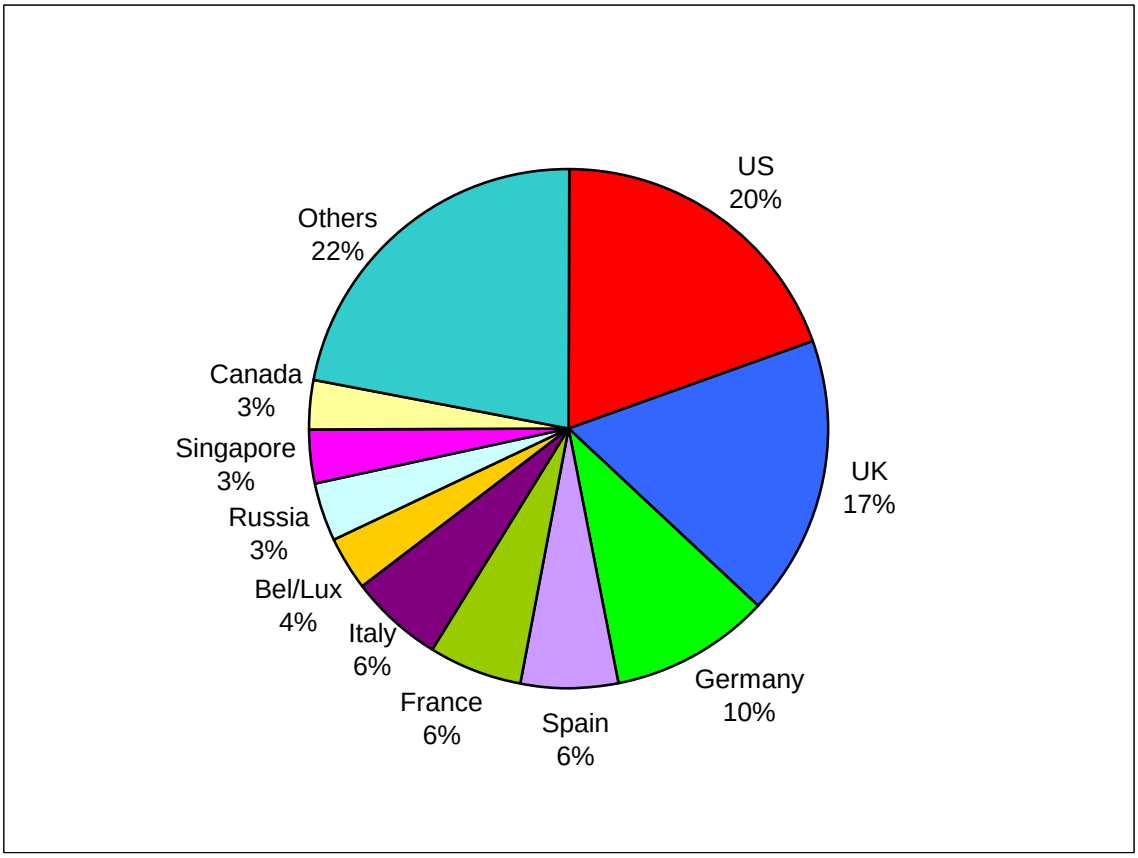
[274] Commission on Intellectual Property Rights *Integrating Intellectual Property Rights and Development Policy* (London: CIPR, September 2002) 100.

[275] H Sun "Copyright Law under Siege: An Inquiry into the Legitimacy of Copyright Protection in the Context of the Global Digital Divide" (2005) 36(2) *International Review of Intellectual Property and Competition Law* 192 194 & accompanying notes.

[276] 194 & accompanying notes.

[277] See Table 3.1.

[278] J Litman *Digital Copyright: Protecting Intellectual Property on the Internet* (Amherst: Prometheus Books, 2001) 13.



The Top Book Exporting Countries by Market Share, 1998
Source: UNESCO (2000a)

Table 3.1

Clearly, both international and national copyright laws can play a vital role in adjusting the imbalance caused by the digital divide. Copyright limitations and exceptions are particularly important to strike a balance between right holders and users. However, a major problem is that the limitations and exceptions contained in international copyright conventions and treaties are inconsistent and subject to various interpretations. The following examination of several international copyright instruments shows that they are less than useful in being able to address the right holder and user imbalance.

3 2 The ways to harmonize copyright law

For international trade to be meaningful requires internationally recognized rules.[279] Quite simply,

[279] HC Gutteridge *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (Cambridge: Cambridge Univ Pr, 1946) 155-157.

the Internet and ICT challenge national regulations.[280] The complexity of economic relationships occurs on a scale that is far too large to be dealt with by a single nation state.[281] A transnational body such as the EU was thus formed to deal with many transnational issues. For copyright law, the Berne Convention has provided minimum copyright protection standards for its members for over a century.

Law is a creature of culture (*nomos*) and reason (*logos*).[282] That said, law has a normative function to determine what is the bad and how it differs from the good, as well as a positive function that establishes concrete norms. Lawmakers of developing countries need to avoid a purely legal positivist approach that simply transplants a set of rules without thought. Moreover, Gutteridge shows when unifying law, a rule agreed upon by a majority of countries may be repugnant to a minority of them. Such a rule may lead to a radical modification of their national law.[283] Even more perilous is that certain interests may seek to advantage themselves through unification.[284] For example, an exporting country may want to impose a rule favoring exports that is disagreeable for an importing country. This commonly happens between copyright product exporters and importers when formulating international copyright rules. Therefore, as long as different legal traditions exist and national economic levels are unequal, national copyright laws are sure to be very different in the future.

Berman, in discussing globalization, argues that instead of having diverse jurisdictions, there is a trend emerging that a single central legislative or administrative organization "swallows up" jurisdictions.[285] But in fact the nation-state monopolies of authoritative norms are declining and the emergence of the EU law, international trade laws (like the WTO), and international human rights committees attest to this.[286] Goldman also is a believer in "global jurisprudence", particularly in the area of international trade.[287] With copyright law, usually it is copyright treaties that are subject to the WIPO and the WTO's administration. However, it is quickly pointed out that global

[280] DB Goldman *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge: Cambridge Univ Pr, 2007) 47.

[281] M van Creveld *The Rise and Decline of the State* (Cambridge: Cambridge Univ Pr, 1999) 385.

[282] 70-74.

[283] Gutteridge *Comparative Law* 160.

[284] 160.

[285] 160.

[286] Goldman *Globalisation and the Western Legal Tradition* 1-21.

[287] 292-295.

jurisprudence does not mean there will be a suppressive regime. Rather, it is suggested lawmakers of such international organizations will be sensitized to generalizing rules for different jurisdictions because of their diverse cultures and values.[288] For a country implementing a set of generalized rules, national policymakers need to maintain a balance between synchronizing the national law very closely with the rules and applying the rules flexibly so they will not drastically interrupt the country's legal tradition.

There are three approaches to harmonizing and unifying a law.[289] The first way is to select a rule commonly recognized and agreed upon by the legal systems involved and ensure all the parties adopt it. The second way is to abandon all the old rules and create a new rule that all parties agree they will implement. The third is a middle-way approach that generalizes the rules of the different jurisdictions and ensures these generalized elements become a minimal standard that all the parties have to comply with. This approach neither interferes with the practice of law in the vast majority of communities nor does it abandon the fundamental nature of the participants' national laws.

The following is an examination and evaluation of the differing approaches to copyright limitations and exceptions contained in regional and international copyright conventions and treaties. This shows that international copyright legislation has followed a partial unification approach to harmonize copyright law. The Berne Convention adopted a three-step test as a general rule that is neither created nor borrowed from a particular country. Rather, it is a compromise between competing legal systems. Many subsequent treaties have adopted a test similar to the Berne three-step. Countries adopting a three-step test are able to keep their own customs and standards on copyright, and at the same time meet the minimal international standard for copyright protection. To harmonize copyright law, it is desirable for countries to have the discretion to design specific limitations and exceptions under an overarching rule such as the Berne three-step test.

3 3 Copyright limitations and exceptions

3 3 1 A clarification of language

It is the limitations on copyright that establish a boundary where the copyright ends and the public domain begins. The exceptions to copyright determine the types of protected materials not subject

[288] 292.

[289] Gutteridge *Comparative Law* 160.

to the holder of the copyright.[290] Generally, exceptions are meant to give users privileges for acts that would otherwise be considered an infringement of copyright.[291] Note that the term "exception" varies in different jurisdictions.

The two terms, "limitation" and "exception", are often used interchangeably.[292] In particular, copyright exceptions rooted in different legal systems refer to a variety of activities that are often semantically vague. For instance, the Information Society Directive employs the term "exceptions or limitations", while the Berne Convention employs "exceptions" and "free uses of works". In the UK, the CDPA uses the term "permitted acts". In the US, "fair use" operates as a flexible test to examine whether usage of copyrighted material has infringed copyright or not.[293] Some countries employ "limitations" or "limits", as well as "restrictions".[294] In general, "limitations and exceptions" are used in this study unless a special term is taken from a specific legislative text.

3 3 2 The justifications for limitations and exceptions

Copyright limitations and exceptions such as the fair use tenet are important components in copyright law. As Miller and Davis concisely write

> "If the copyright law is the 'metaphysics' of law, fair use is its semiotics."[295]

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[290] Gervais (2002) *Fordham Intell Prop Media & Ent LJ* 929 936.

[291] Netanel (1998) *Vand L Rev* 222; Ryan (2000) *Or L Rev* 660-661.

[292] World Intellectual Property Organization & P Sirinelli *Exceptions and Limits to Copyright and Neighboring Rights* (3-12-1999) WCT WPPT/IMP/1 3.

[293] Some scholars consider fair use as a defense against copyright infringements, while others regard it as a privilege granted to users, see *Meeropol v Nizer* 560 F 2d 1061 1068 (2nd Cir 1977). In Canada, certain uses of copyrighted works are users' rights, see *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13 para 48. See also Vaver *Copyright Law* 170. Some scholars consider fair dealing is a right of the public, see Laddie et al *Copyright and Designs* 749. This study considers fair use a defense against copyright infringements. Simply considering fair use a user's right is impractical and weakens or even disguises the current imbalance between copyright owners and users. For example, although Canadian copyright law generally favors a users' rights approach, the Courts do not always follow this approach, Vaver *Copyright Law* 171 cited a case in which the Court interpreted exceptions narrowly: *Cie générale des établissements Michelin/Michelin & Cie v CAW Canada* (1996) 71 CPR (3d) 348 at 381 (Fed. TD) [*Michelin*].

[294] The word "limit" is used in Germany and Spain, while "limitation" is used in Sweden, Greece and the United States. "Restriction" is used in Switzerland, and "free use" is used in Portugal. See Sirinelli *Exceptions and Limits* 2.

[295] R Miller & MH Davis *Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell* 2 ed (St. Paul, MN: West/Wadsworth, 1990) 349.

Moreover, any search for a legislative solution is by itself generally fruitless, because the judiciary has played an important role in determining the current system of exceptions.[296] In the US, fair use as a legal principle not only exists in statutory law, but also guides some judicial activities. Hence, fair use is a telling example as to why copyright should be limited and how it might be done.

There are two important justifications for fair use. First, from the perspective of distributive justice, the distribution of scarce resource should meet each individual's minimum need. The basic principles of distributive justice theory are meant to maximize liberty, equity of opportunity and a second principle of justice. The second principle of justice means social and economic inequities are only justified if they provide the greatest benefit to society's least advantaged members.[297] Unlike utilitarianism that is criticized for tolerating a minority suffering from inequities in the interest of the most efficient utility,[298] the justice theory primarily concerns social equity. The theory of justice regards liberty as a political right. Consequently, growth of property is subordinate to political liberties because, at least in theory, political liberties cannot be exchanged for economic gain.[299]

Pursuant to the distributive justice theory, Drahos regards the right to receive information to be a political liberty.[300] The knowledge and skills that one can acquire from books and other copyrighted materials are vital for the growth of human capital in any society. However, intellectual property in general, and copyright in particular, arbitrarily prices knowledge since copyright law regulates who can print books and journals and how much copyright owners can charge users to obtain access to protected materials.[301] Arbitrarily priced books and journals discourage and restrain poorer people from investing in educational materials. Therefore, fair use and compulsory licensing schemes

[296] Burrell & Coleman *Copyright Exceptions* 9.

[297] It is also called the *difference principle*, see Rawls *Justice* 60 & 83. See also L Crocker "Equality, Solidarity, and Rowls' Maximin" (1977) 6(3) *Philosophy and Public Affairs* 262 262-266; S Fleischacker *A Short History of Distributive Justice* (Cambridge, MA: Harvard Univ Pr, 2004) 109.

[298] Rawls *A Theory of Justice* 28; HA Bedau "Justice and Classical Utilitarianism" in CJ Friedrich & JW Chapman (eds) *Nomos* volume 6 (New York: Atherton Pr, 1963) 284 284-305, argues that Bentham's utilitarian theory is unable to account for moral rights that are at the heart of justice theory; B Parekh "Bentham's Theory of Equality" (1970) 18(4) *Political Studies* 478 478-495 presented a similar argument; A Goldworth "The Meaning of Bentham's Greatest Happiness Principle" (1969) *Journal of the History of Philosophy* 315 315-321; A Goldworth "The Sympathetic Sanction and Sinister Interest in Bentham's Utilitarianism" (1987) 4.1 *History of Philosophy Quarterly* 67 67-68, argues Bentham's theory cannot accommodate the principles of distributive justice and individual entitlements.

[299] Rawls *Justice* 303.

[300] Drahos *A Philosophy of Intellectual Property* (1996) 177.

[301] 179-180.

compensate disadvantaged groups and help to rebalance society.[302]

Second, from an economic perspective, when transaction costs exceed the intrinsic value of a given good, market failure occurs;[303] extra transaction costs need to be removed or avoided to ensure the market's efficiency.[304] For example, the private use of a copyrighted work has long been regarded as a type of fair use.[305] This came about since investigating and controlling private use is usually expensive and time-consuming, and often technically impossible.[306] In addition, private use in most cases does not decrease a work's commercial profit. Therefore, private use is generally permitted as fair use in order to further the operation of an efficient market.

3 3 3 Why limitations and exceptions are of interest

Recently limitations and exceptions have attracted unprecedented attention for several reasons. First, in the UK and other European countries, there are concerns that stem from the implementation of the Information Society Directive[307] the EU employs to harmonize European countries' copyright legislation. Because EU Member States are significantly different, these countries have sought to minimize the impact of the Information Society Directive. Although the Directive does not seek to harmonize permitted uses, it did release an exhaustive list of exceptions including a mandatory one and a number of optional ones. Therefore, a number of the Member States face the issue of amending their national legislation.[308] For example, the problem for the UK is that fair dealing is included in the CDPA as an exception, but the Directive has no general or additional exception for fair dealing.[309]

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[302] Rawls *Justice* 303. Drahos *A Philosophy of Intellectual Property* 180.

[303] Landes & Posner *The Economic Structure of Intellectual Property Law* 11-24; Gordon (1982) *Colum L Rev* 1600 1600-1657; Coase (1960) *JL & Econ* 1 15-17. However, some economists argue that markets do not fail, see BP Simpson *Markets Don't Fail!* (Lanham, MD: Lexington Books, 2005).

[304] Coase (1960) *JL & Econ* 3.

[305] It is debatable whether private use should be fair use in a digital environment anymore, see JC Ginsburg & Y Gaubiac "Private Copying in the Digital Environment" in JJC Kabel & GJHM Mom (eds) *Intellectual Property and Information Law* (The Hague: Kluwer Law Int'l, 1998) 149 149-155.

[306] 149.

[307] Directive 2001/29/EC of the European Parliament and the Council (2001) OJ L 167/10.

[308] Burrell & Coleman *Copyright Exceptions* 2-3.

[309] Fair dealing exempts infringements of copyright for the purposes of news reporting, criticism and review. Such activities are a part of the right of freedom of expression, a basic human right that is found in Art 10 of Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, Rome, 4.XI. 1950. Fair

In addition to EU developments, there are international instruments that also influence limitations and exceptions. Since the TRIPS Agreement is mirrored by the Information Society Directive, it limits contracting parties' freedom to provide copyright exceptions. However, the TRIPS Agreement advances the enforcement mechanism by linking the dispute settlement mechanism to the WTO.[310] Therefore, Member States have to treat the TRIPS provision more than as merely a general principle.

3 4 Limitations and exceptions at various levels

3 4 1 The national level

3 4 1 1 The UK: fair dealing and permitted acts

The UK CDPA's statutory permitted acts are considered to have created a new range of situations in which copyright can conflict with freedom of expression.[311] Furthermore, there were external constraints that prevented a user from relying on an exception.[312] With this in mind, the following subsection examines laws explicitly related to education. Since permitted acts pertaining to libraries and general rules also are relevant for education,[313] pertinent rules are examined where necessary.

Fair dealing is applicable to education,[314] research and private study,[315] criticism, review and news reporting. [316] Statutory exceptions for education include copying: 1) course instructions or examinations,[317] 2) anthologies for educational use,[318] 3) performances, plays or works in courses offered by educational institutions,[319] 4) recording of broadcasts by educational establishments,[320]

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dealing operates in judicial activities, see *Hyde Park Residence Ltd v Yelland* [2000] 3 WLR 215 (CA); *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2002] ECDR 32 337; *Pro Sieben AG v Carlton Television Ltd* [1999] 1 WLR 605.

[310] May (2003) *EIPR* 2.

[311] Burrell & Coleman *Copyright Exceptions* 79-80.

[312] 79-80.

[313] D Lester & P Mitchell *Joynson-Hicks on UK Copyright Law* (London: Sweet & Maxwell, 1989) 160.

[314] Ss 32-36 of CDPA 1988.

[315] S 29.

[316] Ss 28-30.

[317] S 32 of CDPA 1988.

[318] S 33.

[319] S 34.

and 5) reprographic copying of passages from published works[321] and lending of copies by educational establishments.[322]

An educational institution is permitted to photocopy for instructional purposes up to one per cent of any work in any quarter of the year.[323] Acts carried on behalf of such institutions are also permitted, but are subject to specific restrictions contained in relevant provisions. For example, a photocopying shop is entitled to copy parts of a work on behalf of students for their study. Moreover, a blanket license system may not restrict the proportion of a work that may be copied to less than the amount permitted as fair dealing, although payment may be required.[324] The CDPA also gives the Copyright Tribunal jurisdiction over a general licensing scheme for reprographic copying.[325]

The first problem with the fair dealing provisions is that the meaning of "educational establishments" is unclear. They are defined as schools and any other educational establishments specified by order of the Secretary of State.[326] However, it is unclear whether universities, open universities, polytechnics and other institutions are included in the definition of an educational establishment.[327]

Another problem that attracted criticism is that section 29 of the CDPA, the general rule on the permitted acts for research and private study, over-restricts reprography for educational use. Consequently, it negatively affects higher education institutions.[328] Moreover, the blanket licensing system requiring payment for copying for educational purposes shows the Government tried to begin limiting permitted acts to encourage licensing schemes.[329] The schemes enable educational institutions to access more material through negotiation. However, a licensing scheme may limit the scope of fair dealing in copyrighted works. Instead, educational institutions may have to pay more

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[320] S 35.

[321] S 36.

[322] S 36A.

[323] S 36(2).

[324] S 36(4).

[325] S 130. It requires the Tribunal to consider:

"(a) the extent to which published editions of the works in question are otherwise available, (b) the proportion of the work to be copied, and (c) the nature of the use to which the copies are likely to be put. "

[326] S 174(1) of CDPA 1988.

[327] It is suggested that some types of institutions of higher education would be included, see Lester & Mitchell *UK Copyright Law* 161.

[328] Burrell & Coleman *Copyright Exceptions* 78-79 & 162-163.

[329] Lester & Mitchell *UK Copyright Law* 165.

through a licensing scheme.[330]

A third problem is that the subject matter of fair dealing is narrow in scope. Only literary, dramatic, musical and artistic works and typographical arrangements of published editions are included. Last but not least, educational institutions such as libraries may be burdened financially by having to monitor copying activities. A copy is not exempt from copyright infringement if a license is available to authorize the copying and the person making the copy knew, or ought to have known, of the availability of the license. Even posting a copyright infringement warning next to a self-service photocopy machine may not immunize a librarian against monitoring liability. This is particularly difficult for educational institutions to police. An Australian case *University of New South Wales v Moorhouse*[331] has long represented these concerns. An Australian university was held liable for authorizing copying infringement despite a warning poster it had displayed. Many speculated whether UK courts would reach a similar decision.[332] Then, a Canadian court[333] clearly did not follow the *Moorhouse* approach for it was held to be "inconsistent with previous Canadian and British approaches".[334]

3 4 1 2 The US and the fair use tenet

Two general copyright limitations in the US copyright law are the fair use defense and the demarcation between ideas and expressions.[335] The fair use clause stipulates copyright is not infringed in such areas as criticism, comment, news reporting, teaching (including the use of multiple copies in the classroom), and scholarship/research. The law provides a non-exhaustive list of four factors as a fair use test: 1) the purpose and the character of the use; 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.

Fair use is a general defense that can be applied flexibly. It depends on the precise facts of each case

[330] The Royal Society "Keeping Science Open: the Effects of Intellectual Property Policy on the Conduct of Science" (14-4-2003) *The Royal Society* <http://royalsociety.org/policy/publications/2003/keeping-science-open/> (accessed 27-10-2013); Hilty "Copyright Law and Scientific Research" in *Copyright Law: A Handbook* 315 322.

[331] (1975) 133 CLR 1.

[332] In particular, in *CBS Songs Ltd v Amstrad Plc* [1988] RPC 567 held "it is thought that UK courts would reach a similar conclusion to that in *Moorhouse*", though the House of Lords appeared to take a very different approach to the question of authorization.

[333] *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13 para 51.

[334] Para 41.

[335] The idea/expression dichotomy means copyright only protects expressions fixed in certain forms.

and is not considered a generalized concept.[336] However, the fair use mechanism is threatened by commoditized information[337] and jeopardized by a move towards legal activism. It is thought that the market is not able to allocate an adequate share for public use when schools, libraries and the courts are concerned.[338] There is the thinking that policy goals rather than economic efficiency can advance generous fair use standards to maximize information access,[339] and to promote public learning and free speech.[340]

Three landmark cases reflecting the changing attitude of judicial power towards fair use are analyzed below. They demonstrate that in the last two decades, the courts initially welcomed such new technology as home taping by granting general fair use to certain practices, but became more stringent with users when the Internet allowed the dissemination of information.

The first case is *Sony Corporation of America v Universal City Studios, Inc*[341] in which a Supreme Court majority held that using a videocassette recorder taping function for time-shifting[342] a television program being broadcast was fair use. Time-shifting the recording was consistent with the first and the fourth factors in section 107 of the 1976 Copyright Act. In this case the Court was quite positive toward taping technology.

However, the constraints on photocopying research materials were tightened in the later *Texaco* decision.[343] This case also shows the licensing system encroaching on fair use. The District Court

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[336] See *Campbell v Acuff-Rose Music Inc* 114 S Ct 1164 (1994) 1170; *Harper & Row Publishers v Nation Enterprises* 471 US 539 (1985) 549; *Wright v Warner Books Inc* 953 F 2d 731 (2nd Cir 1991) 740; HR Rep No 94-1476 94th Cong 2nd Sess 65-66 (1976) ("no generally applicable definition [of fair use] is possible, and each case raising the question must be decided on its own facts").

[337] WJ Gordon "Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives" in N Elkin-Koren & N Netanel (eds) *The Commodification of Information* (The Hague: Kluwer Law Int'l, 2002) 149 149-192.

[338] A Rahmatian "Copyright and Commodification" (2005) 27(10) *European Intellectual Property Review* 371 371-378; TJ Brennan ''Markets, Information, and Benevolence'' (1994) 10(2) *Economics and Philosophy* 151 151-168.

[339] RS Brown "Eligibility for Copyright Protection: A Search for Principled Standards" (1985) 70 *Minnesota Law Review* 579 579-609.

[340] P Akester "The Political Dimension of the Digital Challenge — Copyright and Free Speech Restrictions in the Digital Age" (2006) 1 *Intellectual Property Quarterly* 16 16-33.

[341] 464 US 417 (1984).

[342] Time-shifting is to record a television show and then to store it in order to view the show at a time more convenient to the consumer.

[343] *American Geophysical Union v Texaco Inc* 802 F Supp 1 (SDNY 1992); *Re American Geophysical Union v Texaco*

held that some eight articles photocopied from the Journal of Catalysis by the research center of Texaco, a petroleum company, for use by one of its researchers was not fair use. The decision was affirmed by the Court of Appeals in 1994. Most detrimental was that the Court narrowed the scope of research. First, the research purpose in section 107 of the 1976 Copyright Act is narrowed since the Second Circular Court asserts only copying done for laboratory work is a research purpose. It then seems other copying that facilitates research weighs against a finding of fair use.[344] Even worse, the Court attempted to interpret commercial use broadly under the first factor of fair use. However, attempting to distinguish between a commercial use done for institutional research and non-commercial use done by independent research is ambiguous and not sustainable.[345] Even university research nowadays is often sponsored by government or industry and certainly is far from being entirely independent.[346]

Overemphasizing a publisher's potentially lost revenue also shows the Court using circular reasoning. The Court reasoned in *Texaco* that whether copying was fair or not depended only on the availability of the license the publisher had issued.[347] The reasoning was if a license was ready and accessible, the research center should pay for the use of the copied articles. The Court insufficiently considered or possibly neglected the research purpose of the photocopied articles. This is troubling for libraries that may have a problem similar to the *Texaco* one.[348] The Court's logic was that if a use can be charged for, then it should be charged. The Court neglected to consider that the availability of a payment license does not necessarily convert into a compulsory payment, particularly if the use is fair. This decision virtually reduced fair use's application to works without readily accessible licenses.

Moreover, given that Texaco's copying was for a commercial purpose, the use should not be considered as being in conflict with its enjoyment of section 108's rights. Section 108(a)(2)

Inc 37 F 3d 881 (2nd Cir 1994) (*Texaco*).

[344] *American Geophysical Union v Texaco Inc* 37 F 3d 881 (2nd Cir 1994) 5-12. As the dissent points out, however, only a tiny fraction of research actually involves laboratory experiments. Jacobs J, dissenting at 4-10.

[345] The Copyright Crash Course "Professional Fair Use after Texaco" *University of Texas Libraries* < http://copyright.lib.utexas.edu/tex2.html> (accessed 27-10-2013).

[346] above

[347] above*Professional Fair Use after Texaco*.

[348]RT Thomas, SN Weller & Squire, Sanders & Dempsey "Summary of Texaco Decision: Memorandum" (9-9-1992) *Stanford University Libraries: Copyright & Fair Use* <http://fairuse.stanford.edu/texaco/summary-of-decision/> (accessed 27-10-2013). This Memorandum was submitted to the Association of Research Libraries and the Coalition for Networked Information which described and assessed the impact of this decision on library community.

specifically states it is not copyright infringement if the materials are open to the public or specialized researchers. The Court's refusal to apply section 108 was criticized, as the Court should have known the legislative history and the actual purpose of the legislation.[349] Overall, the *Texaco* case does a disservice to libraries and researchers. It is worrisome that subsequent courts need to follow this approach in interpreting the scope of fair use restrictively.[350]

The *Napster*[351] case is a watershed decision on peer-to-peer (P2P) technology.[352] If *Texaco* shows the Court relying on a licensing system that reduces fair use, *Napster* represents yet another layer that strengthens copyright protection, that is, digital technology. The Court was less friendly and encouraging to new technology than it was in *Sony*. Napster provided a file-swapping service enabling end users to use the Internet to exchange their music and other files from each other's hard disc. Although Napster was not directly involved in maintaining the files on its equipment, it facilitated the exchange by providing *Musicshare* software and maintaining an index facility. The Court concluded that the swapping activities of end users were not fair use and released an injunction to bar Napster from offering its service. The blanket ban on Napster's service exceeded the need of copyright protection because the swapped materials were not only copyrighted music, but also music that was already in the public domain or had never received music protection.[353] Besides music, other audio products for learning, such as lectures and records of symposia, also could be swapped via Napster's network. However, all of these lawful materials were barred from being shared. Lessig argued that there were "lots that under any fair estimation constitute fair or non-infringing use" and "[t]he use is clearly non-infringing and substantial".[354]

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[349] Thomas et al "Memorandum", cited HR Rep 1476, 94th Cong, 2nd Sess (1976).

[350]Thomas et al "Memorandum". See also "Texaco" http://fairuse.stanford.edu/primary_materials/cases/texaco/settlement.html (accessed 07-05-2010); KD Crews *Copyright Law, Libraries, and Universities: Overview, Recent Developments, and Future Issues* (1992) working paper presented to *Association of Research Libraries*, October 1992 http://cool.conservation-us.org/bytopic/intprop/crews.html (assessed 27-10-2013) .

[351] 284 F 3d 1091.

[352] P2P architecture means individuals can identify and transfer files from other individuals. In other words, it enables peers to obtain files from other peers. Although Napster's service is not what one might call complete P2P architecture because there is a centralized database to provide information to on-line users, the effect is peer to peer.

[353] Lessig gives an example of some kinds of music that have had never received copyright protection. He points out "music that has never existed in the history of music production" as:
"The important factor is not that a user can get Madonna's lasted songs for free; it is that one can *find* (emphasis added by the author) a recording of New Orleans jazz drummer Jason Marsalis' band play 'There's a Thing Called Rhythm'." Lessig *Future of Ideas* 131.

[354] 196.

The *Napster* case shows that the judges have become very cautious about the ubiquitous disseminating ability of the Internet. They are inclined to adopt a more restrictive approach to control the massive transmission and exchange of materials.

3 4 2 The international level

3 4 2 1 The Berne Convention

The limitations and exceptions in the Berne Convention fall into three categories: specific exceptions for informational and educational purposes, a copyright limitation on the right to reproduce and a non-voluntary licensing system. The limitations and exceptions are governed by a three-step test contained in the Berne Convention.[355]

3 4 2 1 1 The general exception

The Berne Convention needed substantial flexibility to accommodate members of competing legal systems in order to be a real international copyright regime. The ideal was reached when an overarching general exception was created and inserted in Article 9(2) of the Convention. It read:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

The provision is also called the three-step test, a crucial provision that subsequently was included in many national and international copyright laws. The three elements of the test are examined below.

The first step of "certain special cases" implies copying is exempt in different kinds of cases, such as for one's private appreciation as well as for education and research. Since it was impossible for Union Members to agree upon a list of specific purposes, countries of common law and civil law systems compromised and adopted a generalized term "certain special cases".[356] However, legal experts and scholars now argue among themselves over the meaning of "certain special cases".

[355] Art 9(2) of the Berne Convention 1986; T Heide "The Berne Three-step Test and the Proposed Copyright Directive" (1999) 21 *European Intellectual Property Review* 105 105-109.

[356] WIPO & Sirinelli *Exceptions and Limits* 42.

Ricketson suggests the word "special" implies that the purpose of an exception be justified on the basis of public policy.[357] In contrast, others argue that a non-normative approach be adopted. That said, the term "certain special cases" does not mandate national legislators to make exceptions for any special purpose.[358] This viewpoint was endorsed by a WTO Panel.[359] According to the Panel, the term means clear definitions of limitations and exceptions in a national law with a clear and explicit scope.[360] Exceptions should be specific both in a quantitative and qualitative sense without having normative values.[361] In addition, the first step must be read in conjunction with the subsequent two steps.[362] It is important to take the three steps as a whole to determine whether or not a usage falls within the scope of exception.[363]

The second step requiring that a use "does not conflict with a normal exploitation of the work" is central to the issue at hand. This is because the second step closely relates to right holders' financial and economic interests. A general understanding of "normal exploitation" is an author's expectation of receiving revenue from a marketed work. There are two approaches to understand the scope of economic revenue. The static approach postulates the portion of an exempt work is still under an author's exclusive control; and then calculates the amount of revenue for it as if it had been for sale. The "normative" or "dynamic" approach not only calculates the value in the market of an exempt use, but also calculates and includes the potential income from its future use.[364] It also considers a work's indirect revenue it may generate. For example, a printed journal generates revenue from a

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[357] World Intellectual Property Organization & S Ricketson *Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (04-05-2003) SCCR/9/7 17-18; S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Kluwer Law Int'l, 1987) 482.

[358] JC Ginsburg "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test'for Copyright Exceptions" (2001) 187 *Revue Internationale du Droit d'Auteur* 2 2-65. Some experts supported the non-normative approach; see World Intellectual Property Organization & A Bogsch, *WIPO Guide to the Berne Convention* (Geneva: WIPO, 1978) 55-56. Also see W Nordemann, K Vinck, PW Hertin, G Meyer & W Nordemann *International Copyright and Neighboring Rights Law: Commentary with Special Emphasis on the European Community* (G Meyer tran, Weinheim,GR: Wiley VCH, 1990) 108-109.

[359] World Trade Organization *United States — Section 110(5) of the US Copyright Act: Report of the Panel* (2000) WT/DS160/R 33.

[360] 33.

[361] 33-34.

[362] Ginsburg (2001) *Rev Internat Dr Auteur* 51-53. Gervais suggests an alternative application of the three-step test is to apply the third step of the test at the first stage, see DJ Gervais "Towards a New Core International Copyright Norm: The Reverse Three-Step Test" (2005) 9 *Marquette Intellectual Property Law Review* 1 27-30.

[363] KJ Koelman "Fixing the Three Step Test" (2006) *European Intellectual Property Review* 407 409.

[364] WIPO & Ricketson *Study on Limitations and Exceptions* 18.

subscription fee, but it also may generate income from the licensing of its articles to a website that in turn republishes them online.[365]

The WTO Panel interpreted "normal exploitation" as a work receiving direct revenue as well as other forms of revenue that could be quite important as it could be quite substantial.[366] This shows that the Berne Convention adopted a dynamic approach in defining the revenue derived from the exploitation of a work. This approach favors copyright owners and substantially restricts the scope of exceptions.

But what if a free copy of a work does not adversely affect an author's works in the financial market, but still creates economic benefits for users? The WTO Panel answered this question by stating that whether a use is commercial or not should not be the principal factor in determining the legitimacy of a use. The Panel's words:

> "… in our view, not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with a normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test of the second condition and Article 13 might be left devoid of meaning, because normal exploitation would be equated with full use of exclusive rights."[367]

The benefit of an exempt use can be non-economic as well. According to Ricketson, the interpretation of the Berne Convention is subject to both customary international law and the Vienna Convention.[368] For customary international law, provisions on limitations and exceptions based on non-economic considerations are widely accepted. For national copyright law, there are a number of exempt uses for the free flow of information that enhance democracy.[369] For example,

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[365] *American Geophysical Union v Texaco Inc* 37 F 3d 881 (2nd Cir 1994) 898-899. Although the majority held that photocopying journal articles without a license infringed copyright, the dissenting opinion was:
"… there is no normal market in photocopy licenses, and no real consensus among publishers that there ought to be one" at 904.

[366] *WTO Panel Decision* 48. The precedent value of the WTO Panel's decision is limited as it binds only the parties to the legal proceedings. Neither other Member States nor domestic courts are bound by the decision for even a later Panel would arguably not be legally obliged to follow the decision. J Oliver "Copyright in the WTO: The Panel Decision on the Three-Step Test" (2001-2002) 25 *Columbia Journal of Law & the Arts* 119 132-133.

[367] *WTO Panel Decision* 48.

[368] WIPO & Ricketson *Study on Limitations and Exceptions* 19.

[369] Arts 2(4) & 2*bis*(1) of the Berne Convention.

there are exemptions for the purposes of criticism and review,[370] education[371] and news reporting.[372] These uses do not generate economic benefits directly. Therefore, the extent a non-economic benefit should be considered normal exploitation requires a delicate balance between the interests of the public and the authors.[373]

In particular, policymakers of developing countries need to be less restrictive in interpreting "normal exploitation".[374] The courts should evaluate use of copyrighted material through the lens of the test as a whole rather than focusing on one factor.[375] Thus the second step of the test does not require courts to interpret limitations and exceptions narrowly, rather they should interpret them according to their objectives and purposes. Consequently, generous exceptions for education and research ought to be granted to users to encourage them to create more works.

The third step requires that a use "does not unreasonably prejudice the legitimate interests of the author". The Stockholm Conference records provide little guidance on the meaning of "legitimate interests". But they do show that it was quite difficult to strike a balance between authors' rights and societal cultural needs.[376] In analyzing "legitimate interests" two points need to be made. First, it is the authors' legitimate interests that are referred to and not those of the derivative copyright holders such as publishers. In contrast, Article 13 of the TRIPS Agreement replaces "authors" with "right holders". The distinction makes it clear that the Berne Convention considers both moral and pecuniary interests to be "legitimate interests". Second, their interpretation is normative.[377] That

[370] Art 10(1).

[371] Art 10(2).

[372] Arts 10*bis* (1) & (2).

[373] WIPO & Ricketson *Study on Limitations and Exceptions* 20.

[374] Yoo argues from an economics perspective that a transformative use of a copyrighted work could create a work to compete with the original one. In other words, a transformative work is an indirect substitution of the original one. A "narrow" copyright regime that generously allows transformative uses would increase users' entry to a particular type of works. Moreover, such a narrow copyright regime does not necessarily reduce right holders' incentive to create if two conditions are met. First, copyright owners can profit from many different types of copyrights. Second, the copyright protection is strong enough for right owners to profit. See CS Yoo "Towards a Differentiated Products Theory of Copyright" in LN Takeyama, WJ Gordon & R Towse (eds) *Developments in the Economics of Copyright: Research and Analysis* (Cheltenham, UK: Elgar Edward, 2005) 103 103-119. See also CS Yoo "Copyright and Product Differentiation" (2004) 79 *New York University Law Review* 212 212-280.

[375] Geiger et al (2008) *EIPR* 491.

[376] World Intellectual Property Organization *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (The Stockholm Conference Records)* vol I & II (Geneva: WIPO, 1971)Preparatory Doc S/1 71 113.

[377] WIPO & Ricketson *Study on Limitations and Exceptions* 21; Gervais (2005) *Marq Intell Prop L Rev* 27-30.

said, it is legitimate to make the normative judgment that the public interest is a legitimate interest.[378] Moreover, if a copyrighted work contains material that conflicts with public policy, then the author no longer has an interest in the copyrighted work. This is the justification for banning a pornographic novel.[379]

In addition to the issue of what legitimate interests are, the term "unreasonable prejudice" suggests a use of a work be quantitatively proportionate to the entire amount of the work being used.[380] For example, an author has the right to be attributed. Thus, excessively quoting from a work without acknowledgement unreasonably prejudices the author's moral right to be known for his/her thoughts and ideas.[381]

In conclusion, countries with very different copyright laws can use the three-step test to create a general exception that is quite flexible. Still, its language is quite vague as its writing is a compromise. It is open for members to use their own copyright laws to apply the three steps. The first step of "certain special cases" requires exceptions to be made with specified purposes under a national law. The second step of "normal exploitation" can be interpreted to mean in either static or dynamic ways. To strike a balance between authors and the public, it is desirable for a country to interpret normal exploitation in order to limit the direct economic revenue generated from a particular work. It is vitally important to recognize that a use that can produce revenue does not render the use illegitimate. Also note a use that creates non-economic benefits for society such as promoting scholarship should be exempt. The third step that requires exceptions should not unreasonably prejudice authors' legitimate interests. The latter two steps do not allow a third party to compete with authors for economic gain nor unreasonably prejudice authors' various interests.

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[378] PB Hugenholtz & RL Okediji *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report* (06-03-2008) report of a workshop held at the Cardozo School of Law in New York on 16-18 December 2007 http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf (assessed 27-10-2013).

[379] For example, D H Lawrence's works have been banned in the UK for many years because they were considered to be pornography.

[380] Ulmer stated that:

"… a rather large number of copies for use in industrial undertakings … may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

See *Stockholm Conference Records II* 1145-1146.

[381] M Senftleben *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (B Hugenholtz ed, The Hague: Kluwer Law Int'l, 2004) 219-220.

Quite simply, the three steps are flexible enough so that almost any country can use them, although it inevitably subjects them to legal uncertainties. These uncertainties are open to interpretation, and it is the wide interpretation that gives countries the discretion to determine how they synchronize their copyright laws according to their needs.

3 4 2 1 2 Exceptions for education and research

Pursuant to the three-step test, Article 10(2) covers an exception for utilizing literary or artistic works for teaching. It reads:

> "(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

The principal features of the provision are: 1) the exception is for the purpose of teaching; 2) users can utilize literary and artistic works to teach; 3) the exception requires that it should be compatible with fair practice. A close examination of the provision shows that, first, the Berne Convention gives each one of its members the discretion to define "utilization" in the legislation of their country or in a bilateral agreement. In order to utilize a work, users can reproduce, display or distribute it. Notably the provision does not explicitly exempt distributing a work over a cable system or the Internet as a form of utilization. Compared with Article 10*bis* (1) and (2), the omission is quite meaningful. Consequently, utilizing materials for teaching in a network environment is restricted.

Second, Union members are free to determine the nature of teaching activities. One important question is where do they take place. That is, should they be confined to a physical classroom, or extended to include correspondence and online education? Ricketson suggests Union members include correspondence courses and online education as a form of teaching since it is an important means of education.[382] Another crucial question is what kinds of institutions should be granted a teaching exception? The Committee Report answers:

> "The wish was expressed that it should be made clear in this Report that the word 'teaching' was to include teaching at all levels — in educational institutions and

[382] WIPO & Ricketson *Study on Limitations and Exceptions* 12.

> universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the public but not included in the above categories, should be excluded."[383]

This explanation clarifies a teaching activity as an act of instructing students at a variety of educational institutions. However, the explanation is flawed for it does not include adult education that is in the forefront in eliminating illiteracy and providing widespread training.[384] Developing countries particularly need to employ adult education to develop fully their human resources.

Finally, the additional requirement that a particular use complies with fair practices shows the Convention's respect for its members' traditions. Since each country has differing standards in judging whether usage is fair or not, the Convention respects their customs with this exception.

3 4 2 1 3 Other limitations

In addition to the teaching exception, the Berne Convention restricts authors' rights with statutory licenses and minor reservations, which are exceptions with little economic significance. The statutory licensing system makes it compulsory that authors allow their works to be used in a small number of situations, such as to record music works[385] and to broadcast dramatic and music works.[386] Right holders cannot prohibit these uses permitted under a statutory license but have a right to receive remuneration from statutory licensees. At the Brussels and Stockholm Conferences on the Revision of the Berne Convention, the delegates invoked the minor reservation doctrine to justify maintaining exceptions of minor importance in their national law.[387] These reservations usually limit performances, recitations and broadcasting rights.

At the 1967 Stockholm Conference, developing countries argued that they needed additional flexibility to deal with education within the international copyright framework. Consequently, the Conference produced a Protocol allowing developing countries to reduce the term of protection to 25 years.[388] It also allowed developing countries to apply for compulsory licenses to translate works

[383] *Stockholm Conference Records II* 1148.

[384] 1148.

[385] Art 13(1) of the Berne Convention.

[386] Art 11*bis*(2).

[387] Senftleben *Copyright, Limitations and the Three-Step Test* 198-201.

[388] Art 2 of the Protocol Regarding Developing Countries to the Berne Convention of 1967 (the Protocol).

into local languages. Particularly controversial were licenses for translating works for any use for educational, scientific or research purposes.[389] However, the Stockholm Protocol was left unratified because Union members could not reach consensus on the above-mentioned issues. Eventually in 1971, there was an agreement allowing developing countries to grant limited compulsory licenses for translating works into local languages.[390] However, only a handful of countries ever included the special provision in their national laws.[391] This is believed to be because the provisions are complicated and the administrative procedures burdensome.[392] As a result, developing countries benefitted little from the compulsory license.

3 4 2 2 The TRIPS Agreement

Article 10 of the TRIPS Agreement confers copyright protection on computer programs and compilations of data. The legal status of both is somewhat unclear in the Berne Convention. This is because Article 2 of the Berne Convention does not include computer programs as a type of protected literary works. And Article 2(5) protects collections of literary or artistic works that have been put together such as encyclopedias and anthologies. However, it does not refer to any other form of compilation, such as data or materials that are neither literary nor artistic works. Article 10(1) of the TRIPS Agreement protects computer programs as literary works under the Berne Convention. But then to make it somewhat confusing, Article 10(2) provides that data or other materials that have been collected are protected "as such" without reference to Article 2(5) of the Convention. Therefore, the extended protection for data that has been compiled is seemingly a freestanding obligation created by the TRIPS Agreement. Nevertheless, since its Article 9(1) requires its members to assume the obligations imposed by Articles 1 through 21 of the Berne Convention, it seems unreasonable for the Agreement to additionally require its members to provide copyright protection for data compilations.[393]

The TRIPS Agreement transformed the three-step test from an international copyright rule into an overarching beam of international trade law. Commentators point out that the TRIPS Agreement

[389] Art 1 of the Protocol.

[390] Appendix to the Berne Convention.

[391] For the history's Protocol and Appendix, see Ricketson *Berne Convention* ch 11.

[392] RL Okediji "Sustainable Access to Copyrighted Digital Information Works in Developing Countries" in KE Maskus & JH Reichman (eds) *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge Univ Pr, 2005) 142 162-168.

[393] WIPO & Ricketson *Study on Limitations and Exceptions* 55.

three-step test has shifted the focus of copyright protection from authors to copyright holders. Moreover, the cumulative application of the three steps is tilting the balance to favor copyright holders.[394]

In addition to this general exception, the TRIPS Agreement also has exceptions for rental rights it has created. Rental rights apply in such cases as renting of computer programs and cinematographic works.[395] The renting of cinematographic works is exempt if the rental does not lead to widespread copying of the original work thus materially impairing right holders' reproduction right. Renting a computer program is exempt if the program itself is not the purpose of the rental.

3 4 2 3 The WIPO Copyright Treaty

The WCT is linked to the Berne Convention in several ways. It permits contracting parties to extend current limitations and exceptions that are acceptable under the Berne Convention to a digital environment. It also allows countries to create new copyright exceptions. Article 10(2) of the Treaty neither reduces nor extends the scope of the limitations and exceptions permitted by the Convention.[396]

The WCT restricts copyrights in two ways. First, Article 10(2) requires contracting parties to comply with the Berne Convention's substantive provisions on copyright limitations and exceptions. Second, Article 10(1) allows contracting parties to devise additional exceptions for the new rights the Treaty granted to authors, such as distribution rights,[397] rental rights,[398] and the right of communication to the public.[399] All of the restrictions on copyright are subject to the three-step test.[400] In addition, Article 2 reiterates the "idea/expression" dichotomy as a general copyright limitation. It restricts copyright protection for the forms of expressions. Thus, the protection does not extend to ideas, procedures, or methods of operation and mathematical concepts.

It seems that the WCT is unable to address issues in a digital environment by simply following the

[394] Hugenholtz & Okediji *Conceiving an International Instrument* 17 & accompanying n 49.

[395] Art 11 of the TRIPS Agreement.

[396] Agreed statement concerning Article 10 of the WCT.

[397] Art 6 of the WCT.

[398] Art 7.

[399] Arts 8 & 10(2).

[400] World Intellectual Property Organization *Seminar for Asia and the Pacific Region on the Internet and the Protection of Intellectual Property Rights* (1998) WIPO/INT/SIN/98/4 (1998) 11-12.

Berne Convention's provisions. This is because the much earlier drafted Berne Convention predated the complexities of the electronic age with all of the problems associated with the almost instant reproduction and distribution of copyrighted materials.

The reproduction right is at the core of copyright protection. One of the most controversial issues is whether temporary reproduction should be protected as other forms of reproduction protected under the Berne Convention. In a digital environment, there are two types of reproduction: one of which is permanent, such as the downloading and storage of music to a MP3 player. This is an example of conventional reproduction. The other type of reproduction is temporary, such as storing a file of information in a computer's memory. The Berne Convention grants protection for permanent reproduction.

The following defines temporary reproduction and discusses whether or not it should be protected as an exclusive copyright. Temporary reproduction is an integral and essential part of a technical process having the sole purpose of enabling a transmission in a network. Temporary reproduction is usually incidental or transient and does not maintain a permanent copy of a file. For example, uploading a file into a computer's memory to form a temporary reproduction of the file is the prerequisite for any transmission of information by the computer and a network.[401] In the transmission process, multiple copies can be made in the memory of a number of computers connected by a network. This enables the computer users to view the information.

In theory, reproduction right could apply to both permanent and temporary reproductions.[402] However, this could cause undesirable consequences. For instance, a network server's random access memory (RAM) saves many ephemeral copies to process and transmit files of information. A user must download a temporary copy of a file to the computer's RAM to read the file. The downloading technically makes a digital file that a computer user can read. If temporary reproductions are protected by copyright, the legal owners will in theory have exclusively control over the computer's automatic copying activities that facilitate information processing.[403]

During the drafting of the WCT, legal experts argued that transient or incidental reproduction

[401] World Intellectual Property Organization *Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions volume I & II* (1996) CRNR/DC/2 (1996) 188.

[402] *Diplomatic Conference Records II* 672.

[403] TC Vinje "The New WIPO Copyright Treaty: A Happy Result in Geneva" (1997) 19 *European Intellectual Property Review* 230 231.

should not fall within the scope of the exclusive reproduction right.[404] For example, South African delegates also were concerned about the possible chilling effects of protecting temporary reproduction as an exclusive right.[405] However, it seems the drafters of the WCT intended to protect temporary reproduction by copyright. An agreed statement contained in the Appendix of the Treaty states that the storage of a protected work in digital form in an electronic medium constitutes a reproduction under the terms of the Berne Convention.[406]

The legal effect of the agreed statement on the definition of reproduction is uncertain because it is located in the Appendix rather than in the main text of the Treaty.[407] Some countries suggested treating the statement as a part of the Treaty text with all parties protecting temporary reproduction in digital form in their national law. Others suggested contracting parties determine whether to accept the statement or not at their own discretion.[408] Moreover, the contracting parties merely agreed upon the first half of the statement.[409] As a result, the statement only won a US led majority vote rather than a consensus.[410] After a number of discussions and debates, up to now the effect of the statement is still pending.[411]

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[404] M Ficsor *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford Univ Pr, 2002) para C8.24; J Reinbothe & S von Lewinski *The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (Markham, ON: Butterworths Canada, 2002) 112.

[405] *Diplomatic Conference Records II* 670.

[406] Agreed statement concerning Article 1(4) of the WCT that requires Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention. The statement reads:
"Agreed statements concerning Article 1(4): The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

[407] Art 31 (2) (a) of Vienna Convention on the Law of Treaties provides that when an interpretation of a treaty is in need, in addition to the text of the treaty, any agreement relating to the treaty which is made between all parties should be taken into consideration.

[408] *Diplomatic Conference Records II* 670.

[409] WIPO & Ricketson *Study on Limitations and Exceptions* 56-57, citing *Diplomatic Conference Records I* 189 and *II* 628 & 674-675.

[410] WIPO & Ricketson *Study on Limitations and Exceptions* 57.

[411] above 57-60, discusses the legal effect of the agreed statements under the guidance of the Vienna Convention. Ficsor argued that an agreed statement does not need unanimity to be effective because it is not a "treaty" under Article 31(2)(a) of the Vienna Convention. On the contrary, Sinclair argues just the opposite writing that unanimity is necessary when referring to the Vienna Convention's other articles.

3 4 2 4 The Rome Convention and the WPPT

The Rome Convention and the WPPT provide protections for neighboring rights of performers as well as producers of phonograms and broadcasting organizations.[412] The WPPT also intends to extend neighboring rights to a digital environment. Nevertheless, unlike the TRIPS Agreement and the WCT, the WPPT is not linked to the Rome Convention that was drafted much earlier. This leaves national legislators with a number of uncertainties. This can be seen in Article 16 that refers to limitations and exceptions:

> "(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works."

> "(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."

Article 16(1) does not require contracting parties to limit performers, phonograms and broadcasting producers' rights. It simply requires them to provide for the same kinds of limitations and exceptions to protect neighboring rights when dealing with the protection of copyright in literary and artistic works. Therefore, if a country is a member of both the WPPT and the Rome Convention, a conflict may arise between Article 16(1) of the WPPT and Article 15(1) of the Rome Convention.[413] This is because Article 15(1)(a) of the Rome Convention exempts private use of works. To limit neighboring rights according to the limits on copyrights in literary and artistic works substantially eliminates the possibility of exempting private use of performance and phonogram works. In this way, Article 16(1) of the WPPT requiring contracting parties to limit neighboring rights the same way as they limit copyrights preempts Article 15(1) of the Rome Convention.[414] Thus the exception granted by the Rome Convention for private use seems to have

[412] They enjoy a number rights, for example, a right of broadcasting and rebroadcasting, a right of communication to the public, a right of reproduction of phonograms and a right of fixing performances to tangible media.

[413] Art 15 of the Rome Convention provides that exceptions could be granted for (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research.

[414] Another argument is that Art 15(1) of the Rome Convention is not mandatory. Therefore, Art 16(1) does not annul

been rendered almost in vain.

3 4 2 5 The Anti-counterfeiting Trade Agreement

The forum of international copyright protection and enforcement is shifting from the WIPO and WTO administration to independent negotiations among countries. The US, EU and Japan as well as a number of developed countries commenced negotiations on the Anti-counterfeiting Trade Agreement (ACTA) at the fourth Global Congress on Combating Counterfeiting in early 2008. The Agreement was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the US. In 2012, Mexico, the EU and 22 countries which are EU member states signed the Agreement as well.

The ACTA was determined to establish an international agreement setting higher legal standards for piracy and counterfeiting of intellectual property, including copyright and trademarks.[415] During the course of negotiations, concerns widely arose with regard to the provisions pertaining to ISP liability and anti-circumvention activities since they would limit fair use and digital file-sharing activities as well as affect national privacy policy.[416] One laudable progress made by the Tokyo round negotiations is the final version of the Agreement dropped the secondary liability imposed on ISPs. In earlier drafts, an ISP would be accused of a copyright infringement occurred on its network if the ISP does not respond swiftly to a copyright holder's notice warning about the infringement.[417] The newest version of the Agreement also contains anti-circumvention provisions that mirror the US DMCA requiring all participating countries to enact domestic anti-circumvention law. Critics worry that DMCA will be made a "world standard" that compels other countries to adopt DMCA-

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the obligations the Rome Convention has imposed. See WIPO & Ricketson *Study on Limitations and Exceptions* 65.

[415] E Ayoob "Recent Development: The Anti-counterfeiting Trade Agreement" (2010) 28 *Cardozo Arts & Entertainment Law Journal* 175 179.

[416] CR McMains "The Proposed Anti-counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty" (2009) 46 *Houston Law Review* 1235 1246-1256. The Free Software Foundation is concerned ACTA would threaten free software, see http://www.fsf.org/campaigns/acta/. The Wellington Declaration also states that copyright exceptions and limitations should be properly addressed to balance copyright protection with the fundamental purposes of copyright, see PublicACTA "The Wellington Declaration" (10-4-2010) *ACTA* http://acta.net.nz/the-wellington-declaration (accessed 29-10-2013) .

[417] M Geist "Major ACTA Leak: Internet and Civil Enforcement Chapters with Country Positions" (01-03-2010) *Michael Geist* http://www.michaelgeist.ca/content/view/4829/125 (accessed 27-10-2013); M Geist "New ACTA Leaks: Criminal Enforcement, Institutional Issues, and International Cooperation" (19-03-2010) *Michael Geist* http://www.michaelgeist.ca/content/view/4886/125/ (accessed 27-10-2013).

like laws.[418]

In order to maintain a balance between copyright protection and limits in the digital environment, ACTA maintains that by providing adequate protection and effective legal remedies for copyright infringement, each Party may adopt new limitations and exceptions or maintain the ones in their national copyright laws.[419] The same clause also states ACTA provisions do not prejudice limits imposed on copyrights under domestic laws. Therefore, once ACTA is in force, contracting countries need to develop restrictions as well as design new copyright limits very carefully.

3 4 3 The regional level

The Information Society Directive harmonizes copyrights and neighboring rights within the EC. One of its goals is to limit copyrights for education and research.[420] It incorporates WCT and WPPT as well as implements new international obligations. Still, the trade-related Directive does not deal with moral rights.[421] The Directive employs a closed system to enumerate an exhaustive list of limitations and exceptions.

Article 5(1) is a mandatory exception for temporary acts of reproduction that are transient or incidental and are an integral and essential part of a technological process. Following are a number of optional exceptions. Article 5(2)(b) grants EU Member States discretion to determine whether or not to provide an exception for private use. Article 5(3)(a) allows use of copyrighted works solely for teaching or for scientific research. Article 5(4) grants Member States the discretion to devise exceptions for distribution rights. All exceptions are subject to the three-step test contained in article 5(5) that is taken almost verbatim from the TRIPS Agreement.

3 4 3 1 Limitations and exceptions for education and research

Article 5(3)(a) provides an exception for the use of copyrighted works for teaching or scientific research. The use is solely for illustration as long as the source, including the author's name is shown. Member States can decide what a teaching or research activity is when they implement the

[418] R Pegoraro "Copyright Overreach Goes on World Tour" *The Washington Post* (15-11-2009); N Anderson "The ACTA Internet Provisions: DMCA Goes Worldwide" (09-11-2009) *ars technica* http://arstechnica.com/tech-policy/news/2009/11/the-acta-internet-provisions-dmca-goes-worldwide.ars (accessed 27-10-2013).

[419] Art 8 s 5 ch 2 of the ACTA.

[420] Recital 14 of the Information Society Directive.

[421] Recital 19.

Directive. Germany, for example, narrowly allows use of copyrighted works for illustrative purposes and only in a classroom or on the intranet. Gasser and Ernst believe legislators should interpret teaching broadly to cover not only in-classroom teaching, but also students' class preparation, home study and learning activities before and after class.[422]

Article 5(3)(a) deliberately leaves it open for national legislators to determine uses that can be considered to be non-commercial. Some Member States specify the maximum quantity a user is allowed to reproduce for education and research. Germany only allows teachers to copy small portions of published works, short works, or individual contributions to newspapers and periodicals.[423] The Danish Copyright Act allows copying published works as well as the recording of radio and television works for educational activities.[424] Copying activities are administered by an extended collective license.[425]

3 4 3 2 Evaluations

Article 5(3)(a) of the Directive is broader in scope than the Berne Convention since it grants exceptions for not only teaching activities but also for scientific research. Member States have the discretion to define such terms as "teaching activities" and "scientific research". On the one hand, some countries interpret activities broadly to accommodate both in-classroom and distance education. Others only exempt activities in the classroom or within an educational institution.[426] On the other hand, the legislative literature provides little guidance as what constitutes scientific research.

Whether an exempt usage needs to be strictly non-commercial or not is the central concern of legislators. The Directive is tilted to favor copyright holders by excluding activities that could result in commercial gain.[427] In contrast, an analysis of the Berne three-step test shows[428] commercial use itself does not solely determine legitimate usage. In particular, the Berne Convention only requires a

[422] 14.

[423] Art 53(3) Law on Copyright and Neighboring Rights of 1965 Federal Law Gazette Part I page 1273 (as amended in 2008).

[424] S 13(1) of the Copyright Act of 1995 Act No 395 of June 14, 1995 *amended by* Consolidated Act on Copyright of 2006 Consolidated Act No. 763 of 2006 (WIPO English version).

[425] S 50.

[426] For example, Art 53(3) of the German Copyright Law of 1965 and Art 40(1A) of the Australia Copyright Act of 1968.

[427] Art 5(3)(a) of the Information Society Directive.

[428] See above para 3 5 1 1.

use for teaching be compatible with fair practice. It implies that in addition to the commerciality of usage, other conditions should be considered to determine the fairness of usage.[429] However, the Directive potentially prohibits users' competition with copyright proprietors by ruling that copyrighted material cannot be used that gives the user any commercial profit.

The Directive is restrictive also in that Article 5(5) restricts Member States granting limitations and exceptions. The Berne Convention has a three-step test as an umbrella rule that deals with limitations and exceptions. It serves as guidance for its members to devise copyright exemptions as they wish. However, the Directive puts specific limitations and exceptions prior to the three-step test contained in Article 5(5). Thus, the test is like a dual filter that only allows Member States to have precise exemptions that satisfy each and every factor of the three-step test. First, a limitation/exception only applies to an exclusive copyright recognized in the Directive. Second, it has to fall within the scope of Article 5. Third, a specific exception must comply with the three-step test contained in the Directive. Therefore, Member States face three layers of legal constraints in devising limitations and exceptions within the framework of the Directive.[430]

3 4 4 Interim conclusions

A survey of national copyright laws and international copyright law shows that limitations and exceptions exist in different jurisdictions. Since the approaches prescribing limitations and exceptions are very different between the *droit d'auteur* and copyright systems, to bring them together, a three-step test was formulated to make the Berne Convention acceptable to most countries. The three elements provide guidance for countries to limit copyright. At the same time, countries can interpret the test flexibly when devising their own copyright exemptions. Subsequent international, regional and national copyright legislation shows the three-step test is widely accepted.

In addition to a general exception, national copyright laws more or less contain provisions for education and research considered to be in the public interest. Consequently, regional and international legal instruments prescribe exceptions for learning and research activities. Notable is the Berne Convention that provides an exception for use of copyrighted works for illustration for teaching, and the Information Society Directive which grants exceptions for teaching and scientific

[429] Hugenholtz & Okediji *Conceiving an International Instrument* 12.

[430] Senftleben *Copyright, Limitations and the Three-Step Test* 256.

research. Both copyright instruments deliberately leave the term “teaching” and “scientific research” open for interpretation.

The chart below briefly illustrates the general exception and specific exceptions for education and research contained in the Berne Convention, the TRIPS Agreement, the WIPO Internet Treaties and the Information Society Directive. The number of relevant clauses is indicated.

Table 6.1

	BERNE	TRIPS	WCT	WPPT	InfoSoc Directive
General exception	9(2): 3-step test	13: 3-step test	10(2):3-step test	16(2): 3-step test	5(5):3-step test
For education/ research	10(2) (1) "utilization" not defined (2) no quantitative requirement for a use (3) "teaching" not defined (4) an omission: whether or not distribution of a work is exempt	10 exceptions extend to computer programs and compilations of data in some circumstances	4 & 5 exceptions extend to computer programs and compilations of data in some circumstances		5.3(a) (1) "Teaching"/ "research" not defined (2) no quantitative requirement of a use (3) commercial aspects are important but not the most significant (4) exceptions extend to rights other than reproduction right
Private use				16(1) conflicts with 15(1) of Rome Convention, may invalidate private use	5.2(b) leave freedom for Member States to determine whether to allow or not

* InfoSoc Directive: Information Society Directive
* RC: Rome Convention

3 5 Open and closed systems

The US Copyright Act is an open system that employs the flexible fair use doctrine for judges to determine whether usage is fair. Countries sharing the Roman law tradition employ a closed system that exhaustively stipulate copyright limitations and exceptions in detail. The US and European countries at one time were in two blocs, the UCC and the Berne Convention. In Continental Europe and the UK, it is admitted by copyright law scholars and policymakers that maintaining a closed system of copyright exceptions becomes increasingly difficult in a fast changing world.[431] Therefore, it is worth introducing some open-ended norms to the closed system to enhance the copyright exception flexibility. Since South African copyright law has a fair dealing section and Chinese copyright law employs a closed system enumerating exceptions exhaustively, to look for the compatibility of open-ended norms like fair use with a closed system thus has relevance to both South African and Chinese copyright law.

The following discussion compares the three-step test with the US fair use and UK fair dealing doctrines, as well as the EU Information Society Directive and several European national copyright laws. The comparison seems to suggest that it would be wise for countries to adopt the three-step test since it has the merit of flexibility and can be generalized. A general exception to copyright would help to harmonize copyright law at the international level.

3 5 1 Comparisons between the three-step test and the fair use doctrine

The fair use doctrine is an open system since it does not prescribe any specific usage as fair use. Rather, it contains four factors for judges to apply on a case-by-case basis. The four factors are: 1) the purpose and character of a use; 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 or value of the copyrighted work.[432]

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[431] Commission of the European Communities
COM (2008) 466/3 19-20. A Gowers *Gowers Review of Intellectual Property* (Norwich, UK: Her Majesty's Stationery Office, 2006) Recommendation 11
http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf (accessed 19-10-2013).
PB Hugenholtz & MRF Senftleben *Fair Use in Europe: In Search of Flexibilities* (Institute for Information Law, 2011) 4.

[432] S 107 of the Copyright Act of 1976.

Empirical data shows that judges primarily consider the first and the fourth factors to determine whether usage is fair or not. A study of US copyright cases from 1978 to 2005 demonstrates how the weighing of the four factors evolved.

The first factor, the purpose and character of use, is one of the two most decisive factors.[433] Judges have shown a great deal of latitude in determining whether the purpose of a use is fair or not. In a survey of district courts, 19% replied that defendants resorted to the first factor to defend their uses of copyrighted works. Seventy-two percent of them held that the defendants who used works for criticism did not infringe copyrights in the works. Sixty-one percent of judges ruled in favor of defendants who used works for research purposes, while 35% of them ruled in favor of defendants used works for educational purposes.[434]

In addition to the purpose of a use, the first factor also distinguishes the type of usage involved. That is, a user can use a work for commercial or non-commercial purposes, or a user can transform a work or simply reproduce without adding any value to it. Making use of a work as a parody would be a transformative use while simply recording music for personal appreciation is simple reproduction. In alleged copyright infringement cases the courts often have ruled a work has been transformed by applying this usage factor.[435] Nevertheless, a user who transforms a work into a new one that is considerably different, even if the use generates commercial gain, does not disqualify it as fair use.[436] This shows the courts has attempted to encourage creativity by limiting the incomes of copyright holders when their works are creatively used by others.

The inherent nature of a copyrighted work is the least considered.[437] It concerns whether a work is published or not as well as the amount of a work's creativity. A work can be highly creative such as a novel or only slightly creative such as a telephone directory. There is also the question about the availability of a work. If it is available in the market at a reasonable price, there is little basis upon which to claim fair use. In the previously mentioned survey, a large percentage of judges found this particular factor irrelevant or not considered.[438]

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[433] Beebe *An Empirical Study of the U.S. Copyright Fair Use Cases, 1978-2005* (2006) http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/Beebe.pdf 10 (accessed 18-05-2010).

[434] 11.

[435] Fisher (1988) *Harv L Rev* 1783.

[436] Beebe *US Copyright Fair Use Cases* (2006) 10.

[437] Above.

[438] Above 11.

A third factor involves both the amount of a copyrighted work that has been used and the nature of the used portion. Copyright defendants often have been given favorable consideration if they showed the portion they used was reasonable and was not a substantial amount of the total work.[439] Courts usually considered the copying of an entire work as copyright infringement. However, this is not always the case if the use is for a legitimate purpose such as research. Then, copying an entire work may be seen as fair use.

A fourth factor is the effect on the market when copyright is avoided. This simply means a use of a copyrighted work should not compete with the original work so as to reduce its value and profitability. The study shows copyright holders have a better chance to win in litigation if they are able to prove a negative use affected the market of the original work.[440] It also shows a sizable percentage of courts found the fourth factor the most important in judging fair use.[441]

The judiciary attempted to rebalance the interests between right holders and the public by paying more attention to the first factor that often has led judges rule in favor of users. Historically, judges considered the fourth factor to be a priority, for their primary concern was the economic interests of copyright holders. However, the US courts changed the pro right holders' position after the *Campbell* case[442] by considering the four factors as a whole. In particular, courts at different levels generally agree that nothing can be concluded without considering the first factor.[443] The study also shows the first factor has becoming increasingly decisive in fair use cases.[444]

The reasons why the application of the first factor helps to rebalance the relationship between right

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[439] 12.

[440] 12.

[441] 13-14.

[442] *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994) 580 n 12. The Court upheld a parody work as a fair use because it was a transformative use. The transformative nature of the use outweighed commercial consideration.

[443] See, eg, *Leibovitz v Paramount Pictures Corp* 137 F 3d 109 (2nd Cir 1998) 113. Newman J wrote:
"The Court's emphasis on an aggregate weighing of all four fair use factors represented a modification of the Court's earlier view that the fourth factor, effect on the potential market for, or value of, the original, was 'the single most important element of fair use.'"
Campbell v Acuff-Rose Music Inc 510 US 569 (1994) 590 n 21, the Court's reference to the fourth factor was that "the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors."

[444] Beebe *US Copyright Fair Use Cases* (2006) 10-11.

owners and users are, first, right holders' income from their works are limited if a user uses a work creatively. A creative use, also referred to as a transformative use, does not have to be strictly non-commercial to be fair use. Second, if a use is for a creative purpose such as research or for the public good such as disclosing information, the amount of a work being used is not restricted. That means copying either part of, or entire works, qualifies as fair use. Therefore, it is to users' advantage to rely on the first factor to justify their usage of copyrighted works.

When comparing the three-step test with the fair use doctrine, it is notable that the both rules take into account the effect of a use on valuing the original work. The second step of the test concerns whether or not a use is in conflict with a normal exploitation of a work. This is comparable with the fourth factor of the fair use doctrine. Normal exploitation does not strictly mean a use must be non-commercial. Nor does it mean there should be a full exploitation of exclusive copyrights.[445] The judicial application of the first factor of the fair use doctrine dealing with the character of use also shows that a transformative use can be commercial. Therefore, both the three-step test and the fair use doctrine imply that an exploitation of a work be limited. Consequently, neither of them disqualifies fair use or an exception merely because a use involves commercial gain.

There are discrepancies between the three-step test and fair use. The first element of the test requires national legislators to specify the purposes of exempt usage of copyrighted material.[446] It implies that countries have to employ a closed system to stipulate copyright exceptions. The fair use doctrine is normative and non-specific in judging the purpose of a use. However, uses for criticism, research and education purposes often won defendants a favorable judgment. Article 10 of the Berne Convention also allows utilization of literary and artistic works for teaching purpose. In addition, the fair use doctrine focuses on copyright holders' fiscal rights while the Berne three-step test covers both authors' fiscal and non-fiscal rights.

3 5 2 Comparisons between the three-step test and the EU as well as UK legislation

The EU Information Society Directive is a closed system in that it specifies limitations and exceptions and subjects them to a three-step test. Apart from the Directive, European countries consider usage to be fair if the usage is for one of the purposes the copyright law specifies. In most countries, copying for education and research is permitted. The use of a work should have no

[445] See above para 3 4 2 1.

[446] WIPO & Ricketson *Study on Limtations and Exceptions* 68-69.

commercial significance.[447] A user should neither intend to copy an illegal copy, nor know that a copy in use is unauthorized.[448]

The EU copyright law at regional and national levels shares elements with the three-step test. First, European national copyright laws specify circumstances when limitations and exceptions apply. Second, the Directive requires fair compensation be paid to right holders in most circumstances. The fair compensation requirement is compatible with the three-step test. Recital 35 preceding the Information Society Directive explains clearly that fair compensation is required when right holders are actually harmed by acts of private copying.[449] Therefore, right holders who suffer no real harm from economically insignificant use cannot claim losses and require compensation. This follows an appropriate application of the normal exploitation referred to in the second step of the three-step test. Since the scope of normal exploitation is less than the full exploitation of exclusive copyrights, fair compensation is also limited to compensate right holders' real losses.

Sirinelli believes the fair dealing system adopted by the UK could be a bridge between an open and a closed system. He argues the system determines fair dealing in two stages.[450] First, it determines whether a use is permitted by the copyright law. Second, if one is permitted, it continues to examine whether the practice is fair or not. Therefore, it ensures there is legal certainty at the first stage and flexibility at the second stage. However, it seems the difference between the fair dealing system and a fully closed system is that the former first determines the legality of the purpose of a use, and subsequently examines the amount of the use. Thus, it is more akin to a closed system and is not capable of bridging an open and a closed system.

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[447] Art 5(2)(e) of the Information Society Directive.

[448] See above para 3 4 3.

[449] Recital 35 provides that:

"In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

When social institutions do private copying and reproduce broadcasts they should pay royalties, see Arts 2(a), (b) & (e) of the Information Society Directive.

[450] WIPO & Sirinelli *Exceptions and Limits* 22.

3 5 3 Conclusion

An open system has flexibility yet tends to be indeterminate. A closed system is more restrictive in application, but provides more legal certainties. Nevertheless, the two systems have some factors in common when determining whether or not a use is fair or limitations on copyright are reasonable. They are: 1) the purpose of a use; 2) whether a use is commercial and if so, the extent of its market effect on the market; and 3) the amount of a copyright work that is being used. The Berne three-step test reflects these elements.

To ensure a national copyright legislation is flexible enough to accommodate future changes, and has legal certainties for the judicial application, it is recommended that the legislative model has a general exception as well as specific exceptions. This would be particularly useful for such developing countries as South Africa and China. A three-step test can serve as a general exception. Using a general exception as a guideline, legislators can then formulate specific limitations and exceptions. In this way, lawmakers are able to modify copyright law promptly by adding new limitations and exceptions to ensure the law keeps pace with advancing technology and changing societal needs. Legislators are free to create exceptions as long as they are compatible with the general exception rule. On the one hand, copyright law is flexible because the general exception only provides minimum standards for copyright protection. On the other hand, copyright law provides legal certainty since it specifies the criteria for limitations and exceptions.

It was suggested earlier in this chapter that the partial unification of law approach is desirable in many circumstances.[451] The harmonization of law is a prerequisite for a partial unification approach. The three-step test is a copyright rule that has been created to contain the elements of limitations and exceptions found universally in different copyright systems. This helps harmonize copyright law on a much larger scale. Since it is unrealistic to unify diverse copyright exceptions with detailed provisions,[452] having a general guide for countries to devise exceptions in their national copyright laws is a pragmatic solution.[453] Not only do legislators putting together copyright treaties widely accept the three-step test as a general exception,[454] but most countries also included it in their national copyright laws. This seems to prove that the test is a workable guide for copyright legislation as it respects different countries' legal customs by leaving them the discretion to interpret

[451] See above para 3 2.

[452] WIPO & Sirinelli *Exceptions and Limits* 11-12.

[453] 6.

[454] WIPO & Ricketson *Study on Limitations and Exceptions* 65.

the three steps.

3 6 Australian Copyright Act: a third approach

The Copyright Act of 1968 adopted fair dealing provisions that followed the UK. However, it differed from an open or a closed system for the Australian legislators dealt with copyright by combining fair dealing and fair use doctrines. They also employ a three-step test with exceptions for libraries, educational institutions and persons with disabilities. For research and study, Article 40(1A) of the Copyright Act of 1968 exempts a use of a literary work for an approved course of study or for research by a student who is enrolled in an educational institution.[455]

Australian copyright law followed the early 20th Century British model and then underwent reform after the US-Australia Free Trade Agreement (FTA).[456] In 2006, Australian copyright law went through a significant reform to strike a new balance in the digital age with the enactment of the Copyright Amendment Act (the Amendment Act).[457] Several major changes were made including the inclusion of anti-circumvention rules as well as adding a number of new exceptions.

The Amendment Act mainly made two changes for education and research. One change, moved along by the US with the FTA, was the strengthening of the anti-circumvention law modeled on DMCA. The other was that the Act amended exceptions and introduced new ones for education: 1) statutory licensing was broadened to deal with free-to-air podcasts and webcasts since originally free programs that were broadcast could be reproduced for educational purpose under the conditions of the license prescribed in Part VA of the Copyright Act. 2) A three-step test introduced to allow libraries and educational institutions to reproduce works as long as the copying conformed to specific purposes.[458] 3) Films and sound recordings could be played for teaching purposes through an information network.[459] For example, a teacher can play a DVD in a library and transmit it to a classroom. 4) The Act clarified that caching for speedy downloading was not a copyright

[455] Arts 40-43 of the Copyright Act of 1968.

[456] MJ Davison, AL Monotti & L Wiseman *Australian Intellectual Property Law* (Cambridge: Cambridge Univ Pr, 2008) OH Dean *Handbook of South African Copyright Law* (Kenwyn: Juta, 1987) 180-186.

[457] Copyright Amendment Act 2006, No 158.

[458] Art 200AB of the Copyright Act of 1968.

[459] S 28. For more details, see http://www.unimelb.edu.au/copyright/information/amendments2006.html(accessed 18-05-2010).

infringement and merely clicking a link does not constitute an act of communication.[460] 5) The Act permitted copying and communicating an electronic anthology up to 15 pages.[461] This brought electronic anthologies in line with printed anthologies.

In general, uses of materials are fair dealing under Australian copyright law if they are for: 1) research or study; 2) review or criticism; 3) parody or satire; 4) news reporting; and 5) judicial proceedings and for professional legal advice.

Fair dealing for research and study provides five factors for judges to determine whether a use is fair dealing or not.[462] The factors are: 1) the purpose and character of the dealing; 2) the nature of the work; 3) the possibility of obtaining the work within a reasonable time at an ordinary commercial price; 4) the effect on the potential market for a work's value; 5) in a case where only a part of a work is reproduced, the amount and substantiality of the part being reproduced in relation to the whole work. The factors are very similar to the fair use doctrine.

Despite subsection 2, Article 40(3) provides that reproducing all or part of a literary, dramatic or music work contained in a periodical article is fair dealing. Article 40(4) states that the preceding subsection is inapplicable if another article in the same publication is also reproduced for the purpose of different research or a different course of study. Article 40(5) specifies the amount that is considered reasonable when reproducing a work other than a periodical article. A reasonable amount can be no more than 10 percent of the number of pages in an edition or a single chapter for a work divided into chapters.

In summary, fair dealing exempts students' reproduction of works if the students are registered at an educational institution. The fair dealing provision has quantitative legal certainty since it specifies an amount considered reasonable for students to reproduce with particular types of works. An open-ended test similar to the fair use one is a part of the fair dealing provision. Incorporating this test into the fair dealing provision largely reduces the test's uncertainties since it specifically applies to study and research. At the same time, the first factor of the test would allow users to use copyrighted materials for a variety of study and research activities and reduce the possibility of copyright infringement.

[460] See Copyright Act of 1968 Act No. 63 of 1968 http://www.unimelb.edu.au/copyright/information/amendments2006.html (accessed 18-05-2010).

[461] Same as above.

[462] S 40(2).

In addition to employing fair dealing for study and research, there is a three-step test with specific exceptions for uses made by libraries, educational institutions and the disabled. Section 200 of the Copyright Act lists conditions that apply to the use of works and broadcast for educational purposes. Section 200AB contains a three-step test[463] in which the terms "special case", "conflict with a normal exploitation" and "unreasonably prejudice the legitimate interests" having the same meaning as the TRIPS Agreement three-step test .[464]

The Copyright Act drafters preserved legal tradition by maintaining fair dealing provisions. They creatively combined a test akin to the fair use tenet with the fair dealing provision dealing with study and research to make it flexible. The provision has legal certainties by specifying exceptions with permitted purposes along with the amount a user can use from any single work. Legislators also brought the Copyright Act in line with international treaties by introducing a three-step test with a series of new exceptions. Therefore, the Copyright Act maintains its copyright law tradition modeled on its British counterpart, while simultaneously addressing the national needs of education and research.

3 7 The implications of the international copyright regime

3 7 1 Some harmonization

To harmonize copyright law it is necessary to smooth out international trade. Internationally it is preferable to have a concise and generalized copyright exception rather than a detailed one in order to reconcile very different legal systems. Sirinelli suggests employing a minimalist approach to develop international copyright rules since "simplicity dictates consistency". [465] For him, an international rule on copyright exception should be both familiar and acceptable to most countries. Sirinelli's proposal of adopting a minimalist approach to draft international copyright rules is similar to Gutteridge's discourse on the partial unification of law. Gutteridge shows that a partially unified system of law not only recognizes the fundamentals of its participants' legal systems, but unifies the

[463] S 200AB provides that a copyright in a work is not infringed by a use of the work if the use is a special case prescribed by the Copyright Act and the use is for libraries, educational institutions and the disabled. The use should neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the copyright owner.

[464] S 200AB (7).

[465] WIPO & Sirinelli *Exceptions and Limits* 41.

law on the basis of its fundamentals.[466]

At the international level, the three-step test is a concise and generalized copyright rule. Since it contains some of the most important elements that both an open and a closed system have in common, it is acceptable to most countries. To some extent it allows national policymakers to apply the three steps flexibly according to a particular country's legal traditions and national needs. At the same time, national applications of the test are generally consistent because the test is so simple containing only three steps rather than a plethora of details.

At the national level, in addition to the generalized three-step test, it is possible to combine the features of the two systems to formulate a more efficient copyright law. The Australian Copyright Act demonstrates how national legislators can take advantage of different legal systems' doctrines and weave them together. Such a hybrid is inspirational for countries with less advanced copyright legislation. This is particularly applicable for China since it does not have a copyright law tradition. Of course, a hybrid copyright law is not just a compilation of other countries' laws. Rather, it only can be produced if legislators thoroughly understand the different copyright systems and carefully select legal doctrines that fit into their legal culture as well as arrange them appropriately in legislation. Additionally, lawmakers need to realize that often the problem of copyright lies in enforcement. Thus, rather than simply elevating the standard for copyright protection, they might be better off to pay attention to administering and enforcing the law more efficiently.

At last, international organizations play a leading role in copyright harmonization. The WIPO provides a forum for countries to present diverse opinions with less oppression as compared with the WTO. More regional organizations that specialize in intellectual property protection should be established to encourage and help countries to meet regularly. Regionally harmonized copyright law promotes trade as well as prevents oppression by a dominant power using harmonization to further other ends.

Hugenholtz and Okediji proposed using three principles to construct an international copyright instrument.[467] The principles are worth considering for drafting both international and regional copyright treaties. First, a copyright instrument should be put together so that it can be modified to accommodate technological change. Second, it should be flexible enough to accommodate different

[466] See above para 3 2.

[467] Hugenholtz & Okediji *Conceiving an International Instrument* 42-43.

market structures in rich and poor countries. It needs specific provisions to address such unique problems as the monopolies caused by concentrated market power and to provide judges with clear guidance in balancing competing interests between right holders and users. And, it should allow countries to address their unique cultural needs. For example, the Berne Convention allows members to keep minor reservations and contains a special license for developing countries to translate foreign works into local languages.

3 7 2 Unity in diversity

Copyright law is very much related to international trade. Therefore, unless national interests are closely aligned, nations are unlikely to further copyright law harmonization. Fitzpatrick observed that worldwide the utilitarian approach has become more prevalent than ever in copyright legislation.[468] This means the focus for copyright has shifted from protecting individual authors to protecting right holders' economic interests. The reason for this shift is that economic growth generated by copyright-related industries is becoming increasingly important for national development. Copyright importers prefer lax copyright rules while copyright exporters favor strong copyright protections.[469] Fitzpatrick points out that many less developed countries just cannot afford to import copyrighted products that are indispensable for education and scholarship.[470] He further predicts the digital divide and the economic gap between the first world and everyone else will continue to persist.[471]

Legislators in developing countries need to understand that copyright law is trade-oriented. At the same time, it is crucial for cultural development and the advancement of education and research. Since national economies are not all at the same level, copyright protection needs to be diverse as well. Therefore, copyright law is part of a national developmental strategy that needs to 1) promote the domestic economy by encouraging creativity as well as promoting education and research; 2) lower the costs of international copyright transactions and, 3) ease potential conflicts of copyright law with trade partners. Developing countries also should actively participate in formulating international copyright law by taking advantage of WIPO as a forum to present their interests.[472]

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[468] Fitzpatrick (2003) *EIPR* 215 222.

[469] 222.

[470] 222.

[471] Fitzpatrick (2003) *EIPR* 224.

[472] See World Intellectual Property Organization Standing Committee on Copyright and Related Rights *Proposal by*

Chile on the Analysis of Exceptions and Limitations (2005) SCCR/13/5. (2005).

Chapter Four

The Technological Revolution and its Impact on Copyright Law

The information network, particularly the Internet, makes it much easier to disseminate information.[473] With the rapid development of ICT and information networks, new forms of copyright products are becoming a part of daily life. For instance, software has been greatly improved so MP3s and DVDs can be played on a variety of multimedia platforms. At the same time, conventionally printed copyrighted material such as books and periodicals remains an important source of reliable information for education and research.

In a digital environment, stakeholders, including copyright owners, end users, and intermediaries such as ISPs, face unprecedented legal challenges. Copyright proprietors are not only authors and performers, but also media conglomerates to whom authors and performers have licensed or assigned their copyrights.[474] These copyright owners have cumulative layers of protection for their works: copyright protection, technological protection, anti-circumvention protection that by law legitimizes protective technological measures, and contracts that limit end users' legitimate use of a work and may preempt copyright exemptions.[475] This multiple protection substantially limits users' ability to access and use copyrighted material. At the same time, mechanisms that ensure continued access to copyrighted material for legitimate purposes have been neglected and downplayed. Copyright holders often reproach consumers for circumventing technological barriers that prevent unauthorized or unlawful use of materials.[476] But at the same time, copyright holders are criticized

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[473] See *Religious Tech Center v Netcom On-Line Comm* 907 F Supp 1361 (ND Cal 1995) 1370. The Court ruled that:
"The decentralized network was designed so that if one link in the chain be closed off, the information will be dynamically rerouted through another link."

[474] Vinje (2000) *EIPR* 559-560.

[475] T Hardy "Property (and Copyright) in Cyberspace" (1996) 217 *University of Chicago Legal Forum* 217 223-224; Netanel (1996) *Yale LJ* 384.

[476] M Lewis "Metallica Sues Napster, Universities, Citing Copyright Infringement and RICO Violations" *LiveDaily* (13-04-2000) http://www.livedaily.com/news/781.html (accessed 15-05-2010). It quotes Lars Ulrich, Metallica drummer who said:
"From a business standpoint [trading files via Napster], this is about piracy--a.k.a. taking something that doesn't belong to you; and that is morally and legally wrong. The trading of such information--whether it's music, videos, photos, or whatever--is, in effect, trafficking in stolen goods."
Right owners resort to criminal law to stop unauthorized access, see, eg, *UMG Recordings Inc v MP3.Com Inc* 92 F Supp 2d 349 (SDNY 2000); *Recording Indust of America v Diamond Multimedia* 29 F Supp 2d 624 (CD Cal 1998);

for gatekeeping their works which restricts the public's access to information, stifles fair use and often prevents the application of copyright law.[477]

Many scholars have shown technology can enforce copyright law, but it should not compete or replace it.[478] In the past, copyright law has been responsive to technological developments.[479] Very likely, the digital revolution also mandates there be innovative copyright rules such as anti-circumvention ones and licensing schemes that address the challenges from digital technology.

This chapter is broken into five sections. First, there is an examination of anti-circumvention rules that prohibit end users from bypassing technological measures to access or use material in digital

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Studios v Metro Goldwyn Mayer Studios Inc 307 F Supp 2d 1085 (ND Cal 2004); *Metro–Goldwyn–Mayer Studios Inc v Grokster* 125 S Ct 2764 (2005) 2775.

[477] JD Lipton "Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-device Provisions" (2005) 19(1) *Harvard Journal of Law and Technology* 111 145, Lipton argues the anti-trafficking and anti-device provisions in the DMCA and the CDPA can stifle individual users' legitimate uses of works. M Kretschmer presents similar arguments in "Digital Copyright: The End of an Era" (2003) *European Intellectual Property Review* 333 333-341. Possibly, computer codes may replace the law. See T Wu "When Code isn't Law" (2003) 89(4) *Virginia Law Review* 679 679-752. Scholars argue copyright owners tend to implement their own policy with technological measures, see Ginsburg (2001) *Colum L Rev* 1613-1648; JE Cohen "Some Reflections on Copyright Management Systems and Laws Designed to Protect Them" (1997) 12 *Berkeley Technology Law Journal* 161 161-162; JD Litman "The Exclusive Right to Read" (1994-1995) 13 *Cardozo Arts and Entertainment Law Journal* 29 29-54.

[478] Luo (2005) *EIPR* 100. Dusollier also argues technology should not determine what copyright law should look like, see (2005) *EIPR* 201-204.

[479] Historically, copyright law always responded to technological development. The invention of printing technology induced the birth and development of copyright law. For more discussion, see T Dreier "Developments and Perspectives of Copyright: From Gutenberg to Data Highways" in K Brunnstein & PR Sint (eds) *Proceedings of the Conference on Intellectual Property Rights and New Technologies* (1995) 31 31-50. Entering the electronic era, an innovative copyright levy system for remuneration collection and distribution for copyright holders was employed for such analogue equipment as the photocopy machine, and analogue video and audio tapes. More recently this has come to include hard disks. For more discussions, see P Akester & R Akester "Digital Rights Management in the 21st Century" (2006) 28(3) *European Intellectual Property Review* 159 159-168. Also see the Final Report for Institute for Information Law prepared by PB Hugenholtz, L Guibault & S van Geffen *The Future of Levies in a Digital Environment: Final Report* (Amsterdam: Institute for Information Law, March 2003) http://www.ivir.nl/publications/other/DRM&levies-report.pdf (accessed 27-10-2013); LMCR Guibault *The Reprography Levies across the European Union* (Institute for Information Law, 29-04-2003) http://www.ivir.nl/publications/guibault/introconcl.pdf (assessed 27-10-2013). For typical cases showing the interaction between copyright law and technology, see eg, *Sony Corp v Universal City Studios* 464 US 417 (1984) 447; *Teleprompter Corp v Columbia Broadcasting Sys Inc* 415 US 394 (1974); *Buck v Jewell-La Salle Realty Co* 283 US 191 (1931).

form. Second, the use of contractual agreements with digital products, particularly software and online services are scrutinized. Third, since the right to reproduce materials is a core copyright issue, new issues relating to temporary reproduction and private copying are revisited. Fourth, the legal uncertainties that various stakeholders encounter in circulating information are investigated. Finally, a case study showing how EMI releases its music products through a new cooperative model with ISPs suggests a new method of releasing research and educational materials. This can benefit both copyright proprietors and users.

4 1 The impacts of technological measures and anti-circumvention rules

There are several legal barriers to accessing information that is in digital format. First, the expansion of copyright to a *sui generis* right for database increases privatization of information for economic benefit.[480] Second, copyright proprietors employ technological measures to restrict access and use of protected materials.[481] Third, anti-circumvention law legitimizes technological measures. Since for the most part copyright law does not protect databases,[482] the anti-circumvention law is analyzed as follows.

Technological measures to protect information are based on cryptography and other technical means[483] that control or restrict access or the reproduction of digital media content with electronic devices.[484] Widely used digital rights management (DRM) contains such technological measures as digital encryptions, virtual containers and watermarks.[485] The Content Scramble System (CSS) that

[480] K Zetter "Hands Off! That Fact is Mine" *Wired* (03-03-2004) http://www.wired.com/techbiz/media/news/2004/03/62500 (accessed 11-05-2010). *Sui generis* database rights are found in Chapter III of the Legal Protection of Databases Directive 96/9/EC on 11 March 1996 and the Database and Collections of Information Misappropriation Act of 2003 (HR 3261) on 8 October 2003, the Act is still pending.

[481] C Geiger "Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World" (2006) 28(7) *European Intellectual Property Review* 366 368-370.

[482] J Watal *Intellectual Property Rights in the WTO and Developing Countries* (The Hague: Kluwer Int'l Law, 2001) 218-221.

[483] Serial numbers and passwords are examples of technical means.

[484] They are employed to protect videotapes, audio CDs, software and DVDs. For example, the Content Scrambling System (CSS) is used widely to protect unauthorized access and duplication of DVDs; Sony BMG Music employs Extended Copy Protection (XCP) to control CD production.

[485] Digital rights management (DRM) is the umbrella term for several technologies used to enforce pre-defined policies controlling access to software, music, movies and other digital data. In more technical terms, DRM deals with description, layering, analyses, valuation, trading and monitoring rights in a digital work. For additional details, see TC

was introduced around 1996 is a type of DRM used on almost all DVDs utilizing a weak, proprietary 40-bit stream cipher algorithm.

There is always a technology race between copyright proprietors and end users.[486] On the one hand, technological measures are advantageous in monitoring the reproduction of illegal copies and controlling rampant piracy.[487] On the other hand, technological measures are criticized for perpetuating private control of digital copyright content regardless of a copyright's limited statutory protection period.[488] They also undermine copyright law in the sense that copyright exceptions for fair use cannot be fully recognized and enforced. Consequently there is a decline in the dissemination of creative content.[489] Thus, anti-circumvention rules have brought about extensive debates amongst scholars, copyright holders and the public.[490]

The anti-circumvention provision first appeared in the WIPO Internet Treaties in 1996 and was first implemented by the US in the DMCA[491] in 1998. In 2001, the EU enacted the Information Society

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Vinje "A Brave New World for Technical Protection Systems: Will There Still Be Room for Copyright?" (1996) 8 *European Intellectual Property Review* 431 431-440. It has been suggested the final solution for information protection relies on a variety of technologies. For the names of a few, see C Clark "The Answer to the Machine is in the Machine" in PB Hugenholtz (ed) *The Future of Copyright in a Digital Environment* (The Hague: Kluwer Law Int'l, 1996) 139 139-146; R Poynder "The Answer to the Machine is the Machine" in R Poynder (ed) *Caught in a Web, Intellectual Property in Cyberspace* (London: Derwent/Thomson Scientific, 2001) 123 123-139; LA Hollaar *Legal Protection of Digital Information* (Washington, DC: Bureau of National Affairs, 2002) 199-202.

[486] J Liu "Regulatory Copyright" (2004) 83(1) *North Carolina Law Review* 87 129.

[487] P Samuelson "The Copyright Grab" (January 1996) 4.01 *Wired* 134 134-139; Stefik "Letting Loose the Light: Igniting Commerce in Electronic Publication" in Stefik (ed) *Internet Dreams: Archetypes, Myths, and Metaphors* (1996) 219 226-234; MJ Stefik "Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing" (1997) 12 *Berkeley Technology Law Journal* 137 139-140; C Clark "The Publisher in the Digital World" in K Brunnstein & PP Sint (eds) *Proceedings of the Conference on Intellectual Property Rights and New Technologies* (Munchen: Oldenbourg, 1995) 85 97-101.

[488] Litman *Digital Copyright* 27.

[489] Kretschmer (2003) *EIPR* 337; Vinje (2996) *EIPR* 436.

[490] A substantial number of legal scholars have debated and commented on the anti-circumvention rules. For example, Samuelson (1999) *Berkeley Tech LJ* 537-544; P Samuelson "Anticircumvention Rules: Threat to Science" (2001) 293 *Science* 2028 2028-2031; L Ginsburg "Anti-circumvention Rules and Fair Use" (Fall 2002) *UCLA Journal of Law and Technology* 4 4-8; JD M Hecht "Reconciling Software Technology and Anti-circumvention Provisions in the Digital Millenium Copyright Act" (Fall 2004) *UCLA Journal of Law and Technology* 3 8-12; S Lai "The Impact of the Recent WIPO Copyright Treaty and Other Initiatives on Software Copyright in the United Kingdom" (1998) 1 *Intellectual Property Quarterly* 35 42-55.

[491] Pub L No 105-304, 112 Stat 2860 amended title 17 of the United States Code (USC) by codifying relevant

Directive[492] that also contained anti-circumvention rules. With pressure from the US, the EU implemented the Information Society Directive modeled after the DMCA. EU Member States basically follow the Directive approach, but different nations have anti-circumvention rules with different provisions.[493] The UK amended its CDPA[494] in 2003 to bring the Information Society Directive into its domestic legislation. In particular, section 296 of the CDPA was amended to contain anti-circumvention provisions.

Anti-circumvention provisions extend copyright law to a digital environment.[495] The relevant provisions in the DMCA are compared with the ones in the CDPA. Following is an investigation as to how anti-circumvention rules affect the dissemination, access and copying of copyrighted materials as well as other kinds of materials already in the public domain.

4 1 1 Definition of an "effective technological measure"

Generally, both the DMCA and the CDPA divide technological measures into two categories: 1) technological measures that control access to a work, and 2) technological measures that control copying a work.[496] The DMCA defines an "effective technological measure" as one effectively controlling access to a work, a process, or a treatment requiring a copyright owner's authority to gain access.[497] The CDPA stipulates an effective technological measure should control both access and copying.[498]

A notable difference is that the DMCA grants complete protection to access-control technological measures and partial protection to copy-control technological measures, while the CDPA grants

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provisions as § 1201-1204.

[492] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[493] U Gasser & M Girsberger "Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States: A Genie Stuck in the Bottle?" (November 2004) *Berkman Publication Series* No 2004-10 http://cyber.law.harvard.edu/home/2004-10 (assessed 27-10-2013).

[494] Copyright, Designs and Patents Act of 1988.

[495] Lipton (2005) *Harv JL & Tech* 139-142.

[496] 17 USC § 1201. Also see Copyright Office (US) *The Digital Millennium Copyright Act of 1998: US Copyright Office Summary* (US: Copyright Office, December 1998) http://www.copyright.gov/legislation/dmca.pdf (assessed 27-10-2013).

[497] 17 USC § 1201(a)(3)(B).

[498] S 296ZF of CDPA.

protection to both types.[499] Both pieces of legislation have provisions granting protection to any material protected by technological measures regardless of its copyright status.[500] This means materials not protected by copyright still can be protected by technological measures. There is case law on this point.[501]

4 1 2 Circumstances under which violation of anti-circumventing rules lead to liabilities

These two pieces of legislation contain a circumventing act prohibition and a device prohibition. They both assign liabilities on the basis of a violation of technological measures rather than on the basis of a copyright infringement. This liability significantly differs from the one set in the Berne Convention.

There are four major differences between the two pieces of legislation. First, in the DMCA liabilities are triggered simply with a technological violation,[502] while in the CDPA the liability trigger is "intention" and "knowledge".[503] Second, the DMCA employs a minimalist approach with liability flowing from the violation of technological measures controlling access, while the CDPA employs a comprehensive approach with liability flowing from the breach of both technological measures controlling access and copying. Third, with the DMCA there are two types of violation. One violation is the circumvention of technological measures controlling access as well as the sale of circumvention devices and the provision of services.[504] Another violation is not prohibiting the circumventing act itself.[505] Therefore, a person can circumvent copying-control measures to use a work if the law permits the person to access the work. But if the person aids others by publicly offering the devices or helps in the circumvention, then the person has committed a technological

[499] S 296ZF(2).

[500] Dusollier (2005) *EIPR* 202-203; DL Burk "Anticircumvention Misuse" (2002) 50 *University of California at Los Angeles Law Review* 1095 1096.

[501] For example, *Universal City Studios Inc v Reimerdes* 111 F Supp 2d 294 (SDNY 2000), aff'd 273 F 3d 429 (2nd Cir 2001) was the first test of the DMCA. The Court held the defender whom devised a device circumventing the CSS was liable under the DMCA. In *United States v Elcom Ltd and Sklyarov* a computer programmer was charged with providing computer software to the public for circumvention. See also *Lexmark Intern v Static Control Components* 2003 US Dist LEXIS 3734 (ED Ky 2003); *Studios v Metro Goldwyn Mayer Studios Inc* No C 02-1955 SI (ND Cal 2004).

[502] 17 USC § 1201(a)(1)(A).

[503] Ss 296ZA(1)(b) and 296ZB(5) of CDPA.

[504] 17 USC § 1201(a)(1)(A) and (a)(2). For details, see *Summary of DMCA* 3 and HR Rep No 105-551, pt 1 18.

[505] 17 USC § 1201(b).

breach and is liable.[506] The reason for the exemption of liability for copy-control circumvention is to preserve fair use.[507] Fourth, the CDPA stipulates that people who both possess and traffic in circumvention devices are liable.[508] Nevertheless, possession is only culpable for commercial purposes since there is an exemption for private and domestic use.[509]

Many argue that an "access right" has been implicitly created for copyright holders.[510] This access right strengthens copyright holders' monopoly power over copyrighted works. Of note is that breaching this right does not require the liable person to know that the circumvention act he or she is engaged in is prohibited.[511] Therefore, it broadens the scope of the material under the protection of technological measures[512] and allows a longer protection period than is granted by the copyright law. This greatly disadvantages end users using digital content.[513]

Although circumvention for fair use is ostensibly preserved by law, users circumventing a DMCA copy-control technological measure still face a dilemma. This is because a circumventing device is broadly defined,[514] and without circumventing tools, ordinary users are unable to locate materials they can use for legitimate purposes.[515] Very simply, the preservation of fair use is virtually gone.

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[506] S Rep 105-190, S Rep No 190, 105th Cong, 2nd Sess 1998, 1998 WL 239623 29.

[507] *Summary of DMCA* 4. However, in *Universal City Studios Inc v Corley* 273 F 3d 429 (2nd Cir 2001) 443-444, 60 USPQ 2d (BNA) 1953 1961-1962, it was ruled the fair use defense was not applicable to circumvention. Nevertheless, the Supreme Court acted differently in *Chamberlain Group v Skylink Tech Inc* 381 F 3d 1178 (Fed Cir 2004) 1204, 72 USPQ 2d (BNA) 1225 1244. It ruled the DMCA did not prohibit circumvention if it did not constitute or facilitate copyright infringement. In *Lexmark* 387 F 3d 522 (6th Cir 2004) 546-549, 72 USPQ 2d (BNA) 1839 1856-1858, the Sixth Circuit substantially diminished the scope of access-control measures and upheld the legality of circumvention for interoperability between competing products.

[508] Ss 296ZB(1)(c)(iv) and 296ZD(1)(b)(C) of CDPA.

[509] Importing circumventing devices other than for private and domestic use is an offense, see s 296ZB(1)(b) of CDPA. According to the wording of s 296ZB(1)(c)(iv), possession in the course of business is prohibited.

[510] Heide (2001) *EIPR* 469 475; LN Gasaway "The New Access Right and Its Impact on Libraries and Library Users" (2002) 10 *Journal of Intellectual Property Law* 269 269-308; JC Ginsburg "From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law" (2002-2003) 53 *Journal of the Copyright Society of the USA* 113 119-126.

[511] Vinje (1997) *EIPR* 235.

[512] Art 11 of the WCT.

[513] KJ Koelman "A Hard Nut to Crack: The Protection of Technological Measures" (2000) 6 *European Intellectual Property Review* 272 274.

[514] See subs 4 1 3.

[515] For example, see above n 29 *Reimerdes*.

4 1 3 Definition of a circumventing device

The DMCA defines a circumventing device broadly.[516] There are three categories of circumventing devices: first, a device designed or produced primarily for circumvention; second, a device that has only a limited commercial purpose other than to circumvent and third, a device marketed for circumventing. The CDPA mirrors almost verbatim the three categories.[517]

To prohibit devices having limited commercial use other than for circumvention is a disservice to manufacturers because a device can be multifunctional. However, under the DMCA prohibition provision, even a legitimate use does not prevent a device from being prohibited. The DMCA modifies the substantial non-infringing use standard established in the *Sony* case.[518] In short, the strict prohibition of a circumvention device nullifies fair use.

4 1 4 Circumvention exceptions

The commercialization of copyrighted works and access to them are essential to promote societal learning.[519] Commercialization gives copyright proprietors an economic incentive, and gives the public access and use of copyrighted works. Mass-printed books are easily accessible, however, software, CDs and other materials in digital form are difficult to access because of producers' technological measures making them inaccessible or not operable on different platforms or devices.[520] Thus, the balance between copyright proprietors' monetary reward and the public's access is distorted. Two policies are recommended: the first is to give the judiciary the discretion when a dispute arises as to whether a technological measure prevents the application of fair use.[521] The second is when a copyright proprietor shows no interest in providing full access to copyrighted

[516] 17 USC § 1201(a)(2).

[517] S 296ZD(1)(b) of the CDPA.

[518] D Burk & J Cohen "Fair Use Infrastructure for Rights Management Systems" (2001) 15 *Harvard Journal of Law and Technology* 41 46-47. Lobbyists argued the substantial non-infringing standard established in *Sony* was insufficient for copyright protection. See statement of Peters, Register of Copyrights, Copyright Office of the United States in On-Line Copyright Liability Limitation Act: Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary 105th Cong (1997) 33.

[519] Kreiss (1995-1996) *UCLA L Rev* 1-77.

[520] 74.

[521] 41-70.

works, the court withholds any injunction brought against the copyright infringer if the copyright proprietor has been adequately compensated.[522] In addition, exceptions are needed to restore the imbalance between restrictive access to software and other digital products and copyright proprietors' exclusive control over technological devices and measures.

In the DMCA, prohibitions in section 1201 are subject to a number of carefully crafted exceptions. Section 1201(c) includes a fair use clause stating that nothing in section 1201 affects the rights, remedies, limitations or defense of copyright infringement, including fair use.[523] Sections 1201(d) to (i) are the exceptions.[524] Section 1201(e) is a general exception to the application of the entire section on circumvention for law enforcement, intelligence, and other such governmental activities.

The broadest of these exceptions in section 1201[525] establishes an ongoing administrative rule-making procedure to evaluate the impact of prohibiting circumvention.[526] The latest adoption of the eight exemptions, for all intents and purposes, took place on 28 October 2012.[527] They are narrow in scope and apply to specific industries. They not only pertain to the Internet, but to a broad multimedia environment. Nevertheless, they do not exempt trafficking actions.

The exceptions in the CDPA, unlike those in the DMCA, are loosely constructed. Section 296ZA(1) provides the grounds for anti-circumvention rules and states that anyone who does anything which circumvents technological measures knowingly, or with reasonable grounds to know that he is pursuing that objective is liable for circumvention. Section 296ZA(2) provides an exemption for research on cryptography. The exemption for circumventing devices is section 296ZB(3), which provides an exemption for law enforcement and intelligence agencies to manufacture and use devices and services designed for circumvention. Section 296ZE provides a remedy when technological measures prevent permitted activities.[528]

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[522] 71-74.

[523] 17 USC § 1201(c)(1).

[524] The exceptions are for (1) a non-profit library, archive, and educational institution; (2) reverse engineering; (3) encryption research; (4) minor protection; (5) personal privacy and (6) security testing.

[525] 17 USC § 1201(a)(1)(B)-(E).

[526] For an evaluation of the ongoing administrative rule-making procedure, see WN Hartzog "Falling on Deaf Ears: Is the 'Fail-Safe' Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use?" (Spring 2005) 12(2) *Journal of Intellectual Property Law* 309 309-351.

[527] Library of Congress *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (2012) Fed Reg 65260-65279.

[528] The permitted acts are enumerated in Pt 1 of Sch 5A of the CDPA.

A common concern is the lack of a general exemption for circumventing acts in the anti-circumvention laws.[529] However, there are exemptions that have been negotiated by parties in the entertainment and software industries,[530] publisher lobbyist groups,[531] consumer groups and libraries.[532] Although the copyright industries are major users of technological measures, the US Congress overlooked that "trade secret owners" and "privacy-seeking individuals" would likely employ technological measures to protect non-copyrightable material.[533] Therefore, to circumvent certain technological measures does not necessarily breach copyright law. Another problem is that the anti-circumvention rules are often restrictively interpreted.[534] Without a general exemption, the legislation is unduly harsh for users and ISPs since criminal sanctions may apply when a violation occurs.[535]

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[529] P Samuelson "Towards More Sensible Anti-circumvention Regulations" (2001) 1962 *Financial Cryptography: Lecture Notes in Computer Science* http://people.ischool.berkeley.edu/~pam/papers/fincrypt2.pdf (accessed 27-10-2013). Also see Samuelson (1999) *Berkeley Tech LJ* 544 -546.

[530] OG Hatch "Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium" (1997-1998) 59 *University of Pittsburgh Law Review* 719 749-750.

[531] See the statement by Jack Valenti, Chairman and CEO of the Motion Picture Association of America at On-Line Copyright Liability Limitation Act: Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary 105th Cong (1997) 78-82; and the statement by Edward J Black, President of the Computer and Communications Industry Association On-Line Copyright Liability Limitation Act: Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary 105th Cong (1997) 256-265. The Business Software Alliance with its principal member being Microsoft advocated a cooperative system between computer and software makers that makes the use or copying of a protected work very difficult for law to endorse. For details, see Lipton (2005) *Harv JL & Tech* 111; IR Kerr, A Maurushat & CS Tacit "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 *Ottawa Law Review* 7 32.

[532] See BA Lehman *The Report of the Working Group on Intellectual Property Rights* (Washington: Information Infrastructure Task Force, 1995). Many have criticized the report and an earlier draft because it overly favored publishers' interests. See P Jaszi "Caught in the Net of Copyright" (1996) 75 *Oregon Law Review* 299 299-308; LA Kurtz "Copyright and the National Information Infrastructure in the United States" (1996) 18 *European Intellectual Property Review* 120 120-126; Litman (1994-1995) *Cardozo Arts & Ent LJ* 29-54; Samuelson (1996) *Va J Int'l L* 369-440.

[533] Samuelson (2001) *Financial Cryptography* 7.

[534] For example, see *Davidson & Associates v Jung* 422 F 3d 630 (8th Cir 2005), 2005 Copr L Dec P 29,043, 76 USPQ 2d (BNA) 1287.

[535] SS Shayesteh "High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy" (1999) 33 *Loy LA L Rev* 183 213-216 & 223-224.

4 1 5 Conclusions

Since the anti-circumvention rules contained in the WIPO Internet Treaties do not define a circumventing act and a device specifically,[536] national legislators should avoid simply "copying and pasting" provisions as set out by international treaties without first defining core concepts and terms clearly.[537] In particular, developing countries should consider lenient anti-circumvention rules to foster Internet growth and provide for the public's access and use of technologically protected copyrighted works. Minimum anti-circumvention rules can be drafted in this way. First, copyright law grants protection for both access-control measures and copy-control ones. Circumventing copy-control measures for legitimate purposes is exempt from copyright infringement. Second, the circumventing copy-control liability exemption is supplemented by a restrictive definition of a circumventing device. A circumventing device could be defined as a device designed solely for circumvention or marketed for circumvention.[538] Third, a general purpose exemption should be included to allow circumvention for other legitimate purposes than just ones specified by the copyright law.[539] Fourth, materials not protected by copyright should not enjoy copyright protection simply because they are protected by technological measures. To encourage content providers to convert non-copyrightable materials into digital format and distribute them online, the law could provide them with other forms of rights as economic rewards. Quite simply, copyright law should not extend protection for non-copyrightable materials.

4 2 The impacts of licenses and contracts in copyright transaction

Copyright proprietors increasingly use contractual agreements and technological measures to easily

[536] Art 11 of the WCT only requires Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures by authors exercising their rights.

[537] U Gasser "Legal Frameworks and Technological Protection of Digital Content: Moving Forward towards a Best Practice Model" (2006) 17 *Fordham Intellectual Property, Media & Entertainment Law Journal* 39 102. The author proposed five principles in constructing a model anti-circumvention law, see 102-106. The first principle is defining core concepts clearly and unambiguously.

[538] Producers of copying assisting devices at one time were considered contributory infringers. Historically, most European countries imposed levies on media or equipments used primarily for private copying. Since a device that might be used for circumvention can be multifunctional, it is unfair to prohibit such kind of devices simply because they have a circumvention function. In addition, end users usually have to pay for material with a pay-per-view format. A strict ban on devices that could assist circumvention is akin to a second subsidy for right holders.

[539] Samuelson (2001) *Financial Cryptography* 6.

devise well-tailored licensing terms that exclude the application of copyright law.[540] An example is shrink-wrap[541] and click-wrap licenses[542] that are used primarily by software producers, and ISPs to limit users' obtaining, using and disposing of such a product as software even though it was legally acquired. The following section examines two license types with particular attention paid to their validity and enforceability. Thereafter is an examination of legislative responses that have addressed the issues of validity and enforceability.

4 2 1 Uses of shrink-wrap and click-wrap license

The shrink-wrap license affects users' rights in several ways. First, it is more similar to delivering a service than to selling a physical good. For example, for non-profit libraries, section 109 of the US Copyright Act of 1976[543] gives non-profit libraries the right of software circulation for archival purpose and for essential adaptations, but it is the shrink-wrap license that is the primary obstacle to using the software.[544] A notable feature of the shrink-wrap license is that it only allows specified uses of software rather than transferring ownership. In this way, a non-profit library that purchases software is substantially deprived of an owner's rights to the software, thus making copying rights for archival purpose virtually inapplicable.[545]

Second, the shrink-wrap license employs contractual terms to override copyright limitations and exceptions. For example, the Seventh Circuit held in the *ProCD, Inc v Zeidenberg*[546] (*ProCD*) case that shrink-wrap licenses were intellectual property private transactions and therefore, a state, a legal public entity, should not interfere with them. If a shrink-wrap license is a contract, then the

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[540] JH Reichman & JA Franklin "Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information" (1999) 147(4) *University of Pennsylvania Law Review* 875 899-911.

[541] A shrink-wrap license is a protective wrapping for articles consisting of a clear plastic film that is wound around an article and then shrunk by heat to form a sealed, tight-fitting package. By tearing open a shrink-wrap, a user automatically assents to the enclosed software terms.

[542] A click-wrap license is often found on the Internet as a part of the installation of many software packages or where agreement is sought electronically.

[543] Pub L No 94-553, 90 Stat 2541 (1976).

[544] A shrink-wrap license with software strengthens copyright protection for software producers. See A Klinefelter "The Circulation of Software by Libraries" in LN Gasaway (ed) *Growing Pains: Adapting Copyright for Libraries, Education and Society* (Littleton, CO: Fred B Rothman & Co, 1997) 215 224.

[545] LN Gasaway & SK Wiant *Libraries and Copyright: A Guide to Copyright Law in the 1990s* (Washington, DC: Special Libraries Association, 1994) 119; Klinefelter "The Circulation of Software by Libraries" in *Growing Pains* 225.

[546] 86 F 3d 1447 (7th Cir 1996).

relevant part of section 301(a) of the Copyright Act of 1976 preempts any legal or equitable rights that are equivalent to statutory copyrights.[547] The Court rejected the argument that such a contract was preempted by the Copyright Act of 1976.[548] Rather, the Court envisioned copyright and contractual rights as co-existing. This is because copyright is a property right while contracts are governed by obligatory rules.[549] Therefore, a contract did not necessarily create something that was equivalent to an exclusive copyright but merely was a contractual obligation.[550] The opinion concluded the shrink-wrap license was enforceable since it did not violate the basic requirements of a valid contract.[551] Subsequent courts followed this approach and held that shrink-wrap licenses were generally valid under contract law.[552]

Shortly after the shrink-wrap license, the click-wrap license became popular for it allowed users to read the contractual terms before accepting a contract. In this sense, a click-wrap license guarantees the user has accepted the terms to a contract that give the person access to a service or good, and subsequently is voluntary. However, the click-wrap license is a standard-form contract drafted by the seller and leaves no room for negotiation. It has often been argued that this creates too strong a right for the seller and diminishes the contractual rights of the purchaser. If a user does not accept the terms of such a license, the only choice is to click the "no" button to reject or cancel it. If a user

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[547] One function of s 301 of the 17 USC is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain. S 301(a) reads:
"On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

[548] 1455.

[549] 86 F 3d 1447 (7th Cir 1996) 1454.

[550] 1454.

[551] 1449.

[552] See, eg, *Wrench LLC v Taco Bell Corp* 256 F 3d 446 (6th Cir 2001) 455 held that a state law contract claim was not preempted by federal copyright law; similar decisions can be found in *Lipscher v LRP Publications Inc* 266 F 3d 1305 (11th Cir 2001) 1318; *Bowers v Baystate Technologies Inc* 320 F 3d 1317 (Fed Cir 2003) 1324-1325; *Lattie v Murdach* No C-96-2524 MHP, 42 USPQ 2d (BNA) 1240 1244-1245, 1997 US Dist LEXIS 3558 11-12 (ND Cal 8 Jan 1997); *I Lan Systems Inc v Netscout Service Level* 183 F Supp 2d 328 (D Mass 2002) 338 where the enforceability of a click wrap license is affirmed. But see *Vault Corp v Quaid Software Ltd* 847 F 2d 255 (5th Cir 1988) 269, it affirmed a shrink-wrap software license was a "contract of adhesion" and therefore was unenforceable; *Shoptalk Ltd v Concorde-New Horizon Corp* 897 F Supp 144 (SDNY 1995) 147, declined to enforce a contractual obligation to pay royalties after the expiration of a work's copyright.

cannot find a substitute product or service that is provided with the click-wrap license, then a decision must be made whether to accept the license terms unwillingly or refuse to use the product or service. This may cause the user significant inconvenience or loss. Few jurists have considered the validity of click-wrap licenses, however, when they have been challenged, the contract terms have ultimately been upheld subject to conditions. The conditions are that the contractual terms must be readable with words of a proper font size and users are given ample time to read, print and review the material.[553] It is noteworthy that the terms must be read before acceptance.[554]

4 2 2 Validity of shrink-wrap and click-wrap licenses

Both scholars[555] and courts[556] have challenged the validity of the shrink-wrap license. This is best shown in an attempt to amend the US Uniform Commercial Code (UCC).[557] The American Law Institute (ALI) and the National Conference for Commissioners on Uniform State Laws (NCCUSL) drafted a new Article 2B to complement Article 2A that regulates lease contracts of goods as well as underpins the UCC's position on governing contracts and shrink-wrap licenses. Then in May 1997, the ALI adopted an amendment to the UCC draft of section 2B-308 stating:

> "[in a mass-market license,] a term that is inconsistent with any of the provisions of copyright law … cannot become part of an exclusive contract under [the mass-market] section."

This was a laudable attempt to limit the enforceability of a shrink-wrap license if it contained terms

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[553] See *In re RealNetworks Inc, Privacy Litigation* Not Reported in F Supp 2d, 2000 WL 631341 (ND ILL 2000), upheld an arbitration clause, 5-6.

[554] *Register.com Inc v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 429; *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001) 593-594.

[555] N Elkin-Koren "Copyright Policy and the Limits of Freedom of Contract" (1997) 12 *Berkeley Technology Law Journal* 93 109-110.

[556] *Kabehie v Zoland* 102 Cal App 4th 513 (Cal App 2 Dist 2002) 528; *Green v Hendrickson Publishers Inc* 770 NE 2d 784 (Ind 2002) 789-790, held that *ProCD* relied on three other cases, each involving a contract right significantly broader than the simple right not to reproduce. Accordingly, none of them supported the broad conclusion the Seventh Circuit ascribes to them. Also see *Arizona Retail Systems v Software Link* 831 F Supp 759 (D Ariz 1993); *Step-Saver Data Systems Inc v Wyse Technology* 939 F 2d 91 (3rd Cir 1991).

[557] The phrase "Uniform Laws" can be misleading. A Uniform Law is not law unless the National Conference has approved it. Otherwise it is simply a 50 state legislative proposal. The UCC is a success with some of its versions in nearly all US jurisdictions — see the Legal Information Institute "Uniform Commercial Code" *Cornell University Law School* http://www.law.cornell.edu/ucc/ (accessed 27-10-2013).

that preempted copyright exceptions. However, in 1999 the NCCUSL abandoned efforts to adopt Article 2B in the UCC. Instead the proposed article was revamped and named the Uniform Computer Information Transaction Act (UCITA)[558] that favors large licensors by making terms commonly found in shrink-wrap and click-wrap licenses completely enforceable. UCITA also allows licensors not to disclose their license terms until a customer has purchased a product with a shrink-wrap license, thus preventing comparison shopping. Not only have commentators criticized UCITA for its bias favoring the sellers of "online information",[559] but only two states have adopted it as of 2004.[560]

In Europe, since no specific legislation has been enacted, courts often strike a balance between freedom of contract and copyright limitations.[561] The lawmakers have taken a firm step to curb the freedom of contract to ensure users' enjoy copyright limitations and exceptions without unreasonable contractual restrictions.[562] Article 9(1) of the Computer Program Directive[563] expressly provides that:

> ". . . any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void".[564]

Later, Article 15 of the Database Directive[565] adopts a similar provision that nullifies contracts

[558] M Bitton "A New Outlook on the Economic Dimension of the Database Protection Debate" (2006) 47(2) *IDEA: The Journal of Law and Technology* 93 161. The UCITA is a proposed state contract law to regulate transactions for such computer information products as computer software, online databases, software access contracts and e-books.

[559] See, eg, MA Lemley "Beyond Preemption: The Law and Policy of Intellectual Property Licensing" (1999) 87(1) *California Law Review* 111 166-168. It stated that Article 2B was not in line with the anti-trust doctrine; WA Effross "The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code" (1997) 34 *San Diego Law Review* 1263 1328-1359, showing that often the terms of a shrink-wrap license only appear on a computer screen when a buyer attempts to run the software. The buyer either accepts the terms limiting further use or is not allowed to use the software. This is patently unfair because the terms only are displayed after customers have paid and opened the package.

[560] Maryland and Virginia.

[561] LMCR Guibault *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (London: Kluwer Law Int'l, 2002) 214-215.

[562] F Verstrynge "Protecting Intellectual Property Rights within the New Pan-European Framework: The Case of Computer Software" (1992) 2 *Droit de l'informatique et des télécoms* 6 12.

[563] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

[564] See also Recital 26 of the Directive.

[565] Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

excluding the rights that the Directive grants users. A Dutch court interpreted a shrink-wrap license's contractual terms restricting downloading and other forms of copying as merely a warning to users.[566] In other words, the restrictive terms are not legally binding on the consumer who purchased the CD-ROM.

Others have argued that the complete enforceability of shrink-wrap and click-wrap licenses makes them a quasi property right.[567] The effect of such licenses goes beyond the contracting parties as the Seventh Circuit held in *ProCD*.[568] For example, a person receiving a CD as a gift has to accept the contractual terms although the person is not involved in the transaction. Such a legitimate use as reverse engineering can be prevented by the terms of a license.[569] Moreover, legally endorsing the enforcement of such licenses encourages software sellers to inconspicuously insert unfavorable terms for customers in a pile of documents that no one pays any attention.[570] The excessive use of shrink-wrap and click-wrap licenses with arbitrary, non-negotiable contractual terms ultimately undermine users' ability to access copyrighted material contained in digital products. It can also prevent them from exercising their legal rights such as copying for archival purpose or carrying out reverse engineering for testing a computer program's flaws. Legal endorsement of the validity and enforceability of such licenses that preempt copyright exceptions impairs users' rights for software

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[566] *Vermande v Bojkovski* District Court of The Hague, decision of 20 March 1998 *Informatierecht/AMI* 1998 65-67.

[567] See T MS Hemnes "Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing" (1993-1994) 71 *Denver University Law Review* 577 577-606, that discussed enforceability of restrictions on software use by referring to the doctrine of equitable servitudes; MJ Radin & RP Wagner "The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace" (1998) 73 *Chicago-Kent Law Review* 1295 1295-1318; SE Sterk "Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions" (1985) 70 *Iowa L Rev* 615 615-662, discusses the extent law should interfere with private agreements. The article also justifies restrictions on equitable servitude on the grounds that such servitude creates significant negative externalities. Sterk's analysis on real property also applies to intellectual property, see Lemley (1999) *Cal L Rev* 111-172.

[568] JE Cohen, LP Loren, RL Okediji & MA O'Rourke (eds) *Copyright in a Global Information Economy* (NY: Aspen Publishers, 2006) 709.

[569] 709.

[570] Lemley (1999) *Cal L Rev* 123. In a discussion of the potential harm of adopting UCC Article 2B, Lemley describes three ways that the Article could expand the scope and power of contracts. First, Article 2B automatically recognizes a transaction as a license regardless of its substantial economic impact. Traditionally, a transaction has been distinguished as a sale, a lease, or a license. Second, Article 2B prejudices customers' rights in shifting the traditional focus on contractual norms of offer and acceptance to a straightforward recognition of the conclusion of contracts. The shift makes licenses with digital products more akin to property right because of the lack of negotiation. Third, Article 2B endows contracts with omnipotent power to waive all legal default rules by making special agreements between contracting parties.

and other digital products.

4 2 3 Solutions to deal with a contract's overriding effects

Copyright law and contracts can be in conflict in various ways. First, some contracts do not allow licensees to make a copy of a licensed work even for a legitimate purpose. For example, section 117 of the Copyright Act of 1976 expressly states the owner of a copy of a computer program can make an additional copy for certain purposes.[571] However, a computer program purchaser just might be a licensee rather than an owner.[572] Second, another common problem is that software users are often prohibited from reverse engineering for research and to achieve interoperability.[573] Third, if a

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[571] 17 USC § 117 (a):

"Making of Additional Copy or Adaptation by Owner of Copy--Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

For cases, see *Vault Corp v Quaid Software Ltd* 847 F 2d 255 (5th Cir 1988) 270, holding that s 117 authorized the defendant to make a copy necessary to analyze and defeat a copyrighted "anti-copying" program. A similar decision is found in *Foresight Resources Corp v Pfortmiller* 719 F Supp 1006 (D Kan 1989) 1009-1010.

[572] The term "owners of a copy" in s 117 has made some courts focus on whether a computer program user is really an "owner" or a "licensee". See *MAI Systems Corp v Peak Computer Inc* 991 F 2d 511 (9th Cir 1993) 519 n 5, holding s 117 did not apply to software that was licensed since the user of such software was not the "owner" of a copy. Therefore, the customer could not hire a third party to install or debug a purchased program. In contrast, see *DSC Communications Corp v Pulse Communications* 976 F Supp 359 (ED Va 1997) 362, holding that whether a defendant owned a copy under s 117 should be determined by the economic realities of the transaction rather than simply by the form of a license.

[573] Reverse engineering of software is also called "decompilation" that involves working backwards from object codes to produce source codes that can be used to devise a new program without simply duplicating the original, see A Johnson-Laird "Software Reverse Engineering in the Real World" (1993-1994) 19 *University of Dayton Law Review* 843 843-902. Most courts and most commentators agree that reverse engineering is legitimate, particularly for achieving interoperability. See, eg, *DSC Communications Corp v DGI Technologies Inc* 81 F 3d 597 (5th Cir 1996) 601; *Bateman v Mnemonics Inc* 79 F 3d 1532 (11th Cir 1996) 1539 n 18; *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1510 (9th Cir 1992) 1527-1528; *DSC Communications Corp v Pulse Communications* 976 F Supp 359 (ED Va 1997) 364. For comments, see JE Cohen "Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of 'Lock-Out' Programs" (1994) 68 *Southern California Law Review* 1091 1091-1202; LD Graham & RO Zerbe Jr "Economically Efficient Treatment of Computer Software: Reverse Engineering, Protection, and Disclosure"

software transaction is recognized as a license instead of a sale, the first sale doctrine does not apply.[574] Once a purchaser has obtained a lawfully acquired copy, the first sale doctrine allows the purchaser to transfer and dispose of it without permission. But since it does not apply a copyright holder's rights to control the ownership transfer of a particular software copy, shrink-wrap licenses virtually allow perpetual protection for licensed materials.[575]

Experts in this area have suggested two ways to deal with an expansive license that restricts or precludes copyright limitations and exceptions. The first is to grant copyright law an absolute preemption privilege.[576] The other is to overlook the section of the contractual terms that conflict with copyright law.[577] Both of these solutions are problematic.

The first solution is too broad to target particular contractual terms because it does not differentiate among the different types of contracts. Thus, the court may be reluctant to preempt the contractual terms of licensing.[578] The second solution makes it difficult for a court to determine under which circumstances a contractual term should be preempted. This is because the more explicit a copyright law on preemptive issues, the more willing a court is to preempt contractual terms. The explicitness of copyright law varies with three levels of legal rules and public policy.[579] A statutory copyright provision provides a judge with a clear guide to invalidate particular contractual terms if they are in

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(1996) 22 *Rutgers Computer & Technology Law Journal* 61 61-142; DS Karjala "Copyright Protection of Computer Documents, Reverse Engineering, and Professor Miller" (1994) 19 *University of Dayton Law Review* 975 1016-1018; MA O'Rourke "Drawing the Boundary between Copyright and Contract: Copyright Preemption of Software License Terms" (1995) 45(3) *Duke Law Journal* 479 534; DA Rice "Sega and Beyond: A Beacon for Fair Use Analysis ... At Least as Far as It Goes" (1994) 19 *University of Dayton Law Review* 1131 1168; P Samuelson "Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega" (1993) 1 *Journal of Intellectual Property Law* 49 49-118; TS Teter "Merger and the Machines: An Analysis of the Pro-Compatibility Trend in Computer Software Copyright Cases" (1993) 45(4) *Stanford Law Review* 1061 1061-1098, argues rightfully so that the value of computer programs depends very much on interoperability.

[574] See HR 94-1476, 94th Cong (1976).

[575] The *ProCD* case is an example. A Minassian "The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements" (1997-1998) 45 *University of California at Los Angeles Law Review* 569 593.

[576] IT Hardy "Contracts, Copyright and Preemption in a Digital World" (1995) 1 *Richmond Journal of Law & Technology* 2.

[577] Lemley (1999) *Cal L Rev* 143-144.

[578] Lemley (1999) *Cal L Rev* 145; Reichman & Franklin (1999) *U Pa L Rev* 922; O'Rourke (1995) *Duke LJ* 534-541. The author also proposed to expand the treatment of antitrust law rather than merely to rely on the preemption doctrine, at 545.

[579] Guibault *Copyright Limitations and Contracts* 121-152.

conflict with the provision. For instance, if a contract agrees to transfer an author's moral rights to a purchaser, the contract is simply unenforceable. Public policy as a default in statutory law, such as the fair use doctrine, is less explicit. Consequently, it is more difficult for a judge to apply.[580] A court simply cannot preempt contractual terms that do not conform to a default rule. An example of this would be to preempt a claim made by a licensee that the person would never use any part of a licensed work for fair use.[581] Implicit public policy, implied from a Constitutional clause is the least reliable guidance for a court to judge preemptive disputes.[582] In such cases, courts are very reluctant to preempt contractual terms.[583]

Some courts, scholars and commentators argue that contracts are not equivalent to copyright granted by statutory law. Here, contract only defines rights and obligations between parties while copyright is a property right that cannot be used except in a voluntary transaction.[584] Hence, parties

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[580] Lemley (1999) *Cal L Rev* 144-146. However, the fair use doctrine is sometimes considered more than merely a default rule, see DS Karjala "Federal Preemption of Shrinkwrap and On-Line Licenses" (1996-1997) 22 *University of Dayton Law Review* 511 520; Lemley (1996-1997) *Tex L Rev* 1042-1083; DA Rice "Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions against Reverse Engineering" (1992) 53 *University of Pittsburgh Law Review* 543 556-570.

[581] Lemley (1999) *Cal L Rev* 146. 17 USC ss 203(a)(3) & (5) and 304(a)(3) & (5).

[582] US Constitution art VI. *Stewart v Abend* 495 US 207 (US Cal 1990) 228. The Court stated that:
"Absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a pre-existing work are extinguished when his work is incorporated into another work, it is not the role of this Court to alter the delicate balance Congress has labored to achieve."

[583] Hardy (1995) *Rich JL & Tech* para 23.

[584] A host of courts have agreed that contracts are not equivalent to statutory rights. In *ProCD* 1455, the Court held a simple two-party contract was not equivalent to any of the exclusive rights within the general scope of copyright and therefore was enforceable. JT Warlick IV "A Wolf in Sheep's Clothing? Information Licensing and De Facto Copyright Legislation in UCC 2B" (1997) 45 *Journal of the Copyright Society of the USA* 158 168-169 criticized the approach. In contrast, see MA Jaccard "Securing Copyright in Transnational Cyberspace: The Case for Contracting with Potential Infringers" (1997) 35 *Columbia Journal of Transnational Law* 619647. The author argued that the rights conveyed by a contract may be equivalent to copyrights even though the contract law has different elements. The District Court in *PC Films Corp v Turner Entertainment Co* 954 F Supp 711 (SDNY 1997) 715 concluded that an agreement that bound a licensee beyond the expiration of copyright was enforceable because it was
"merely a contract between two private parties".
The Second Circuit rejected this approach in dictum, though it concluded not to resolve the issue of whether restrictions on licensees could survive the expiration of copyright. See *PC Films Corp v MGM/UA Home Video Inc* 138 F 3d 453 (2nd Cir 1998) 458, the Court stated that:
"We are not convinced that this analysis gives sufficient weight to federal copyright law and the constitutional principle that a grant of copyright rights can be for 'limited times' only."

can rightfully form a contract according to their own best interests. Autonomy should not be eliminated through state interference.[585] However, it should be noted that preemption not only occurs when there is a conflict between a contractual term and a copyright statutory provision such as section 301 of the Copyright Act of 1976. A conflict between a contractual term and a legal default rule or a public policy may also cause preemption.[586] Intellectual property rules have preempted contracts in a number of cases on grounds other than merely being in conflict with statutory provisions.[587] Moreover, a contract can restrict the "downstream" disposition of a legally acquired product. Doing so not only prevents the application of the first sale doctrine, but also goes against contract law's privity doctrine.[588] The privity doctrine only occurs between the parties of a contract and provides that a contract should not confer rights or impose obligations on third parties. Thus, the legally endorsed enforceability of restrictive contracts working together with technological protective measures restrain the public from accessing, using, or circulating software and digital products in other forms.

One can conclude the validity and enforceability of such contracts as shrink-wrap and click-wrap licenses ought to be limited in certain circumstances. Lawmakers should be clear that shrink-wrap and click-wrap licenses may not be enforceable not only when they conflict with a statutory provision, but also when they do not conform with default legal rules. Public policy may also invalidate a license. Clarifying the copyright law could restore the imbalance caused by the suppressive shrink-wrap and click-wrap licenses used in the distribution and circulation of software and online digitized material. By doing so, individual learners, libraries, and educational institutions would benefit fully from copyright limitations and exceptions without unreasonable contractual restrictions.

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[585] Hardy (1995) *Rich JL & Tech* para 23.

[586] Lemley (1999) *Cal L Rev* 148, the author concluded that three types of public policy can preempt contracts, namely copyright misuse, restrictions from federal law and restrictions from state law.

[587] Lemley (1999) *Cal L Rev* 148, quoting about a number of cases in which courts preempted the contracts attached to products or services that contradicted such intellectual property rules as the fair use and trade secret doctrines. For recent examples, see, eg, *Markogianis v Burger King Corp* 42 USPQ 2d 1862 (SDNY 1997) 1865 preempted a claim for implied contract to protect ideas; *American Movie Classics v Turner Entertainment Co* 922 F Supp 926 (SDNY 1996) 930-931; *Wright v Warner Books Inc* 953 F 2d 731 (2nd Cir 1991) 741 held that a broad construction of a book license restriction would conflict with the fair use doctrine; *Wolff v Institute of Elec & Electronics Eng* 768 F Supp 66 (SDNY 1991) 69; SOS *Inc v Payday Inc* 886 F 2d 1081 (9th Cir 1989) 1088; *Vault Corp v Quaid Software Ltd* 847 F 2d 255 (5th Cir 1988) 270; *Saturday Evening Post Co v Rumbleseat Press Inc* 816 F 2d 1191 (7th Cir 1987) 1199-1200, refused to enforce an agreement by a licensee not to challenge the possible copyrighting of a licensed work.

[588] Lemley (1999) *Cal L Rev* 148.

4 3 New issues concerning the reproduction right

4 3 1 Temporary reproduction

The reproduction right is one of the most debated issues of copyright protection. In a digital environment, generally reproduction is carried out in two ways: one aims to maintain permanent copies, such as the downloading and storage of music to a MP3 player. This is an example of conventional reproduction. The Berne Convention explicitly grants protection for this kind of reproduction. The other type of reproduction is temporary, such as storing a file of information in a computer's memory. One of the most controversial issues is whether temporary reproduction should be protected as are other forms of reproduction protected under the Berne Convention.

Theoretically, the right of reproduction could apply to both permanent and temporary reproductions.[589] However, this may be undesirable. This is because temporary reproduction is an integral and essential part of a technical process with the sole purpose of enabling information network transmission. Temporary reproduction is usually incidental or transient, and is not meant to maintain a permanent copy of a file. If temporary reproductions are protected by copyright, right owners will have complete control over the automatic copying activities that are essential for information processing.[590]

During the drafting of the WCT, experts argued that transient or incidental reproduction should not fall within the scope of the exclusive reproduction right.[591] For example, South African delegates were concerned about the possible chilling effect of protecting temporary reproduction as an exclusive right.[592] The South African delegates proposed a reproduction for the sole purpose of making a digitized work perceptible, or a reproduction that occurred as a part of the technical process that transmitted or utilized a work, or a reproduction incidental to the lawful use of a work should be excluded from copyright protection.[593] They believed there would be conflict at the international level if copyright treaties protected a temporary reproduction and left nations to

[589] WIPO *Diplomatic Conference Records and Neighboring Rights* II 672.

[590] Vinje (1997) *EIPR* 231.

[591] Ficsor *The Law of Copyright and the Interne* para C8.24; Reinbothe & Von Lewinski *The WIPO Treaties 1996* 112.

[592] WIPO *Diplomatic Conference Records and Neighboring Rights* II 670.

[593] WIPO *Diplomatic Conference Records and Neighboring Rights* II I 670-671.

voluntarily exempt it from copyright infringement.[594] Moreover, a broad concept of reproduction that includes temporary reproduction would legally obstruct the development of Internet and information networks in other forms.[595] Some European countries, especially the Nordic ones, took the same stance as South Africa.[596] Consequently, the WCT did not define reproduction rights, but rather included a statement that the storage of a protected work in digital form in an electronic medium constituted a reproduction.[597]

In Europe, the Information Society Directive that is meant to implement the WCT grants copyright protection for temporary reproduction. However, the Directive makes a mandatory exemption for a transient or incidental reproduction that solely transmits within a network or is an indispensable part enabling another part to operate.[598] This mandatory exemption restricts copyright holders' exclusive control of digital information.[599] Thus, some kinds of temporary reproduction are exempt from copyright infringement. For example, temporary copies of digital data made by a computer's RAM enabling users to browse and view a webpage are exempt. The temporary reproduction exemption is subject to the three-step test and should have no economic importance.[600] In short, the exemption only applies when temporary reproduction occurs for technical reasons. The UK followed the Directive to include temporary reproduction as a part of the exclusive reproduction right[601] but exempts certain kinds of temporary reproduction.[602]

It is laudable that the legislators made the Directive legally certain by explicitly protecting temporary reproduction. Nevertheless, some European copyright experts criticize the scope of the exempt temporary acts of reproduction, believing them to be overly restrictive. They maintain the Internet can only function appropriately through such activities as copying onto a computer's

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[594] WIPO *Diplomatic Conference Records and Neighboring Rights* I 670-671.

[595] Vinje (1997) *EIPR* 233.

[596] WIPO *Diplomatic Conference Records and Neighboring Rights* II 672-673. Norway, Denmark, Switzerland and a number of other countries were concerned that transient and incidental copying could be protected as reproduction under the Berne Convention.

[597] Agreed statement concerning Article 6 of the WCT.

[598] Art 5(1) of the Information Society Directive.

[599] V Van Coppenhagen "Copyright and the WIPO Copyright Treaty, with Specific Reference to the Rights Applicable in a Digital Environment and the Protection of Technological Measures" (2002) 119 *South African Law Journal* 429 435.

[600] Preamble 33 preceding to the Information Society Directive.

[601] S 17(6) of the CDPA 1988.

[602] S 28A.

internal memory, web browsing and use of routers and proxy servers.[603]

4 3 2 Private copying

The electronic medium drastically changes the way people access material in digital form and makes it easy to copy. Researchers and academics, in particular, welcome the convenience of digital technology that helps them to circulate their works as well as to copy other scholars' works at low cost.[604] At the same time, copyright proprietors can easily oversee the usage of their works with technological measures and manipulate price in a monopolistic way detrimental to research and education.[605] Consequently, private copying previously exempted from copyright infringement is being questioned.

4 3 2 1 National and regional practices

The UK copyright law grants exceptions for private copying as long as the act of copying is fair dealing. Section 29 of the CDPA provides that in addition to computer programs, private copying of a literary, dramatic, musical or artistic work is permitted as long as the author is sufficiently acknowledged. But there are two conditions: first, a user with a private copying exception must be a researcher or a student. Second, a fair dealing user cannot copy material if the person knows or has reason to know that the copies will be distributed at substantially the same time and for substantially the same purpose. This prevents the mass distribution of a copyrighted work that may affect the market and the value of the copied work.

The ways in which European countries deal with private copying illustrate the different attitudes that underlie this issue. Portugal and Switzerland take a liberal view maintaining that users have the privilege to copy for private use although Switzerland is not an EU member.[606] A Spanish court ruled that under the nation's law the downloading of music from a variety of file-sharing platforms for private use was not illegal.[607] Germany restricts private copying by requiring users to copy from

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[603] T Dreier & B Hugenholtz (eds) *Concise European Copyright Law* (Netherlands: Kluwer Law Int'l, 2006) 371.

[604] G Harper "Will We Need Fair Use in the Twenty-first Century?" (1994) *University of Texas Libraries* http://www.utsystem.edu/ogc/intellectualproperty/fair_use.htm (accessed 27-10-2013).

[605] G Harper "Will We Need Fair Use in the Twenty-first Century?" (1994) *University of Texas Libraries*

[606] Art 19(1) of Federal Law on Copyright and Neighboring Rights of 9 October 1992, as last amended on 16 December 1994 (WIPO English version).

[607] G Tremlett "Spanish Court Rules Free Music Downloads Are Legal for Own Use" *The Guardian* (03-11-2006).

only an authorized master copy.[608] Sweden also takes a strict approach.[609] Italy is another country not allowing an exception in making copies from an unlawful master copy.[610] At the regional level, article 5(2)(b) of the Information Society Directive leaves it for Member States to determine whether to allow an exception for private use as well as the circumstances when the exception applies.

4 3 2 2 Solutions to the private copying problem

Technicians, legal scholars and practitioners have proposed several private copying solutions. The first is a typical "the answer to the machine is in the machine" approach.[611] This suggests devising intelligent and user-friendly technological measures able to distinguish copying for personal use from copying for productive purposes.[612] However, technology is never a perfect tool to address legal problems that involve public policy considerations.

In addition to a technological solution, legal scholars and practitioners have their own solutions. Christophe Geiger, inspired by the Continental European copyright legislation, maintains copyright law permits all private copying and ensures copyright proprietors are remunerated for copied works.[613] In other words, private copying is an enforceable right against copyright proprietors' exclusive right of reproduction rather than merely a defense of copyright infringement.[614] Gasser

[608] S 53(5) Law on Copyright and Neighboring Rights of 9 September 1965 (Federal Law Gazette [BGBl] Pt I 1273), last amended on 19 July 1996 ([BGBl] Pt I 1014) (WIPO English version).

[609] Art 12(3) of Act on Copyright in Literary and Artistic Works of 30 December 1960 No 729, last amended on 1 April 2000 (WIPO English version).

[610] Art 12 of Protection of Copyright and Rights Related to Its Exercise of 22 April 1941 No. 633, as last amended on 2 February 2001 (WIPO English version).

[611] Clark "The Answer to the Machine is in the Machine" in *Future of Copyright* 139.

[612] Clark "The Answer to the Machine is in the Machine" in *Future of Copyright* 139. Also see CN Chong, S Etalle, PH Hartel & YW Law "Approximating Fair Use in LicenseScript" in TMT Sembok, HB Zaman, H Chen, SR Urs & SH Myaeng (eds) *Digital Libraries: Technology and Management of Indigenous Knowledge for Global Access: 6th International Conference on Asian Digital Libraries, ICADL 2003, Kuala Lumpur, Malaysia, December 8-12, 2003: proceedings* (Berlin: Springer, 2003) 432 434-435. The authors proposed a license named LicenseScript Engine allowing users to assert new rights in a license issued by a copyright owner as well as allowing the copyright owner to monitor asserted rights and subsequent usage of the work by an audit logging mechanism. The copyright owner can allow or disallow the asserted rights and bring an action against any subsequent user. However, it is unclear what rights a user enjoys if the final decision is subject to the copyright owner's discretion.

[613] Geiger (2006) *EIPR* 372.

[614] C Geiger "The Three-step Test, a Threat to a Balanced Copyright Law?" (2006) 37(6) *International Review of Intellectual Property and Competition Law* 683 685.

and Ernst also recommend that national copyright laws confer a broad right to private users that applies to both analog and digital equipment.[615] This is particularly useful in addressing the legality of mass private copying with the file-sharing technology. They argue that if private copying is a user's right, then even large scale file-sharing activities should be legal as long as the copyright owner is adequately compensated.[616]

The proposed individual user's right of copying, turning exceptions for mass private copying into compulsory licensing, is feasible. It conforms to the Berne three-step test as a general copyright exception.[617] The second step of the test is that limitations and exceptions not conflict with the normal exploitation of a work. By paying copyright proprietors for using their works, the impact on the primary market for copied works is minimized. In this way, a copyright proprietor's exclusive right of reproduction converts into a remuneration right, usually a financial payment, in a way that fulfills the copyright law's goal of fostering creativity and rewarding copyright holders.

Another possible solution is a compulsory levy on all such devices as printers and computers that upload, transmit, and disseminate copyrighted materials in electronic or digital forms.[618] This proposed levy is analogous to the levy on cassettes and recorders. Equipment levies are rooted in Europe and still prevail.[619] However, many copyright scholars argue that technological measures make equipment levies less justifiable than ever. In a digital environment, a consumer pays a levy when purchasing a product or service that enables the person to copy, and again pays a copyright holder directly for copying a work through the DRM. Here, the levy is unfair for consumers and

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[615] Gasser & Ernst *EUCD Best Practice Guide* 11.

[616] 11.

[617] Art 9(2) of the Berne Convention provides:

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

[618] A good number of scholars have suggested adopting a non-voluntary licensing system to address the copyright issues caused by P2P technology. For example, see NW Netanel "Impose a Noncommercial Use Levy to Allow Free Peer-to-peer File Sharing" (2003) 17 *Harvard Journal of Law and Technology* 1 19; WW Fisher *Promises to Keep: Technology, Law, and the Future of Entertainment* (California: Stanford Univ Pr, 2004) 199-251; Lessig *Future of Ideas* 254.

[619] For example, the German Supreme Court had private copying levies from the 1950s to 1960s in a series of cases. The manufacturers and distributors of recording equipment were considered to have contributory liability in copyright infringement cases. More recently levies have been imposed on digital media such as CD-ROMs and even digital equipment, see Hugenholtz et al *Future of Levies* 11-12 & 37.

equipment producers.[620] Moreover, a right holder can employ technological measures to allow users to view a work but prevent them from copying it. Hence, co-existing levies and technological measures have consumers, in effect, paying twice to make a private copy.[621]

This legislative trend suggests a gradual phasing-out of levies on digital media and equipment able to copy and store copyrighted works protected technologically. The Information Society Directive attempts to reconcile technological measures with the levy system for private copying by stating copyright holders should receive "fair compensation".[622] Notably, the concept of "fair compensation" is distinct from "equitable remuneration" found in the EC Rental Rights Directive.[623] Whereas "equitable remuneration" may involve situations in which right holders suffer absolutely no harm, the Information Society Directive requires fair compensation to right holders whose financial interests are actually harmed by private copying.[624] For example, if a right holder receives payment from a license that offsets private copying losses, the right holder should not receive compensation from equipment levies. The reason is essentially the same as the one used by a right holder who employs technological measures to protect works. He should be prevented from receiving compensation from the levies.

In addition to the phrase-out provision of equipment levies, copyright holders are restricted from receiving compensation by a *de minimis* rule established by the Information Society Directive which provides that a person who reproduces a work of little economic significance is not obligated

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[620] Hugenholtz et al *Future of Levies* 37.

[621] Hugenholtz et al *Future of Levies* 34. Also see J Reinbothe "Private Copying, Levies and DRMs, against the Background of the EU Copyright Framework", presentation delivered at the Conference on *The Compatibility of DRM and Levies*, Brussels, (8-9-2003) http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm (accessed 14-02-2012).

[622] Art 5(2)(b) of the Information Society Directive states:

"in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;"

[623] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

[624] Preamble 35 of the Information Society Directive states:

"In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

to pay the right holder.[625] A number of copyright scholars maintain that since most copies made by end users either on digital media or digital equipment are likely to cause no more than minimal or no harm at all to right holders, they fall outside the Directive's exempt private copying activities. Therefore, analogue levies should not be simply applied to digital media or equipment.[626]

Multi-purpose technologies such as personal computers (PCs) make it complicated to levy equipment with copying and storage functions since PCs are used for a wide range of purposes. Although many consumers use computers to copy copyrighted materials, this is not their primary use. Therefore, levies on PCs or hard disks would no longer reflect the contributory liability rationale for the levy system. Copyright scholars point out that an overly expanded levy scheme will inevitably lead to a copyright tax being applied to any hardware with a memory and a reproduction function, such as digital cameras, mobile telephones and digital watches.[627]

Analysis shows that levies on analogue equipment should not be moved directly to the digital environment. On the one hand, the levy meant to serve as fair compensation to copyright holders is losing ground since digital technology enables right holders to control and charge for using their works. On the other hand, multi-purpose machines such as PCs whose primary function is not copying eliminates the justification for levies. Very simply, equipment manufacturers do not see themselves assisting users to copy materials and infringe on someone's copyright. Moreover, in a multimedia environment, activities such as converting the format of a copyrighted work so that it works on different platforms does little harm to right holders' financial interests.

It is crucial for national copyright lawmakers to distinguish different types of private copying and have copyright exceptions priced reasonably for each type. Doing this can reward copyright holders with payments and ensure users' access and use of copyrighted works. Moreover, a copying

[625] Preamble 35. Activities with little affect on right owners' economic benefits include recording broadcasts for later perusal, and converting the format of a copyrighted work to play it on different platforms as long as the material is legally acquired. However, the de minimis rule is eroded in *Bridgeport Music Inc v Dimension Films* 410 F3d 792 (6th Cir 2005). The Court of Appeals held usage of any section of a music work, even sampling a two-second chord, would be in violation of copyright unless the copyright owner gave permission and was compensated. This decision is deemed to have extremely adverse effect on the balance between creativity and copyright protection, see Free Expression Policy Project "Appeals Court Reaffirms Its Tone-Deaf Approach to Music Sampling" (03-06-2005) *Free Express Policy Project* http://www.fepproject.org/news/bridgeport.html (accessed 27-10-2013).

[626] 36.

[627] 40-41.

exemption for cultural prosperity and the free flow of information should be preserved.[628] At the same time, other private copying for consumptive and recreational purposes can be administered under a compulsory licensing scheme requiring payment for use.

4 4 Legal challenges in the electronic dissemination of information

Both copyright owners and intermediaries that store and transmit information face legal challenges in circulating electronic produced items subject to copyright protection. Following is a discussion of questions that arose about a new copyright for right holders that would make a work available to the public on demand. There is also an examination of the legal status of various stakeholders involved in educational and research activities, such as libraries, distance education institutions, as well as ISPs. There is then legislative solutions to unfetter information intermediaries who play an important role in knowledge transfer.

4 4 1 The "new" right of communication to the public

Conventional communication is a one-way activity with copyright holders determining when and where they communicate a copyrighted work to the public. It is in this environment that right holders have a number of public communication rights. This include a right to make public performances,[629] a right to make public recitations,[630] and a right to broadcast with a loudspeaker and by cable or wireless.[631] Right holders have those public communication rights in dramatic works, music works,[632] literary works and cinematographic works.[633]

Communication becomes interactive in a network connected environment. End users are no longer just passive receivers of information but rather demand that copyright owners distribute works to receivers at a time and a place chosen by them. For example, a mobile phone user can access the Internet and download music to a phone at any time and at any place. Therefore, on-demand

[628] PB Hugenholtz "Adapting Copyright to the Information Superhighway" in PB Hugenholtz (ed) *The Future of Copyright in a Digital Environment* (The Hague: Kluwer Law Int'l, 1996) 81 83.

[629] Art 11 of the Berne Convention.

[630] Art 11*ter*.

[631] Arts 11*bis* & 11*ter*.

[632] Art 11.

[633] Arts 11*ter* & 14.

communication differs from a centralized communication model such as is employed by TV and radio broadcasting stations.

Clearly, copyright owners need a new and much different form of copyright than the traditional communication rights model that protects on-demand distribution of copyrighted works. The WCT grants copyright owners a right to make copyrighted works available to the public in such a way that a person can access works from a place and at a time the individual chooses.[634] This right, called "the right of making available", is applicable when copyright owners use an interactive network system to distribute their works upon a user's command.[635] As there are a variety of communication activities in a network environment, unlike the Berne Convention, the WCT does not stipulate what constitutes public communicative activities. Rather, it ensures that "the right of making available" is a protected type of communication right. [636]

Questions invariably arise about "the right of making available" concept. First, is this right subject to Berne compulsory licensing, a limitation on copyright, which applies to traditional communication rights such as broadcasting ones? [637] A straightforward answer is that since transmitting copyrighted works in digital form through information networks is a means of communication similar to broadcasting programs with wireless signals, "the right of making available" is a part of the right of communication.[638] For example, Preamble 23 of the Information Society Directive provides that the right of communication covers a variety of transmissions and retransmissions of a work to the public by wire or wireless means, including broadcasting. Article 3(2) of the Directive categorizes "the right of making available" as a type of public communication right. Hence, such a right should be subject to compulsory licensing much like other communication rights.

Second, do end users who employ file-sharing technology such as P2P software to share and swap

[634] Art 8 of the WCT.

[635] JC Ginsburg "The (New?) Right of Making Available to the Public" in DV Vaver & L Bently (eds) *Intellectual Property in the New Millennium: Essays in Honour of William R Cornish* (Cambridge: Cambridge Univ Pr, 2004) 234 234-247.

[636] *JC Ginsburg "The (New?) Right of Making Available to the Public" in DV Vaver & L Bently (eds) Intellectual Property in the New Millennium: Essays in Honour of William R Cornish (Cambridge: Cambridge Univ Pr, 2004) 234* 5-6.

[637] Art 11*bis* of the Berne Convention.

[638] Ginsburg "The (New?) Right of Making Available to the Public" in *Intellectual Property in the New Millennium* 241; Reinbothe & Von Lewinski *WIPO Treaties 1996* 103.

material stored on their computer hard drives infringe on "the right of making available"? The answer is complicated. Ginsburg indicates that end users' sharing and swapping material stored on a hard drive is a public communication activity. This is because a person can choose a time and a place to access and copy material stored on a hard drive. This means an infinite number of end users who access digital material constitute "the public".[639] In other words, communicating to the public in a network environment does not require physically assembling audiences. Therefore, although sharing and swapping seems to be an activity between individuals, under the WCT it is considered to be communication with the public. Consequently, individuals who share and swap can be liable for infringing on "the right of making available". The WCT also leaves contracting parties the discretion to determine whether producers and suppliers of file-sharing technology are liable for contributory copyright infringement.[640]

Third, does the indirect distribution of a work such as a link to a website infringe on "the right of making available"? There is not a definitive answer since the WCT is unclear about the issue. A linked website enables a user to access another website through the home page of the linked site by using a link. By clicking a uniform resource locator (URL) a user knows he or she is being redirected to a different website or web page. The WCT maintains that merely providing physical facilities that enable or create communication is not communicating with the public.[641] Physical facilities usually refer to hardware supplied by telecommunication companies and ISPs. Thus, it is at national legislators' discretion whether the digital mechanism that directs users to a copyrighted work infringes "the right of making available".[642]

In common law countries, merely providing hyperlinks that lead to copyrighted materials stored on other web servers is not a direct copyright infringement.[643] For example, in the UK, the Copyright and Related Rights Regulations 2003[644] that brought about the Information Society Directive made several changes to the communication right. It redefined "broadcast" to include not only wireless transmissions as the phrase originally meant, but also it included similar kinds of wired transmissions. It changed "broadcast and cable program" to the technologically neutral expression,

[639] Ginsburg "The (New?) Right of Making Available to the Public" in *Intellectual Property in the New Millennium* 244.

[640] 244.

[641] Agreed statement concerning Article 8 of the WCT.

[642] Ginsburg "The (New?) Right of Making Available to the Public" in *Intellectual Property in the New Millennium* 243.

[643] MB Nimmer & D Nimmer *Nimmer on Copyright* volume 3 (Los Angeles, CA: LexisNexis, 2003) ch 12 B.05[A][2].

[644] Amendments of the CDPA SI 2003/2498.

"electronic transmission of visual images, sounds or other information".[645] Then, the CDPA categorized "the right of making available" and "the right of broadcasting" as two distinct types of public communication rights.[646] Section 182CA of the Copyright and Related Rights Regulations gives performers a right to make a recording of a performance available to the public by electronic transmission. This right is limited for there are statutory exceptions. Hence, in the UK, simply providing a link does not infringe "the right of making available" because the link does not display the linked work's content. Rather, it merely gives the user access to a particular work.[647] The owner still has the discretion to determine whether to make a work available to the public.

The ability to reroute users to another website with a link is particularly important for researchers and educators. For instance, a teacher can establish a linked website to direct students to learning materials stored at different websites. Copyright lawmakers need to interpret communication activity broadly to include on-demand communicative activities and ensure the right of "making available" has the same exceptions that apply to conventional communication rights. Moreover, new exceptions need to be crafted, in particular, there is a need for a special exemption for digital mechanism such as rerouting codes that would undoubtedly enhance researchers and educators' ability to widely share knowledge in a digital format.

4 4 2 Public libraries

Libraries, particularly non-profit public libraries, have a clientele who are accessing information and acquiring knowledge.[648] These libraries are particularly helpful for the deprived who cannot afford copyright products since the poor should not be the "missing link of the information age".[649] However, libraries face challenges from a combination of technological protective measures and licenses with overriding effects. The circulation of software is particularly problematic for public libraries. Those responsible for the circulation of published academic papers and the interlibrary loan service also have problems. They are dealt with below.

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[645] S 4 of the Copyright and Related Rights Regulations.

[646] S 20 of the CDPA.

[647] H MacQueen & C Waelde "UK Copyright Law in the Digital Environment" (2006) 10(3) *Electronic Journal of Comparative Law* 1 http://www.ejcl.org/103/art103-10.pdf (accessed 27-10-2013) 11.

[648] SM Schlosser "The High Price of (Criticizing) Coffee: The Chilling Effect of the Federal Trademark Dilution Act on Corporate Parody" (2001) 43(4) *Arizona Law Review* 931 15-25.

[649] RK Molz "The Public Library Inquiry as Public Policy Research" (1994) 29(1) *Library & Culture* 61 71 & 93.

4 4 2 1 Circulation of software

Software is as an important information carrier as printed books for a library collection.[650] However, many libraries are reluctant to acquire and circulate software because of copyright obstacles.[651] For example, the US Computer Software Rental Amendments Act of 1990 forbids general renting or lending of software and exempts lending by non-profit libraries and educational institutions.[652] In this way it attempts to prevent illegal software copying after much sought after software has been legally rented or loaned. This provision lessens the first sale doctrine allowing disposal of a work after legal purchase since software purchasers cannot lend or rent a work as they might wish. The reason the rental of software is prohibited is because reproducing software is much easier than photocopying a book; although the cost is small, the quality is almost the same.

Librarians have to be careful to ensure that software can only be accessed by one person at a time when uploading it to a file server for remote access or in-library multiple use.[653] Sections 107 and 108 of the Copyright Act of 1976 allow additional copies to be made for fair use or for interlibrary loan among non-profit libraries and educational institutions.[654] Nevertheless, experts still recommended that non-profit libraries purchase more than one copy for individual use if they wish to load software for multiple concurrent usage.[655] Otherwise they have to negotiate for a network multiple-user license.[656] Section 119 exempts non-profit libraries from copyright infringement when copying software but with two conditions: first, the copying is strictly for a non-commercial purpose; second, a lawfully made copy only is to circulate within the academic community.

Some commentators argue that for a variety of reasons the first sale doctrine should not fully apply to digital products such as software.[657] Unlike tangible property that can be owned by one person at a time, software can be used simultaneously once multiple users have acquired the licensing code for installation and use. Consequently, it is much more difficult to control their dissemination.

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[650] For software is an important means to carry information, see ML Brandy, IF Rockman & DB Walch "Software for Patron Use in Libraries: Physical Access" (Summer, 1991) 40 *Library Trends* 63 81. Software also is important for the library collection, see Klinefelter "The Circulation of Software by Libraries" in *Growing Pains* 222.

[651] The Computer Software Rental Amendments Act of 1990: The Nonprofit Library Lending Exemption to the "Rental Right": A Report on the Acting Register of Copyrights (1994) (Register's Report) 35-36.

[652] Computer Software Amendments Act 1990, Pub L No 101-650, 104 Stat 5089, tit VIII.

[653] Klinefelter "The Circulation of Software by Libraries" in *Growing Pains* 219.

[654] S 802 of the Computer Software Amendments Act 1990.

[655] Klinefelter "The Circulation of Software by Libraries" in *Growing Pains* 220.

[656] 220.

[657] Z Chafee "Equitable Servitudes on Chattels" (1928) 41(8) *Harvard Law Review* 945 982.

Moreover, it is difficult to clearly separate software in a computer program.[658] This is because the program contained in the software is much more valuable than the CD-ROM itself, without which the CD-ROM is almost worthless. To make things more complicated, the EU does not regard supplying such digital products as software, music as well as broadcasts as supplying goods but rather it is viewed as a kind of service.[659] The term "software" is sometimes used synonymously to mean a computer program, although it is more often thought of as a component of a program. Moreover, software has been increasingly integrated into other products such as books. For example, a digital reading manual contained in a CD-ROM can help readers to understand a product much better when it is displayed on a computer screen. If software is regarded as a whole computer program, librarians, especially the non-profit ones, are not able to circulate their reading manuals freely as is done with their printed counterparts.

Copyright law has to ensure that non-profit libraries can use and circulate software with fewer copyright obstacles. The price for software and its circulation should not be a burden for libraries. Compared with purchasing many software copies, it may be more economical to make multiple use licenses easily available to libraries at a reasonable rate. This kind of license would allow the renting of software for circulation within a permitted community, for example, a library and the library's registered readers and staff. However, it would be necessary to distinguish software from computer programs that are merely instructional and are an integral part of a product. This would relieve librarians from the risk of copyright infringement when circulating software to readers and staff.

4 4 2 2 Journal articles

It is ironic that academic faculty members are major contributors to academic periodical journals, particularly in the hard sciences, for their journals are used much more as primary resources than are books.[660] However, authors of these journal articles receive little, if any, financial remuneration.[661] In institutions of higher education, the authors' employers, in turn pay high

[658] Register's Report 35-36.

[659] EC Directive 2002/38/EC of 7 May 2002, amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting, see Annex.

[660] BR Boyce "Does Faculty Assignment of Copyright Violate the Constitutional Mandate?" in LN Gasaway (ed) (Littleton, Colo: Fred B Rothman & Co, 1997) 441 442.

[661] See *American Geophysical Union v Texaco Inc* 802 F Supp 1 (SDNY 1992) 26; *American Geophysical Union v Texaco Inc* 37 F 3d 881 (2nd Cir 1994) 896.

subscription fees to those journals paying little or nothing to their authors.[662] With libraries bearing a heavy financial burden supporting an extremely large collection of serial journals, libraries are turning to electronically on-demand journals to meet their patrons' needs. But an on-demand service requires network access and other facilities that are not available to every user, all of which jeopardizes users' ability in accessing a library's journal loan service.[663]

Academics need to publish journal articles and books to be promoted and to obtain tenure. With authors having little room to negotiate with publishers, they assign their copyrights to them and receive little or no payment.[664] To address this imbalance, copyright scholars have proposed several solutions. Boyce suggests an innovative solution that allows authors and their institutions of higher education to enjoy copyright jointly and retain copyright after publication for a limited number of years.[665] In this way, authors and their affiliated institutions could control a work's copyright and recover a portion of the expense of academic research and writing. Thus, institutions of higher education would not have to pay a prohibitively high fee to use their employees' copyrighted works.[666]

Professor Reto Hilty has gone further by arguing it is unnecessary for researchers to assign the copyright of their articles to journal publishers to have their works circulated. Publishers as "derivative right holders"[667] charge a subscription fee for both printed and digitized versions of articles. This makes research institutions and libraries pay increasingly more every year to subscribe to academic journals.[668] Since usually universities and research institutions are subsidized by public or governmental funds, the state and the public should benefit from the research.[669] Thus, these

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[662] Boyce "Does Faculty Assignment of Copyright Violate the Constitutional Mandate?" in *Growing Pains* 445.

[663] 442. Moreover, the on-demand service's pay-per-view format limits users' ability to copy a copyrighted work even though they can access the work, see S Harnad "Implementing Peer Review on the Net: Scientific Quality Control in Scholarly Electronic Journals" in R Peek & G Newby (eds) *Scholarly Publishing: The Electronic Frontier* (Cambridge, MA: MIT Pr, 1996) 120.

[664] Boyce "Does Faculty Assignment of Copyright Violate the Constitutional Mandate?" in *Growing Pains* 447.

[665] 446-447. Having considered several ways to amend the copyright law, Boyce finally came to a radical conclusion that to promote science and learning, copyright should be abolished from applying to learning literature.

[666] S Bennett & N Matheson "Scholarly Articles: Valuable Commodities for Universities" *Chronicle of Higher Education* (27-05-1992) 36.

[667] Hilty "Copyright Law and Scientific Research" in *Copyright Law* 329.

[668] 324-327.

[669] C Visser "Intellectual Property Rights from Publicly Financed Research: The Way to Research Hell is Paved with Good Intentions" (2007) 19 *South African Mercantile Law Journal* 363.

institutions should share information and their staff's research works with an inter-varsity information network. This suggestion is feasible because salaried researchers working with institutions that are subsidized by public or governmental funds are little concerned about financial rewards for their research. Such a network is an alternative platform to academic journals controlled by corporate publishers. Moreover, Hilty argues that copyright proprietors' strong power in negotiation should be reduced to benefit the general public.[670] This can be done by differentiating authors from corporate right holders.[671] The way to do so is to make all copyrighted works accessible while rewarding authors with remuneration through a statutory licensing scheme. The statutory licensing scheme must comply with the three-step test. To manage the distribution and collection of fees of academic works, academic communities should establish a collective society much like the American Society of Composers, Authors and Publishers (ASCAP).[672] For example, authors might receive residual payments each time their works are used.[673]

At present, academic publishers are intermediaries with monopolistic market power. The users of the published academic works most probably are the institutions which the academic authors are affiliated. There is no need for such intermediaries if a self-regulatory non-profit organization could do the same thing at lower cost.[674] Thus, an organization functioning much like a collective society in the academic arena is worthy of consideration. However, it is a challenge for educational and research institutions to skillfully manage such an organization. Moreover, this would be particularly challenging for developing countries' institutions that lack funds and managerial skills.

4 4 2 3 Interlibrary loans

Interlibrary loan facilities, by definition, support the sharing of knowledge that is so vital for learning and research.[675] An interlibrary loan is the lending of original material, or a copy, to a patron at another library not having the material in its own collection.[676] However, a traditional

[670] Hilty "Copyright Law and Scientific Research" in *Copyright Law* 329.

[671] 350.

[672] 446. ASCAP protects rights of its members including composers, songwriters, lyricists and music publishers by licensing and distributing royalties for non-dramatic public performances of their copyrighted works. ASCAP functions as an intermediary between copyright proprietors and users.

[673] 446.

[674] 447.

[675] LW McClure "Interlibrary Loan in the Electronic World" in LN Gasaway (ed) *Growing Pains: Adapting Copyright for Libraries, Education and Society* (Littleton, CO: Fred B Rothman & Co, 1997) 173 186.

[676] DJ Ensign "Resource Sharing and Copyright among Library Consortia Members" in Gasaway (ed) *Growing Pains: Adapting Copyright for Libraries, Education and Society* (Littleton, CO: FB Rothman & Co, 1997) 151 155.

interlibrary loan system has several shortcomings that make the loan process not only unpleasant, but occasionally librarians are reluctant to heed requests. For instance, the mailing of requested material can be slow and costly,[677] and the loss of lent materials, particular from serial collections, can be devastating. When original material is physically transferred to a recipient library, for a time users at the lending library are unable to use the material.[678] Electronic technology used in photocopiers and scanners convert books and journals in a printed format into a digital format that are then sent off with a click. This has greatly changed the time-consuming and laborious traditional interlibrary loan operation. Thus, growing electronic interlibrary loan service helps to promote readers' access to learning materials.

Nevertheless, publishers complain about interlibrary loans, since the lending among university consortium members reduces the sale of their publications.[679] The enforcers of the US Copyright Act of 1976 face a dilemma in dealing with the library reproduction exception.[680] Section 108 allows a library to provide one copy to a library patron who is allowed to borrow materials.[681] It also allows libraries to engage in routine interlibrary loans.[682] However, the amount of materials cannot be so great that it allows a patron to avoid purchasing a subscription or avoid the purchase of works. The section also allows non-profit libraries and education institutions to lend and borrow material from each other. But again, the amount of interlibrary loan material should not be so excessive that it is a substitute for the subscription or purchase of the works.[683]

Therefore, the quantity of requested journals and books is the key factor in determining whether a loan constitutes a copyright infringement. If a court deems a loan to be a copyright infringement, the library can resort to section 107 to defend its action as fair use. Whether the fair use doctrine applies, a court considers four fair use factors. The most relevant is the amount of material that has

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[677] MM Roche *ARL/RLG Interlibrary Loan Cost Study: A Joint Effort by the Association of Research Libraries and the Research Libraries Group* (Washington. DC: Ass'n of Research Libraries, 1993) 12; AW Alexander "Prices of US and Foreign Published Materials" in C Barr (ed) *The Bowker Annual of Library & Book Trade Almanac* 40 ed (New Providence, NJ: R R Bowker, 1995) 485 489.

[678] Alexander "Prices of US and Foreign Published Materials" in *Bowker Annual* 489.

[679] Ensign "Resource Sharing and Copyright among Library Consortia Members" in *Growing Pains* 156-158.

[680] S 108 of the Copyright Act of 1976.

[681] S 108(a).

[682] S 108(g).

[683] S 109(b)(1)(A).

been copied. Since fair use is flexible, courts consider and interpret relevant factors with great latitude.[684] If an interlibrary loan service is considered fair use, the library need not pay for usage, and the publisher has no basis to complain about a potential publication reduction.[685] If a library wishes to apply sections 107 and 108 at the same time when there is a copyright dispute over copied loan material, the outcome would likely be that section 107 may very well allow a broad scope of copying under the rubric of fair use. Nevertheless, it still poses a more restrictive limitation on the quantity of a reproduction. This certainly does not encourage interlibrary loan information sharing.[686]

Moreover, the scope of lending permitted in section 109[687] has been narrowed in an electronic environment. Section 109 concerns liability exemption when transferring a computer program copy from one non-profit library to another non-profit library or to an educational institution. However, nowadays libraries increasingly find the "on-demand" format material only allows users to view the material and restricts any further technological dissemination. Therefore, libraries have to subscribe for material in an "on-demand" format rather than borrow a printed version through interlibrary loan. This makes it almost impossible for non-profit libraries to take advantage of the liability exemption for interlibrary loans.

It is evident that non-profit libraries providing interlibrary loans face multiple legal challenges in a digital environment when circulating software and journal articles. Librarians could be severely limited in providing patrons a digital product under a license with overriding effects or one protected by technological measures. Moreover, uncertain legislation would make librarians shun materials that may trigger copyright liability. An answer to their dilemma is copyright law and anti-

[684] S 107(3). For example, in *Radji v Khakbaz* 607 F Supp 1296 (DCDC 1985) 1302, the court held that the defendant's argument of the insignificant portion (2.6%) of the work that was used was "frivolous". It stated
"[i]t obviously does not matter, in law, what proportion of a particular publication consists of bootleg material; what is significant is how much of a copyrighted article or book is being reprinted."
In *Basic Books Inc v Kinko's Graphics Corp* 758 F Supp 1522 (SNDY 1991) 1533, the Court emphasized how substantial what is being copied is more decisive than the length of the copied piece. The copying of a mediocre long paragraph might not be copyright infringement but the copying of a short essential piece would be an infringement. In the *Basic Books* case, the reproduction of five percent of the work was considered sufficient to constitute a copyright infringement, at 1527.

[685] Ensign "Resource Sharing and Copyright among Library Consortia Members" in *Growing Pains* 163.

[686] 157-158.

[687] Section 109(b)(1)(A) of the Copyright Act of 1976.

circumvention rules to give more generous exceptions allowing librarians to lend software, journals and books to readers. Innovative licensing schemes such as a multiple license enabling librarians to lend software to different users also eases the financial burden on libraries which otherwise have to purchase a few pieces of the same software.

4 4 3 Distance educational institutions

Distance education plays an increasingly important role in colleges and universities, as well as for a number of elementary and high schools.[688] In the US, section 110 of the Copyright Act of 1976 is relevant for distance education. Commentators criticize section 110 as it provides little help to distance education for two major reasons. First, section 110 limits the types of materials that can be used for distance education. Non-dramatic literary and music works are excluded,[689] thus forcing libraries and instructors in educational institutions to seek licenses from copyright proprietors to use these materials. This provision even limits the scope of music works that teachers can use in the classroom. Ironically, a music history teacher can use and display symphonies and popular music but has to shun operas and stage musicals.[690]

Second, section 110(2) provides little but flawed exceptions for distance education. First, the transmission of learning material is limited to officially enrolled students.[691] It does not explicitly permit a private residence to receive transmitted materials. This provision ignores disabled students unable to attend classes and have to stay at home to learn.[692] Section 110(2) makes no exception for reproductions distributed to the public. All of these restrictive copying and transmission exceptions for distance education greatly reduce materials available for distance education and make its academic programs less effective.[693] Another relevant problem is that section 112(b) narrows the conditions of copying a transmission program for no more than 30 copies can be made the first and

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[688] KD Crews "Copyright and Distance Education: Displays, Performances, and the Limitations of Current Law" in LN Gasaway (ed) *Growing Pains: Adapting Copyright for Libraries, Education and Society* (Littleton, CO: Fred B Rothman & Co, 1997) 377 390.

[689] Ss 110(3) & 110(9) of the Copyright Act of 1976.

[690] Crews "Copyright and Distance Education" in *Growing Pains* 391.

[691] S 110(2)(C)(i) of Copyright Act 1976.

[692] Crews "Copyright and Distance Education" in *Growing Pains* 391-392.

[693] AP Lutzker *Content Rights for Creative Professionals: Copyrights and Trademarks in a Digital Age* 2 ed (US: Focal Pr, 2003) 253.

only time.[694] Moreover, the copies can be preserved for no more than seven years after a program's first transmission to the public.[695]

Scholars recommend that the scope of available material for distance education be broadened to relieve teachers from the burden of constantly seeking licenses from copyright proprietors.[696] In addition to the scope of materials available for distance education, educational experts also suggest modifying section 112(b) to allow a broader range of material that could be transmitted along the lines of section 107.[697] Allowing greater numbers to receive transmitted educational material for non-commercial purposes would definitely promote distance education.[698]

Responding to criticism, the Technology, Education, and Copyright Harmonization Act of 2002[699](TEACH Act) expands the scope of copyrighted works that teachers can use who are carrying out face-to-face-classroom teaching. With the TEACH Act teachers now are entitled to display or perform almost all types of copyrighted works. Educational institutions are allowed to digitize works and retain the digital material for students' access for a specific period. The TEACH Act also permits the copying and storage of copyrighted materials that are incidental in the transmission process or are necessary for transmission over an information network.

The US legislative experience illustrates that to allow distance educational institutions to benefit the most from digital technology, teachers should be allowed to digitize and transmit a wide range of copyrighted material to students enrolled in distance learning programs. Moreover, they should be able to keep the digital material on file for a certain period for the students' revision.[700]

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[694] S 112(b)(1) of the Copyright Act of 1976.

[695] S 112(b)(2).

[696] Crews "Copyright and Distance Education" in *Growing Pain* 392. Boyce suggested in order to encourage learning as well as distance education, non-profit organizations should be allowed to display or reproduce copyrighted materials for instructional purpose, see Boyce "Does Faculty Assignment of Copyright Violate the Constitutional Mandate?" in *Growing Pains* 446. See also RA Wynbrandt "Music Performance in Libraries: Is a License from ASCAP Required?" (1990) 29 *Public Libraries* 224 224-225.

[697] Crews "Copyright and Distance Education" in *Growing Pain* 392.

[698] However, policymakers favored copyright proprietors by granting them exclusive control of transmitting their works, see *Intellectual Property and the National Information Infrastructure* 95-96 & 213-218.

[699] Pub L No 107-273, 116 Stat 1758.

[700]KD Crews "New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act" *American Library Association* http://www.ala.org/Template.cfm Section=Distance_Education_and_the_TEACH_Act&Template=/ContentManagement/ContentDisplay.cfm&ContentI =25939 (accessed 27-10-2013)

4 4 4 ISPs

ISPs face legal uncertainties in storing, transmitting and locating information. Title II of the DCMA, the Online Copyright Infringement Liability Limitation Act (OCILLA) in the US and the E-Commerce Directive in the EU deal with ISP liability issues. One of the core issues of ISP regulation is the copyright liability for ISPs who provide access, host and search services that involve material breaching copyright protection. The issues are discussed below.

For ISPs providing Internet access service, section 512(a) of OCILLA limits their liability when they are transmitting data from users and the transmission is done automatically. Here the ISP neither selects and modifies the content of the transmitted data, nor does it select the recipients. Moreover, the ISP maintains no permanent copies of the transmitted materials, rather it only keeps them temporarily for the time it takes for their transmission. In Europe, Article 12 of the E-Commerce Directive also exempts ISPs from copyright infringement liability when they only provide mere conduit services to transmit information initiated by third parties. It is less restrictive than OCILLA since it does not limit an exemption for a service that is merely automatic and technical.[701]

For ISPs providing hosting services that rent users server space to upload content, such as a webpage, section 512(a) of OCILLA limits ISPs liability when subscribers request they store materials on their systems. Section 512 also has a notice-and-take-down provision to exempt ISPs if they take down material expeditiously once they realize it is infringing or if a copyright owner sends a notice that requires the material be taken down.[702] If an ISP is without knowledge that the material on its system is infringing and has neither the right nor the ability to control its transmission, the ISP is exempt if it quickly removes the material. Although an ISP may realize there is illegal material, if access to it is prevented, then it is also exempt. An ISP also becomes exempt even when it has the right and ability to monitor the material, but only if it has not directly profited from the infringing activity.

As a remedy to the notice-and-take-down mechanism, OCILLA provides “put back” procedures to ensure material mistakenly removed or blocked can be put back on the ISP’s systems.[703] A subscriber may send a counter-notification to an ISP that a copyright owner notified it to remove

[701] Art 12(2) of the E-Commerce Directive.

[702] S 512(c) of OCILLA.

[703] S 512(g).

material because it was infringing. This notification states the removal of the material was a mistake or the material was misidentified. If the counter-notification meets statutory requirements, the ISP needs to put back material that was removed and also formally notify the copyright owner with a copy of the counter-notification.

In Europe, Article 14 of the E-Commerce Directive exempts an ISP if it has no actual knowledge of infringing material or is unaware of it. It guarantees that an ISP will not be subject to criminal liability if it unknowingly infringes copyright. Moreover, even if an ISP realizes it is illegally infringing a copyright, it may be exempt as long as it acts quickly to remove the material or prevents it from being accessed.

Here, well-established common law rules in certain areas of law, such as defamation, are instructive in understanding culpable knowledge. In general, whether an ISP has editorial control over the information it transmits is decisive in determining its liability for any defamatory information it may have circulated. In the US, *Prodigy*[704] and *CompuServe*[705] are landmark cases about ISPs' liability in providing allegedly defamatory information. In the *Prodigy* case, Prodigy was sued for defamation based on statements made by a customer in a Prodigy discussion group. Crucial was whether Prodigy was a distributor of information like a bookstore, or a publisher of information like a newspaper. The judge held that since Prodigy had well-publicized policies on monitoring and censoring its forums, it was a publisher of information and potentially liable for the defaming statements.

The *CompuServe* case was launched with a similar factual background to *Prodigy*. However, the *Prodigy* decision was very different for a federal court found CompuServe acted merely as a distributor of information in its discussion groups and was not liable. The decision was made on the grounds that CompuServe neither knew about a specific defaming statement, nor had any reason to know about the statement.

Finally, when ISPs provide information about location services such as a search engine, section 512(d) of OCILLA limits their services to providing information about a directory, an index, a reference, a pointer, or a hypertext link. For an ISP to fall under limited liability its search results can only identify the link to the material and not identify the material itself. In Europe, the E-

[704] *Stratton Oakmont Inc v Prodigy Services Co* 1995 WL 323710 (NY Sup Ct).

[705] *Cubby Inc v CompuServe Inc* No 90 Civ 6571 (PKL), 776 F Supp 135 (SDNY1991).

Commerce Directive does not exempt ISPs providing searching and linking services.

The brief review of the two pieces of legislation dealing with ISP liability shows that OCILLA creates a safe harbor to shield ISPs from liability under certain circumstances. In doing so, an ISP neither is involved in selecting and modifying information nor is it obliged to monitor its contents. The E-Commerce Directive also limits ISPs liability when they provide other intermediary services such as storing information on their network systems. It is worth emphasizing that in the transmission of information, an ISP's liability should be limited to the extent of the editorial control it exercises over the content being transmitted. Moreover, an ISP should be penalized only when it has actual knowledge about an alleged copyright infringement. It is clear ISPs need precise and copyright exemptions to provide various services that are indispensable in fostering a prosperous Internet environment.

4 5 A new model for copyright transaction

4 5 1 Examples

EMI's cooperation with ISPs in releasing free music in 2007 is an example of a new transaction model for copyrighted works.[706] It shows that it is not necessary to sacrifice a right holder's profits to disseminate such copyrighted works as music cheaply or for free.

DRMs have been technical barriers preventing unauthorized access and use of music. They also prevent users from playing a music product in different devices. In the EMI case, EMI provided much higher sound quality music for downloading than existing products. The music products were free of DRM restrictions. EMI cooperated with Apple iTune, the operator of the first online music store, to sell the DRM-free music products. Eliminating DRM enabled users to access and download music at their convenience and allows for full interoperability among devices. For instance, a user could play a single piece of downloaded music on a computer, a mobile phone or an MP3 player. Eric Nicoli, CEO of the EMI Group announced:

> "Protecting the intellectual property of EMI and our artists is as important as ever, and we will

[706] Business Wire "EMI Music Launches DRM-free Superior Sound Quality Downloads across Its Entire Digital Repertoire" (02-04-2007) *Mobility Tech Zone* http://www.mobilitytechzone.com/news/2007/04/02/2457667.htm (accessed 27-10-2013).

> continue to work to fight piracy in all its forms and to educate consumers. We believe that fans will be excited by the flexibility that DRM-free formats provide, and will see this as an incentive to purchase more of our artists' music."[707]

Indeed, the distribution of high quality music free of technical barriers helps to promote new albums, which ultimately benefits music corporations.[708] However, economists who work with copyright studies also indicate that strict prohibition of unauthorized copying can lead to a loss in social welfare because it prevents potential consumers who prefer a lower price from accessing and testing products. As a consequence, producers also lose the chance to profit from those potential consumers.[709] Takeyama argues that encouraging people who use unauthorized copies to purchase an original copy is a better strategy than simply preventing copying.[710] Similarly, software developers often release full versions of their programs for free for a short period to allow potential customers to test their products. This shows that copyright proprietors are in a position to carry out such a policy.

Moreover, EMI went even further with free music distribution by reaching an agreement with Baidu, China's largest search engine. The agreement allowed Baidu to establish a special "EMI Music Zone" in its music search channel that legally streamed EMI Music's entire Chinese repertoire.[711] Consumers could listen and download music from the repertoire for free. At the same time, consumers were exposed to online advertisements. EMI and Baidu agreed to exploit the advertising-supported music downloading service by sharing the commercial advertising revenue. Doing this, they expected to control rampant piracy of music products and expand the digital music market

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[707] Business Wire "EMI Music Launches DRM-free Superior Sound Quality Downloads across Its Entire Digital Repertoire" *Mobility Tech Zone*.

[708] Downloading music has not significantly reduced the sale of CDs, see SJ Liebowitz "Back to the Future: Can Copyright Owners Appropriate Revenues in the Face of New Copying Technologies?" in WJ Gordon & R Watt (eds) *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham, UK: Edward Elgar, 2003) 1 9.

[709] LN Takeyama "Piracy, Asymmetric Information and Product Quality" in WJ Gordon & R Watt (eds) *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham, UK: Edward Elgar, 2003) 55 62. Since some works may be copied more frequently than others, copyright proprietors charge for the more frequently copied works at a higher price to indirectly obtain revenue from copies made from them, see Liebowitz "Back to the Future" in *Economics of Copyright* 13.

[710] Takeyama "Piracy, Asymmetric Information and Product Quality" in *Economics of Copyright* 62.

[711] Business Wire "EMI Music Launches DRM-free Superior Sound Quality Downloads across Its Entire Digital Repertoire" *Mobility Tech Zone*. Baidu.com Inc is the largest Internet portal in China and the fourth largest in the world, see Baidu.com Inc "The Baidu Story" *Baidu.com Inc* http://ir.baidu.com/ (accessed 27-10-2013).

across one of the world's largest markets.

In this case, although the digital music is free, copyright still exists to protect the copyright proprietors' interest. But how can authors, performers and other copyright owners be rewarded if the music is free? The answer is that advertising agencies as third parties have already paid royalties for the music that has been downloaded. This is an example of “free access” rather than “access for free”.[712] It shows that protecting copyrighted music does not necessarily mean copyright law has to become more stringent, restricting public access and expanding the terms of protection. Instead, right holders should seek alternative methods to profit from copyrighted materials.[713] The EMI's example shows that on the one hand, users' access to music is not restricted, while on the other hand, copyright holders' profits are guaranteed. In this way the interests of copyright proprietors and users are balanced. More importantly, legal protection for copyright is only meaningful when it promotes the value of copyrighted products. In the EMI case, the value of music is fully appreciated by both the EMI music corporation and the end users.

4 5 2 The new model

The release of DRM free music is a win-win situation. Producers are able to profit since advertisers pay for the music, and free music samples promote subsequent sales of original albums. End users listen to good quality music for free. Advertisers are happy, for when audiences increase, viewers who are potential consumers also increase.

Traditionally publishers assumed all production, packaging, and delivery costs. Therefore, charging consumers was the only way to recover costs and profit. At present, with the advance of the mass media and the Internet, producers are able to create additional value by providing consumers an incentive to purchase a good other than for its primary function. For example, a brand of coffee may make one feel fashionable in addition to the coffee’s stimulative function. With bundling, producers have a better opportunity to sell their products. For example, a stationery set may attract a student

[712] Lessig *Future of Ideas* 12-13.

[713] Alternatively, musicians can, on their own, sell their CDs and other tangible products directly in online shops, or distribute their music online via digital transmission technology. See T Regner “Innovation of Music” in WJ Gordon & Watt (eds) *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham, UK: Edward Elgar, 2003) 104 111. The author suggests a concentrated music industry is not the only efficient way to distribute music and collect royalties for artists with digital technology. Instead, artists should consider managing their works with the assistance of technology.

when purchasing books. This concept is attractive for advertising agencies and companies promoting selling. Advertisers are willing to pay a substantial amount for a product if the product also can be used as an advertisement to attract potential consumers of other products. This explains why EMI is willing to release its musical products for free.

It is important to devise a strategy for copyright protection that deters copyright piracy. For economists, piracy is more than just a matter of morality. Economic factors also are important to determine whether consumers purchase an authorized copy or not. The factors are: 1) the price of a good, 2) users' evaluation of its value, and 3) the risk of being caught and punished for using an unauthorized copy. Punishment imposed by a copyright law also is a cost for consumers.[714] In other words, the expected punishment for committing piracy and a product's price set by the copyright holder, together constitute a user's product cost. When a product's price is significantly higher than consumers value it, the risk of being caught and punished is minimal. Or possibly the copyright law is lax or enforcement is inefficient. Consequently, a consumer's rational economic choice would be to use an unauthorized copy. When the price is high and copyright law is stringent and well enforced, consumers who cannot afford to purchase are excluded from the market. It would be disastrous if this happened in the market for educational and research materials .

With the EMI's free music example, the removal of DRM and the legitimization of free music downloading fit a "high value, low cost" situation. Without DRM's restriction, consumers can save money by playing a single piece of downloaded music on different devices. Therefore the value of the music product actually increases.[715] At the same time, the risk of piracy is removed. When price is not a factor, consumers turn from purchasing pirated copies to purchasing authorized copies because the latter have better quality.

Moreover, as Tummon points out:

> "[a] law violated so brazenly is more than meaningless — it undermines the effectiveness of the legal system generally."[716]

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[714] SJ Liebowitz "MP3s and Copyright Collectives: A Cure Worse than the Disease?" in LN Takeyama, WJ Gordon, & R Towse (eds) *Developments in the Economics of Copyright: Research and Analysis* (Cheltenham, UK: Edward Elgar, 2005) 37 42.

[715] 42. Quality sound tracks sold at $1.29 without a DRM restriction while standard sound tracks sold at $0.99 with DRM applied.

[716] J Tummon "The Case for the Death of Copyright" *Vancouver Sun* (20-02-2008).

Copyright law has to evolve with the development of technology so as to strengthen, not undermine, its effectiveness and authority. The technology race between copyright proprietors and end users is endless. Copyright law's overly broad punishment of users who circumvent technological measures neither encourages consumption nor fosters cultural prosperity.[717] A harsh copyright law also hurts the poor by excluding them from the learning material market. Moreover, copyright law should encourage copyright holders to buy and sell copyrighted products in alternative ways. The removal of DRM and the cooperation between EMI and Baidu in distributing free music are worthwhile examples of an alternative model of copyright transaction. It helps to resolve the conflicting interests between copyright proprietors and users. The problems P2P technology caused in the *Napster*[718] and *Aimster* [719]cases can be resolved with this model.

The EMI case shows copyright is still important even when the downloading and copying of music is unauthorized. This is because copyright not only guarantees a product is of good quality but that it also is an efficient mechanism to protect authors' moral rights. Copyright also gives economic incentive to music companies that encourage them to invest in large scale product marketing.

Exploiting the additional value of copyrighted products by right holders and a third party reduces customers' costs. This is particularly inspiring to behold for individuals copying learning material. Copyright holders should be financially rewarded, but the reward need not necessarily come from users. As long as copyright holders are content with their rewards, copyright law should allow them to decide which of their products can be copied without authorization. Moreover, exceptions granted to users for private copying only need to be set to a user free level. This minimum ensures users will not be discriminated against by right holders who could employ technological measures to exclude unauthorized access. At the same time it leaves room for right owners to determine whether or not to allow users to utilize copied work in other ways. Adopting a minimum approach is beneficial for both copyright owners and users.

[717] P Belleflamme "Pricing Information Goods in the Presence of Copying" in WJ Gordon & W Watt (eds) *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham, UK: Edward Elgar, 2003) 26 50.

[718] *A&M Records Inc v Napster Inc* 284 F 3d 1091 (9th Cir 2002).

[719] *In re Aimster Copyright Litigation* 334 F 3d 643 (7th Cir 2003).

4 6 Conclusion

Digital technology poses profound challenges to the copyright law system. Lawmakers need to be responsive to the challenges by carefully constructing and developing a regulatory framework to address copyright-related issues. This includes devising anti-circumvention rules that accommodate the fair use tenet and other copyright exceptions as well as regulate contractual licenses that are used to restrict statutory exemptions to copyright. Lawmakers also need to pay particular attention to creating and amending the reproduction right and the public communication rights which face the most challenges in a digital environment.

Although digital technology makes the reproduction and dissemination of copyrighted materials convenient at relatively low cost, copyright law does not have to become more stringent to prevent unauthorized copying. Rather, lawmakers should encourage copyright proprietors to find other ways to broaden access to copyrighted works while still making profits.

Chapter Five

South Africa: Digital Age Copyright Limitations and Exceptions for Education and Research

South Africa needs to review its copyright law in an era when traditional and digital media converge.[720] A rebalancing of interests between stakeholders is crucial for successful copyright law reform. The copyright law should, on the one hand, give a shot in the arm to the country's culture and economy; and on the other hand, it carries out its international obligations. Lawmakers must pay close attention to ensure the law benefits educators and students by granting wide entry to copyrighted materials at an affordable price.

As South Africa is a country that inherited the British copyright law tradition, its policymakers need to remember that transplanting law does not merely entail techniques and form, but also includes values and content.[721] Since sub-Sahara countries' intellectual property laws are derived from colonial laws and legal systems, the function of intellectual property law is not well understood in many countries.[722] Up to today, intellectual property systems simply have not fully suited local conditions.[723] Moreover, the administration costs of an IPR system are unaffordable for many African countries.[724] Therefore, while retaining South Africa's legal tradition, its lawmakers need copyright law that suits national needs and fits into the country's Constitution that is the supreme law.

This Chapter examines South African copyright law and related laws in a digital environment.[725] First is shown that despite the country's relatively advanced digital technology and information network infrastructure,[726] the copyright law has not been successful in transmitting digital

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[720] Traditional media such as newspapers and the radio, and new media such as the Internet and the mobile phone work together to share and process information to produce differing types of information vehicles that combine texts, images and sounds for a variety of different recipients.

[721] E Örücü "Unde venit, quo tendit comparative law?" in A Harding & E Örücü (eds) *Comparative Law in the 21st Century* (NY: Kluwer Academic of Achilles, 2002) 1 13.

[722] Adewopo (2001) *U Tol L Rev* 750.

[723] 755.

[724] 755.

[725] To name but a few, the pieces of legislation this Chapter deals with are Copyright Act 98 of 1978, Copyright Act Amendment 9 of 2002, Copyright Regulations of 1978, Electronic Communications and Transactions Act 25 of 2002, and Consumer Protection Act 68 of 2008 .

[726] According to a United Nation report, South Africa's technological capabilities rank first among African countries,

educational and research materials as people had expected. Following the introduction is an examination of the Copyright Act of 1978 with its "fair dealing" provisions and other exceptions for education and research. A close analysis of the issues shows that copyright law has not addressed a good many issues including the validity of a variety of licenses basically underpinned by the Constitution's foundational values. Other pertinent issues such as anti-circumvention rules, the temporary reproduction right, and ISP's liability are scrutinized as well. Finally, there is an examination of options that different stakeholders have proposed for amending copyright limitations and exceptions. This is done to work out an optimal way to reform copyright law that will in turn produce quality education and research.

5 1 Copyright law history

Britain had a strong influence on South African copyright law during the 20th century. Although Roman-Dutch law was utilized in South Africa in the 19th century with a form of common law copyright, the first statute granting intellectual property protection was the Patents, Designs, Trade Marks, and Copyright Act 9 of 1916.[727] It repealed the common law copyright that had been in force in the Orange Free State and repealed the "Provincial Copyright Acts" in provinces such as Transvaal and Natal.[728]

As South African copyright law developed, it was less subject to British influence. The Copyright Act of 1916 was incorporated as a schedule of the United Kingdom Copyright Act of 1911 and generally was subject to its regulation.[729] In 1965, the Copyright Act 63 of 1965 repealed the previous Act. While it closely followed the British Copyright Act of 1956, it only adopted the Act's substantive parts without being subject to its administration. Although the Copyright Act of 1978 that repealed the 1965 Act was somewhat similar to the British Copyright Act of 1956, it has its own characteristics.[730] The 1978 Copyright Act has been amended several times, with the most

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followed by Mauritania, Zimbabwe and Kenya, see United Nations of Center on Transnational Corporations *Africa's Technology Gap: Case Studies on Kenya, Ghana, Uganda and Tanzania* (July 2003)UNCTAD/ITE/IPC/Misc13 12. According to *The Global Information Technology Report 2008-2009*, produced by the World Economic Forum in cooperation with INSEAD, South Africa and Mauritius rank first for their ICT levels, followed by Egypt, Botswana, and Senegal, see S Dutta & I Mia eds *The Global Information Technology Report 2008-2009* (Geneva: World Econoimc Forum & INSEAD, 2009).

[727] S 142 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

[728] Dean *Handbook of South African Copyright Law* 1–3.

[729] 1-3.

[730] 1-3.

recent being the Copyright Amendment Act 9 of 2002.

5 2 The current situation of education

Education that fosters human capital is vital for developing countries' economic growth. However, countries of the global south struggle to provide sufficient education for their citizens since they need to import expensive copyrighted materials.[731] High pricing hampers less developed countries' access to such products as software and books which are protected by intellectual property rights held by copyright owners in the developed world. Developing countries gradually have come to realize that intellectual property law, including copyright law, needs to balance the interests between right holders and users. Argentina and Brazil rightly point out in a proposal to WIPO that:

> "Intellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development. The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis."[732]

5 2 1 Expensive educational materials

South Africa education is generally characterized as underperforming.[733] A major reason for this is that copyrighted materials are too costly for educational institutions, libraries and students in rural and poor areas. For example, the Print Industries Cluster Council (PICC) concludes that South Africa is "not a reading nation" because only about 4% of the population purchase books.[734] The major reason is that reading material is too expensive for ordinary people to purchase.[735] A telling example is Nelson Mandela's *The Long Walk to Freedom* which is sold at a higher price in South

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[731] *Copyright and Development: Global Imbalances* PICC IP Report. This report is extracted from the *PICC Report on Intellectual Property Rights in the Print Industries Sector* (2004). See E Gray & M Seeber *PICC Report on Intellectual Property Rights in the Print Industries Sector* (Cape Town: PICC, May 2004) 1.

[732] World Intellectual Property Organization *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO* (27-07-2004) WO/GA/31/11 2.

[733] A Rens, A Prabhala & D Kawooya *Intellectual Property, Education and Access to Knowledge in Southern Africa* (South Africa: ICTSD, UNCTAD & tralac, 2006) http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf (assessed 27-10-2013).

[734] Gray & Seeber *PICC Report* 45.

[735] 45.

Africa than in many wealthier countries.[736]

In particular, the excessive cost of textbooks and other learning materials is a major problem for teachers and students. Not only is the market for textbooks quasi monopolistic since only established publishers publish textbooks, but the Department of Education is the major purchaser.[737] Moreover, the market for academic materials is small and tends to be concentrated as well.[738] This has led to a seemingly contradictory phenomenon. On the one hand, South Africa has a well-established publishing industry with a turnover of approximately R2 to R2.5 billion a year.[739] On the other hand, the publishing industry relies heavily on publishing textbooks[740] and maintains it suffers heavy losses from school students' mass photocopying of books.[741] It argues that students' copying activities substantially reduce the sale of textbooks and shrink publishers' profits. However, the argument is flawed. Since photocopying a book is time-consuming and expensive, and a photocopied book is of low quality, a photocopy is an imperfect and poor substitute for the original. Students only photocopy a book when the copying cost is significantly lower than purchasing the original. Thus, the excessive cost of learning material is the prime factor in a student's decision to copy rather than to purchase a book. Schools and institutions of higher education are equally concerned about the high cost of learning material. Libraries also suffer from insufficient funding to purchase books and subscribe to journals in both printed and digital form.[742]

Online scholarly material converted from printed versions to digital form seems to be a solution to the expensive printed books. Indeed, since South Africa has a relatively well-established

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[736] The book sells for R150 in South Africa while it sells for approximately R70 in the US, R80 in the UK and R75 in India.

[737] A Prabhala "The High Price of Reading" *Mail & Guardian Online* (15-04-2005) http://ibt.afrihost.com/accessof/files/mail_&_guardian_online_the_high_price_of_reading.mht. Also see Genesis Analytic (Pty) Ltd *Factors Influencing the Cost of Books in South Africa* (South African Book Development Council, 2007) http://www.sabookcouncil.co.za/pdf/PICC_Cost_of_books_studyFinal.pdf (assessed 27-10-2013).

[738] SABDC *Cost of Books* 70-73.

[739] *PICC Report* 12.

[740] The book publishing industry profits most from publishing school textbooks and teaching materials. Publishing academic papers and references is less profitable than publishing textbooks. Nevertheless, policymakers and the publishing industry consider publishing academic works strategically important for the national economy and social development. See *PICC Report* 13.

[741] 12-13 & 94-95.

[742] FY Patel *The Resourcing, Funding and Financing of Schools in South Africa* (2004) paper presented at the *Secondary Education in Africa, 2nd Regional SEIA Conference* at Dakar Senegal, 6-9 June 2004 http://siteresources.worldbank.org/INTAFRREGTOPSEIA/Resources/paper_Patel.pdf (accessed 27-10-2013).

information network infrastructure, users tend to access digital material for study and research since online access is speedy and convenient.[743] However, while users can access certain teaching and training materials without copyright restrictions, available open access material is limited and is of lower quality than its paper-based counterpart.[744] Therefore, teachers and researchers still have to pay to access materials covered under a variety of copyright protection mechanisms. In a copyright transaction, librarians have some flexibility in negotiating licensing terms on behalf of their institutions with copyright holders.[745] Nevertheless, copyright holders are very reluctant to reduce the price of licensed digital material.[746]

Ironically, in contrast to the well-established publishing industry that administers copyrights efficiently with a variety of licenses with carefully crafted licensing terms,[747] most librarians, readers and academic administrators are ignorant about the copyright law governing digital content.[748] Also, many librarians and academic administrators misunderstand a license agreement that limits particular uses and the disposal of licensed materials. Most believe it is a license that simply inhibits all forms of access.[749]

In short, educational institutions, libraries and students face two major problems. Firstly, in a legal sense, the fair dealing provisions and the library exception provided by the Copyright Act are very limited in scope. The licensing schemes add more complexity to users who are unsophisticated in negotiating licensing terms and rights management. Secondly, insufficient funding results in libraries' inability to meet students' increasing demand for learning materials although libraries pay a substantial amount to obtain copyright licenses to reproduce copyrighted works. A number of researchers describe the libraries difficulties as:

> "[F]aced with increasing enrolment and an increasing amount of physical and electronic knowledge goods that need procurement, libraries enter into licensing agreements with

[743] CA Masango *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* PhD thesis University of Cape Town (Cape Town: University of Cape Town, 2005) 111-112 & 165. The major data the author provided was from Cape Town, West Cape Province.

[744] 126.

[745] 129-132.

[746] 153.

[747] 121-123.

[748] 113-114.

[749] 121-123.

collecting societies, but find, in turn, that while they are paying high fees in intellectual property rent, they are yet unable to fully meet their students' cumulative demand. While fair dealing/ fair use regulations protect rights-holder interests to the general detriment of the library's work, paradoxically, library administrators find themselves increasingly required to devote institutional resources towards 'copyright education'."[750]

5 2 2 Conclusion

African universities realize that although an insufficient information network infrastructure and insufficient computer facilities hamper access to digital information, it is legal barriers that obstruct the future of education.[751] Since universities and other educational institutions play a vital role in the forthcoming knowledge economy, copyright law needs to provide them with opportunities, not barriers, for future education and research.

In South Africa, costly copyrighted products that hamper access to knowledge primarily disadvantage the underprivileged in society. This is worrisome in a society that prides itself on equal enjoyment of the rights and freedoms put forth in the Constitution including equal access to education. Obviously, the price of copyrighted materials is a key issue for lawmakers to consider when copyright law is to be carefully examined. One answer to the disproportionately high price for educational material would be to broaden and develop the existing limitations and exceptions that grant free access and usage of copyrighted works in this digital era. Also, lawmakers need to encourage educational institutions to negotiate with collective copyright management societies for pro-education licensing schemes to reduce the cost of educational material.

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[750] Rens et al *Intellectual Property, Education and Access to Knowledge* 20 (footnotes omitted).

[751] Regional Association of Universities in Southern Africa "African Higher Education: A Driver for Development." (2004) *South African University Vice-Chancellors' Association* http://www.commissionforafrica.org/english/consultation/submissions/ro/sb-nov-dec04-228.pdf (accessed 27-10-2013) submission by the South African University Vice-Chancellors' Association (SAUVCA) on behalf of the University Vice-Chancellors of the SADC Region to the consultative process of the Commission for Africa. The report points out that higher education is critical for African countries striving for a knowledge economy. Also see South African Universities Vice-Chancellors Association *SAUVCA Position Paper: A Vision for South African Higher Education* (SAUVCA, November 2002) http://heglobal.international.gbtesting.net/media/4197/a%20vision%20for%20south%20african%20he.pdf (assessed 27-10-2013). It envisions the coming knowledge economy in South Africa and predicts that universities and other higher education institutions will play a critical role in developing the knowledge economy.

5 3 South Africa transformative constitutionalism

In South Africa, the executive, the legislature and the judiciary are all subject to the supremacy of the Constitution.[752] Traditional legal doctrines, methodologies used to interpret the law, and legal principles must be tested against the standards set by the Constitution for it sets the fundamental goals and the social order society aspires to achieve in the future. This is referred to as "transformative constitutionalism". [753] Justice Sachs explains that within the context of a transformative constitution, the courts are mandated to adopt an approach (a "substantive approach") to equality that focuses on applying and interpreting the Constitution in a way that advances the enjoyment of equal rights and opportunities the Constitution entails.754 The former Chief Justice Pius Langa describes transformative constitutionalism as "a permanent ideal" which embraces the foundational values of South Africa. He points out the importance of making a commitment to an open and inclusive society, a respect for democracy, a sharing of joint responsibility for the transformation of all three branches of government, and a dynamic civil society.[755] In this sense, constitutional transformation strongly emphasizes having wider access to education and opportunities than simply government endeavoring to fulfill the right to education by making it a prescribed socio-economic right.

When a *prima facie* conflict arises between a statutory right and the Constitution, the statutory right in question must always be viewed and interpreted through the lens of the Constitution.[756] In the same vine, the Constitution stipulates that a court may develop the rules of the common law to limit a right according to the constitutional imperatives S 8(3)(b).[757] This means either the court will

[752] Constitution of the Republic of South Africa,1996.

[753] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal On Human Rights* 146 150.

[754] *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC) para 142.

[755] Justice Pius Langa "Transformative Constitutionalism" Lecture delivered at Stellenbosch University on 9 October 20P Langa J *Transformative Constitutionalism* lecture delivered at Stellenbosch University, 9-10-2006 http://sun025.sun.ac.za/portal/page/portal/law/index.afrikaans/nuus/2006/Pius%20Langa%20Speech.pdf (assessed 27-10-2013)

[756] O Dean "Trade-mark Dilution Laughed Off" *Bregmas Attorneys* http://www.roylaw.co.za/home/article/trademarkdilutionlaughedoff/pageid/ip-law (accessed 27-10-2013).

[757] S 36(1) of the Constitution provides that rights in the Bill of Rights may be limited only by the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. Relevant factors needing to be taken into account for limitation include 1) the nature of the right; 2) the importance and purpose of the limitation; 3) the nature of the limitation; 4) the relation between the limitation and its purpose; and 5) less restrictive ways to achieve the purpose.

balance competing interests, or apply section 36 of the Bill of Right that enables the court to curb a right. Section 36 includes such factors as the nature and the purpose of the right, the limitation of the right, and the complex relationship between the limitation of a right and its purpose.

5 3 1 The Constitution and IPRs

Section 25 of the Bill of Rights safeguards property against deprivation. According to the Constitutional Court, intellectual property is a kind of property.[758] Academics and others also point out that intellectual property rights, including trade mark rights, are a type of property rights protected under the Constitution.[759]

"Laugh It Off ",[760] a landmark case dealing with the conflict between the protection of trade marks under section 34(1)(c) of the Trade Marks Act[761] and the constitutional right of free expression, sheds light on how the judiciary interprets and balances competing interests at the constitutional level when dealing with IPRs. In this case, Laugh It Off Promotions CC (Laugh It Off) sold t-shirts with a label similar to the color and design of the trade marks of South African Breweries (SAB). The original wording of the Carling Black Label was substituted with "Black Labour White Guilt", "Africa's Lusty Lively Exploitation Since 1652" and "No Regard Given Worldwide". SAB sued Laugh It Off at the Cape High Court for trade mark infringement. Laugh It Off's defense was that its use of the trade mark was protected by the freedom of expression right, and had not infringed SAB's registered trade marks since damage to its reputation had not been established. The Cape High Court simply defined the words used on the t-shirts as "hate speech" and upheld SAB's claim.

Laugh It Off then appealed to the Supreme Court of Appeal, but was unsuccessful.[762] Laugh It Off then made a final appeal to the Constitutional Court that pointed out the two-stage approach

[758] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para75.

[759] AJ van der Walt *Constitutional Property Law* 3ed (Cape Town: Juta & Co, 2011) 143-150. T Roux "Property" in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (Cape Town: Juta & Co 2004) 46 46-15-16. VAJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (Cape Town: Juta & Co, 1999) 352.

[760] *SAB International t/a Sabmark International v Laugh It Off Promotions* 2003 2 All SA 454 (c).

[761] 194 of 1993.

[762] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA)

adopted by the previous courts was incorrect.[763] The Court considered firstly whether an infringement of trade mark right existed and if so, whether the infringement might be excused under the free expression right.[764] The Constitutional Court held that a balancing exercise placing the protection of intellectual property rights on an equal footing with the protection of constitutional rights was more appropriate; both competing interests were constitutionally protected rights.[765] Moreover, the Court held Laugh It Off had not infringed the registered trade marks of SAB since no economic loss was established.

Sachs J further pointed out that SAB failed not simply because damage to the trade marks has not been established, but rather there were more substantial grounds for the holding.[766] He emphasized the position powerful corporations played that grabbed the most speech and wielded great influence on policymaking.[767] To make social comments on t-shirts then was a way ordinary people could use to express their opinions since the ordinary mass media was usually expensive, centralized and inaccessible.[768] He maintained the focus should be whether the parodistic activity was primarily communicative or primarily commercial. He went on to say the commercial element of the parody might be a factor to be taken into account in the balancing exercise, but it should not in and of itself be determinative.[769]

The significance of the judgment was that the Court took a substantive approach focusing on equality in society. As Sachs J indicated, the issue was not about the limitation of a right, but rather it was in balancing competing interests.[770] The caveat is that when a *prima facie* conflict arose between trade mark rights and free speech rights, the Trade Mark Act must be constitutionally construed so that Laugh It Off's constitutional rights would be least adversely affected.[771] The approach adopted by the Court surely provides useful guidance in the future as how to evaluate

[763] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

[764] Paras 43-44.

[765] G Devenish "We are Amused: Laugh It Off Promotions CC v SAB International (Finance) BV T/A Sabmark International" (2005) 122 *South African Law Journal* 792 794.

[766] *Laugh It Off Promotions CC v South African Breweries* Para 74.

[767] Para 105.

[768] Paras 93-95.

[769] Paras 84-85.

[770] Para 83.

[771] M Rimmer "The Black Label: Trade Mark Dilution, Culture Jamming and the No Logo Movement" (2008) 5(1) *Scripted* 70 114-116.

ostensible contradictions between IPRs, including copyright, and the Constitution.[772]

5 3 2 The Constitution and other sectors of law

The commitment to equality mandated by section 9 of the Bill of Rights, is fundamental for the new constitutional order. The pursuit of equality has profound implications for all sectors of law in South Africa. For instance, in the area of contract law, recognizing equality rights directs courts to focus on how to adjust the intrinsic unequal positions of the negotiators, some of whom work for strong contracting parties, often conglomerates or monopolies and other who work for weaker contracting parties, usually individual consumers. Although case law is not well developed about the amount or the extent of influence of section 9 of the Constitution has on the law of contract, both the Court of Appeal and the Constitutional Court have some idea how to deal with unfair contract terms.[773] Decisions on unfair contracts are explored in greater detail a bit later.

Another example is that section 29 of the Bill of Rights guarantees a right to education including basic education and state provided "available and accessible" further education. This commitment to provide an equal and quality education for all citizens is relevant to copyright law which sometimes restricts access to educational materials. As noted above, when a conflict between an existing right and the Constitution arises, the supremacy of the Constitution requires the courts to interpret such conflicts on the basis of the foundational values enshrined in the Constitution.

5 4 Copyright law: limitations and exceptions

The Copyright Act of 1978[774] provides a number of copyright exceptions. Section 12 of the Act contains fair dealing provisions and section 13 employs a three-step test as a general exception for reproduction rights. Sections 12 and 13 are parallel with one another. The Copyright Regulations of 1978[775] (the Copyright Regulations) implements the Copyright Act's section 13 and stipulates special exceptions for educational institutions and libraries. The Copyright Regulations reiterate the three-step test as a general guide for exceptions.

[772] Schlosser (2001) 963-964.
[773] See the discussion in para 5 5 1 in this Chapter.
[774] 98 of 1978.
[775] GN no R 2530 *GG* no 6252 of 22 December 1978.

5 4 1 Fair dealing for teaching, research and private study

The Copyright Act of 1978 is largely modeled on the British copyright law. The Act contains fair dealing provisions just as does its British counterpart. In particular, the Act's section 12(1) provides the use of literary and music works for research or private study, criticism or review, as well as news reporting, all of which fall under fair dealing.[776] Uses of artistic works and published works for research and private study are considered to be fair dealing as well.[777]

The fair dealing provisions in the Copyright Act of 1978 can be compared with the fair dealing provisions of the UK CDPA of 1988 to determine whether they suit South Africa's education and research needs. Firstly, the CDPA permits fair dealing for literary, dramatic and artistic works as well as works of music for research or private study. The scope of fair dealing has been criticized as being much too restrictive to reflect researchers and private learners' increasing need for non-textual media materials.[778] For example, a learner might not be allowed to copy a part of a sound recording under British copyright law even though the copy would not infringe the recorded music copyright. Consequently, the CDPA introduced a schedule allowing fair dealing to pertain to a performance or a recording being evaluated and reviewed.[779] The Copyright Act of 1978 also allows users' fair dealing for criticism and review of non-textual materials such as sound recordings and cinematographic films. This truly brings the South African copyright law into the multimedia environment.

Secondly, neither the CDPA nor the Copyright Act of 1978 defines “research” and “private study” even though both require a very long time to be successful. Cohen notes that to access a work and to creatively use it are two sides of a coin in a creative process.[780] Researchers and students almost always collect relevant materials prior to delving into a particular subject. They may find it difficult to demonstrate how much mental and physical effort as well as labour they have invested in research or study, particularly when they are at a preparatory stage in their work.

In South Africa where educational and research materials are expensive and copyright law silent on

[776] S 12(1)(a) of the Copyright Act 1978 provides that fair dealing with a literary or music work for research or private study does not infringe copyright.

[777] Ss 15(4) and 19A provide that 12(1) shall *mutatis mutandis* apply to artistic works and published editions.

[778] K Garnett, JER James & G Davies (eds) *Copinger and Skone James on Copyright* 16 ed (London: Sweet & Maxwell, 2011) para 9-08.

[779] S 2 of Sch 2 of the CDPA 1988.

[780] JE Cohen “Copyright and the Perfect Curve” (2000) 53 *Vanderbilt Law Review* 1799 1816-1817.

defining research and study, courts should grant generous fair dealing for such activities on a case-by-case basis. In the future, legislators should add a provision to the fair dealing section of the Copyright Act to allow a reproduction of a certain amount of a literary and artistic work as long as the user demonstrates the material for copying was deliberately selected and likely would be used for future research or study.

Third, the 1978 Copyright Act qualifies the protection granted to copyrighted literary and musical works by excluding them from being infringed when used for illustrations in any publication, broadcast, or sound or visual recording if the material is used for teaching. The user must acknowledge the author and the use must be compatible with fair practice.[781] In contrast, the CDPA does not have a fair dealing exception for teachers. It is laudable that South African legislators exempt teachers' usage of both textual and non-textual copyrighted materials under the fair dealing provisions. Since South Africa has a young but relatively developed information network, the fair dealing exception enables teachers to take advantages of networks and computer facilities to teach in a multimedia environment.

5 4 2 Exceptions for educational institutions and libraries

5 4 2 1 The general exception for reproduction

Section 13 of the Copyright Act is a general exception dealing with Copyright Regulations on reproduction. Section 13 states that the reproduction of a work not conflict with a normal exploitation of the work and not unreasonably affect the copyright owner’s legitimate interests. The wording of section 13 is similar to the TRIPS Agreement three-step test. The Copyright Regulations' first chapter discusses implementing the Copyright Act's section 13. The chapter in particular deals with the reproduction of copyrighted works by libraries, archives and teachers.

The Copyright Regulations permit reproduction of a work with two limitations.[782] The first limitation is that a user not be allowed to make more than one copy of a reasonable portion of a work. The second limitation is that the cumulative effect of a reproduction not conflict with the normal exploitation of the work so that the author's legal interests and residuary rights are not unreasonably effected.[783] The Regulations' two limitations apply to all exceptions for libraries and

[781] S 12(4) of the Copyright Act of 1978.

[782] S 2 of the Copyright Regulations of 1978.

[783] Section 1(iii) of the Regulations clarifies the meaning of “cumulative effect”. It states:

> “(a) not more than one short poem, article, story or essay or two excerpts copied from the same author or more

educational institutions.

These provisions are similar to the exceptions for educational institutions and libraries contained in the Australian Copyright Act of 1968. The Australian exceptions also suggest an amount that is reasonable for a user to reproduce without infringing copyright. In addition, the Australian Copyright Act introduced a test akin to the fair use tenet to allow judges flexibility to exempt the usage of copyrighted materials. The Copyright Regulations do not have this flexibility.

Therefore, it would seem the general reproduction exception restricts users excessively. First, a user cannot reproduce an amount of work exceeding the standard in section 1(iii) of the Copyright Regulations. Second, a reproduction satisfying section 1(iii) has to meet the two limitations in section 2 of the Copyright Regulations. Clearly, the copyright law limits reproduction for education and research far more than the Berne Convention intends.

While restrictive for users, the reproduction exception certainly takes authors' interests into consideration. Section 2(b) of the Copyright Regulations states "the legal interest and residuary rights of the author" replaces "the legitimate interests of the owner of the copyright" found in section 13 of the Copyright Act. This indicates that the copyright law's primary concern is the authors' financial reward. This is a better approach for PICC shows that authors suffered losses in the educational market, particularly textbook authors. While the publishing industry is well established and profitable, authors are not proportionately as well rewarded as is the industry. A better policy would be to have academic authors rather than corporate copyright holders profit from copyright protection. In this way the interests of the publisher and the author would be rebalanced.

5 4 2 2 Special exceptions

The 1978 Copyright Act is unclear whether a librarian is entitled to copy on behalf of patron readers, as well as whether teachers are allowed to make multiple copies for classroom use. The South African Universities Vice-chancellors Association (SAUVCA) Copyright Committee suggests the Copyright Act not address the above issues in detail but rather leave them to clarifying copyright regulations.[784] The Copyright Regulations formulated the same year as the Copyright Act prescribes

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than three short poems, articles, stories or essays from the same collective work or periodical volume for the purpose of instructing a particular class during any one term; and

(b) not more than nine instances of such multiple copying for one course of instruction to a particular class during any one term;"

[784] *PICC Report* 72.

how a library and its employees reproduce and distribute a work.[785] The conditions are: 1) the library must not in any way profit from its reproduction or distribution. 2) The library has to be open to the public or available to researchers affiliated with the library. 3) The librarian can reproduce and distribute a limited amount of an unpublished work. 4) The librarian can reproduce a published work to replace an original copy only if the original has deteriorated or is damaged and is unavailable in the market at a reasonable price. 5) The librarian can reproduce and distribute a work from its own collection on a reader's request or for another library or archive depository. But the librarian is not allowed to copy more than one article in a periodical or more than a reasonable portion of any other copyrighted work. The copy only is to be used for private study or personal use. 6) On a reader's request, a librarian can reproduce and give a reader an entire work or a substantial portion of a work if it is unavailable in the market at a reasonable price. 7) The reproduction of a work must have a copyright warning, and the library has to have a copyright warning prominently displayed on its premise.

The library exceptions show that a librarian can copy materials on behalf of a reader for private study. The CDPA's fair dealing is more comprehensive since it allows librarians to make copies for not only readers' private study but also their non-commercial research. Therefore, South Africa can learn from the UK to broaden the fair dealing provision to allow librarians to make copies for both research and private study.

In addition to the library exception, the Copyright Regulations' section 7 allows making multiple copies for classroom use provided no more than one copy is made for each pupil in each one of the pupil's courses. Section 8 allows a teacher to make a single copy for research, teaching or preparation for teaching a class. Section 9 clearly states that none of the copies can be used as a substitute for the purchase of books. All of these regulations provide teachers clear guidance when they copy copyrighted materials.

5 4 3 Evaluation

The Copyright Act of 1978 and the Copyright Regulations provide exceptions, including fair dealing for private learners, educators and librarians to reproduce copyrighted materials. In general, the fair dealing provisions are well constructed. In addition to allowing reproduction for research and private study, the fair dealing section accommodates teachers who need to use both paper-based

[785] S 3 of the Copyright Regulations of 1978.

and electronic materials in a multimedia environment. Another value of fair dealing is that it allows private learners to copy or request a librarian to make copies for them.

On the one hand, the general exception for reproduction restricts users; on the other hand, it strikes a balance between such publisher copyright holder types and authors. The general exception must be revamped to accommodate users' need for research and learning. One solution is to maintain the statutory standard on the amount a user is permitted to reproduce and then incorporate an open-ended test akin to the US fair use doctrine into the legislation. While legal certainty is retained, an open-ended test allows judges flexibility to determine whether usage is fair by considering a number of disparate factors rather than rigidly applying the copyright legislation to every case at hand. Australian copyright law shows that combining an open-ended test with fair dealing is workable.[786] To help courts determine whether a use is fair or not, a fair dealing test should include the following: 1) the purpose and character of the dealing; 2) the nature of the work; 3) the possibility of obtaining the work within a reasonable time in an ordinary market; 4) the effect of using a work on the work's potential value in the marketplace, and 5) when only a part of a work is reproduced, the value of the amount being reproduced in relation to the value of the whole work.

5 5 The law of contract governing the licenses of electronic products

Vendors of certain electronic products often use contractual terms to restrict users already limited by copyright from using a product legitimately. Licenses usually are standard-form contracts. Although no copyright principle directly relates to the legality of shrink-wrap and click-wrap licenses that purport to restrict copyright exemptions under the Copyright Act,[787] common law and a number of statutes regulate the validity of licenses containing unfair or harmful clauses. In analyzing pertinent laws, one has to consider that all laws in South Africa, including those governing the enforcement of contracts, must follow the values enshrined in the Constitution.[788]

[786] See para 3 6 of Chapter 3.

[787] T Pistorius "The Enforceability of Shrink-wrap Agreements in South Africa" (1993) 5 *South African Mercantile Law Journal* 1 8.

[788] DM Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (Kenwyn: Juta, 1999) 162. D Bhana & M Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values" (2005) 122 *South African Law Journal* 865 879-880.

5 5 1 Contracts and public policy

The sanctity of contract is becoming increasingly controversial in mass consumption markets where standard-form contracts are widely used by suppliers/sellers to limit the rights of consumers. Honoring agreements voluntarily undertaken is a common law principle.[789] Nevertheless, the validity of terms in a standard-form contract that courts have contended to be unfair and unjust are rendered unenforceable if the terms do not follow public policy principles that follow basic constitutional values. Following is an examination of the development of the common law of contract as it applies to ticket contracts and similar documents. The principles that have evolved can be used to regulate the terms of standard-form licenses that come with electronic products.

In *Durban's Water Wonderland (Pty) Ltd v Botha*,[790] Mrs. Botha and her daughter were injured when flung from an amusement park ride. When they purchased their tickets, attached to the window of the ticket office was a disclaimer notice exempting the park from being liable in any event caused by negligence. The Supreme Court held the notice was prominently displayed on the ticket office window so that it was almost impossible for a purchaser to ignore when purchasing a ticket. Therefore, it was decided the amusement park had given consumers "reasonably sufficient" notice of the terms of the disclaimer.[791] Moreover, since a disclaimer constitutes a part of a contract, and a contract is valid if contracting parties have entered into it consensually, the ticket contract was valid for Mrs. Botha must have seen the disclaimer on the window. The "ticket cases" principle[792] was thus applicable for the consumer has assented to the contractual terms since the consumer has seen a notice containing them.[793]

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[789] SW van der Merwe, LF van Huyssteen, LF Reinecke & GF Lubbe *Contract: General Principles* 4 ed (Cape Town: Juta & Co, 2012) 20-21.

[790] 1999 (1) SA 982 (SCA).

[791] 417.

[792] In contract law, the principle comes about from a series of cases in which the courts held a person handed a ticket or another document with terms is bound by the terms no matter whether the person had read the terms or not. If the ticket holder was indeed unaware of the terms existence, then the court considered whether a reasonable person would have known the ticket contained terms. If the answer was affirmative, then the ticket holder was bound by the terms; if not, then the court turned to the general test of whether a reasonable notice of terms was given. *Parker v The South Eastern Railway Co* (1877) 2 CPD 416 established the "ticket case" principle, which was developed in *Olley v Marlborough Court* (1949) 1 KB 532 and *Thornton v Shoe Lane Parking* [1971] 1 ALL ER 686. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, it was held reasonable notice must be given by the party who wished to make an onerous term a part of the contract that was to be accepted by the other party.

[793] *Durban's Water Wonderland (Pty) Ltd v Botha* 416.

The *Durban's Water Wonderland* case shows the court's compliance with the autonomy of contract, the principle that signing or engaging in a like activity such as purchasing a ticket infers consent to a contract. With the wide use of standard-form contracts leaving consumers with a take-it-or-leave-it situation, the basic assumption of this form of contract faces Constitutional challenges.

South African legal commentators across the legal spectrum maintain a contract will not be enforced if its enforcement contravenes public policy.[794] The Constitutional Court also endorses this principle in *Barkhuizen v Napier*[795] which shows that public policy underpinned by the rights and values of the Constitution is decisive in determining the legitimacy of contract.[796]

In *Barkhuizen v Napie*r, whether a 90-day time-limit clause inserted into an insurance contract conflicted with the public policy exemplified in section 34 of the Bill of Rights was extensively dealt with. Section 34 guarantees the right to access to courts where a legal dispute can be resolved.

In the Constitutional Court decision,[797] Justice Ngcobo explained that two questions needed to be answered in order to determine the fairness of the contract in question. First, was the clause itself unreasonable? Second, if rather the clause seemed reasonable, were there any situations that would make it unnecessary to comply with the contract?[798] For the first question, the reasonableness of the contract involves weighing two considerations. One is that the autonomy of contract, a default principle governing contracts, should be observed in general. Parties should comply with contractual obligations that they have freely and voluntarily undertaken. A party's bargaining position is a relevant factor in determining whether a contract has been undertaken with free will.[799] The other consideration is that constitutionally all persons have a right to seek judicial redress. Therefore, if a contractual term only provides a very limited time for a dispute to be referred to a court, making it almost impossible for parties to do so, it contravenes public policy and is unenforceable. As for the second question, if a clause is reasonable and does not violate public policy, the onus shifts to the claimant to prove he/she need not carry out the contractual obligations.

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[794] Van der Merwe et el *Contract* (2007) 216; GF Lubbe & CM Murray *Contract: Cases, Materials and Commentary* (Capetown: Juta & Co, 1988) 238; T Naudé & Lubbe "Exemption Clauses - a Rethink Occasioned by Afrox Healthcare Bpk v Strydom" 2005 *South Africa Law Journal* 441 442; L Hawthorne "The Principle of Equality in the Law of Contract" (1995) 58(2) *Journal of Contemporary Roman-Dutch Law* 157 173.

[795] 2007 (5) SA 323 (CC).

[796] See the Constitutional Court decision para 33.

[797] 2007 (5) SA 323 (CC).

[798] Para 56.

[799] *Jordan v Faber* 2010 JOL 24810 (NCB).

Justice Ngcobo's opinion was there was no evidence the contract had not been freely dealt with by either party or that there was one or more clauses not brought to Barkhuizen's attention. He emphasized Barkhuizen was wealthy and middle class, and therefore presumably sufficiently knowledgable to understand the contractual terms.[800] In his view, the contract was neither unreasonable nor unfair. Since Barkhuizen furnished no reason for his non-compliance with the time-limit clause, Ngcobo J concluded enforcing the clause was neither unjust to Barkhuizen nor contrary to public policy, and dismissed the appeal.

In dissenting, Sachs J noted that unfair or unreasonable clauses in a standard-form contract always negate public policy. Very simply, bargaining power is intrinsically unequal between sellers using standard-form contracts and individual consumers.[801] This dissenting opinion maintained a standard-form contract was more like an "imposition of will" than a "mutual consent to an agreement".[802] It was argued that usually an unknown and unfair term is buried in a voluminous set of documents hardly noticed by the consumer.[803] In the Justice's view, such factors as the social and economic status of the consumer was irrelevant since a standard-form contract affected a wide range of consumers from various backgrounds, all entitled to the same degree of protection under the Constitution. A more desirable approach would be to utilize an objective test to examine whether a contractual clause is significantly unfair as to arouse public concern. In short, the tendency of the clause in the long term should be taken into account rather than its effect on a particular case.[804]

The substantive approach taken by Sachs J on redressing the unfairness and inequality of contracts certainly is welcome. There is no need for a blanket ban of standard-form contracts since they greatly help sellers reduce transaction costs in contract negotiations when providing goods and services on a massive scale.[805] Nevertheless, courts should not rigidly follow the legal principle of autonomy of contract that at one time was universally used in a market where transactions took place between individual sellers and individual consumers. Rather, in a mass-consumption market,

[800] Ngcobo J decided the fairness of the contract clause in question must be assessed on the basis of the parties' circumstances, see the Constitutional Court decision para 64.

[801] Para 140.

[802] Para 138.

[803] Para 148.

[804] Paras 146-148.

[805] J Vickers "Economics for Consumer Policy" in PJ Marshall ed *Proceedings of the British Academy* vol 125 (Oxford: Oxford Univ Pr /British Academy, 2004) 287.

the court needs to scrutinize the effects of a standard-form agreement has on all societal members' rights to equality and dignity over the medium to long term. Each and every citizen is entitled to fair and reasonable transactions without oppression. This is especially the case with inconspicuous oppression from suppliers with strong, if not monopolistic, bargaining powers disguised as freely entered contracts. The objective test proposed by Sachs J effectively underpins the constitutional values of freedom and equality in the area of contract law.

As commentators and scholars have rightly pointed out, in the past, one of the central problems of South African contract law was an overemphasis placed on freedom of contract.[806] With the development of mass consumerism, suppliers and sellers would employ standard-form contracts to insert terms and clauses on a take-it-or-leave-it basis. This relegated consumers to a weak bargaining position. However, a significant judicial shift from the sanctity of freedom of contract is the *Barkuizen v Napier* case in which other constitutional values are weighed against freedom of contract.[807]

Nevertheless, to solely focus on and develop the common law of contract is insufficient.[808] Some form of legislation for the consumer is needed,[809] particularly in developing countries where a large portion of consumers are little aware of their rights and few are affluent. It is only the well-off who can financially afford to seek judicial redress.[810] Thus, consumer protection legislation is vital for providing much greater legal certainty for both consumers and suppliers. The legislature needs to develop the principles of equality and fair dealing, on the basis of the constitutional value of dignity, to better protect consumers.[811]

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[806] PJ Sutherland "Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier 2007 5 SA 323 (CC) Part 2" (2009) 20(1) *Stellenbosch Law Review* 50 53.

[807] 2007 (5) SA 323 (CC) para 141.

[808] T Naudé "Unfair Contract Terms Legislation: The Implications of Why We need It for its Formulation and Application" (2006) 17(3) *Stellenbosch Law Review* 361 362.

[809] Naudé (2006) *Stell LR* 381.

[810] T Naudé "Enforcement Procedures in respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms under the New Consumer Protection Act in Comparative Perspective" (2010) 126(part 3) *South African Law Journal* 515 517.

[811] Naudé (2010) *SALJ* 517; see also the minority opinion by Sachs J.

5 5 2 The Consumer Protection Act

The Consumer Protection Act[812] (CPA) was enacted in 2009 to promote a fair, accessible and sustainable marketplace for consumer products and services and to prohibit certain unfair marketing and business practices. The Act deals extensively with unfair contract terms and gives the courts powers to deal with them. The Act is relevant to click-wrap and shrink-wrap licenses and its wording clearly shows that it applies to electronic product licenses.[813] In addition to the CPA, the Consumer Affairs (Unfair Business Practice) Act[814] empowers the Consumer Affairs Committee to investigate unfair business practices and make recommendations to the Minister of Trade and Industry.[815] The Committee may recommend to the Minister that a particular business practice, including a type of contract or a contract term be declared an unfair business practice.

Of particular relevance is Part G of the CPA titled "Right to fair, just and reasonable terms and conditions". The section contains three categories:[816] rules on incorporating contract terms which are formal prerequisites for a contractual term to be valid;[817] substantive rules consisting of a prohibited list of contractual terms that are illegal and invalid;[818] and interpretation rules that are useful for the courts to interpret a contract term.[819]

The CPA is moving forward in providing legal certainty. However, the Act does not fully provide effective and comprehensive protection for consumers. A paramount problem is the Act has no enabling clause for a consumer organization to launch an effective challenge to unfair contract terms. Rather, the legislation only applies when an individual consumer brings legal action against a supplier about the legality of certain terms in a contract. With the wide usage of standard-form contracts, certain unfair and unjust contractual terms are employed on a large scale and potentially affect large groups of consumers. In such a situation, it is more appropriate for an organization than an individual consumer to raise the issue about an unfair term that is of public concern. The problem is that on the one hand, section 52 only grants courts powers in "a transaction or agreement

[812] No 68 of 2008.

[813] Art 1 of the CPA.

[814] No 71 of 1988.

[815] Art 4 of the Consumer Affairs Act.

[816] T Naudé "The Consumer's 'Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective" (2009) 126 *South African Law Journal* 505 506.

[817] Ss 49 & 50 of the CPA.

[818] Ss 48, 51& 52.

[819] S 4(4).

between a consumer and a supplier".[820] On the other hand, it is unclear which consumer organization can apply to restrain a business using unfair terms. Although section 78 provides that accredited consumer protection groups may bring actions to protect consumers' interests individually or collectively, confusion emerges for section 4 stipulates that the group, now an association, has to be "acting in the interests of its members" to approach a court, the Tribunal or the National Consumer Commission (NCC).[821] In practice, the courts as well as consumer representative organizations, on their own initiative, may challenge unfair terms.[822]

The Act needs to have a general use challenge clause that would then allow qualified consumer organizations on their own initiative to challenge suppliers.[823] This provision needs to stipulate that before instituting an act against a supplier or a seller, a consumer organization must send a notice to the supplier requesting the cancellation of the unfair terms. If there is no response within a specified period or the response is unsatisfactory, the NCC or perhaps other regulatory authorities would have the authority to bring a restraint order, an interdict application, against the supplier using unfair terms.[824] To ensure consistent and predictable national policy enforcement, one national body, preferably the NCC, should be given ultimate responsibility to monitor unfair contract terms of suppliers and sellers operating in more than one province.[825] Therefore, it would be advantageous for the legislation to mandate the NCC in explicit terms to bring forward interdict proceedings.

Other technical changes also need to be made. The burden of proof should fall on differing parties in differing situations. If an individual brings an action, the obligation should be placed on the supplier. However, if an institution challenges a supplier, the onus should fall on the party launching the challenge.[826] This is because institutional challengers are much more resourceful in seeking evidence to support their claims.

A second problem with the Act is that it places far too much emphasis on procedural unfairness than it does on substantive unfairness. It does not sufficiently take into account typical problems faced by consumers confronted with the terms of standard-form contracts.[827] The overemphasis on

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[820] S 52(3)(b)(iii).

[821] S 4(1)(e).

[822] *Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd* 2008 (6) SA 468 (W).

[823] *Naudé* (2009) *SALJ* 515.

[824] Naudé (2010) *SALJ* 527.

[825] 524.

[826] *Naudé* (2009) *SALJ* 535.

[827] 510.

procedural unfairness somewhat misleads consumers into believing that mere substantive unfairness is not sufficient to challenge a supplier with a standard-form contract.[828] An explanation about what constitutes substantive fairness should be added to the Act to provide guidance for consumers in identifying a substantively unfair term.[829]

The Unfair Contract Terms Bill proposed by the English and Scottish Law Commissions in 2005 provides a valuable guideline for a "fair and reasonable test" since it contains relevant factors that constitute unfairness.[830] A number of these fairness factors worthy of consideration are the balance of the parties' interests, risks to the party adversely affected by a term, the extent to which a term changes the meaning from what would have been the case in its absence, and the bargaining positions of the parties.[831] Surprisingly, the Bill recommended the test not include a good faith requirement though it has been argued the concept is unfamiliar to British lawyers.[832] Professor Naudé, a South African contract law expert, suggests several factors the courts should consider when formulating what consists of "unfairness".[833] First, is the degree of imbalance in the parties' rights and obligations; second, is whether the contract term in question is detrimental to the consumer or unnecessarily protects the advantaged party; third, as a common law rule, whether or not the contested contract term is based on good faith, and last, does the consumer's fundamental right to dignity contractually encompass this same standard.[834] Naudé substantive fairness test would be a significant improvement to the current legislative text for any future amendment. This would be particularly important for it would bring a fairness test to South African contract law and the Constitution.

Finally, the control rules in the Act are inadequate in providing comprehensive legal predictability. Section 51 only contains a relatively short list of prohibited terms. Much more detailed provisions would enhance the real and proactive effect of the Act on unfair contract terms.[835] The more detailed the provisions, the less likely the parties have to depend upon courts and administrative

[828] Naudé (2006) *Stell L Rev* 372.

[829] Naudé (2006) *Stell L Rev* 375-376.

[830] The Law Commission and the Scottish Law Commission *Unfair Terms in Contracts* (2005) LAW COM No 292/ SCOT LAW COM No 199 http://lawcommission.justice.gov.uk/docs/lc292_Unfair_Terms_In_Contracts.pdf (assessed 27-10-2013).

[831] Law Commission and the Scottish Law Commission *Unfair Terms in Contracts* para 3.104.

[832] Para 3.86.

[833] Naudé (2009) *SALJ* 531.

[834] Naudé (2006) *Stell L Rev* 366.

[835] 381-382.

authorities to determine their cases. This would also be helpful for sellers and suppliers who could adjust their contracts accordingly to forestall any future legal squabbles.[836]

Since there is no list of terms presumably unfair or unjust in the text of the legislation, under section 120(1)(d) of the CPA, the Department of Trade and Industry (DTI) issued a set of CPA Regulations[837] in 2011 with a list of particularly suspicious terms.[838] Fortunately, the section on suspicious terms is indicative and non-exhaustive.[839] This allows the courts leeway rather than being restricted to terms solely on a list of suspicious terms. Nonetheless, perhaps it would be even better if the list was incorporated into the text of the legislation since in this way such a list of suspicious terms would have the same legal effect as a list of prohibited terms.

In dealing with unfair and unreasonable contract terms, there is a subtle shift to an approach that weighs public policy and private interests. Thus the CPA provides a more comprehensive legal framework for consumer protection that has certainty and predictability. An examination probing the relevant sections of the legislation shows that three major problems need to be addressed. First, the Act should be broadened to accommodate not only disputes between specific consumers and sellers/suppliers but also include general use challenges launched by consumers organizations against them. Second, a test of substantive fairness should be developed and added to ameliorate the strong overemphasis on procedural unfairness. Third, the suspicious list should be consolidated into the text of the legislation to ensure its legality. All of these actions would greatly improve the Act.

5 5 3 The intersection of contract law and the Copyright Act

Consumers can challenge the enforceability of shrink-wrap and click-wrap licenses that control the use of a copyrighted product more restrictively than copyright law allows. As an example, typical shrink-wrap licenses often prevent users from sub-licensing, renting, or leasing a computer program. However, the right holder of a computer program cannot simply invoke an exclusive rental right to prohibit all types of rental. This is because section 11(B) of the Copyright Act gives computer program copyright owners an exclusive rental right to let, offer or hire a computer program for commercial purposes. Thus, the Copyright Act only prohibits for-profit unauthorized rental.[840] Even

[836] Naudé (2009) *SALJ* 527.

[837] Consumer Protection Act (No 68 of 2008): Regulations.

[838] S 44 of the CPA Regulations.

[839] S 44 (2).

[840] Pistorius (1993) *SA Merc LJ* 1 16.

here, the user can challenge the validity of broad anti-rental licensing terms. Consumers also can challenge a shrink-wrap license that attempts to prohibit making any kind of copies since the Copyright Act allows users to make copies for necessary back-up purposes or copy exclusively for personal or private use.[841]

However, the Copyright Act is silent about whether contracting parties have freedom to exclude a copyright exception with an agreement. Again, the UK CDPA provides examples of worthwhile borrowable legislative techniques. The CDPA stipulates that if an action allowed by a statutory exception breaches a contractual term, the action does not infringe copyright but it may breach the contract.[842] Since the UK legislators recognized that certain exceptions should not be contracted out under any circumstances,[843] they felt a piecemeal approach was preferable to a blanket prohibition on excluding exceptions by contract.[844] This piecemeal approach means copyright legislation distinguishes excludable exceptions from non-excludable ones and allows contracting parties to exclude the former.

The CDPA's chapter III describes fair dealing and other exceptions as permitted actions. Fair dealing and most of the permitted acts for computer programs and databases are non-excludable. Moreover, it is widely held that fair dealing prevails over a contract.[845] Sections 296A and 296B of the CDPA make it very clear that any contractual agreement purporting to prohibit or restrict particular permitted action involving computer programs and databases is illegal and void. Permitted actions include making a computer program back-up copy, de-compiling a computer program for observation and studying or testing the functioning of a computer program,[846] as well as temporarily reproducing a database.[847] Many, if not all other permitted actions are presumably also excludable. For example, a computer program copyright holder can use a shrink-wrap license to prohibit users from adapting a program although the CDPA allows the user to do so.[848] In addition to what is excludable and what is not, the exception for educational establishments to make a limited quantity of copies for instructional purposes does not apply if a license for multiple copies

[841] S19B of the Copyright Act of 1978.

[842] S 28(1) of the CDPA 1988.

[843] Burrell & Coleman *Copyright Exceptions: The Digital Impact* 69.

[844] 69.

[845] WR Cornish & D Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 5 ed (London: Sweet & Maxwell, 2003) para 19–77.

[846] Ss 50A, 50B(2) & 50BA of the CDPA 1988.

[847] MacQueen & Waelde (2006) *EJCL* 5 .

[848] S 50C of the CDPA 1988.

is available.[849]

A piecemeal approach is workable since it avoids being inflexible on the issue of a complete prohibition on the contractual exclusion of copyright exceptions. South Africa could, with little difficulty, adopt an approach that provides legal certainty to contracting parties. First, the Copyright Act's fair dealing and computer program exceptions can be made non-excludable. Second, since educational institutions and libraries are in a relatively weak position in bargaining with corporate copyright holders, certain exceptions for educational institutions and libraries can be made non-excludable as well. If all of this were done, students, teachers and researchers would be little hurt by licenses that contain restrictive and unfair terms.

5 6 Issues in a digital environment

South Africa is a member of both the Berne Convention and the WTO, and a signatory of the WIPO Internet Treaties.[850] It has a relatively high technological capability and a high Internet usage rate among developing countries.[851] ICT and information networks enable South African educators and learners to access digital information to save the cost of purchasing paper-based materials. Academics are provided with platforms to publish and circulate their works online. Moreover, not only the education and research sector, but also the publishing industry profits from digitizing print format materials.[852]

South Africa urgently needs a sound legal and regulatory framework for software developers, computer manufacturers and ISPs. The Electronic Communications and Transactions Act of 2002 (ECTA)[853] is meant both to encourage and regulate electronic communications and transactions that govern a variety of activities in a network connected environment. This section examines how South Africa should develop its digital information network related law, including ECTA, with a particular focus on anti-circumvention rules. Other such legal issues as the reproduction right in a digital context, interactive communication and ISPs' liability are also discussed.[854]

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[849] S 36(3).

[850] South Africa entered the WTO on 1 January 1995.

[851] Gray & Seeber *PICC Report* 111.

[852] 112.

[853] Electronic Communications and Transactions Act 25 of 2002.

[854] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

5 6 1 Anti-circumvention rules

Although many countries include anti-circumvention rules in their copyright legislation, there is little guidance on anti-circumvention rules for South Africa and its place in copyright law. Nevertheless, South Africa has ECTA that contains anti-circumvention rules dealing with unauthorized access and use of data in electronic communications and transactions. Unlike anti-circumvention rules in copyright law that may involve civil or criminal liability, violation of ECTA rules directly leads to criminal punishment. To access data without authorization,[855] to modify or destroy data,[856] and to overcome security measures protecting data[857] are criminal offenses. Section 85 of ECTA stipulates that a person who knows that he or she is unauthorized to access data, but continues to do so is criminally liable. The rule is unclear at what point a person should be aware access to data is not authorized.[858]

In addition to accessing data without authorization, someone who produces, sells, uses or possesses devices, including computer programs or their components that are designed primarily to overcome security measures is criminally liable as well.[859] However, it is questionable to charge someone who simply uses or possesses a circumventing device because there are a number of devices with circumventing functions. South African experts in this field point out that it is ECTA that should charge a person who uses a device having a circumventing function with accessing, intercepting or interfering with data.[860]

Since ECTA's purpose is to secure electronic commerce, its anti-circumvention rules have little relevance for copyright issues. South Africa needs to construct copyright-related anti-circumvention rules for an arriving digital environment. The rules should strike a balance among copyright owners, end users, and manufacturers as well as software developers who produce devices and software with a circumventing function.

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[855] S 86(1) of ECTA.

[856] S 86(2).

[857] S 86(4).

[858] T Pistorius "Developing Countries and Copyright in the Information Age — The Functional Equivalent Implementation of the WCT" (2006) 9(2) *Potchefstroom Electronic Law Journal* 1 7 http://ajol.info/index.php/pelj/article/viewFile/43448/26983 (accessed 20- 05-2010).

[859] S 86(3) of ECTA.

[860] Pistorius *Potchefstroom Electronic LJ* 7.

As the analysis of anti-circumvention laws in Chapter Four indicates, a developing country such as South Africa should consider lenient anti-circumvention rules to promote the advancement of the Internet for people seeking information.[861] A minimum anti-circumvention law contains the following rules. First, is distinguishing access-control measures from copy-control ones and granting protection for both. Exemptions also are created for circumventing copy-control measures for legitimate purposes. Second, the liability exemption for circumventing copy-control measures is supplemented with a restrictive definition of a circumventing device. This device could be defined as one designed solely for circumvention or marketed for circumvention.[862] Third, a general purpose exception is included to allow circumvention for other legitimate purposes than the ones specified by the law.[863] Fourth, materials unprotected by copyright do not enjoy copyright protection under anti-circumvention rules simply because they are protected by technological measures. Rather, the law provides other rights for content providers to convert non-copyrightable materials into digital format and distribute them online as economic rewards.

5 6 2 The right to reproduce works

The Berne Convention grants copyright holders exclusive rights to reproduce most types of works in any manner or form.[864] This broadly means reproduction can be made by analogous, electronic or digital means, and can be temporary or permanent. However, it is questionable whether a broad reproduction right still is suitable for the information network environment since the Berne Convention predates the digital era. A copy of a printed work lasts for ages and could be a substitute for the original. In contrast, reproduction of digital information could be temporary and not a substitute for an original copy. Therefore, an exclusive reproduction right should be restricted to avoid right holders' over control of access to digital information.

At the 1996 WIPO Diplomatic Conference, South African delegates suggested temporary reproduction should not be protected as an exclusive copyright.[865] A copy made for the sole purpose

[861] See para 4 1 of Chapter 4.

[862] Producers of copying assisting devices used to be considered contributory infringers. Historically, most European countries imposed levies on media or equipment used primarily for private copying. Since a device that might be used for circumvention can be multifunctional, it is unfair to prohibit devices simply because they have the circumvention function. In addition, end users usually pay for material with a pay-per-view format. A strict prohibition of devices that assists circumvention is much like a second subsidy for right holders.

[863] Samuelson (2001)*Financial Cryptography* 6.

[864] Art 9(1) of the Berne Convention.

[865] WIPO *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* CRNR/DC/56 (1996) 1.

of making a digitized work perceptible, or a reproduction that just incidentally occurs in a technical process that transmits or utilizes a work, or a reproduction incidental to the lawful use of a work should be excluded from copyright protection. South African delegates proposed this for law would conflict at the international level if copyright treaties protected temporary reproduction and left it to their member nations to voluntarily exempt temporary reproduction from copyright infringement.[866] Moreover, a broad concept of reproduction that includes temporary reproduction would legally obstruct the development of the Internet as well as information networks in other forms.[867]

In South Africa, whether temporary reproduction is protectable is under debate. Since the all-encompassing term "any matter or form" in the Berne Convention seems to indicate temporary reproduction also is a protected copyright,[868] experts in the area suggest South African copyright law introduce the Information Society Directive approach that exempts temporary reproduction for certain purposes from copyright infringement.[869] The Information Society Directive grants copyright protection for temporary reproduction with a mandatory exemption for reproduction that is transient or incidental when solely transmitting within a network or is an indispensable part that enables another work to operate.[870] The mandatory exemption restricts copyright holders' exclusive control of digital information.[871]

5 6 3 Interactive transmission

The Copyright Act of 1978 grants copyright owners a number of rights to communicate different types of copyrighted works to the public. This includes a right to broadcast, re-broadcast and transmit a work in a diffused way,872 a right to perform a work in public and a right to publish.873 Note that transmission intended for specific members of the public should be done with wires or

[866] WIPO *Records of Diplomatic Conference I* 670-671.

[867] Vinje (1997) *EIPR* 233.

[868] Van Coppenhagen (2002) *SALJ* 429 437.

[869] 437-438.

[870] Art 5(1) of the Information Society Directive.

[871] Van Coppenhagen (2002) *SALJ* 435.

[872] The Copyright Act defines a diffusion service as a telecommunication service of transmissions consisting of sounds, images, signs or signals. Section 6(e) of the Act grants copyright holders an exclusive right to transmit a literary or musical work in a diffusion service, and section 7(d) provides a right to transmit a television program or other program including an artistic work in a diffusion service.

[873] In South Africa, whether to make a work available on the Internet means it is a publication is an unsettled issue; see R Buys (ed) *Cyberlaw@SA: The Law of the Internet in South Africa* (Pretoria: Van Schaik Publishers 2000) 47.

other means with a service that diffuses sounds, images, signs, and signals.874

In the UK, the CDPA at one time employed specific technological terms to define broadcasting and cable programs as the means of communication. Now the Copyright and Related Rights Regulations 2003[875] uses a general term "electronic transmission" that includes all types of communication based on electronic and digital technology.[876] Examples are the Internet and other kinds of information networks such as a company's intranet.877 Since an information network connects computers and other media together to transmit digital information by cable or with wireless signals, they are diffusion services.

In South Africa, Vanessa van Coppenhagen recommends the legislature should incorporate "the right of making available" into the Copyright Act as a separate right applicable to all categories of copyrighted works.878 This is feasible since information networks are services diffusing sounds, images, signs, and signals. Making works available to the public over information networks should be a public communication right. Thus, transmitting a work to the public using any network would not terminate the work's copyright.879

"The right of making available", like other copyrights, ought to be limited by copyright law. Since it is a public communication right like a broadcasting right, it should be limited in a way similar to other public communication rights. Under the Copyright Act, sections 12(6) and 12(7) provide general exceptions for the reproduction and broadcast of literary and music works. Section 12(6)(a) provides that the copyright in a lecture or a similar work delivered in public is not infringed by reprinting or broadcasting for informative purposes. Section 12(7) provides that the copyright in a newspaper article, periodical article or an article being broadcast on any current economic, political or religious topic is not infringed by it being reprinted or rebroadcast. Section 12(10) provides that subsections 12(6) and 12(7) apply to a work transmitted in a diffused state. Thus, exceptions to the reproduction and broadcasting of public lectures and articles in newspapers, periodicals or works being broadcast can be extended to an information network. In this way, education and research is

[874] S 1 of the Copyright Act of 1978. Van Coppenhagen suggests the Internet is a service that diffuses sounds, images, and signals, see 2002 *SALJ* 440.

[875] Amendments of the CDPA SI 2003/2498.

[876] S 4 of the Copyright and Related Rights Regulations.

[877] An intranet is a private computer network that uses Internet technologies to share an organization's information or operational systems with its employees.

[878] Van Coppenhagen (2002) *SALJ* 440.

[879] 440.

not stifled by “the right of making available” when information is shared.

5 6 4 ISPs' liability

ISPs provide a variety of services including accessing the Internet, hosting services and information searching.880 Some ISPs act much like a mere conduit of electronic signals and data, just like telephone service providers, while others have differing degrees of control over what is being distributed over an information network. In the later case the ISP is more akin to a traditional publisher.

Many contentious issues are sparked by an ISP's liability for any illegitimate material distributed over the information network by a third party. For this reason, what follows is an examination of both common law rules on ISPs' liability and ECTA with special attention paid to situations in which an ISP controls contents originally contributed by a third party.

5 6 4 1 The common law

In South Africa, common law rules regarding publishers' liability, particularly in the area of defamation, shed light on ISPs' liability when an ISP has editorial control of the content uploaded by a third party user. Publishers' liability is in a state of transition for the constitutional right of freedom of speech has gradually gained increasing recognition as judges have begun to weigh free speech as a public interest right against private interests such as personal reputation. These competing interests are balanced to reflect the values of the country's Constitution.

An example of this is the landmark decision of *Bogoshi*,881 which rejected the strict liability doctrine established in *Pakendorf en Andere v De Flamingh*.[882] A doctrine established in *Pakendorf* was that newspapers and broadcasters had strict liability for the content they published. Under strict liability, a defendant cannot rely on a lack of fault defense. That said, even though a publisher does not intend to publish defaming material, or a publisher is not negligent in reporting, the publisher is still liable for publishing material affecting a person's reputation. The Supreme Court of Appeal in the *Bogoshi* case reweighed the private interest in personal reputation against the public interest involved in the right of free expression. It emphasized that since the media plays a significant role in modern society to promote information transparency, imposing strict liability on publishers chills

880 Buys (ed) *Cyberlaw@SA* 21.

881 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

882 1982 (3) SA 146 (A).

the free flow of information.[883] The Court changed direction and accepted an absence of fault defense that enables publishers to avoid liability by proving they are not negligent in reporting some particular news.[884] In the *Bogoshi* case, City Press, the newspaper publisher of the allegedly defamatory articles, relied on both a public interest defense and an absence of fault defense. Since City Press proved that it collected information with great care and reported the information objectively, it was held not liable for a report containing erroneous facts since it was not negligent in its reporting and the report was meant to disclose information very much in the public interest.

The *Bogoshi* case shows that if a publisher has exercised editorial control over the materials it provides to the public and the publisher makes a best effort to exercise editorial control, the publisher should not be liable for publishing material that may affect a person's reputation. If an ISP is considered to be similar to a publisher, then the *Bogoshi* principles should apply.[885] With the same reasoning, if an ISP providing hosting services has transmitted content that unknowingly infringes on copyright while it has made its best efforts to ensure the legality of the content, the ISP should not be held liable.

Tsichlas v Touchline Media[886] is the first reported judgment in South Africa dealing with Internet legal issues over a defamation dispute. Like the *Bogoshi* case, it reflects the judicial trend that judges evaluate conflicting rights through the prism of the Constitution and balances the competing interests. In this case, the first applicant was the Sundowns Football Club's secretary. The first applicant claimed that 20 statements posted to the discussion forum on the respondent's website by various users were defamatory. The applicant sought an interdict of the website defamatory statements and an order for the respondent to remove the statements. She also sought an order for the respondent to monitor and remove any future defamatory statements about her on the website.

Acting Justice Kuny decided that some of the statements might be defamatory, while others were merely injurious or simply meaninglessly abusive. It was noted that since the applicant, a public figure, occupied an important position at the Football Club, she had to accept she might be subjected to attack and criticism if her club did not perform well.[887] In other words, the applicant

[883] 1998 (4) SA 1196 (SCA) 25.

[884] 36-37.

[885] SP Van Zyl “Online Defamation: Who Is to Blame?” (2006) 69(1) *Journal of Contemporary Roman-Dutch Law* 139 140.

[886] *Tsichlas v Touchline Media (Pty) Ltd* 2004 (2) SA 112 (W).

[887] 2004 (2) SA 127.

needed to have greater tolerance when being criticized unless there was actual malice.

The judge also noted that since the applicant had alternative remedies, a legal dispute could have been avoided. She could have notified the website operator to remove the objectionable criticism before launching legal action.[888] Or, she could have exercised a "right to reply" simply by challenging the unsavory comments immediately in the discussion forum.[889] The Internet provides online forum users the opportunity to engage in virtual conversations promptly, and immediately challenge an on-line wrong. The back and forth discussions are in essence an exercise of the constitutional right of free speech. Moreover, the court held that the respondent not be obligated to monitor future website speech postings since this would grossly affect the website users' freedom of speech.

The *Tsichlas* case demonstrates that the working of the Internet differs from traditional paper-based publishing in many aspects, and that common law has developed right along with the advancement of technology. The Internet provides immediate dialogue among multiple users in a virtual public forum, thus making it easier for Internet users to exercise their free speech right without having to rely on formal publication. A hosting services provider should not be burdened with having to monitor possible illegal content posted by third parties. The High Court took the right approach in refusing to deal with the possibility of harmful comments in the future and in encouraging those who might feel wronged to contact the ISP in question to deal with objectionable data before seeking legal action. In doing so a chilling effect on the Internet can be avoided and Internet judicial regulation can be averted.

5 6 4 2 ECTA

ECTA is a hybrid of OCILLA and the E-Commerce Directive when dealing with ISPs' liability.890 Chapter XI of ECTA provides safe-harbor rules for ISPs that are members of an Industry Representative Body and works with third party materials in such a way that it is possible to obtain limited liability. However, such a Representative Body needs to comply with a set of requirements to be recognized. When an ISP has complied with a number of threshold requirements, the ISP may employ the defenses provided by sections 73-76 of ECTA that limit ISPs' civil and criminal liability arising from third party content. The limited liability rules contained in ECTA are balanced with a

[888] 2004 (2) SA 131. S 75(c) of the ECTA provides "take-down notification" procedures to exempt a hosting service provider from liability if it deletes objectionable content promptly upon notification.

[889] A Rens "Tsichlas v Touchline Media (Pty) Ltd" (2005) 122 *South African Law Journal* 740 743.

[890] Buys (ed) *Cyberlaw@SA* 26.

notice-and-take-down procedure enabling victims of unlawful material to coordinate with ISPs to resolve their problems without resorting to the courts.

Inconsistencies about copyright infringing by third parties exist between ECTA safe-harbor rules and the Copyright Act. The Copyright Act recognizes two forms of copyright infringement, direct and secondary infringement.891 Section 23(1) of the Act provides that direct infringement occurs when a person reproduces, exploits or performs a work without the copyright owner's authorization. A person other than a copyright owner, who causes another to carry out an unauthorized act with a copyrighted work, also is liable for contributing to copyright infringement. What is notable is that a person does not have to know that the action infringes copyright to be found liable for both direct and contributory liability.892 In contrast, section 75 of ECTA stipulates a service provider who has no actual knowledge of an infringement or is unaware of the circumstances leading to infringement is not liable for infringing.

The major problem is that Section 23(1) of the Copyright Act may charge an Internet hosting service provider with contributory liability for a third party's infringing materials. However, in such a case the hosting service provider just might have inadvertently caused an end user to use copyrighted works without having the copyright owner's permission. Here, an ISP is exempt under ECTA (provided it meets the requirements) but is still liable under the Copyright Act. Legal authorities argue in this situation, ECTA should supersede the Copyright Act when the person referred to in section 23(1) of the Act is an ISP that falls within the safe harbor rules.[893] This is a welcome approach since it safeguards the free flow of information on the Internet.

Under ECTA service providers have no obligation to monitor the data they transmit or store, nor are they obligated to actively seek out unlawful activity.[894] The *Tsichlas* case shows that this principle is followed by the judiciary. The Court held the respondent should not be obligated to actively monitor materials posted on its website that possibly might be defamatory. Therefore, an ISP is not liable if it does not monitor data unless an infringing activity is so obvious it would be almost impossible not to detect it.

A major weakness of ECTA's ISP exemptions is that there are no procedures similar to OCILLA's

[891] 7.

[892] Dean *SA Copyright Law* 1–B43.

[893] Buys (ed) *Cyberlaw@SA* 23.

[894] S 78 of ECTA.

"put back" procedures enabling ISPs to return wrongfully deleted materials to their systems.[895] Another shortcoming of the ISP exemptions is that it is ECTA rather than the Copyright Act that governs the exemptions. However, a variety of ISPs' services, particularly the hosting and the search services, have brought about a number of copyright infringement disputes. Thus, the Copyright Act should address ISP liability issues when ISPs provide services related to copyrighted materials. Moreover, since access, transmission and storage of electronic information can involve both network security and copyright issues, the Copyright Act and ECTA should have compatible rules on ISPs liability that bear on security and copyright issues.

5 7 Balancing statutory exceptions and licensing schemes

5 7 1 The debates

In South Africa, copyright law reform in the last 20 years has stalled partly because parties with competing interests could not, or would not, compromise.896 On the one hand, the Publishers' Association of South Africa (PASA) representing publishers, wanted to minimize statutory exceptions that allow users to use certain types of copyrighted works for free. Concurrently, they wanted the public to make extensive use of copyrighted works, and suggested policymakers encourage users and right holders to voluntarily determine the conditions of permitted usage. On the other hand, SAUVCA, supported by the Ministry of Education, represented universities that wanted educational institutions to have more generous copyright exceptions.

Governments and agencies in the Northern hemisphere carried out a number of surveys on the benefits developing countries received by protecting intellectual property. 897 The UNESCO Infoethics Conferences and the UK Commission on Intellectual Property Rights (CIPR) are two major research organizations. The CIPR is critical of regimes with overprotective copyright legislation and argues that developing countries should grant generous exceptions to education and research sectors. The CIPR suggests that in the short to medium term, strong copyright protection is likely to reduce developing countries' ability to purchase textbooks, software and scientific papers.898 It recommends developing countries grant generous copyright exceptions to promote

[895] Buys (ed) Cyberlaw@SA 26.

[896] Gray & Seeber *PICC Report* 76-77.

[897] 92.

[898] 99.

education and the transfer of knowledge.899

Jessica Litman, a US copyright law expert, warned that legislators should not wait until all the interested parties agree to amend a law because advantaged stakeholders would not negotiate a position that could leave them worse off.900 In South Africa, stalled copyright law reform favors the publishing industries as well as other copyright-related industries while leaving the education and research sectors worse off. Therefore, it is necessary for the DTI to be positively involved and to develop balanced policies to enhance copyright law reform. Non-voluntary licensing needs to be broadened to guarantee users' access to affordable copyrighted works. Following is an examination of the educational institutions and copyright-related industries' proposals and then suggestions to reform copyright law.

5 7 2 Generous exceptions and non-voluntary licensing

5 7 2 1 Policy background

Non-voluntary licensing, often considered a copyright users' political victory,901 is one of the most important limitations on copyright. Non-voluntary licensing includes both compulsory and statutory licensing. Compulsory licensing statutorily requires copyright owners to grant authorization for the use of particular types of work and be paid for it. Licensing fees are usually determined through negotiation between the right holders' representatives and the users.902 For example, users need not seek prior permission from right owners to use sound recordings being broadcast but only need to pay the owners a fixed rate for the usage. A statutory license prescribes the types of copyrighted works that can be used without a right holder's authorization and designates an authority to price the usage.903 Copyright exceptions are a special type of statutory license for which there is no usage charge for copyrighted works. Collective copyright management organizations help copyright owners to collect royalties for their works used under a non-voluntary license.

Developing countries where copyrighted products are relatively expensive tend to adopt weak copyright regulations and turn a blind eye to the dissemination of unauthorized copies of

899 102-104.

900 Litman *Digital Copyright* 20.

901 CIPR *Integrating IP Rights* 151.

902 Garnett et al (eds) *Copyright* para 29-02.

903 29-02.

knowledge-based products such as computer software.904 Thus, to maintain an international level of copyright protection, copyright industries in the UK launched initiatives to donate books and computer software as well as provide "budget editions" to developing countries.905 However, South African publishers opposed these initiatives and have argued that importing free and low-priced copyrighted products makes the local market less competitive.906

Copyright industries need a competitive market to boost their market share. Public policy should neither deny copyright holders' interests nor those of local industries for they are not charities. Thus, it may seem contradictory to advocate general copyright exceptions and non-voluntary education and research licensing that allows free use of copyrighted works for this may reduce right holders' income. However, many economists maintain that generous copyright exceptions, particularly for education and research, do not necessarily reduce copyright holders' income. Therefore, in addition to public policy considerations, economic analysis provides an additional rationalization for generous copyright exemptions.

5 7 2 2 Economic analysis

The economic analysis of the relationship between the exploitation of copyrighted works and copyright business income is examined below. First and foremost, institutions copying periodicals, particularly academic journals, do not significantly reduce a publisher's profit. An example of institutional copying is a librarian who heeds a reader's request for a journal article and makes a number of copies. Some institutions, such as libraries and schools, copy periodical materials more frequently than do public and private companies. Thus, rather than charging each institutional user for copying, publishers of periodicals charge institutions a higher fee than that charged an individual. In this way copyright holders do not lose a large amount of royalties from copies made by institutions.

The economist Liebowitz introduced the concept of indirect appropriability developed and later used by a number of economists in copyright law studies in order to explain why institutions are charged a higher fee.907 Indirect appropriability occurs when a purchaser uses an original copy not

904 CIPR *Integrating IP Rights* 101.

905 101-102.

906 Gray & Seeber *PICC Report* 93.

907 Under indirect appropriability, the price of an original copy rises when copies of the original are produced. The increased price reflects that the value of the original copy is shared by its purchaser and users who make copies from the original, see SJ Liebowitz "Copying and Indirect Appropriability: Photocopying of Journals" (1985) 93(5) *Journal*

for consumption but to make substitute copies.908 An example is a library employing photocopy machines for systematic copying.909 A purchaser willingly pays a higher price for a copyrighted product if it can be copied. The seller captures some of the value of the copies when the original is priced. Consequently, some economists believe an optimal copyright policy is to give right holders more discretion to decide the extent institutions are allowed to copy academic journals without authorization, provided they pay a large lump sum subscription fee.910 Here, copyright law does not limit educational institutions' copying by stipulating a maximum number of copies of articles a librarian or a teacher is allowed to copy from one journal.

Second, unauthorized copying, allowed under copyright exceptions, does not always harm right holders' finances, particularly in a less competitive market. Economists point out that an ideal situation for both vendors and consumers in a fully competitive market is for vendors to sell different products to a variety of consumers at different prices. This increases consumers' options and reduces prices.911 For example, a publisher can sell immediately a hardcover book to the moderately well off or those eager to read it, and later sell the same book in paperback to those with less money. Thus, readers are not motivated to copy for they can obtain the book at a price that they are willing to pay.

In a less competitive market, consumers turn to unauthorized copies because they cannot obtain an original copy at a favorable price. When products are homogenous and their demand is elastic, producers maximize profit by selling the same products to different groups of consumers at differing prices.[912] For example, a company would be more willing to purchase a Windows

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of Political Economy 945 956-957; WR Johnson "The Economics of Copying" (1985) 93(1) *Journal of Political Economy* 158 158-174; IE Novos & M Waldman "The Emergence of Copying Technologies: What Have We Learned?" (1987) 5(3) *Contemporary Policy Issues* 3434-43; SM Besen & SN Kirby "Private Copying, Appropriability, and Optimal Copying Royalties" (1989) 32(2) *Journal of Law & Economics* 255 255-280.

[908] In economics, one kind of good is said to be a substitute good for another if the two kinds of goods can be consumed or used interchangeably. One does not need to purchase an original copy of a periodical if one has a substitute copy.

[909] This is supported by an empirical study, see Liebowitz (1985) *J Pol Econ* 956.

[910] J Johnson & M Waldman "The Limits of Indirect Appropriability in Markets for Copiable Goods" (2005) 2(1) *Review of Economic Research on Copyright Issues* 19 35. The authors critically examine Liebowitz's theory of indirect appropriability and show the theory has two deficiencies when applied under circumstances other than the sharing and copying within libraries. Nevertheless, the theory still is applicable to academic libraries' sharing and copying activities.

[911] Yoo "Towards a Differentiated Products Theory of Copyright" in *Developments in the Economics of Copyright* 106-107.

[912] D Besanko & R Braeutigam *Microeconomics: An Integrated Approach* (Danvers, MA: John Wiley & Sons, 2002) 33.

operating system because of its computer security than would be a student. The demand for Windows software is elastic because if it is expensive, the student would not purchase, rather the student would purchase alternative software, such as open source software or an unauthorized copy of Windows. Here, eliminating pirated software does not result in all users purchasing authorized software if the price is unchanged. Rather, users who cannot afford it simply do not purchase the software.

A different scenario plays out in a less competitive market with homogenous products and inelastic demand. Here the sole producer is likely to monopolize the market by charging consumers a higher price than it would charge in a competitive market.[913] An example is textbooks that students must purchase for study. With few textbook publishers, students have no option but to purchase textbooks at a high price.

In South Africa, textbook demand is inelastic compared with other copyrighted materials. Therefore, a law prohibiting the unauthorized copying of textbooks would considerably reduce students' access to them. However, since students who cannot afford an original copy would be unable to purchase an unauthorized book after a blanket copying prohibition, textbook copyright holders would not significantly be able to increase their income by eliminating unauthorized copying. Here, a generous copyright exemption allows students to copy a reasonable amount of textbook material for free and is a subsidy to those who cannot afford to purchase basic learning materials.

The above economic analysis shows that generous copyright exceptions, particularly ones allowing users to copy journal articles and textbooks, do not necessarily reduce a copyright holder's financial return. Moreover, in a quasi-monopolistic market, copyright exceptions can subsidize poor students' access to essential learning materials that normally are protected under copyright. Thus, in order to promote education and research, the Copyright Act should allow educators and students to use a good deal of copyrighted materials. One possibility is to establish a minimum amount that right holders must allow users to reproduce for education and research. If right holders still profit despite this change in copying, they are then able to determine whether it is economically viable to allow users to copy more than the law allows.

[913] 38.

5 7 3 Voluntary licensing

5 7 3 1 Background

A voluntary license allows users to negotiate with copyright owners to use their copyrighted works. One type of voluntary license is a transactional license that lays out conditions for single or multiple uses of a copyrighted work. Another type is a blanket license that allows users to use a wide range of copyrighted works under one licensing contract. The preference of educational institutions, organizations and companies usually is a blanket license that allows for a high volume of copyrighted materials.

Voluntary licensing is highly valued since it gives maximum contractual freedom to copyright owners and users. Nevertheless, it has a number of shortcomings. First, contracting parties have to spend time and energy in negotiations that increase transaction costs. Second, copyright owners, particularly copyright industrial conglomerates, are able to dictate oppressive licensing terms that under copyright law strongly prohibit the usage of copyrighted works.

Copyright owners often license their works to users through a collective copyright management organization that helps them to collect royalty monies and distribute them to the owners.914 A copyright management organization is a legal entity that represents rights owners' moral and economic interests as well as administers their copyright transactions with collective copyright licenses.915 On the one hand, such a collective copyright license enables users to clear copyright conveniently.916 On the other hand, it rewards copyright owners with a user's payment. WIPO experts point out that although this organization, a collective organization, primarily serves the right owners' interests, it also benefits users. It does this by almost always obtaining a lower licensing fee than an individual could negotiate to access copyrighted materials.917

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[914] M Ficsor *Collective Management of Copyright and Related Rights* (Geneva: WIPO, 2002) 19.

[915] D Sinacore-Guinn *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations* (Boston: Little Brown & Co, 1993) 10.

[916] Some copyright practitioners argue that with the aid of digital technology, users no longer need to seek authorization from a collective organization but can identify and contact an author directly. However, Reto Hilty argues authors may not be able to benefit from individual copyright management supported by digital technology for they are not necessarily technologically apt. Moreover, market failure cannot be simply interpreted as a commercial problem but it may also come about because of a lack of competition; see Hilty “Copyright Law and Scientific Research” in *Copyright Law: A Handbook* 341-342.

[917] M Ficsor *Collective Administration of Copyright and Neighboring Rights: Study on, and Advice for, the Establishment and Operation of Collective Administration Organizations* (Geneva: WIPO, 1990) 6.

The CIPR suggests that developing countries should judge how much they benefit from collective copyright administration organizations. One reason for doing this is that to establish and run such an organization entails high administrative costs in developing countries where institutional management tends to be weak.[918] Another reason is that at the international level, developing countries that are members of international copyright treaties are obligated to protect domestic and foreign copyrighted works equally. Therefore, a sizable portion of copyright royalties flow to foreign right holders through these collective organizations.[919] There is always the possibility the organizations could harm developing countries by burdening them with high administrative costs and provide little benefit to the domestic economy.

Developing countries with different market sizes need different development strategies. A country can benefit from copyright management organizations if it has a large number of domestic copyright holders, a large market for domestic copyrighted products and developed copyright-related industries. However, a developing country with a small market and few domestic copyright holders receives far fewer benefits from these organizations.[920]

5 7 3 2 A comparison of the copyright societies in the UK and South Africa

In the UK, copyright societies administer copyright transactions for copyright owners who have an agent relationship with them.[921] To establish a copyright society does not need government approval. There are thirteen copyright societies administering different fields of copyright and related rights which can license literary works, dramatic and music works, artistic works and typographical arrangements.[922] Two societies deal with licenses related to educational and research materials. One is the Copyright Licensing Agency (CLA) that grants most of the licenses to schools, colleges and universities to reproduce published literary and artistic works. The CLA's business and public administration licenses permit users to copy its digital publications. If it does not have a digital publication, a user needs to contact the publisher. The other society is the Educational Recording Agency (ERA) that grants blanket licenses to educational institutions that charge on a per capita basis to record or copy recordings for educational purposes. The ERA license requires all recordings and copies to be marked with the wording “for educational and non-commercial

[918] Adewopo (2001) *U Tol L Rev* 755-771; CIPR *Integrating Intellectual Property Rights* 140-141.

[919] CIPR *Integrating Intellectual Property Rights* 98-99.

[920] 98.

[921] Garnett et al (eds) *Copyright* para 28-27.

[922] Ss 137-141 of the CDPA 1988.

purposes under the terms of the ERA Licence".923

The Secretary of State and the Copyright Tribunal supervise the copyright societies.924 The CDPA provides a license that allows users to reproduce certain types of copyrighted works by reprographic means, but if some works are unreasonably excluded, the Secretary of State has the power to extend the scheme or license to cover them.925 If the collective societies or their users are not satisfied with the Secretary of State's decision, they have a right to appeal to the Copyright Tribunal.

The collective copyright management system is well established in the UK. With the societies administering different fields of copyright, the market is competitive. The societies are well regulated for they are under the supervision of the Secretary of State and the Copyright Tribunal. Since the UK is a major exporter of copyrighted products, the domestic economy benefits for these societies facilitate copyright transactions and collect royalty monies worldwide.

South Africa has four copyright societies, namely the Southern African Music Rights Organization (SAMRO),[926] the Dramatic, Artistic and Literary Rights Organization (DALRO) that is directly affiliated with SAMRO, the National Organization for Reproduction Rights in Music (NORM)[927] and the Recording Industry of South Africa.[928]

Particularly relevant to education is DALRO which is a multi-purpose copyright society representing authors, publishers and performers. The society manages its clients' reproduction rights, public performance rights and broadcasting rights for literary works and reproduction rights for works of visual arts.929 In 1990, DALRO became a member of the International Federation of Reproduction Rights Organizations (IFRRO) which furthers co-operation of the national

[923] http://www.era.org.uk/ERA_Labels.html (accessed 22-05-2010).

[924] Garnett et al (eds) *Copyright* para 29-71.

[925] S 137(2)(a) of the CDPA 1988.

[926] SAMRO is the primary representative of music performing rights in Southern Africa. As a member of the International Confederation of Societies of Authors and Composers (CISAC), SAMRO is authorized to fully represent the interests of South African composers, authors and publishers internationally.

[927] NORM is a negotiating body which protects the interests of composers and publishers and issues mechanical copyright licenses.

[928] Recording Industry of South Africa is affiliated with the International Federation of the Phonographic Industries (IFPI). It promotes and
safeguards the collective interests of the South African recording industry.

[929] http://www.dalro.co.za/ (accessed 27-10-2013).

Reproduction Rights Organizations (RROs). Commencing in 1990, it began to license copyrighted works, primarily books and serial publications, to various sectors of higher education for reproduction.[930]

South Africa is a copyright products importer with a relatively small market. Using DALRO as an example. IFRRO statistics show in 2008 DALRO collected R1.5 million in royalties from foreign RROs while it distributed approximately R8.8 million to foreign RROs and R8.7 million to national copyright holders.931 The figures show DALRO distributed 6 times more royalties to foreign right holders than it received worldwide from other RROs. Also found is that South African copyright holders received much more of their payments from domestic users than from foreign users. The figures show that by using DALRO there is a very unequal balance of payment that clearly advantages richer countries.

Educational institutions have to pay considerable royalties and copyright management fees to DALRO in order to reproduce materials for educational purposes. For example, the transactional copyright fee charged by DALRO to higher education institutions is R0.45 per page per copy (VAT excluded). These licensing fees differ from blanket license fees charged by DALRO for institutions, with fees which depend on the registered full-time students of each institution as well as whether or not short courses are covered by the blanket license. The institution annual license fee can range from R1.2 million to R 2 million.[932]

Copyright management organizations benefit a country after it has established copyright-related industries and a strong export sector. Yet, South Africa has done neither very well. In the short to medium term, to avoid high administrative costs to sustain the collective societies and with an unequal balance of payments from South Africa to richer countries, there is no need to establish as many societies as in the UK. However, to alleviate educational institutions' financial burden in paying copyright licensing fees and rights management fees, the country should consider creating one more copyright management organization that deals solely with education and research materials.

[930] http://www.ifrro.org/show.aspx?pageid=members/rrodetails&memberid=22 (accessed 27-10-2013).

[931] http://www.dalro.co.za/ (accessed 27-10-2013).

[932] Figures from Ms Carol Kat, Copyright Officer of Stellenbosch University, at carolk@sun.ac.za. The University of Witwatersrand paid in excess of R 1.7 million to DARLO in 2009 for the blanket license, Mrs Denise Nicholson, Copyright Services Librarian, the source at denise.nicholson@wits.ac.za. Both the transactional and blanket license fees are subject to annual consumer prices index (CPI) increases.

5 7 4 Open licenses

Publishers are very different from individual copyright owners since they are corporate proprietors usually holding copyrights conferred by their authors. For example, in South Africa it is common for authors publishing in a journal to vest their papers' copyright to the journal publisher.[933] However, the copyright industry and academic authors have very different objectives. While the industry maximizes profit by prohibiting others from reproducing and distributing a work, authors, usually employees of educational and research institutions, are little concerned about receiving financial rewards for publishing articles. Rather, they wish to have their works circulated widely to establish an academic reputation.

South African scholars and researchers are encouraged to distribute their works under open licenses as an alternative to the "all-rights-reserved" copyright model. The Cape Town Open Education Declaration states that South Africa needs open educational resources and urges educators, authors, publishers and institutions to release their learning materials under open licenses.934 The Creative Commons (CC) licenses primarily used for literary and artistic works and the GNU General Public licenses used for open source software are typical open licenses.935 Open licenses allow non-commercial usage of a work as long as the user acknowledges the author of the work. This requirement allows a licensor either to permit or prohibit subsequent modification or adaptation to an original work. If the licensor allows a user to change an original work, the user must distribute the modified work under a license that is the same as the original license. In this way, open licenses facilitate usage, revision, translation, improvement and the sharing of copyrighted works.

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[933] For example, see the "submissions" of the South African Music Studies "Submissions" *South African Journals Online* http://ajol.info/index.php/samus/about/submissions (assessed 27-10-2013); "instructions to authors" of the South African Journal of Chemistry "Instructions to authors" (January 2011) *South African Journal of Chemistry* <http://journals.sabinet.co.za/sajchem/chem_aut.html> (accessed 27-10-2013).

[934] Cape Town Open Education Declaration "Read the Declaration" *Cape Town Open Education Declaration* http://www.capetowndeclaration.org/read-the-declaration (accessed 27-10-2013).The Declaration is part of a worldwide movement towards open resources for education. An example is the United Nations Educational, Scientific and Cultural Organization *Forum on the Impact of Open Courseware for Higher Education in Developing Countries* (Paris: UNESCO, 2002) .

[935] Open source software is considered to be a development opportunity for Africa. Users can obtain open source software at a lower cost than proprietary software and create content to suit local needs, N Wachira "Africa: The Linux Continent?" *Wired* (22-09-2000) .

A number of South African private and governmental institutions use open licenses to distribute copyrighted materials for education, research and training. For example, the Shuttleworth Foundation has its open content project materials available under CC licenses. The National Education Department's portal also allows authors to use CC licenses for their works.936 The University of the Western Cape established a free access e-learning website to provide learning materials in law, social work and biology for approximately 40 courses for the public.937 The site was developed using an online learning management system tool, the Knowledge Environment for Web-based Learning (KEWL) that is available under a GNU license at no cost.938 KEWL can be used to search for online learning materials, particularly for Africa and the rest of the developing world.939

A self-regulatory non-profit organization can encourage and help academics to distribute their own works and access other academic works under open licenses. An example is the "Lawspace" of the University of Cape Town, a digital repository that holds a selection of full text LLM Minor Dissertations. Other dissertations, including PhD and Master ones, and publications as well as conference papers are added regularly. 940 Authors hold the copyright for their works in the Repository. The manager encourages authors and copyright holders to submit their works under the Creative Commons South Africa Licenses.

Open licenses help South Africans who have a tradition of creating collaborative groups to share copyrighted materials for education and research. For many South Africans, knowledge is a process of "continuously-evolving creation".941 They hold that knowledge evolves out of the community and so its value should be returned to the community to strengthen future contributions. Open

[936] THUTONG South Africa Education Portal "Licence Conditions" *THUTONG South Africa Education Portal* http://www.thutong.doe.gov.za/tabid/245/Default.aspx (accessed 27-10-2013)

[937] University of the Western Cape "eTeaching: KWEL3.0" *University of the Western Cape* http://eteaching.uwc.ac.za/ (accessed 27-10-2013).

[938] KEWL is an active server page application that runs on any Microsoft operating system.

[939] D Keats "Knowledge Environment for Web-based Learning (KEWL): An Open Source Learning Management System Suited for the Developing World" (January/February 2003) *The Technology Source* http://technologysource.org/article/knowledge_environment_for_webbased_learning_%28kewl%29/ (accessed 27-10-2013).

[940] University of Cape Town "Lawspace" *University of Cape Town* http://lawspace2.lib.uct.ac.za/dspace/ (accessed 22-5-2010).

[941] Creative Commons South African "Information of the Creative Commons South Africa License" *Creative Commons South African* http://za.creativecommons.org/learn/ (accessed 27-10-2013).

licenses also furthers and respects collaborative creation. They make copyrighted works available to the public and allow users to improve a work with their authors' knowledge. In this way, more works are created and their value is fully appreciated by the community.

Moreover, South Africa, a developing country, urgently needs learning material not only for students but for the public at large. Open licenses enable students, academics and the public to access copyrighted materials for learning and research. In addition, these licenses help South Africa, a country with a mosaic culture, to maintain and develop its cultural diversity with less copyright restrictions. It is particularly advantageous to preserve indigenous literary works, folk songs, and dances as well as other indigenous artistic works.

5 8 Conclusion

Educational and research materials are expensive in South Africa notwithstanding that it has ICT and information networks able to distribute digital materials at a lower cost than printed materials. By and large, a less competitive market for copyrighted materials and a restrictive copyright law make copyrighted products costly. Therefore, it is necessary for the copyright law to be better balanced to accommodate the educational and research sectors.

Copyright does not exist on its own but falls within the broader context of the Constitution with its primary goal of striving for a new social order of equality, freedom and dignity. All sectors of law have to be developed and evaluated within the Bill of Rights as a constitutional mandate. The law of IPRs, including copyright, needs to provide wider access to quality education. This will enhance the free flow of information and furnish historically disadvantaged groups with affordable educational materials.

In order to bring copyright law into the digital age, South Africa needs to address a number of digital technology-related issues such as the legality of temporary reproduction and online interactive transmission activities. ISPs' liability for rights-infringing activities, including copyright infringement, needs to be construed within ECTA and the Copyright Act's frameworks.

There are ongoing debates as to whether South African copyright law should make copyright exceptions more generous or leave users maximum freedom to contract with right owners to use

their copyrighted works. In addition to public policy, economic analysis shows that generous exceptions for education and research promotes societal learning and does not significantly reduce right owners' financial return. Thus, generous statutory exemptions may be a solution to resolve South Africa's problem on how to deal with expensive teaching and research materials. At the same time, South Africa needs to consider establishing another collective copyright management organization specifically dealing with learning materials. This would help to make the market more competitive and enable educational institutions to obtain copyrighted materials at a lower price. Moreover, copyright holders should be encouraged to use open licenses to allow use of copyrighted works without right holders' prior authorization as long as users follow the licensing terms.

In the interests of the society as a whole, copyright law needs to be more balanced as well as more flexible to promote education and research. It is an urgent task for South African legislators to bring the country's copyright law into the digital age. When constructing and developing copyright and other related laws, lawmakers should always bear in mind that it is the Constitution's mandate that the state broaden access to education and research that is in the public interest .

Chapter Six

China: Copyright Limitations and Exceptions for Education and Research

Chapter Six and Chapter Seven deal with Chinese copyright law. This chapter primarily focuses on copyright limitations and exceptions with particular reference to education and research. First, there is a review of Chinese legal tradition and culture, followed by some observations on the current situation of the nation's education and research fields. Second, this chapter examines statutory copyright limitations and exceptions in a variety of legal instruments pertaining to private learners, educational institutions and libraries. Finally, this chapter scrutinizes the under-developed collective copyright management system that is barely capable of dealing with China's voluminous copyright trade at home and abroad.

6 1 The history of copyright law

6 1 1 The cultural background

China does not have a copyright law tradition.[942] One important reason for the absence of copyright law was that the state did not intend to create a legal system to protect private rights, and this included copyright.[943] Another reason for the absence of copyright protection is the influence of Confucianism, as intellectuals and publishers alike believed that maintaining a high level of morality was more important than pursuing financial gain.[944] The arts were considered a "not-for-profit" leisure pursuit by the nobility and gentry, and they were therefore ashamed to profit from writing, painting and publishing.

Moreover, since most authors and artists who were Confucian intellectuals believed that creative activities were based on cumulative knowledge, it was unnecessary and undesirable to evoke

[942] Alford *To Steal a Book* .HD Wu Handong & Y Wang "Chinese Traditional Culture and the Copyright Law System" (1994) 4 *Chinese Journal of Law* 18 18-24 (Chinese version); HD Wu *The Fair Use System in Copyright Law* (Beijing: China Univ of Political Science Pr, 1996)19-29 (Chinese version).

[943] Wu *Fair Use System* 28.

[944] Wu *Fair Use System* 20-21; JP Deng *The Poverty of Property* (Beijing: Law Pr China, 2006) 264-267 (Chinese version).

property rights to protect their works.[945] Confucianism's emphasis on the authenticity of past knowledge that is transferred to the future meant that much creative activity was actually an accumulation of past knowledge.[946] Consequently, to write a good poem, a poet needed to read and memorize a good many poems, and without plagiarizing any of them he should be able to write a new poem in a similar style.[947] Many Chinese scholars agree that respecting past knowledge does not stymie an author's creativity nor does it confine authors to an outmoded past and archaism.[948]

It can be seen that Confucianism highly respected past knowledge and believed that it should be shared without restrictions. Authors were not encouraged to create works primarily for financial income. Therefore, intellectuals were not keen on protecting their works with exclusive property rights. Confucianism had a profound influence on intellectuals, and the Chinese society as a whole, even until today. In order to make the copyright law system a good fit for China's needs, the tradition of sharing knowledge should be taken into account in preserving a wide access to artistic and literary works by the general public.

6 1 2 A transplanted copyright law

Republican China chose to establish a modern legal system with a civil law tradition in the beginning of the 20th century.[949] In 1949, the PRC was founded under the Communist Party of China (CPC). The CPC abolished all Republican laws and very closely followed the Soviet Union in establishing a "socialist legal system." Nevertheless, the civil law tradition was not eradicated. First, judges formulated their verdicts based on promulgated written laws. A court's verdict was not legally binding on subsequent cases. Second, the General Principles of Civil Law[950] were modeled

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[945] Shao (2005) *IPQ* 412; Wu & Wang (1994) *Studies in Law* 24.

[946] Confucius was an author rather than merely an editor and compiler, see S Cherniack "Book Culture and Textual Transmission in Sung China" (1994) 54(1) *Harvard Journal of Asiatic Studies* 5 16; DL Hall & RT Ames *Thinking through Confucius* (Albany: State Univ of NY Pr, 1987) 90. RP Peerenboom describes Confucius as a creator, see "Confucian Justice: Achieving a Humane Society" (1990) 30(17) *International Philosophical Quarterly* 17.

[947] Shao (2005) *IPQ* 417-418.

[948] Deng *Poverty of Property* 22; 249 n 2 & accompanying text.

[949] JF Zhang *The Tradition of Chinese Law and Its Contemporary Transformation* (Beijing: Law Pr China, 1997) 446 (Chinese version); ZM Wang "The Roman Law Tradition and Its Future Development in China" (2006) 1(1) *Frontiers of Law in China* 72 74.

[950] General Principles of the Civil Law of 1986 Order of the President of PRC [1986] No. 37, promulgated on 12 April 1986; English version is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm (accessed 22-05-2010).

on the Soviet Union's Civil Law that was influenced by civil law as well.[951] Moreover, Chinese legal scholars indicate that the General Principles' structure was similar to the German Civil Code and the *Code Napoleon*, two representatives of the Roman civil law tradition.[952] Quite simply, the General Principles include the major legal principles found in the German Civil Code and the *Code Napoleon*.

China's copyright law is another example of "transplanted law". The first copyright legislation was not promulgated until 1990, and it only granted authors a very limited amount of exclusive copyright protection.[953] China reformed its copyright law in the 1990s as it shifted to a market-economy. It acceded to the Berne Convention in 1992 and the WTO in 2001. In order to meet the requirements of the TRIPS Agreement, China passed the Copyright Law Amendments of 2001[954] (Copyright Law Amendments) and adopted a number of regulations to implement the Amendments.[955] China also acceded to the WIPO Internet Treaties and passed Regulations on Protection of the Right of Communication through Information Network[956] (Information Network Regulations) that became effective in 2006 to implement the Treaties. Recently the Copyright Law of 1990 is undergoing significant reform, and it is very likely the text of the legislation will be structurally expanded with more comprehensive and systematic copyright protection.[957]

After China passed the 1990 Copyright Law, Alford warned that China should not simply borrow intellectual property laws, including copyright laws, from western countries and re-jiggle them so

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[951] XQ Li "Transplanting the Soviet Model of Civil Law Code to China" (2002) 5 *Social Sciences in China* 125 125-141 & 206 (Chinese version).

[952] Wang (2006) *Frontiers of Law in China* 77.

[953] Authors has a right to publish, a right to be named, a right to adapt a work, a right to maintain the integrity of a work, and a right to be paid, see Art 10 of the Copyright Law of 1990 Order of the President of PRC [1990] No. 31.

[954] Copyright Law Amendments of 2001 Order of the President of PRC [2001] No. 58 was adopted on 27 October 2001; English version is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383888.htm (accessed 23-05-2010).

[955] Chinese intellectual property legal system is comprised of three major parts: laws, administrative regulations promulgated by the State Council, and department rules. The Supreme People's Court also is involved in policymaking by issuing judicial interpretations. For an introduction, see SD Li "Intellectual Property Protection in China" *Judicial Protection of IPR in China* http://www.chinaiprlaw.cn/show_News.asp?id=4095&key=%D6%AA%CA%B6%B2%FA%C8%A8%B1%A3%BB%A4 (assessed 27-10-2013).

[956] Promulgated by Decree No 468 of the State Council on 18 May 2006.

[957] HB J & King & Wood Mallesons' Intellectual Property Group "Key Disputable Issues regarding the Draft Amendments to China Copyright Law" *China Law Insight* (14-06-2012) http://www.chinalawinsight.com/2012/06/articles/intellectual-property/key-disputable-issues-regarding-the-draft-amendments-to-china-copyright-law (accessed 27-10-2013).

they seemed to be China's own laws. Alford was quick to point out that the country's economy was underdeveloped and its legal tradition was different.[958] Moreover, at the beginning of the 21st century, China's intellectual property legal system has been categorized as an "inchoate" one.[959] An inchoate legal system promulgates legislation rapidly but lacks the infrastructure, means and expertise to administer and enforce the law. An inchoate copyright system deals with piecemeal copyright issues and passes laws without fully understanding the consequences.[960] Therefore, on the one hand, China needs to amend its copyright law to meet international standards. On the other hand, copyright law should benefit the national economy and the majority of the citizens. Alford suggested that in China, in addition to providing protection for copyright holders, an important function of copyright law should be to balance the competing interests among right holders, users and other stakeholders.[961]

China is largely an importer of copyright products. In 2005, China imported six times more copyright products than it exported.[962] In particular, there is an unequal flow of revenue from China to Europe and the US, countries that have exported copyright products to China.[963] Civil copyright disputes rose sharply by forty-three per cent over those of the previous year.[964] Sixty-five per cent of copyright lawsuits had been brought to courts in the wealthy provinces and cities such as Guangdong province, Beijing and Shanghai.[965] It can be observed that copyright litigation is more active in economically more developed areas.

When a country moves from being under-developed to developed, it normally goes through a piracy phase, which is followed by the understanding of the importance of copyright protection and, ultimately a respect for IPRs.[966] China is no exception. It needs to develop a sound legal system to

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[958] Alford points out that China's post-cultural revolution intellectual property law reform was largely the US wanting to secure its economic interests by compelling China to promulgate western-style intellectual property law in the name of legality. See Alford *Steal a Book* 112-123.

[959] T Black *Intellectual Property in the Digital Era* (London: Sweet & Maxwell, 2002) 115.

[960] 115.

[961] Alford *Steal a Book* 121.

[962] China IPR *China Intellectual Property Rights Yearbook of 2006* (Beijing: Intellectual Property Publishing, 2006) 374 (Chinese version).

[963] China exported 16 types of copyright products to the US and 74 types to the UK, see China IPR *China Yearbook* 377.

[964] Alford *Steal a Book* 110.

[965] Other provinces with a high rate of copyright litigation are Jiangsu, Zhejiang and Shandong, see 112.

[966] JM Wu "China Pushing Forward with IP Protection" *Mondaq Business Briefing* (21-09-2006) http://www.mondaq.com/article.asp?article_id=42902&lk=1 (accessed 27-10-2013); PK Yu "Intellectual Property, Economic Development, and the China Puzzle" in DJ Gervais (ed) *Intellectual Property, Trade and Development:*

protect both domestic and foreign copyright holders, to promote domestic copyright-related industries and to lower copyright transaction costs within the framework of international copyright treaties. In particular, it needs to develop an efficient collective copyright system able to accommodate the needs of its large domestic market. In order to reform its copyright law system, China should take a utilitarian approach to make the law more trade-oriented and able to balance competing interests.

6 2 Education and research

During the 20th century, East Asian universities have been teaching and training-oriented while research has been left to the public sector.[967] The teaching-oriented model, also known as the "late comer development model", has quickly boosted East Asian countries' national economies by training human capital with necessary skills.[968] However, in the 21st century, China and other East Asian countries also need to enhance the capacity of their institutions of higher education to generate original research required for a knowledge economy.[969] Meanwhile, China needs to continue to provide basic education to eliminate illiteracy and train skilled workers. China's Ministry of Education has recently publicized a plan that aims to make a nine-year compulsory education available to all children, to improve the quality of higher education and to promote vocational education.[970] The Ministry of Education is encouraging the growth of the private sector, with both enterprises and non-profit organizations providing vocational education.[971]

Distance education plays an important role in China since the country has a vast territory and the largest population in the world. In 2000, a number of leading universities and colleges began a consortium, the Coordination Team for Advanced Distance Learning in Higher Education, to establish online campuses and share educational materials. In 200l, the China Education and

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Strategies to Optimize Economic Development in a TRIPS Plus Era (Oxford: Oxford Univ Pr, 2007) 173 173-220.

[967] JA Mathew & H Mei-Chih "Universities and Public Research Institutions as Drivers of Economic Development in Asia" in S Yusuf & K Nabeshima (eds) *How Universities Promote Economic Growth* (Washington, DC: World Bank, 2007) 91 94.

[968] 93.

[969] 107.

[970] Ministry of Education *9th 5-Year Plan for China's Educational Development and the Development Outline by 2010* <http://www.moe.edu.cn/publicfiles/business/htmlfiles/moe/moe_2807/200906/48868.html> (accessed 29-10-2013). The Compulsory Education Law was promulgated by Order No 52 on 29 June 2006; English version is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383936.htm (accessed 24-05-2010); the Law on the Promotion of Privately-run Schools was promulgated by Order No 80 on 28 December 2002, English version is available at http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382110.htm (accessed 24-05-2010).

[971] Ministry of Education *9th 5-Year Plan* .

Research Network and the China Education Broadband Satellite Net were launched to allow simultaneous transmission of channels of video and multimedia programs.

In China, to promote scientific research and to develop education at all levels is a national development policy. China has an advanced information network infrastructure, able to distribute digital materials at a low cost for education and research. Now, it is crucial to develop the copyright law to unfetter the dissemination of learning materials in digital and printed forms.

6 3 Copyright law and relevant regulations

6 3 1 The Copyright Law of 1990 and the Amendments of 2001

After China's accession to the WTO, many provisions of the Copyright Law of 1990 needed to be amended. The Director General of the National Copyright Administration (NCA), in an explanatory report to the National People's Congress (NPC), indicated three major issues that copyright law needed to address. Firstly, to strengthen the enforcement of the law; secondly, to provide appropriate protection for foreign copyrighted works under China's international obligations; and thirdly, to strike a balance between copyright protection and the development of science and technology.[972]

The Copyright Law Amendments made a number of changes to the Copyright Law of 1990 which remain effective today, with many of these changes relevant to education and research. One comprehensive change to the legislative text is that the 2001 Amendments use term *chuban* in place of *fabiao*, which was previously used in the Copyright Law of 1990. While *fabiao* means to publicize a work in any manner or form, *chuban* means only to publish a work in printed form. Since the Berne Convention uses the word "publish" to denote publishing in hard copy, it is more appropriate for the amended Copyright Law to use *chuban* since it has a narrower meaning which is more in line with the terms of the Berne Convention.

The amendments pertinent to education and research are: 1) Article 3 replaced "computer software" with "computer program". Since software can be a component of a computer program, the phrase "computer program" provides more comprehensive protection for computer programs. 2) Copyright holders enjoy more rights, such as a rental right of computer programs and cinematographic works

[972] SK Guo "New Chinese Copyright Act" (2000) 31(5) *International Review of Intellectual Property and Competition Law* 526 526-527.

as well as a right to communicate works to the public through an information network. 3) Under certain circumstances, a database can be protected as a copyrighted work. 4) Textbook writers have a statutory license that enables them to pay to use specified copyrighted materials without right holders' prior authorization. 5) A collective copyright administration system was created within the existing framework of the Copyright Law.

6 3 2 Limitations on copyright: a general picture

The Chinese Constitution provides that

> "The State undertakes the development of socialist education and works to raise the scientific and cultural level of the whole nation."[973]

It guarantees citizens the right to receive an education and the right to engage in

> "scientific research, literary and artistic creation and other cultural pursuits."[974]

However, it does not explicitly ensure access to materials necessary for education and scientific research. Since obtaining basic educational materials at an affordable price is still a problem in poor areas, a constitutional guarantee of access to basic educational materials would enhance the enforceability of the right to education.

In the area of copyright law, it is widely acknowledged that copyright should be limited.[975] Article 4 of the Copyright Law puts forward general limitations on copyrights. One limitation is that works prohibited by law from being published or distributed shall not be protected under the Copyright

[973] Art 19 the Constitution of 1982, as amended in 1988, 1993, 1999 and 2004; English version is available at http://www.npc.gov.cn/englishnpc/Constitution/node_2824.htm (accessed 24-05-2010). Article 19 provides that 1) the State establishes and administers schools of various types. 2) The State develops educational facilities in order to eliminate illiteracy and provide political, scientific, technical and professional education for citizens. It encourages people to engage in self-learning to obtain an education. 3) The State encourages the collective economic organizations, state enterprises and institutions and other sectors of society to establish educational institutions of various types in accordance with the law.

[974] Arts 46 and 47 of the Constitution of 1982.

[975] CS Zheng *Textbook on Intellectual Property Law* (Beijing: Law Pr China1986) 124 (Chinese version). In Taiwan, see CS Yang *Collections on Copyright Law* (Taiwan: Huaxin Wenhua Xhiye Zhongxin, 1983) 177-179 & 181 (Chinese version).

Law.[976] The other limitation is that copyright owners should not violate the Constitution or laws, or prejudice the public interest when exercising a copyright.[977] Article 4 is an attempt to ban works that are unconstitutional, illegal or immoral. However, in 2009, the WTO Panel concluded that Article 4 was inconsistent with China's obligation to provide equal protection for domestic and foreign works under the Berne Convention and the TRIPS Agreement.[978] Since a country should have the discretion to censor works protected under copyright and ban specific inappropriate works from circulation within the country, Article 4 of the Copyright Law can be amended. This can be done to state specifically that the authors of copyrighted works prohibited by law from being published or distributed shall not have their economic rights for their works protected under the Copyright Law. This implies that the Copyright Law still protects their moral rights as authors.

The Second Chapter of the Copyright Law of 1990 lists a number of limitations and exceptions for copyright.[979] The list employs a closed system that enumerates permitted acts very definitely and very exclusively with copyrighted works. Article 22 allows users to use a copyrighted work without permission from, or payment to, a right holder under 12 different circumstances. The permitted uses relevant to education and research are: 1) to utilize a published work for private study, research and self-entertainment; [980] 2) to translate or reproduce a small quantity of a published work for classroom teaching or scientific research, provided that the translation or reproduction is neither published nor distributed;[981] and 3) to reproduce a work for archival or display purposes.[982] Article 23 provides a statutory license for writers to pay to use a limited amount of specified copyrighted works to write textbooks. Articles 22 and 23 are applicable to publishers, performers, sound and video recording producers, and radio and television broadcasters.

Both Articles 22 and 23 require a user to provide the author's name and the title of a work when the work is being used. At the same time, a user should not prejudice a right owner's other rights granted by the Copyright Law. The two requirements are akin to the first and the third elements of

[976] Art 4 of the Copyright Law of 2001. Works can be prohibited by such laws and regulations as the Criminal Law, the Regulations on Administration of Printing Industry, the Regulations on Administration of Broadcasting, the Regulations on Administration of Audio-visual Products, the Regulations on Administration of Films, and the Telecommunications Regulations.

[977] Art 4 of the Copyright Law Amendments of 2001.

[978] World Trade Organizations *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights WTO Panel Report* (2009) WT/DS362/R para 8.1.

[979] Ch 2 S 4 of the Copyright Law Amendments of 2001.

[980] Art 22(1).

[981] Art 22(6).

[982] Art 22(8).

the three-step test adopted in the TRIPS Agreement. However, the "no prejudice to copyright owners' other legitimate rights" requirement is narrower in scope than the third step of the three-step test preventing copyright owners' legitimate interests from being prejudiced. This is because interests include legally granted rights and benefits that should be protected, but are not stipulated by law. The Regulations[983] that implement the Copyright Law of 1990 became effective in 2002 contain a three-step test almost identical to the one included in the TRIPS Agreement:

> "The utilization of a published work which may be exploited without permission from the copyright owner in accordance with the relevant provisions of the Copyright Law shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner."[984]

The following section examines the exemption for private copying and the exemptions for teachers, researchers, educational institutions and libraries. It also examines two statutory licenses found in the Copyright Law as well as the Information Network Regulations. One license allows users to pay to use specific works for textbook writing and the other allows certain activities for distance education. After examining relevant exceptions and statutory licenses, suggestions are then made to construct limitations and exceptions more systematically within the framework of the Copyright Law and to amend the exemptions to better accommodate societal needs for education and research.

6 3 3 Private use

Article 22 of the Copyright Law exempts the utilization of copyrighted works for private study, research and self-entertainment. It does not define what activities constitute "utilization". In practice, a user usually reproduces a work or a part of it to use the work. The Copyright Law provides that reproduction can be done by printing, photocopying, lithographing, producing a sound or video recording, duplicating a recording, or a photographic work, or by other means.[985] It is unclear whether users are exempted from copying a work for specific purposes under Article 22, particularly copying with electronic or digital equipment. It is implied that if reproduction is an indispensable process in the utilization of a work, it falls under the private use exemption.

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[983] Implementing Regulations of the Copyright Law of 2002 Order of State Council of China [2002] No 359 on 2 August 2002.

[984] Art 21 of the Regulations for the Implementation of the Copyright Law.

[985] Art 10(5) of the Copyright Law Amendments of 2001.

A major problem with the private use exemption is that it is too broad, as it allows free use of works for one's personal recreation. This provides society with little benefit. This provision should be amended in such a way that private use for study or research continues to be exempted, while the exemption for private use for self-entertainment should be deleted.[986] This is because an exemption for the use of personal entertainment was based on a market failure theory. Nowadays, it is possible for a user to employ technology or use a collective copyright society to contact a right holder and pay usage charges. Consequently, the exemption does not fulfill its original function and should be dispensed with.[987]

Nevertheless, it may be inappropriate to introduce an outright prohibition of private copying of copyrighted works for personal recreational purposes. Rather, copyright law could allow private copying for purposes other than study or research but require users to pay right holders for making copies. Although individual users profit little from private copying and there is little effect on right holders' financial interests, large scale private copying may reduce right owners' income. A solution proposed by a German scholar, Professor Dietz, is that China follows the German system and allows private copying for specific purposes under copyright law. Then equipment that enables users to copy and store such copies would have taxes levied on them. The levy would compensate copyright holders' losses for copying done with equipment having copying and storage functions.[988] Dietz pointed out that a levy system not only compensated right holders, but also relieved users from the risk of copyright infringement. Moreover, manufacturers also could produce equipment with copying and storage functions legally after paying a levy.[989] A number of Chinese copyright scholars took the same stance as Dietz and maintained that a levy system could serve to compensate copyright holders who suffered from rampant piracy facilitated by electronic and digital equipment that enabled users to copy and store works.[990]

However, some Chinese copyright experts doubt the feasibility of a levy system. First, an all-

[986] SH Cao *Frontier Issues in the Areas of Intellectual Property Rights in the Post-TRIPS Era* (Anhei, China: Univ Pr of Science and Technology, 2006) 93 (Chinese version). He suggests the copyright law allow a person's family or the people with a close relationship with the person to make a copy or copies of a work on behalf of the person.

[987] Wu *Fair Use System* 280; JY Chen *The Copyright in the Science and Technology Periodicals* (Beijing: Tsinghua Univ Pr, 2005) 174-175 (Chinese version).

[988] A Dietz "Draft Report on the Amendment of Chinese Copyright Law — Elaborated at the Request of National Copyright Administration of the People's Republic of China" (2000) 10 *Intellectual Property Studies* 229 270.

[989] ZW Liang *On the Digital Copyright* (Beijing: Intellectual Property Publishing House, 2007) 125 (Chinese version).

[990] Y Huang & SQ Yu "A Model for a Levy System Compensating Copyright Holders in China" (2008) 7 *Electronics Intellectual Property 22* 22-24 (Chinese version).

encompassing levy on equipment having copying and storage functions does not distinguish the purpose of copying. Hence, although the Copyright Law allows free copying for private study and research, users have to spend more to purchase or hire a copying machine. Thus, there is a reduction in the benefit that the exemption is meant to confer on students and researchers. Second, China does not have an efficient system able to collect and allocate monies from the levy on equipment to right holders based on the frequency of usage. Therefore, a levy system could lead to an unfair distribution of monies to right holders, regardless of usage.[991]

Analysis shows that levies on analogue equipment should not be moved directly to the digital environment. On the one hand, the levy that is meant to serve as fair compensation to copyright holders is losing ground since digital technology enables right holders to control and charge for using their works. On the other hand, multi-purpose machines such as personal computers whose primary function is not copying, eliminates the justification for levies. Moreover, in a multimedia environment, activities such as converting the format of a copyrighted work to play it on different platforms do little harm to right holders' financial interests.

Therefore, it is unnecessary for China to establish a levy system on copying equipment. First, it is likely the levy system will be phased out gradually when technological protective measures are available in the marketplace. Second, it is unfair to levy taxes on equipments which also have non-copying and non-storage primary functions. Third, China does not have a tradition of imposing levies on equipment and lacks experience and management skills to establish and run a levy system. In addition, Chinese scholars point out that levies paid by equipment manufacturers would hardly benefit the national economy, as China exports electronic and digital equipment and devices, whereas it imports a sizable amount of copyrighted works. A levy system would lead to an unequal amount of revenue flowing from Chinese equipment manufacturers to wealthier countries exporting copyright products.[992] A levy system also would make Chinese users pay twice to make a private copy of a work, with a royalty paid to a copyright holder and a levy payment to manufacturers.

In summary, where the private use exemption is concerned, the relevant section in Copyright Law should distinguish private use for study or research from private use for personal entertainment, and retain the exemption for study and research. Copyright Law allows users to make private copies for purposes other than study and research, and requires them to pay right holders through a licensing scheme. It is unsuitable for China to adopt a levy system on equipment to compensate right holders

[991] Wu *Fair Use System* 237-238.

[992] XL Zhao "iPod is an Exception" (2005) 5 *21st Century Business Review* 42 43 (Chinese version).

for their private copying losses. Rather, it would be better to let copyright holders use a collective copyright management organization to license their works to users and collect remuneration on their behalf.

6 3 4 Limitations for education and research

6 3 4 1 Reproduction exemptions for classroom teaching and scientific research

Article 22(6) of the Copyright Law of 1990 provides teachers and researchers with an exemption to translate or reproduce a small quantity of a published work for classroom teaching or scientific research. However, they are not allowed to publish or distribute the work being translated or reproduced. There is no quantitative guideline to help determine what constitutes "a small quantity".

A review of the legislative history would help one to understand how much users are allowed to use a work under the "small quantity" requirement. Since there was no specific copyright legislation until 1990, judges had little legislative guidance to determine whether a use was fair or not. *Gao Cheng De* v *UBTV* showed that in the absence of copyright law, judges had substantial discretion to interpret the public interest broadly in a fair dealing case, and unduly overlooked the plaintiff's legitimate interests.[993] In 1984, Professor Gao was invited by the State University of Broadcasting and Television (UBTV) to lecture on the radio for six months. In 1986, the UBTV reproduced the sound recordings of Gao's lectures and created 20,000 cassettes without authorization nor payment, and sold the cassettes to UBTV's students in Zhejiang Province. Gao brought an action against the UBTV in June 1986. One year later, the Zhejiang Intermediate Court ruled that the reproduction and distribution of the sound recordings were fair dealing on the grounds that the recordings were made solely for distance education, which was in the public interest. Moreover, the UBTV did not profit from the reproduction and distribution. Therefore, the UBTV was not held liable for copyright infringement.

Many considered this a shocking decision, since they found it hard to believe that the large number of lectures that were reproduced was considered non-infringement. The State Council and the Copyright Office were concerned that without legislative guidance, judges could simply maintain an ideological outlook that the public interest prevailed over private interests and continue to neglect legitimate private rights involved in copyrighted works.[994] Therefore, they began to prepare copyright legislation. Early on, a consensus was reached that unauthorized non-commercial usage

[993] For details of *Gao Cheng De v UBTV*, see Zheng & Pendleton *Copyright Law in China* 46-49.

[994] 48-49.

of copyrighted works for education should be exempted under copyright law.

The legislative history shows that legislators have taken copyright holders' interests into consideration and protected copyrights by limiting the amount of material users are allowed to deal with, as well as preventing them from distributing it. Legislators avoided being overly rigid by stipulating the maximum amount of material a user was permitted to work with.[995] Judges could rely on the "small quantity" requirement and utilize their discretion to determine whether a use was exempt.

The reproduction exemption for teachers and researchers has three shortcomings. First, it only applies to classroom teaching.[996] The exemption should be expanded to cover educational activities outside a classroom for people who just are unable to attend classes, such as those with disabilities as well as students enrolled in distance education courses.[997] Second, the exemption only allows teachers to use a work for reproduction and translation. Since the Copyright Law enumerates exemptions very definitively and exclusively, the wording of the provision excludes such means as performance and broadcasting. In contrast, the Berne Convention allows the use of literary or artistic works in publications, broadcasts or sound and visual recordings, so long as the material is used for teaching.[998] Therefore, Chinese copyright scholars and educators suggest that the reproduction exemption be broadened to allow teachers to perform and broadcast copyrighted works for educational purposes. Third, the exemption is too restrictive for the sharing of knowledge, since it prohibits further distribution of copies made under the copyright law exemption. The blanket prohibition appears to be an extreme response to *Gao v UBTV*.

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[995] Some copyright scholars argued that the phrase "small quantity" only related to the number of articles in a periodical rather than a portion of a book or similar works, see H Yao (ed) *Interpretations on the PRC Copyright Law* (Beijing: Qunzhong Publishing 2001) 164 (Chinese version). Chen suggested that user should not be allowed to reproduce an entire book or all articles in a periodical under any circumstance. According to her, a reasonable amount of work being reproduced should be considered on a case-by-case basis. Moreover, she suggested two rules be taken into account in determining whether a reproduction was reasonable, they were: 1) reproduced copyrighted material should be used just for the teaching objective for a particular class; 2) The copies should not compete with the original copy in the market. However, she argued that translators should be treated differently from teachers and be allowed to use an entire work. See Chen *Copyright in the Science and Technology Periodicals* 83.

[996] Chen *Copyright in the Science and Technology Periodicals* 83; Wu *Fair Use System* 283. Ricketson argued that distance education was a form of teaching, see WIPO & Ricketson *Study on Limitations and Exceptions* 12.

[997] Wu *Fair Use System* 283; LL Hu "Intellectual Property Protection for Shared Science and Technology Resources" in HD Ma & H Zhang (eds) *Studies on the Issues of Legislating for Shared Science and Technology Resources* (Beijing: China Univ of Political Science and Law Pr, 2008) 214 223 (Chinese version).

[998] Art 10 of the Berne Convention.

The reproduction exemption needs to be amended as follows. First, it should apply to preparatory activities before class and revisions after class. It should also apply to distance education and education for the disabled and the blind.[999] Second, teachers should be allowed to deal with reproduction of materials, translation, performances and broadcasting. They also should have a right to digitize works and distribute them for use on a diffusion service such as the Internet. Third, rather than simply prohibiting the distribution of copies, the reproduction exemption could allow certain types of distributions under certain conditions. The Copyright Law can follow the Berne Convention, which requires exempt usage be compatible with "fair practice" under national law.[1000] With the "fair practice" requirement the Convention intends to give Berne Union members the discretion to determine whether usage was fair or not under their laws and legal traditions.[1001] For example, a number of countries have a tradition of allowing free minor usage of copyrighted works that affect copyright holders' financial interests very little. Simply using a work that is non-commercial and does almost no harm to a right holder can be considered fair practice under national copyright law. Since China has a tradition of sharing knowledge, distributing copies for non-commercial education should be considered fair practice and permissible under Chinese copyright law.

6 3 4 2 Distance education

Despite the development of a national information network infrastructure and university collaborative projects, distance education remains underdeveloped as it faces copyright barriers. The following section examines laws governing distance education and evaluates the relevant parts of the Copyright Law.

Currently, an educational website run by an online school can furnish users with learning materials in two ways.[1002] One is to transmit digital materials from a web server to end users; another is to

[999] Brazil, Ecuador and Paraguay submitted a proposal to the WIPO for the adoption of a treaty for an improved access for blind and visually impaired persons in May, 2009, see W New "Proposed WIPO Treaty on visually impaired access gets deeper look" (29-5-2009) *Intellectual Property Watch* http://www.ip-watch.org/2009/05/29/proposed-wipo-treaty-on-visually-impaired-access-gets-deeper-look/ (accessed 27-10-2013). The proposed treaty draft can be found at www.wipo.int/edocs/mdocs/copyright/en/sccr.../sccr_18_5.pdf (accessed 10-09-2009).

[1000] Art 10(2) of the Berne Convention.

[1001] Hugenholtz & Okediji *Conceiving an International Ins*

www.wipo.int/edocs/mdocs/copyright/en/sccr.../sccr_18_5.pdf trument on Limitations and Exceptions to Copyright (2008) .

[1002] Ministry of Education *Provisional Administration Methods for Educational Websites and Online Schools of 2000*

make arrangements with a TV station and transmit TV programs over the Internet to end users.[1003] An educational website or an online school can provide a variety of higher education, adult education and vocational training programs.[1004] In short, educational institutions with an information network are able to provide distance education to differing groups of people at different levels and through different media .

The Information Network Regulations grant educational institutions a statutory license allowing them to pay copyright holders to use their copyrighted works as course materials and to distribute the materials over information networks. However, this statutory license only applies to educational material involved in state-funded compulsory education program for children, as well as other state-funded education programs for secondary schools and institutions of higher education.[1005] Teachers are allowed to use a single piece of literary or music work that is very short in length or small portions of a longer literary or music work, as well as a single piece of an artistic or photographic work for distance courses.

The statutory license is very restrictive. First of all, it does not apply to non-public non-profit schools. This is inconsistent with the policy of promoting education at all levels and encouraging the private sector to provide education to the public. Second, its use by state-owned educational institutions is quite restrictive, since teachers are limited in the scope and the amount of materials they can use. Therefore, educators have asked for a new statutory license that would allow them to use a broader range of copyrighted works with less quantitative restrictions. Moreover, they hope to be allowed to perform and display dramatic and music works for distance courses under a new statutory license.[1006]

The US TEACH Act[1007] may shed some light that is helpful for Chinese copyright law and its relationship with distance education. The TEACH Act expanded the scope of copyrighted works that teachers were allowed to utilize in a face-to-face classroom setting, and extended the

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(2000) http://www1.cnnic.cn/ScientificResearch/LeadingEdge/hlwzcyj/zcfg/201209/t20120915_36210.htm (accessed 29-10-2013), promulgated by the Ministry of Education on 29 June 2000.

[1003] Art 3 of the Provisional Administration Measures for Educational Website and Online Schools.

[1004] Art 6.

[1005] Art 8 of the Regulations on Protection of the Right of Communication through Information Network of 2006 Order of State Council [2006] No 468 (Information Networks Regulation).

[1006] G Li & Y Xiao "Copyright of Modern Distance Education" (2007) 3 *Journal of Radio & TV University (Philosophy & Social Sciences)* 107 (Chinese version).

[1007] Pub L No 107-273, 116 Stat 1758.

concession to application in an information network environment. Before the TEACH Act, teachers were only allowed to display slides or other still images and to perform music, videos, and other similar works in a classroom. With the introduction of the TEACH Act, teachers are now entitled to display or perform almost all types of copyrighted works. Educational institutions are allowed to digitize works and retain the digital material for students' access for a specific period. The TEACH Act also permits the copying and storage of copyrighted materials that are incidental in the transmission process, or are necessary for transmission over an information network.

Chinese copyright law can learn from the example set by the TEACH Act and relax the restrictions on teachers and educational institutions' digitization and online distribution of learning materials. First, Article 22 of the Copyright Law, that only exempts teachers' reproduction activities for classroom teaching, should be broadened to allow teachers to use a wide range of materials for both face-to-face classroom courses and distance learning courses. Teachers should be allowed to reproduce, display, perform and distribute copyrighted works over an information network for educational purposes.[1008] Second, non-public educational institutions should be allowed to use the same statutory license for public schools when they provide not-for-profit courses. In order to determine the eligibility of non-public education institutions in using the statutory license, the Ministry of Education can establish the appropriate criteria and procedures.

Chinese scholars are quick to point out that the proposal to broaden the statutory license to accommodate the growing needs of distance education is not meant to harm copyright holders' financial interests.[1009] This is because the license would only be applicable under certain circumstances and with certain conditions. First, teachers could be allowed to use an information network to provide students only with learning materials that are closely related to their teaching objectives. Second, the materials can only be distributed to students enrolled in a distance education course. Third, teachers and their educational institutions would be obliged to employ technological measures to prevent students from redistributing the materials in such a way that would significantly harm copyright holders' financial interests. Teachers should be obliged to remind their students that the materials they use are protected under copyright. Fourth, only educational institutions would be allowed to digitize works that do not have a digital version. If a work already has a digital version, teachers should use the digital version.

[1008] Gan & Yin (2007) *Journal of Radio & TV University* 107.

[1009] 107-108.

6 3 5 Limitations for libraries

6 3 5 1 Libraries' exemptions and a right to lend

Article 22(8) of the Copyright Law allows libraries to reproduce copyrighted materials in their collections for display or preservation, without the need for authorization. The Information Network Regulations that implement the Copyright Law has two exemptions for libraries.[1010] One exemption is for libraries to provide a digital version of a published work to readers with a reading system supported by Internet technologies on its premises. Here the libraries are required to employ technological measures to prevent readers from copying digital works from a reading system.[1011] Another exemption is for libraries to digitize a copyrighted work for display and preservation if the original is lost, damaged, or stored in an obsolete format, and is unavailable in the market at a reasonable price. Library exemptions do not apply if a library profits from digitization and distribution of a work. Moreover, neither exemption applies if a copyright holder declares in advance that any further distribution of a work is not allowed.

In China, conventional libraries have a right to lend the printed material in their collections to readers. The Copyright Law grants copyright holders a right to sell or donate an original copy of a work or copies of the original to the public.[1012] Simultaneously, the Copyright Law grants copyright holders a right to rent cinematographic works and computer software to the public.[1013] Clearly, the Copyright Law does not confer copyright holders a right to rent copyrighted works other than cinematographic works and computer software to the public. Therefore, libraries have only a public lending right to lend their collections to readers. The libraries also can make print copies of a work upon a user's request and give them to the user without infringing the copyright.

6 3 5 2 Legal issues and libraries

Both conventional and digital libraries [1014] risk infringing on copyrights when transmitting copyrighted material over an information network. Since the Copyright Law Amendments confers copyright holders with a right to communicate their works to the public via an information network, libraries in particular face a risk of infringing on the network communication right in the

[1010] Art 7 of the Information Networks Regulations.

[1011] Art 10(4).

[1012] Art 10(6) of the Copyright Law Amendments of 2001.

[1013] Art 10(7).

[1014] A digital library stores its collections in digital format and makes the content accessible by computer through information networks. Unlike a conventional library, a digital library does not need to store hardcopies of books. See D Greenstein & SE Thorin *The Digital Library: A Biography* (NY: Library and Librarians' Publication, 2002).

transmission process. There is an imbalance in the copyright law for while protection for copyright holders is strengthened in an information network environment, exemptions for libraries are neglected. Therefore, this part of copyright law needs revisiting to take into consideration that societal needs to access knowledge should be balanced with generous copyright exemptions.

Since lending digital material is different from lending print material in many ways, it is worth examining *Zheng v Shusheng*[1015] which is a landmark case that highlights issues relating to digital material being distributed over the Internet, before proceeding to evaluate the copyright law governing libraries and make suggestions as to how the law should be amended.

Shusheng Digital Technology was a company providing services for conventional libraries to digitize their collections. In 2003, the company established the Shusheng Digital Library and stored digitized materials in its database when asked to do so by its client libraries. It allowed the public to browse some of the works displayed on the Shusheng Digital Library website and distributed digital copies at a user's request. Zheng Chengsi found out that a number of his works were digitized and displayed online without his permission. In 2004, he filed a copyright lawsuit against Shusheng in the Haidian District Court, a Beijing court.

Shusheng first argued that a digital library should be treated as a conventional library under copyright law because they both provided similar services. On this ground, the Shusheng Digital Library had a right to lend digital material in its collection to the public. Second, it technically limited the number of readers who could simultaneously read a work online by allocating user names and passwords to the readers. Moreover, it employed "screen shot", an anti-copying protective measure, to prevent copying. Since readership was limited and copying was prevented, Shusheng argued that its reading service was strikingly similar to the service provided by a conventional library.

The Court did not find Shusheng's arguments convincing. First, it rejected Shusheng's analogy between a conventional library and a digital one and maintained that there was a significant difference between the two. The Court pointed out that lending hardcopies of a work has little effect on the market, but lending digital copies of a work can have a major adverse effect on a right holder's financial interest since a digital copy can easily be reproduced and distributed. Second, the Court maintained that the protection to prevent a massive distribution of copyrighted materials was

[1015] *Zheng Chengsi v Shusheng Digital Technology Co Ltd* (2004) Hai Min Chu Zi No 12509, affirmed by Beijing No 1 Intermediate People's Court (2005) Yi Zhong Min Zhong Zi No 3463.

technically ineffective and can easily be circumvented or bypassed. Moreover, the Court held that despite *Shusheng* employing technological measures to limit readership and prevent copying, it should nonetheless have obtained copyright holders' permission before distributing the works. Finally, the Court ruled that the plaintiff had a right to communicate copyrighted works to the public with an information network and Shusheng infringed upon the communication right.

There are several problems with the District Court's reasoning. First, the Court did not address the question of whether a digital library had a public lending right similar to a conventional library. It simply stated that the *Shusheng* Digital Library's distribution of copyrighted materials over an information network was impermissible because the distribution of digital copies would affect copyright holders' financial interests much more so than the distribution of print copies. However, this reasoning is unsustainable if a digital library uses technological measures that prevent copying and redistribution. In this situation, it is less legitimate to ban a digital library from providing digital copies to readers. Second, the Court should clarify whether *Shusheng* was entitled to invoke library exemptions under copyright law. Arguably, if *Shusheng* was qualified to apply for library exemptions, it would certainly be allowed to use non-authorized copyrighted works.

In 2005, the Beijing No 1 Intermediate People's Court rendered a final ruling and affirmed the Haidian District Court's decision. The Court clarified that *Shusheng* was a for-profit enterprise and therefore the *Shusheng* Digital Library was not qualified to apply library exemptions.

This case demonstrates new copyright issues emerging during the development of digital libraries. The first issue is what kinds of libraries can apply for library exemptions granted by copyright law? In the *Shusheng* case, the No 1 Intermediate Court judges made it clear that for-profit libraries like the Shusheng Digital Library were not qualified to be exempt. The Information Network Regulations take the same approach and state that libraries should not profit from reproduction and digitization of works in their collections for display or preservation.[1016] In practice, librarians suggest that only non-profit libraries should be allowed exemptions.[1017]

Under most circumstances, non-profit libraries are public ones. Zheng Chengsi held that only non-profit libraries open to the public established and financed by the state were eligible to apply for the

[1016] Art 7 of the Information Networks Regulations.

[1017] Q Wang & LY Chen "A Comparative Study of Copyright Exemptions for Public Good Libraries between Chinese and US Copyright Laws" (2008) 9 *Library Journal* 2 2-5 (Chinese version).

library exemptions.[1018] However, as China shifts to a market economy, non-state-subsidized libraries established by private donors or social entities can be non-profit entities as well. In order to encourage the private sector to provide library facilities to the public, the Copyright Law should not exclude them from applying for library exemptions.

Therefore, the Copyright Law should make it very clear that non-profit libraries, whether they are state funded or privately funded, can apply for the exemptions. Notably, the "non-profit" requirement does not imply that libraries cannot charge for their electronic reading system services. This is because libraries, particularly ones not subsidized by the state, need to recover their costs in maintaining their electronic reading systems and the equipment used for digitization.

A second issue is whether a digital library has a right to lend materials by means of an information network to the public in essentially the same way a conventional library lends the printed material. Zheng Chengsi pointed out that digital and conventional libraries have the same legal status and the same obligations under copyright law since they provide services of the same nature.[1019] Many copyright experts agree.[1020] Under this assumption, a digital library would have a public lending right to digitize and distribute works in its collections to the public. However, other copyright scholars agree with the judges of the *Shusheng* case and maintain that a digital library should not have a public lending right for the lending of digital copies threatens copyright holders' economic income.[1021]

It is inappropriate to apply a conventional library's lending right almost word for word to a digital library, since such a right would enable digital libraries to lend material in any manner unless copyright law states otherwise. Since information networks develop quickly, a lending right conferred on a digital library could possibly lead to consequences that adversely affect copyright holders' interests. Therefore, copyright law needs to conceive new and innovative exemptions for

[1018] CS Zheng "Library, Internet Service Provider, Internet Piracy and 'Balance of Interests'" (2005) 83(4) *China Patents & Trademarks* 69 69-70.

[1019] 70.

[1020] FR Zhan, CF Chen & Y Xiao "Some Recommendations for the Revision of 'Regulations for the Protection of Information Network Dissemination Right (Draft)'" (2006) 2 *Journal of Library Science in China* 5 5-8 & 14 (Chinese version); LB Deng "Regulations for the Protection of Information Network Transmission Right and Its Application in Library" (2007) 2 *Library Journal* 21 22 (Chinese version with English abstract).

[1021] ZH Zhou & JG Yan (eds) *Encyclopaedia of Chinese Intellectual Property Law Practice* (Beijing: Communication Univ of China Pr, 1992) 101 (Chinese version). Some scholars argue that it is the author, not the library, who has a public lending right, see XQ Feng & LH Yang *Research on Hot Issues of Intellectual Property* (Beijing: China People's Public Security Univ Pr, 2004) 317-318 (Chinese version).

libraries in a digital environment.

German copyright legislation offers an example of exemptions that allow public libraries, museums and archives to distribute digital materials with information networks.[1022] Public libraries are allowed to display copyrighted works at electronic reading places where patrons read them at electronic terminals. The exemption clearly takes copyright owners' interests into account. A library has to limit the number of digital copies that patrons can use simultaneously. The number of digital copies has to correspond to the number of print copies in the library's collection.[1023] In addition, public libraries are allowed to reproduce individual newspapers and magazine articles as well as small portions of published works, and disseminate copies by mail, fax and other electronic means.[1024] The "online-transmission at a user's request" exemption was fairly balanced against copyright holders' interests as it only applies to teaching and scientific research materials.

Chinese copyright law can borrow from German law and relax copyright restrictions on libraries. Libraries should have an exemption for providing digital material to readers with electronic reading systems as well as an exemption for transmitting digital material at a reader's request. The two exemptions can be applied with conditions. One condition is that users can only use digital material under these two exemptions only for such non-commercial purposes as study, research and teaching. Another condition is that the number of digital copies distributed to readers cannot exceed the number of print copies in a library's collection. Moreover, libraries must be required to employ technological measures to prevent large scale copying of material. However, users can be allowed to copy a portion of digital material as they are currently already allowed to copy print material. Publishers and libraries can negotiate the amount of work in digital form that users can copy. Copyright law can encourage publishers to allow library patrons to copy copyrighted works generously for private study, teaching and research purposes. At the same time, copyright law can also set out a minimal amount that publishers have to allow patrons to copy from a digital format work. This ensures on the one hand that copyright holders' financial interests are not significantly affected, since the number of same time digital copies is limited and mass copying is prevented technically. On the other hand, users can deal with material in digital form with copyright limitations and exceptions in much the same way as they work with printed material.

[1022] The Second Law for the Regulation of Copyright in the Information Society, became effective on 1 January 2008, English version available at International Association of Scientific, Technical & Medical Publishers "Update 'Second Basket' German Copyright Law" (1-10-2007) *stm* http://www.stmassoc.org/2007_10_01_German_Copyright_Law_Update_Second_Basket.pdf (accessed 27-10-2013).

[1023] Art 53b of the Second Law for the Regulation of Copyright in the Information Society.

[1024] Art 53a.

In addition to the issues just examined, the *Shusheng* case also has an additional implication. Shusheng argued that it did not seek copyright holders' permission to digitize works since locating large numbers of right holders was too costly. Although the argument was largely fallacious,[1025] it illustrates the problem that China lacks an efficient collective copyright management system enabling users to clear copyright with a blanket license. A judge of the Fifth Civil Tribunal of the Beijing No 1 Intermediate Court also pointed out that it was difficult for digital libraries to obtain a collective copyright license to digitize copyrighted works.[1026] Many university libraries could not provide the full text of books and other learning materials to their students for the same reason.[1027] At the same time, copyright holders have suffered financial losses as they were unable to collect royalty monies from scattered cyberspace users.[1028] Therefore, China urgently needs to develop an efficient collective copyright management system.

6 3 6 Conclusion

The Copyright Law of 1990, the Copyright Law Amendments and the Information Network Regulations give students, teachers, educational institutions and libraries a number of exemptions and statutory licenses that allow them to use copyrighted material without authorization. A major structural flaw of the Copyright Law is that it did not incorporate a three-step test similar to that adopted in the TRIPS Agreement laying out criteria for copyright limitations and exceptions. Since exemptions are enumerated definitively and exclusively, without a three-step test, judges lack flexibility to interpret and apply exemptions in different situations, particularly where an exemption cannot be applied in a straightforward way.

The limitations and exceptions for education and research need to be developed in a digital environment. First, the exemptions for educational purposes should be broadened. The reproduction exemption should cover reproduction activities for non-classroom educational programs such as distance education, as well as education for the disabled and the blind. In addition to reproducing or translating a work permitted under the current copyright law, teachers should be allowed to perform

[1025] JR Liu "New Development in Digital Copyright Protection in China — the Landmark Case of Zheng Chengsi v Shusheng" (2006) (5) *European Intellectual Property Review* 299 302.

[1026] J Zhao "Legal Issues of Copyright in Digital Library Building: A Chinese Judicial Perspective" (2005) 4 *China Patents & Trademarks* 60 62-63.

[1027] Zhao (2005) *China Pat & Trademarks* 63; P Zhang "The Issues of Digital Library Building and Copying Policy Study" (2001) 10 *Copyright* 11 11-13(Chinese version).

[1028] Liu (2006) *EIPR* 301.

and broadcast a copyrighted work. Distribution of a work being reproduced or translated should not be completely prohibited, but should be allowed with certain conditions.

Second, the statutory license for distance education should apply to non-profit institutions providing educational programs with no commercial gain. This would encourage the private sector to provide education to the public.

Third, copyright law should create new exemptions to allow such institutions as schools and libraries to distribute material over an information network, provided the institutions are non-profit organizations and do not profit from the distributions. Since teachers and library patrons are allowed to copy a small quantity of non-authorized print material for free, copyright law should ensure that they can deal with digital copyrighted material in essentially the same way by stipulating a minimal amount of a work that users can copy without authorization.

Finally, the exemption for private use of copyright works allows learners to use a work for study or research. It is important that unauthorized reproduction of a work for study and research be continued to be exempted from payment, while unauthorized reproduction for personal recreation should be exempted but subject to payment to copyright holders.

Case analysis shows that China urgently needs to improve the collective copyright administration system to ensure that libraries and educational institutions can continue to operate in the public interest, while at the same time abide by clear and consistent copyright legislation. It has been shown that compensating copyright holders with money from a levy system on equipment having a copying and storage function is not an optimal solution. Rather, creating and using a collective copyright organization to license copyrighted material to individual users on a collective basis would be a better solution. Therefore, it is essential to develop a collective administration system under copyright law.

6 4 Collective copyright management

6 4 1 Background

With increasing copyright trade, China needs to develop a collective copyright administration system within the framework of copyright law. On the one hand, collective societies are able to negotiate with foreign copyright holders to obtain a lower licensing fee for individuals, giving

Chinese users a greater access to foreign works. On the other hand, piracy, a pesky problem in China, can be reduced if copyright clearance is convenient and of low cost. Since Chinese copyright law is a "transplanted law" and China is lacking experience in establishing and managing a collective copyright management system, it is useful to learn from other jurisdictions where collective copyright administration has a long history and is far more developed.

The following section examines three collective administration models and reviews the development of collective copyright management in China. Against this background, it focuses on two issues that have incited major debates with regard to constructing a collective administration system in China. One issue is whether copyright law should grant the Collective Management Organization (CMO) a monopoly in the market, and the other issue is whether copyright law should authorize a CMO in one field of copyright to extend a collective license to non-member right holders of the same field. Finally, the following section suggests ways to amend the Copyright Law to promote the efficiency of copyright collective administration.

6 4 2 Three collective administration models

There are three distinct models of collective administration worldwide, namely the Continental European model, the Anglo-American model and the Nordic model. Europe has a long tradition of collective copyright administration.[1029] In many countries such as Germany, France and Spain, the establishment and operation of CMOs are under close government supervision.[1030] On the EU level, CMOs are subject to antitrust laws.[1031] The Nordic countries' copyright collective administration has an "extended collective licensing" system. Copyright law legally authorizes a CMO in one field of copyright to extend a collective license to non-member right holders of the same field. A user who contracts with a CMO can use both the CMO's members and non-members' copyrighted works under an extended license. Non-members are treated equally as members.[1032]

[1029] The first authors' society, the Société des Auteurs et Compositeurs Dramatiques, was established in France in 1777. From the end of the 19th century to the beginning of the 20th century, authors' organizations were formed in almost all European countries, see Ficsor *Collective Administration of Copyright and Neighboring Rights* 10.

[1030] Ficsor *Collective Administration of Copyright and Neighboring Rights* 75. In Germany, the Patent Office is the supervisory body of CMOs. However, it does not examine and approve tariffs for usage of copyrighted materials. Disputes over tariff must be brought to a special arbitration board, see Dietz (2000) *Intellectual Property Studies* 290.

[1031] Dietz (2000) *Intellectual Property Studies* 291.

[1032] Ficsor *Collective Administration of Copyright and Neighboring Rights* 35-36.

While the Nordic model provides an example of CMOs working with legislative support, the Anglo-American system shows that entirely private schemes could be efficient in copyright administration as well. For example, in the US, the Copyright Clearance Center (CCC) administering reprographic rights was set up with various bodies representing authors and other right holders.[1033] The CCC administers licenses on an individual basis with a licensing fee determined by each publisher.[1034] In the UK, copyright societies, such as the Copyright Licensing Agency (CLA), grant a blanket license to users with unified licensing conditions and a set fee.

6 4 3 CMOs in China

In China, the collective copyright administration system established within the framework of the Copyright Law is under-developed. The Copyright Law Amendments include a provision creating a collective administration system for CMOs. However, it was only until 2005 that the Collective Copyright Management Regulations[1035] (CCMR) implementing the CMO provision came into effect.[1036] Up to now, China has three CMOs that administer music works, audio and video recordings, and literary works.[1037]

The Chinese CMO system shares features with the Continental European model. First, CMOs operate on a trust relationship.[1038] On a legislative and a judicial level, Chinese legislators have

[1033] Ficsor *Collective Administration of Copyright and Neighboring Rights* 37. Also see Copyright Clearance Center "About Us| Copyright" *Copyright Clearance Center* http://www.copyright.com/ccc/viewPage.do?pageCode=au1-n (accessed 27-10-2013).

[1034] Ficsor *Collective Administration of Copyright and Neighboring Rights* 38.

[1035] Promulgated on 22 December 2004 and became effective on 1 March 2005.

[1036] Legislative progress has been slow largely because during the planned-economy era, authors were attached to their "work units" (places of employment) that administered copyright transactions for them.

[1037] The NCA and the Chinese Musicians' Association began the first CMO, the Music Copyright Society of China (MCSC) in December 1992. The MCSC is a member of the International Confederation of Societies of Authors and Composers (CISAC). Until 2005 it had collaborative agreements with 44 CMOs in different countries and regions. In 2005, the total licensing fees the MCSC generated amounted to RMB 64,405,700, an increase of 33.82% over the previous year, see the MCSC Annual Report of 2005 http://www.mcsc.com.cn/gsxx.htm (accessed 26-05-2010). In 2008, the long-awaited China Audio-Video Copyright Association (CAVCA) and the China Written Works Copyright Society (CWWCS) were set up.

[1038] Article 8 of the Copyright Law of 1990 allows copyright holders to "authorize" a CMO to exercise copyright and related rights such as broadcasting rights on their behalf. CMOs are entitled to bring an action against a third party and participate in arbitration and litigation in their own name. Since the Copyright Law does not clarify the nature of CMOs, Chinese copyright scholars generally agree that the relationship between a right holder and the CMO is a trust relationship, XY Yi "The Copyright Authorisation and Collective Copyright

indicated that CMOs operate on the basis of a trust relationship.[1039] In addition, copyright experts point out that Article 8 of the Copyright Law of 1990 makes it clear that CMOs must be non-profit. This non-profit requirement excludes copyright agencies that are for-profit.[1040] In short, right holders authorize CMOs to exercise certain rights for them on a basis of trust.

A second feature of the CMO system is that the establishment and operation of CMOs are under government authorities' close supervision. In order to establish a CMO, approvals need to be obtained from both the National Copyright Agency (NCA) and the Ministry of Civil Affairs (MCA).[1041] The CCMR provides that the departments in charge of copyright affairs under the State Council shall supervise the CMOs' operations.[1042]

A third feature is that CMOs have a monopoly granted by copyright law. The CCMR provides that there should be no less than 50 copyright holders to jointly establish a CMO.[1043] If a copyright holder contracts with a CMO to entrust certain rights to it, the CMO is entitled to exercise the rights exclusively within the contract term.[1044] The CCMR provides that only one CMO should administer one particular field of copyright and precludes the establishment of CMOs competing in the same field.[1045]

A fourth feature is that copyright holders join a CMO voluntarily. They authorize a CMO to administer their copyrights that are difficult to exercise on an individual basis, such as a

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Management of the Digital Library" (2004) 12 *Researches in Library Science* 36 37 (Chinese version with English abstract); JQ Zhou "The Legal Nature of Collective Copyright Management Organizations" (2003) 3 *Law Science Magazine* 47 47-49 (Chinese version); MR Mao & S Zhou "On the Collective Copyright Management System" (2002) 5 *Contemporary Legal Science* 61 (Chinese version) 62 (Chinese version); YX Zhan "On Collective Copyright Management" (2001) 9 *Law Science* 42 45 (Chinese version); XB Yu "The Issues of Collective Copyright Management Organizations as a Litigating Party" in Cao Jianming (ed) *Guide on Intellectual Property Trial* vol 7 (Beijing: Law Pr China, 2006) 212-215 (Chinese version).

[1039] See Supreme People's Court *Judicial Interpretation of Response to the Legal Issues between the Music Copyright Society of China and the Right Holders of Music Works of 1993* Judicial Interpretation (Civil Law Courts) [1993] No. 35 . Also see cases: *Music Copyright Society of China v Beijing Tuteng Digital Press Ltd* (2001) Yi Zhong Zhi Chu Zi No 224; *Music Copyright Society of China v Guangzhou Wangyi (NetEase) Ltd* (2002) Er Zhong Min Chu Zi No 03119.

[1040] GB Cui "The Anti-monopoly Regulation of Collective Copyright Management Organizations" in RG Shen (ed) *Digital Technology and Copyright* (Beijing: Law Pr China, 2004) 139 175 (Chinese version).

[1041] Art 3 of the CCMR.

[1042] Art 5.

[1043] Arts 6-7.

[1044] Art 20.

[1045] Art 7(2).

performance right and a broadcasting right.[1046] A fifth feature is that a national treatment principle applies to foreign copyright holders who are members of a foreign CMO that has a mutual representative agreement with a Chinese CMO, authorizing the Chinese CMO to administer their copyrights in the territory of China.

6 4 4 CMOs' monopoly

Whether or not the Copyright Law should grant CMOs a monopoly in the market is a controversial topic in China. Many scholars are concerned that CMOs would abuse the monopoly to prevent competition and prejudice the interests of copyright holders who have no choice but to authorize a CMO to administer copyright.[1047] For example, the China Audio-Video Copyright Association (CAVCA) is the only organization entitled to collect royalties for producers of audio and video recordings, which are used for commercial purposes such as operating a Karaoke bar. Therefore, commercial users of copyrighted works have to pay a set fee without much room for negotiation while right holders received a disproportionately small amount of money, as CAVCA deducts a considerable amount of the licensing fees as an "administration fee".

Other scholars and practitioners do not consider a monopoly for CMOs absolutely unacceptable. Some commentators realize that without a sound regulatory framework, a simple laissez-faire policy allowing free competition among CMOs would not promote collective administration efficiency.[1048] Others argue that a competition model is not necessarily more advantageous than a monopoly model[1049] and that the current monopoly model is preferable.[1050]

Very few countries grant CMOs a monopoly by law.[1051] However, in a great number of countries,

[1046] C Xu "An Interpretation of the Collective Copyright Management Regulation" (2005) 2 *Electronics Intellectual Property* 13 17.

[1047] XY Liu "Discussion on the Model for Collective Copyright Management in China" (2008) 3 *Social Science Research* 185 186 (Chinese version); L Yang "Expand the Room for Copyright Trade with Copyright Agency" *China Intellectual Property News* (26-09-2008) (Chinese version).

[1048] Liu (2008) *Social Science Research* 186.

[1049] Cui "The Anti-monopoly Regulation of Collective Copyright Management Organizations" in *Digital Technology and Copyright* 145.

[1050] L Zhou "Suggestions to Drafting the Regulations of the Copyright Collective Administration" (2004) 15 *Intellectual Property Studies* 266 268 (Chinese version); HY Lu "Development and Practice of Collective Copyright Management in China" in *Reference of the Trial on Intellectual Property Cases* vol 3 (Beijing: Fang Zhen Publishing, 2002) 17 17 (Chinese version).

[1051] The SIAE, the main CMO in Italy, is a public authority in a monopolistic position in the market. In the Netherlands

there is only one CMO per field of activity.[1052] Moreover, Ficsor points out that the vast majority of CMOs are in a *de facto* monopolistic position and that such a position is, under most circumstances, necessary for CMOs to function well.[1053] Therefore, to avoid CMOs abusing their monopoly, it is very necessary to impose legal restrictions, as well as administrative supervision, over CMOs.[1054] In many continental European countries such as Germany and France, collective societies are subject to a variety of government supervisions.[1055] In the UK, the Monopolies and Mergers Commission and the Copyright Tribunal have the authority to supervise collective societies.

In China, since the CMO system is under-developed, a legal monopoly would promote the CMOs' efficiency. At the same time, the monopoly should be under strict administrative supervision and subject to the control of an antitrust law. A major problem is that the legal and regulatory control over a CMO's monopoly is rather weak. CCMR simply provides that CMOs are subject to the MCA's supervision under the State Council.[1056] However, the MCA is an authority in charge of registering civil societies. Hence, it lacks expertise in supervising organizations specializing in copyright management. The NCA's control of CMOs is less than efficient as well.[1057] CMOs are subject not only to government supervision, but also supervision from copyright holders, users and other people who can report a CMO's misconduct to authorities.[1058] However, CCMR does not detail the procedures that an authority should follow to deal with such reports or complaints.

A number of measures ought to be taken to strengthen supervision over the CMOs. On the

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and Spain, the copyright law expressly discourages competition among CMOs, see DJ Gervais "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (2001) *Canadian Heritage* http://works.bepress.com/daniel_gervais/28/ (accessed 27-10-2013).

[1052] Ficsor *Collective Administration of Copyright and Neighboring Rights* 73.

[1053] 74.

[1054] Ficsor *Collective Administration of Copyright and Neighboring Rights* 74-75; Arts 85 & 86 of the Treaty of Rome; W Wallace "Control over the Monopoly Exercise of Copyright" (1973) 4(3/4) *International Review of Intellectual Property and Competition Law* 380 382.

[1055] In Germany, the Patent Office supervises collective societies; see Art 18(1) of the Law on the Administration of Copyright and Neighboring Rights of 9 September 1965 as amended on 2 May 1985. For France, see Intellectual Property Code Law No 92-597 of 1 July 1992, Art L 321-3, Arts L 321-11 & 12.

[1056] Arts 30-32 & 37-38 of the CCMR. Arts 37-38 provide that the NCA may supervise CMOs inspecting their accounting books, annual budget and finance reports, as well as other relevant documents and by sending an observer to attend major meetings, such as the general assembly of members and meetings of the board of directors of those organizations.

[1057] Cui "The Anti-monopoly Regulation of Collective Copyright Management Organizations" in *Digital Technology and Copyright* 152.

[1058] Arts 33-36 of the CCMR.

administrative level, a division could be established under the NCA to monitor the CMOs' operation.[1059] This division could designate representatives to attend a CMO's major meetings, such as the general assembly of members and meetings of the board of directors, and require the CMOs to submit regular financial reports to the division. On the judicial level, judges should apply relevant provisions of the Anti-monopoly Law[1060] to limit CMOs using their monopoly to manipulate the market.

6 4 5 CMOs' inability to represent non-member right holders

A major reason for collective copyright administration inefficiency is that a CMO only can administer one field of copyright for right holders who are its members. According to the Copyright Law and CCMR, a CMO administers the rights its members voluntarily entrust to it. CCMR implies that a CMO cannot administer non-members' rights unless a user requests for it to do so. However, in China, a large number of copyright holders are not CMO members. In particular, since copyright law contains a number of statutory licenses that allow users to pay to use specified copyrighted works without the right holder's prior authorization, copyright holders found it difficult to collect payment from scattered users for copyrighted works used under statutory license. Moreover, foreign right holders only can exercise their rights in China by authorizing a Chinese CMO to represent them through a foreign CMO that has a bilateral representative agreement with a Chinese CMO.

In order to enable CMOs to collect usage charges for copyright holders whose works are used under statutory license, CCMR gives CMOs' licenses a limited extending effect.[1061] For example, a user who needs to broadcast a piece of music for a commercial purpose can submit usage charges to Music Copyright Society of China (MCSC). MCSC then has an obligation to collect and distribute the usage charges to a right holder, regardless of the right holder's membership. The CCMR obligation gives a CMO agreement a *de facto* effect to cover all works of the same category. Nonetheless, the extending effect is very limited, since a CMO does not have the right to positively

[1059] In China, the Ministry of Commerce and the State Administration for Industry & Commerce supervise issues related to anti-monopoly. It is unclear whether the NCA is empowered to monitor CMOs' monopoly, see Cui "The Anti-monopoly Regulation of Collective Copyright Management Organizations" in *Digital Technology and Copyright* 173 & accompanying n 3.

[1060] Anti-monopoly Law of 2007 Order of the President of PRC No. 68 (2007), adopted on 30 August 2007 and came into effect on 1 August 2008.

[1061] The Appendix of the CCMR provides that if a user exploits a copyrighted work but cannot find a right holder to pay, the user should submit usage charges to a CMO administering the same category of copyrighted works as the one being used, see Art 47 of the CCMR.

license non-members' copyrighted works to users. Rather, it simply is obligated to collect licensing fees for non-member right holders whose works are used under a statutory license.

To improve the CMOs' efficiency in administering copyright, the Copyright Law should introduce an extended collective licensing system to authorize CMOs to extend their copyright licenses to cover non-members' works. This would be similar to the one used in Nordic countries.[1062] An extended collective licensing system means that copyright law presupposes one organization represents one group of right owners in a particular copyright field, and is empowered to negotiate and enforce contracts on their behalf. This copyright law then prescribes that such contracts apply to right owners who are non-members of the organization. With this legally extended contract, a user who contracts with the organization is entitled to use all materials covered by the contract. Non-member right owners are treated in the same way as members, and have a right to be paid and a right to withdraw from the extended license.[1063] A reciprocal treatment doctrine applies to foreign right holders.[1064]

An extended collective licensing system has the following characteristics:[1065] 1) The CMO must represent a substantial number of right holders; 2) The CMO negotiates with the represented right owners for an agreement that is legally binding on non-member right holders as well; 3) Users who contract with a CMO have the right to use all the copyrighted works in the CMO's repertoire; 4) Non-represented right holders have a right to be paid for their works; and 5) Non-represented right holders can withdraw from the system and prohibit the use of their works at any time.

An extended licensing system is particularly beneficial for the education sector in Nordic countries. For example, in Sweden, the extended licensing system applies to reprographic reproduction of

[1062] Liu (2008) *Social Science Research* 187; Liang *Digital Copyright* 171; Chen *Copyright in the Science and Technology Periodicals* 242.

[1063] H Olsson *The Extended Collective License as Applied in the Nordic Countries* (20-5-2005) presentation delivered on *KOPINOR 25th Anniversary International Symposium*, Oslo, 20-05-2005 http://international.kopinor.no/opphavsrett/artikler_og_foredrag/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries (assessed 27-10-2013) .

[1064] For example, see Art 42 of the Swedish Act on Copyright in Literary and Artistic Works of 1960, as amended up to 1 July 2005.

[1065] World Intellectual Property Organization & International Federal of Reproduction Rights Organizations *Collective Management in Reprography* (Geneva: WIPO/Brussels: IFRRO, April 2005). Also see DJ Gervais "Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation" (01-06-2003) study prepared for the *Department of Canadian Heritage*; *Vanderbilt Public Law Research Paper* No 11-26 http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf (assessed 27-10-2013) .

printed materials and recordings of radio or TV programs for educational use. The license applies to many kinds of works, including those in digital form, for educational activities, provided that they have been made available to the public.[1066]

It is feasible for China to adopt an extended licensing system within the framework of the Copyright Law. First, since the CMOs operate on a trust relationship, they are able to enforce their members' copyrights in the name of their members. Under an extended licensing system, CMOs can protect non-member copyright owners' rights in the same way. Second, most of China's CMOs represent a substantial number of music work right holders as well as video and audio recording right holders.[1067] The large membership makes it possible for the Copyright Law to extend the CMOs' collective licenses to non-members' works of the same category. Third, since China is a member of international treaties such as the Berne Convention and the TRIPS Agreement, a national treatment doctrine applies to foreign copyright holders. Therefore, foreign copyright holders would be treated equally to domestic ones under an extended license. Moreover, CMOs benefit from an extended licensing system, because an extended license allows them to have large repertoires, thus giving them greater credibility. Finally, the education sector will benefit from an extended licensing system since they can reproduce and distribute a wider range of copyrighted materials under an extended license.

In order to establish a framework for an extended licensing system based on the Nordic model, a number of issues must be addressed. First, how does a CMO efficiently distribute royalties to non-member right holders? Professor Gervais conducted research on adopting an extended licensing system in Canada and worked out a two-step payment system of payment that is worth considering.[1068] In the first stage, CMOs under an extended license receive royalties which they then pay to their member right holders. In the second stage, CMOs contact the non-member right holders and send royalties to them.[1069]

[1066] Olsson *Extended Collective License*.

[1067] In 2001, in preparation of the CAVCA, more than 70 per cent audio-visual producers signed agreements with the CAVCA authorizing it to administer their rights, see C Xu "Collective Administration of Copyright in China" (July-September 2005) *e-Copyright Bulletin* 1 http://portal.unesco.org/culture/en/files/28721/11513331721xu_chao_en.pdf/xu_chao_en.pdf (accessed 27-10-2013).

[1068] Gervais *Application of an Extended Collective Licensing Regime in Canada* 30-32.

[1069] 30-31. To determine whether CMOs make reasonable efforts to contact right holders, administrative authorities can impose rules of conduct that CMOs must follow. Alternatively, authorities can encourage CMOs to adopt a best practice code. A CMO also can send royalties to foreign right holders if they are represented by a recognized CMO in their own countries. If there is not a CMO representing a right holder in his or her home country, the CMO that received monies

Second, under what conditions can right holders withdraw from a CMO? The answer is complex for the Nordic countries have differing regulations. In Denmark, a right holder needs to give a CMO three months' advance notice to indicate an intention to withdraw from the CMO.[1070] The Statutes of the Swedish Performing Rights Society stipulates that a right holder must sign an affiliation contract with a CMO for at least five years.[1071] In order to terminate the contract, written notice must be submitted to the CMO's council.[1072] However, a right holder has to wait at least two years after joining the CMO before presenting such a notice.[1073]

Third, how many members should a CMO have before being qualified to apply an extended license? Although all Nordic copyright laws require that a CMO must represent a "substantial" or a "considerable" number of members, none of them stipulates an exact number. It is important for a CMO to represent a substantial number of right holders, since it would then be easier to contact most right holders of the same category of works and pay them efficiently. However, it is impossible for a copyright law to set a minimal number of members for a CMO to be qualified to extend a collective agreement. The practice in the Nordic countries is for the Ministry of Culture or the Ministry of Education to lay out the criteria for the establishment of a CMO as well as the authority to approve a new CMO.

In China, the Copyright Law can establish an extended licensing system based on the framework of the current CMO system with the following amendments. Article 8 of the Copyright Law needs to include a clause providing that a CMO can apply to extend a collective agreement under certain conditions. Examples of such provisions can be found in the Nordic countries' copyright laws.[1074] Then the Copyright Law can authorize the State Council to revise CCMR to set out operational details pursuant to Article 8 of the Copyright Law. The revised CCMR needs to put forward the

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must use a variety of techniques to locate the right holder. In the second stage, CMOs need to establish and manage a fund for the remuneration of right holders who cannot be located immediately. A fund is established to retain the royalty money for unfound right holders because at some future time a right holder might appear or a new CMO representing the right holder might be established later near where the right holder resides.

[1070] 32, citing relevant Denmark law from http://www.senat.fr/lc/lc30/lc301.html (accessed 27-05-2010).

[1071] §6 of the STIM *Society Statutes of the Swedish Performing Rights Society of 2005* (25-11-2005, 8-12-2005) http://www.stim.se/en/This-is-STIM/Our-assignment/Statutes/ (accessed 29-10-2013).

[1072] §10.

[1073] §10.

[1074] For example, see s 50 of the Danish Copyright Act of 1995, as amended 30 June 2006; S 36 of the Norwegian Act Relating to Copyright in Literary, Scientific and Artistic Works, etc of 1961, as amended 22 December 2006; S 26i of Swedish Act on Copyright in Literary and Artistic Works of 1960, as amended 1 July 2005.

basic features of this system: 1) The CMO must represent a substantial number of copyright holders; 2) The CMO and the users have the right to negotiate an agreement, and the agreement can be extended to bind non-represented copyright holders; 3) Under the extended agreement, users have the right to use all copyrighted works in the CMOs' repertoire; 4) Non-represented right holders have a right to be remunerated; 5) Non-member right holders have the right to opt out of the extended license as well as to prohibit the use of their own works.

CCMR can make the mechanism for payment a two-step process. The NCA, the administrative authority that currently supervises CMOs, can oversee their payment to non-members as well. In order to ensure CMOs make reasonable efforts to contact right holders, the NCA can enforce rules to regulate payments. These rules should include the methods a CMO should use to locate right holders and the methods to make a payment to a right holder. The rules need to require the CMO to contact a right holder within a specified period, starting from the day the CMO receives a payment in relation to the right holder's work.

Currently, CCMR allows CMOs to determine, in their articles of association, the conditions for a right holder to withdraw from a CMO. A right holder can opt out of a CMO as long as the person complies with the procedures prescribed in the CMO's articles of association. When a right holder presents a request to withdraw from a CMO, but the CMO has already licensed the right holder's works to users, CCMR provides that the license contract is enforceable until expiration. However, after receiving a withdrawal request, the CMO must not license the right holder's works to new users. The right holder is still entitled to receive payment for works that are used until the contract expires.[1075] This rule protects right holders' financial interest by maintaining their right to payment within the contract term. At the same time, the rule guarantees that users can use works even in an unexpected or unforeseeable event, such as a right holder withdrawing from a CMO before the contract expires. Thus, this part of CCMR dealing with a right holder's withdrawal from a CMO does not need to be changed.

Since representing a number of copyright holders in a field is the prerequisite for a CMO to extend a collective copyright license, the NCA approving the establishment of a new CMO should also have the discretion to determine whether a CMO represents enough right holders in order to extend the collective agreement. The Ministry of Education and the Ministry of Culture also need to be involved in determining whether a CMO is qualified to apply for an extended license. The Copyright Law can direct administrative authorities to give CMOs the power to extend their

[1075] Art 21 of the CCMR.

collective agreements on a case-by-case basis.

Finally, copyright law should provide dispute settlement procedures for differences over usage tariff and licensing terms. Moreover, copyright tribunals at the national and regional levels should be established. Currently, the NCA is not entitled to designate a tribunal for copyright arbitration.[1076] Nor is there any tribunal or court specializing in copyright-related issues. Therefore, the Copyright Law should establish a national copyright tribunal to deal with copyright disputes and supervise CMOs nationwide.[1077]

6 5 Conclusion

Chinese copyright law was a "transplanted law" with a concept of copyright introduced to China in the late 19th century. China's modern legal system was developed with a strong civil law influence, and the copyright law is no exception. Similar to European copyright laws, the Copyright Law of 1990 adopts a closed system that definitively and exclusively enumerates limitations and exceptions. However, with increasing societal needs in the education and research sectors, this closed system is not able to adapt to different situations, particularly in today's rapidly evolving digital environment.

In China where the economy is booming and the copyright trade is becoming more and more active at home and abroad, a utilitarian approach needs to be taken with regard to copyright legislation, which should balance the interests of authors, derivative copyright holders such as publishers, and end users. A utilitarian approach also ensures that the education and research sectors can continue to operate in the public interest with copyright limitations and exceptions.

In order to give more flexibility to copyright exceptions, the Copyright Law of 1990 should incorporate a three-step test so that judges can determine whether to exempt a use of a copyrighted work, if such use is not clearly stated under the law. For education at all levels and for research purposes, exceptions should be generously broadened to allow teachers to reproduce and distribute copyrighted materials. Library exceptions also should be broadened and new exceptions created to

[1076] *National Copyright Administration Response to the Question regarding the Arbitration Organ of Copyright National Copyright Administration [2006] No 67* (26-07-2006) http://www.ncac.gov.cn/cms/html/205/1910/200911/693161.html (accessed 27-05-2010) (Chinese version).

[1077] Zhou (2004) *Intellectual Property Studies* 282. Nevertheless, Cui argues that a court can settle copyright disputes. Therefore, it is unnecessary to establish specialized tribunals or other bureaus to deal with copyright disputes. See Cui "The Anti-monopoly Regulation of Collective Copyright Management Organizations" in *Digital Technology and Copyright* 169 & accompanying n 2.

encourage libraries to distribute copyright materials using an information network. In addition to scrutinizing the exemptions for educational institutions and libraries, this chapter also examined private use exemptions, since individuals could use unauthorized copyrighted materials for self-education. It is suggested that when dealing with unauthorized copyrighted materials for private study, its exemption from payment should be continued. Unauthorized reproduction for one's own entertainment can be exempted but subject to a payment made to a CMO.

This chapter also examines issues involved with a statutory license for textbook writing and a statutory license for distance education. These two licenses need to be broadened to enable educators to deal with a wider range of copyrighted materials in an information network environment. Moreover, since users are required to pay copyright holders for works used under statutory license, a well-functioning collective copyright administration system within the framework of the Copyright Law will ensure that users pay licensing fees easily, and that copyright holders are financially rewarded.

An efficient collective administration system would give Chinese users greater access to copyrighted materials and reduce piracy. However, the current collective administration system is under-developed and inefficient. The Copyright Law needs be amended to strengthen administrative regulation and judicial control over the CMOs' monopoly. An extended licensing system similar to the Nordic model should be established to enable a CMO to extend a collective license to non-members.

In short, China needs to reform copyright law in a digital environment and ensure that limitations and exceptions granted by copyright law continue to benefit the sectors of education and research, as this is in the public interest. While China has an advanced information network infrastructure able to distribute learning and research materials at a low cost, individuals and institutions will not be able to freely reproduce and distribute such materials for education and research, unless the Copyright Law relaxes its restrictions on dealing with copyrighted works for matters in the public interest. Therefore, it is critical for China to continue to update and further develop its Copyright Law in favor of education and research.

Chapter Seven

China: Copyright Issues in a Digital Environment

The Copyright Law of 1990 mainly deals with paper-based copyrights. This 1990 law was amended in 2001 in order to address issues arising in an information network environment. Nevertheless, the piecemeal approach adopted by the Copyright Law Amendments of 2001 no longer meets the needs of rapidly developing digital technology and the expanding market of copyrighted products, which requires a more comprehensive revision of copyright laws in China. The Copyright Law of 1990 along with the Copyright Law Amendments enacted in 2001 are undergoing a significant reform since 2012.

Among other things, a new Copyright Law should redefine copyrights such as the reproduction right and the communication right and create new rights and exemptions in an information network environment. Lawmakers, when amending the existing copyright laws, should take into account the interests of ISPs and device manufacturers producing devices with a copying and storage function or those with a circumvention function. The validity and enforceability of such licenses as shrink-wrap and click-wrap ones that are used to preclude statutory copyright exceptions, need to be dealt with as well. In addition, policymakers should encourage copyright holders and authors to grant open licenses allowing wide access to their works while not significantly affecting their financial income. It is worth emphasizing that changes to copyright law require maintaining a delicate balance between the interests of copyright users and copyright holders, particularly in the areas of education and research.

7 1 Copyright in a digital environment

The following section examines the issues relating to a reproduction right, a right to communicate a copyrighted work over an information network and ISPs' liability for providing material that infringes upon copyright. It begins with examining a landmark case and then uses the case to illustrate the major issues that the Copyright Law of 1990 and the Copyright Law Amendments have yet to address. It endeavors to evaluate the current copyright law regulating the above issues and suggests amendments to the copyright legislation.

7 1 1 *Wang Meng et al* v *Century-Online Company*[1078]

In 1999, Wang Meng, a well-known Chinese writer, and five other writers sued the Century-Online Company as the company displayed their copyrighted works on its website without authorization. The displayed copyrighted works were uploaded by users of the company's network services. There were three copyright-related issues in this case. First, whether digitizing printed material constituted a reproduction protected under copyright law. Second, whether there was a copyright for the transmission of copyrighted material over the Internet that was independent and different from the reproduction right and the distribution right. Third, whether Century-Online should be liable for the unauthorized user-uploaded copyrighted material, which was not subject to the company's editorial control.

The Haidian District Court held that the digitization of printed material constituted reproduction protected under copyright law. This is because digitizing a work simply converts printed words into digital codes and does not create a new work. The Court then analyzed whether the storage and display of unauthorized copyrighted materials over the Internet infringed copyright. The Court relied on Article 10(5) of the Copyright Law of 1990 that provided copyright holders with a right to be paid for the use of their works such as broadcasting, publishing, performing and making a video or audio recording. The Court pointed out that the "such … as" wording was open-ended and therefore, to transmit copyrighted material over the Internet was analogous to conventional communicative activities like broadcasting. Consequently, copyright holders have a right to communicate their works to the public over the Internet. The Internet communication right is similar to other public communication rights such as a right to perform and a right to broadcast. It differs from the reproduction right and the distribution right. The Court concluded that Century-Online infringed upon the six writers' Internet communication right.

Finally, the Court examined whether Century-Online should be liable for the user-uploaded copyright infringing material that was stored on the company's web server. Century-Online argued that it did not have editorial control over the uploaded material but simply stored and transmitted it with its network services. It deleted the infringed material immediately when the lawsuit was initiated. Moreover, the company did not profit from the copyright infringing material. Here, the Court categorized Century-Online as an Internet Content Provider (ICP) whose major business was to provide various content to attract readers. It held that an ICP was much like a publisher and had a responsibility to examine the legality of uploaded material. Moreover, since it was in Century-

[1078] (1999) Hai Zhi Chu Zi No 57.

Online's interest to encourage users to upload materials to increase the number of people browsing its website, whether the company directly profited from uploaded materials or not was not a factor for consideration. The Beijing No 1 Intermediate People's Court affirmed the Haidian District Court's holdings.

The *Wang Meng* decision demonstrated that the Copyright Law of 1990 law needs to be further developed to address copyright issues in a digital environment. First, whether digitization was a reproductive means under the copyright law protection needs legislative affirmation. Second, it was correct for judges to consider the transmission over the Internet of a communicative activity to be similar to traditional communicative activities and hold that copyright holders have a communication right for online transmission. However, it was obviously more advantageous to prescribe an information network communication right in the text of the Copyright Law 1990 to give stakeholders more legal predictability. Third, it is necessary for the Copyright Law to define an ICP and an ISP. Definitions would give judges clear statutory criteria to determine a service provider's liability if it carries infringed material while providing its services.

7 1 2 Key issues

This section continues with an examination of the Copyright Law of 1990, the Copyright Law Amendments of 2001, the Information Network Regulations of 2006 as well as other pertinent copyright regulations to determine whether the current copyright law system has sufficiently addressed the issues raised in the *Wang Meng* case. Of particular importance is the Information Network Regulations promulgated to implement the WIPO Internet Treaties that entered into force in China in 2007. It is the first legal instrument dealing with a number of copyright-related issues in a network environment. For example, it provides details of an information network communication right and stipulates liability for ISPs providing different services.

7 1 2 1 The reproduction right

Reproduction rights needed to be redefined in a digital environment. The first issue is whether digitization is a reproductive means that is protected under copyright law. The answer is straightforward: a copyright holder has a right to digitize a copyrighted work and then to reproduce that digitized work. The Copyright Law Amendments include a non-exhaustive clause defining reproduction as making copies by printing, photocopying, lithographing, making a sound or video recording, duplicating a recording or a photographic work, or by other means.[1079] The Regulations

[1079] Art 10(5) of the Copyright Law Amendments of 2001.

on Copyright of Digital Products of 2000[1080] provides that converting a work protected under copyright into digital codes, and storing the digital codes into a medium such as a CD or a DVD, constitutes reproduction that is protected under the Copyright Law of 1990.[1081] The *Wang Meng* decision also held that digitization constituted reproduction protected under copyright law.

However, it is unclear under the Copyright Law Amendments as to whether copyright holders have a right to digitize their works. Consequently, the judiciary does not have certainty and guidance to determine whether digitization should be protected under situations similar to the *Wang Meng* case. The Copyright Law Amendments should keep the open-ended clause to accommodate new reproductive means that may emerge in the future. At the same time, it should stipulate clearly that a copyright holder has a reproduction right for digitization.

A second issue is whether temporary reproduction that occurs in the process of information network transmission should be protected under copyright law. Both the Copyright Law Amendments and the Information Network Regulations did not deal with the issue, since copyright scholars and practitioners have very different views on this issue. A number of Chinese copyright scholars opposed copyright law giving copyright holders exclusive control over temporary reproduction as temporary reproduction did not permanently store a copy that could be used to substitute for an original copy.[1082] However, temporary reproduction could technically facilitate information transmission and computer processing. Therefore, if right holders have exclusive control over each and every temporary reproduction, the Internet would not be able to function properly and Internet users' access to digital material will be hampered.[1083] Moreover, since the WCT does not oblige contracting parties to protect temporary reproduction, China does not need to protect temporary reproduction under its copyright law.[1084]

Liang Zhiwen, a prominent Chinese scholar, categorizes temporary reproduction into three types:

[1080] National Copyright Administration *Regulations on Copyright Issues regarding the Production of Digital Products* National Copyright Administration [1999] No 45 (Regulations on Copyright of Digital Products), promulgated by the NCA on 9 December 1999 and in effect on 1 March 2000.

[1081] Arts 1& 2 of the Regulations on Copyright of Digital Products.

[1082] XL Peng "Reconstruction of the Copyright Law in the Digital Era" (2005) 2 *Intellectual Property* 23 26 (Chinese version).

[1083] Peng (2005) *Intellectual Property* 27.

[1084] L Zhu "Does the Temporary Production Constitute the Reproduction in the Meaning of Copyright Law — A Normative Analysis Based on International Conventions" (2007) 1 *Electronics Intellectual Property* 22 23-25 (Chinese version).

the first type technically enables computers to process information; the second type facilitates computers to browse web pages; and the third type is used for proxy and router caching.[1085] He points out that temporary reproduction which merely enables computers to process information without independent financial significance should not be protected under copyright law.[1086]

Nevertheless, other copyright scholars argue that the Copyright Law should protect temporary reproduction.[1087] Those who maintain copyright law should protect temporary reproduction have differing views in relation to the conditions under which temporary reproduction should be protected. Some scholars argue that temporary reproduction is essentially part of an online transmission, and should be protected under an information network communication right.[1088] Others suggest that temporary reproduction should be a reproduction right.[1089] For example, Liang notes that since temporary reproduction could possibly be more economically significant than other network transmission-related activities, it should be protected as a reproduction right.[1090]

In short, the Copyright Law should stipulate that a copyright holder has a right to digitize his or her work in order to reproduce it. It would be reasonable for copyright holders to have a reproduction right for temporary reproduction with distinct economic significance. At the same time, an exemption should be crafted for temporary reproduction merely enabling information processing. This would protect copyright holders' interests in cyberspace while allowing free flow of information over the Internet.

7 1 2 2 The right of communication with an information network

Before the Copyright Law of 1990 was amended in 2001, copyright scholars and practitioners had differing opinions on whether transmitting a work over an information network should be protected under copyright law. One view held by the judges of the *Wang Meng* case and a number of copyright scholars was that a copyright holder should have a distribution right to transmit a

[1085] Liang *Digital Copyright* 45.

[1086] 55 & 57.

[1087] Liang Zhiwen *On the Digital Copyright* (2007) 42-43. For example, it is argued that Article 16 of the Regulations on Protection of Computer Software implies that a temporary storage of software in a computer is a reproduction of it, see M Ying "Reflection on the Copyright Protection for Temporary Reproduction in Users' Browsing Process" (2004) 3 *China Copyright* 5 7 (Chinese version).

[1088] Peng (2005) *Intellectual Property* 29.

[1089] Hu "Intellectual Property Protection for Shared Science and Technology Resources" in *Studies on the Issues of Legislating for Shared Science and Technology Resources* 222 (Chinese version).

[1090] Liang *Digital Copyright* 44.

copyrighted work over an information network.[1091] A second view, held by Jiang Zhipei, the former Chief Judge of the Supreme People's Court, was that online transmission comprised a series of such activities as uploading, downloading, forwarding, pasting, saving to disc or cache, and digitization.[1092] Therefore, copyright law did not need to create a separate right to protect transmission. Rather, traditional copyrights such as a reproduction right were sufficient to protect copyright holders' interests in the process of transmission. A third view was that transmission over information networks was distinct from reproduction, distribution and wireless broadcasts. Therefore, copyright law needed to create a new, independent right to protect online transmission.[1093]

Traditionally, a copyright holder would determine when and where to communicate a work to the public. However, an information network is very different due to its interactive nature, so a copyright holder would be able to send a copyrighted work to a user on request. Therefore, it is necessary for copyright holders to have a new right to control the transmission of their works in cyberspace. However, there exists a legal problem, as the existing distribution right cannot protect a copyright owner's interests when dealing with information network transmissions, since the right only applies to material articles, not digital codes. A reproduction right is too narrow in scope to protect online transmission. Therefore, it would only seem right for the amended Copyright Law to have a new communication right that deals with online transmission.

The Copyright Law Amendments of 2001 conferred on copyright holders a number of rights when communicating their works to the public, including an exhibition right,[1094] a performance right,[1095] a presentation right[1096] and a broadcasting right.[1097] In addition, it includes a new

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[1091] XQ Feng &LH Yang "Amend and Perfect the Copyright Law in China under the Challenge of Information Technology" (1998) 4 *Intellectual Property* 21 22 (Chinese version).

[1092] ZP Jiang "On the Establishment of an Information Network Transmission Right" *WTO Law Forum* http://www.wtolaw.gov.cn/display/displayInfo.asp?IID=200209200812073289 (accessed 27-10-2013) (Chinese version).

[1093] FD Liu "Preliminary Thoughts on the Legal Nature of Transmitting Works to the Public over the Internet" (1998) 4 *Intellectual Property* 28 30 (Chinese version).

[1094] Art 10(8) of the Copyright Law Amendments of 2001. It is a right to display publicly an original copy or reproductions of an original copy of fine art or a photographic work.

[1095] Art 10(9). It is a right to perform a work publicly and to communicate the performance of the work by any means.

[1096] Art 10(10). It is a right to present an artistic work, a photographic work, a cinematographic work and works made by means of cinematography by projector, slide projector or any other similar instrument.

[1097] Art 10(11). It is a right to broadcast or communicate a work to the public by any wireless means, to communicate works being broadcast to the public by wire or by rebroadcasting, and to communicate works being broadcast by

"right of communication through [an] information network".[1098]

For the first time copyright legislation in China introduced an information network communication right that differs from traditional communication rights. The Copyright Law Amendments provide copyright holders with a right to make a work available to the public in such a way that a member of the public can access the work at a place and at a time the member chooses.[1099] The Information Network Regulations provide that copyright holders have a right to communicate their literary works, performances, sound and audio recordings to the public using an information network, or by authorizing others to do so.[1100] Anyone who wants to upload copyrighted material to an information network so the public can access it should first obtain authorization and pay the owner of the work.[1101]

Subsequent to the 2001 amendments, in a number of cases where unauthorized literary and music works as well as films have been distributed over the Internet, Chinese courts have held that copyright holders have a right of communication with an information network, and that the unauthorized distribution of copyrighted materials over the Internet infringed upon the information network communication right.[1102] This shows that the new communication right protects Chinese copyright holders' interests for online transmission. Moreover, an information network communication right not only protects copyright holders on the Internet, but also protects them in situations where other types of communication technology are used.[1103]

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loudspeaker or any other similar instrument transmitting signs, sounds or images to the public.

[1098] Art 10(12).

[1099] Art 10(12).

[1100] Art 26 of the Information Network Regulations.

[1101] Art 2.

[1102] *Beijing Chinese All Co Ltd v China Tietong Group Co Ltd* (2007) Xi Min Chu Zi No 06397; *Beijing Ciwen Film & TV Production Co Ltd v Xingmei Digital Co Ltd* (2007) Yi Zhong Min Chu Zi No 4885; *Edko Films Ltd v United ITV Inc* (2007) Yi Zhong Min Chu Zi No 909.

[1103] Examples are digital television and third generation mobile communication technology (3G) that provide interactions among users, mobile manufacturers, service providers and content providers. With an information network communication right, copyright holders are better protected in a multimedia environment with an interactive information network system. See WG Wu "Regulating the Right of Information Communication in China" (2008) 2(1) *International Journal of Intellectual Property Management* 59 61. For an explanation of 3G service, see EUROPA "Third-generation mobile communications" (04-09-2006) *EUROPA Summaries of EU Legislation: Information Society* Explanation of 3G service http://europa.eu/legislation_summaries/information_society/l24202a_en.htm (accessed 27-10-2013).

7 1 2 3 ISPs' liability

7 1 2 3 1 The legislation and cases

In China, a large number of copyright litigations were launched against search and linking service providers. Hence, the following section pays special attention to the liability applicable to search service providers. Relevant legislation and cases are examined to show the deficiencies of the current state of the Copyright Law, and suggestions are provided regarding the possible amendments to the current legislation.

The Copyright Law Amendments do not state any principles relating to ISPs' tort liability arising from storing and transmitting material that infringes copyright. Therefore, general civil law principles will apply. According to the General Principles of the Civil Law of 1986, a party has fault liability when that party intentionally or knowingly commits some wrong. Under certain circumstances, a party may have strict liability even when the party is not at fault when providing a service. Since fault is generally understood to be intentional or negligent conduct, strict liability implies that a party could be liable without wrongful intention or negligence.[1104] Strict liability primarily focuses on compensations and the principle of distributive justice, while fault liability focuses on conduct regulation and the principle of corrective justice. A party could have limited liability for a tort if the party can prove that it has fulfilled the duty of care. Under this circumstance, the party must stop infringing copyright activities and return the unjust profits generated by the tort, but the party does not need to compensate the other party for losses suffered as a result of the tort.

Since ISPs play a vital part in disseminating voluminous information over information networks, to impose strict liability on ISPs would have chilling effect on the free flow of information. Therefore, it is reasonable to impose fault liability, rather than strict liability, on ISPs who exercise editorial control over the content stored on their servers. When fault liability applies, whether an accused ISP has the knowledge of the existence of the infringement is a decisive factor. For instance, DMCA includes safe harbor provisions to shield innocent ISPs from liability for contributory copyright infringement when they have no knowledge of the infringement.

The Information Network Regulations have principles determining an ISP's liability. First, it distinguishes four types of ISPs and imposes differing liabilities for each one. An ISP providing search and linking services has limited liability while other types of ISPs have fault liability for

[1104] C van Dam *European Tort Law* (Oxford: Oxford Univ Pr, 2006) 255.

copyright infringement. The Regulations follow DMCA and establish a notice-and-take-down mechanism to exempt both search and linking service providers and information storage service providers from tort liability. This occurs when they remove copyrighted material quickly after they received a copyright holder's notification.[1105] However, if a search and linking service provider knew, or should have known that linked material is illegal and still continued to assist a user to upload and distribute the material, it cannot be exempted from contributory liability.[1106]

The Regulations are less harsh on search and linking service providers than OCILLA and the E-Commerce Directive. The Regulations have a notice-and-take-down mechanism to exempt an ISP from liability if it acts quickly to remove material from its network systems once a right holder notifies it to do so. In contrast, OCILLA exempts search and linking service providers, but with more limitations, while the E-Commerce Directive has no exemption for them. Moreover, the Regulations require that an ISP be notified with relevant information that shows precisely which links are, or have been connected, to infringing materials, as well as the identity of the copyright owners of the materials. In addition, a notification should provide preliminary evidence of a copyright infringement. Finally, the Regulations provide that if an ISP suffers losses by deleting materials mistakenly, the right holder who sent a notification containing wrongful information should compensate the ISP.[1107]

Unfortunately, the Regulations are deficient since they do not provide guidance in working out when an ISP knew, or should have known about an infringement. Clear knowledge of an infringement often occurs when a copyright owner has notified an ISP that his or her copyright has been infringed upon. Compared with the "clear knowledge" requirement, it is harsher for ISPs if the tort liability relies upon constructive knowledge, which is presumed by law that an ISP should have by the exercise of reasonable care, regardless of whether or not the ISP actually does. In such a situation, an ISP could be liable for a copyright infringement if it is almost impossible for the ISP not to detect the infringement. Thus, an ISP should not wait for a copyright owner's notification but should actively take measures to prevent an infringement.

It is clear that actual knowledge satisfies the knowledge requirement. Nevertheless, whether constructive knowledge also meets this requirement is uncertain.[1108] US case law might shed some

[1105] Arts 22 & 23 of the Information Network Regulations.

[1106] Art 23.

[1107] Art 24.

[1108] E Zarins "Notice Versus Knowledge Under the Digital Millennium Copyright Acts Safe Harbors" (2004) 92(1)

light in relation to the proper interpretation of Chinese legislation with regard to the knowledge requirement of contributory copyright infringement. Although the Court in *Sony*[1109] stated that there was no precedent in the law that imposed vicarious infringement liability on a defendant on the ground that the defendant had constructive knowledge that its customers might make unauthorized copies of copyrighted material, the trend of broadening the knowledge requirement can be observed in many following decisions, in which courts are willing to impose liability for contributory copyright infringement when an ISP was considered to have constructive knowledge about a copyright infringement.[1110] Nevertheless, in more recent copyright cases, the Seventh and Ninth Circuits held that if a technology can be used for substantial non-infringing purposes,[1111] the complaining party must prove that the party being accused has actual, not constructive knowledge, about the infringement.[1112]

Therefore, the wording "knew" and "should have known" that denote actual and constructive knowledge sets two very different standards for what constitutes liability. Since search and linking service providers help Internet users to locate information efficiently, Chinese copyright law should enforce fault liability against ISPs that knowingly infringe upon copyright when providing Internet services. When drafting ISP liability rules, lawmakers need to pinpoint the exact circumstances where an ISP should be considered knowledgeable enough to detect a copyright infringement. However, the current copyright law is too sketchy to provide any criteria for judges to determine whether an ISP was or should be, sufficiently knowledgeable to be considered liable.1113

In the absence of clear legislative guidelines, it is useful to examine relevant cases to observe the

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California Law Review 257 257-298.

[1109] *Sony Corp v Universal City Studios* 464 US 417 (US Cal 1984) 439.

[1110] See *Ellison v Robertson* 357 F 3d 1072 (9th Cir 2004) 1077 III (stating the rule as "knew or had reason to know", then applying it as "should have been on notice"); *Religious Tech Center v Netcom On-Line Comm* 907 F Supp 1361 (ND Cal 1995) 1374 (using "knew or should have known" standard); *Sega Enterprises Ltd v MAPHIA* 857 F Supp 679 (ND Cal 1994) 686-687 (conflating knowledge requirement with material contribution requirement); see also MA Lemley & RA Reese "Reducing Digital Copyright Infringement without Restricting Innovation" 2003-(2004) 56(6) *Stanford Law Review* 1345 1357 ("it is not clear that Sony itself would have escaped secondary liability under the Ninth Circuit's reading of the Supreme Court's test" (footnote omitted)).

[1111] *Sony* 464 US 417 442.

[1112] *Metro-Goldwyn-Mayer v Grokster Ltd* 380 F 3d 1154 (9th Cir 2004) 1162; *In Re Aimster Copyright Litigation* 334 F 3d 643 649-651.

[1113] According to the Internet Copyright Disputes Interpretation, an ICP or an ISP that participates in copyright infringement, or assists or abets a user to infringe on copyright is considered to have contributory liability along with the user.

judiciary's attitude towards ISPs' liability. From 2005, both domestic and foreign entertainment companies brought a number of legal actions against search and linking service providers in the courts.[1114] *Baidu*[1115] and *Alibaba*[1116] are two cases that stirred major debates as to whether a court should apply the "knew" or "should have known" liability standard to determine an ISP's liability. In China, Baidu and Alibaba are two major search and linking service providers. Baidu was sued in 2005 by EMI for linking unauthorized music work and Alibaba was sued for similar reasons in 2007. However, Baidu was held not liable for linking infringed music, while Alibaba was held liable. A major reason for the different verdicts is that the *Baidu* court and the *Alibaba* court applied different liability standards.

With *Baidu* it was argued that it only provided search services that automatically displayed links to the material being sought and it did not select or control the material. The International Federation of the Phonographic Industry's (IFPI) Asian Office, on behalf of EMI, notified Baidu of an alleged copyright infringement. However, the notification was silent on which URLs were directing users to infringe upon copyrighted materials and which copyright owners owned the copyrighted works being infringed upon. Baidu contacted the IFPI Asian Office and EMI and asked for more information about the claimed infringement but received no response. Therefore, Baidu argued that since the notification provided insufficient information, it did not have sufficient knowledge to know that there had been a copyright infringement.

The Beijing No 1 Intermediary Court made it very clear that, since the infringing copyright activities happened in 2005, before the promulgation of the Information Network Regulations, the

[1114] *Sony BMG Music Entertainment Hong Kong Limited v Baidu* (2005) Yi Zhong Min Chu Zi No 10170; *Warner Music Hong Kong Ltd v Baidu* (2005) Yi Zhong Min Chu Zi No 8995; *Universal Music Ltd v Baidu* (2005) Yi Zhong Min Chu Zi No 8474; *Gold Label Entertainment Limited v Baidu* (2005) Yi Zhong Min Chu Zi No 7965; *Cinepoly Records Co Ltd v Baidu* (2005) Yi Zhong Min Chu Zi No 8478; *Go East Entertainment Co Ltd v Baidu* (2005) Yi Zhong Min Chu Zi No 7978; *EMI Group Hong Kong Ltd v Alibaba* (2007) Er Zhong Min Chu Zi No 02621; *Universal International Music BV v Alibaba* (2007) Er Zhong Min Chu Zi No 02626; *WEA International Inc v Alibaba* (2007) Er Zhong Min Chu Zi No 02630; *Warner Music Hong Kong Limited v Alibaba* (2007) Er Zhong Min Chu Zi No 02625; *Universal Music Limited v Alibaba* (2007) Er Zhong Min Chu Zi No 02622; *Universal International Music BV v Alibaba* (2007) Er Zhong Min Chu Zi No 02626; *EMI (Taiwan) Ltd v Alibaba* (2007) Er Zhong Min Chu Zi No 02623; *Mercury Records Limited v Alibaba* (2007) Er Zhong Min Chu Zi No 02629; *Sony BMG Music Entertainment v Alibaba* (2007) Er Zhong Min Chu Zi No 02628; *Go East Entertainment Company Limited v Alibaba* (2007) Er Zhong Min Chu Zi No 02627; *Sony BMG Music Entertainment (Taiwan) Limited v Alibaba* (2007) Er Zhong Min Chu Zi No 02624.

[1115] *EMI Group Hong Kong Ltd v Baidu* (2005) Yi Zhong Min Chu Zi No 8488.

[1116] *EMI Records Limited v Alibaba* (2007) Er Zhong Min Chu Zi No 02631.

Copyright Law Amendments and the Internet Copyright Disputes Interpretation were applicable. The Court held that first, Baidu did not intend to assist infringement of copyrighted music, because it could not predict, discern or control the content of the materials searched by users. Second, users listened and downloaded music from websites where the music works were stored rather than from the Baidu site. Third, a website could technically use a document to state that it prohibited other websites from linking with it. However, none of the linked websites had such a document. Fourth, the court held the plaintiff should provide the defendant with sufficient information to let it know which links connected to copyrighted materials that were infringed upon. However, EMI and the IFPI did not specify which URLs should be removed. Therefore, the No 1 Court concluded that Baidu was not liable for providing links to music that infringed on copyright. The Beijing High Court affirmed the No 1 Court's decision.[1117]

In the *Alibaba* case, EMI sent notification to Alibaba in April and July in 2006, providing relevant information regarding the record producers. This included 11 songs that had their copyrights infringed, as well as the albums containing the 11 songs and the singers' names. It also provided three sample URLs they wanted Alibaba to delete. However, Alibaba only removed the sample URLs. The Beijing No 2 Intermediary Court held that with the information that was provided, Alibaba must have been aware that there were more links connected to unauthorized music works other than just the three samples provided. Therefore, the Court held that Alibaba negligently ignored the links that could have directed users to unauthorized music works. The Court applied the Information Network Regulations, the Copyright Law Amendments and the Internet Copyright Disputes Interpretation, and held that Alibaba was liable for assisting others to infringe on copyright. The Beijing High Court affirmed the decision.[1118]

In the *Baidu* case, the judges held that an ISP should not be liable unless it had actual knowledge of an infringement. For example, an ISP would have actual knowledge of an infringement when it receives a copyright owner's notification. Whereas the judges in the *Alibaba* case held that an ISP could be liable even if it was not aware that an activity infringes on copyright. Here, the Court presumed that Alibaba should use any information provided by EMI to investigate whether its linking services were tied to unauthorized music works other than the notification samples. Based on this presumption, Alibaba was held liable for not checking the links that were probably directing users to unlawful music. Clearly, with the "should be aware" standard set by the *Alibaba* case, ISPs are imposed with a heavy duty to evaluate and censor the materials being sought on their search and

[1117] (2007) Gao Min Zhong Zi No 593.

[1118] (2007) Gao Min Zhong Zi No 621.

linking services.

7 1 2 3 2 Recommendations

In China, the tightening control over ISPs is a consequence of copyright holders lobbying the legislature and the judiciary.[1119] Policymakers should not only take into account copyright holders' interests, but also the interests of ISPs and the Internet industry as a whole.[1120] In order to have a more balanced copyright law, the Copyright Law should have a section dealing specifically with ISPs' liability.

The "should be aware" or "should have known" liability standard does a disservice to search and linking service providers and the Internet industry. First, copyright law should not presume that all video and audio recordings on the Internet are subject to copyright. The *Baidu* case shows that after the Court's investigation, quite a number of musical works that were claimed to be infringed upon, were actually in the public domain. Second, although a search and linking service provider should be obligated to remove the URLs indicated by copyright holders, it should not be burdened with the duty of checking the legality of materials stored on other web servers simply because they possibly could infringe on copyright. A service provider should not have to determine whether to remove links connected to materials that may or may not be copyrighted. In South Africa, ECTA does not obligate an ISP to monitor the data it transmits with its network systems. Nor does it obligate an ISP to actively seek out unlawful activities.[1121] China could learn from the South African model and limit ISPs' obligation to monitor materials being sought using their search services. Therefore, the "knew" or "actual knowledge" liability standard construed in the *Baidu* case should be applied widely, while the "should have known" or "constructive knowledge" standard should be used as sparingly as possible to avoid imposing an unfair burden on ISPs.

Some commentators suggest the Copyright Law should follow DMCA to distinguish ICPs from ISPs.[1122] ISPs differ from ICPs, and ICPs should have limited liability. This is because ICPs directly deal with copyrighted materials and have editorial control over the content. Therefore, the chances of committing a copyright infringement are much higher than with ISPs. Under the limited liability principle, a plaintiff does not need to prove that an ICP's intention is to infringe, while an ICP needs

[1119] Liang *Digital Copyright* 269-270.

[1120] 271.

[1121] Art 78 of the ECTA.

[1122] BL Liu "Some Thoughts on the Regulations on Protection of the Right of Communication through Information Network" (2006) 8 *Electronics Intellectual Property* 25 25-27 (Chinese version); Liang *Digital Copyright* 249.

to prove that it had fulfilled its duty of care.[1123] Moreover, limited liability guarantees copyright holders a prompt copyright injunction to prevent losses and a right to demand an ICP return any profits it made from a copyright infringement.[1124]

Nevertheless, a service provider usually provides a variety of services simultaneously. For example, a company establishes a website and uploads materials to the website for users to browse. At the same time, it allows users to upload materials to its network system and provides its users with emailing services. Therefore, it seems unnecessary for copyright law to draw a clear distinction between an ICP and an ISP. Rather, a service provider should be liable only if its services cause copyright infringement. As an exemption, "notice-and-take-down" procedures should apply to both ISPs and ICPs.

In short, copyright legislation and relevant regulations need to be revamped to be more systematic and consistent in regulating ISPs' liability. A major principle that lawmakers should bear in mind is that imposing strict liability on ISPs could be counterproductive, therefore strict liability should not be applied automatically in an information network environment. Rather, fault liability should be applicable to ISPs who have actual knowledge of the copyright infringement. In particular, a notification from a copyright owner must furnish an ISP with sufficient information about the copyrighted works that are claimed to have been infringed upon. Search and linking service providers should not be obligated to monitor and assess the possibility of copyright infringement of the materials being searched and linked.

7 1 3 Conclusion

This section focuses on three key issues: a reproduction right, an information network communication right, and an ISP's liability. The examination of relevant law and regulations shows that current state of copyright law is less than precise and systematic in regulating these issues. Moreover, the Copyright Law is unbalanced, with copyright holders actively influencing policymaking. Therefore, it is critical to construct a systematic copyright law system that takes both the interests of copyright users and the Internet industry into account .

[1123] HJ Han "Copyright Infringement Liability of ISP/ICP" (2008) 10 *Legal & Economy* 54 54-55 (Chinese version).

[1124] 55.

7 2 Anti-circumvention law

7 2 1 Development of anti-circumvention rules

Before amending the Copyright Law of 1990, scholars and practitioners debated whether anti-circumvention law should be introduced to China.[1125] In 2001, the Copyright Law Amendments introduced an anti-circumvention clause. Subsequently, additional regulations and judicial interpretations were written to provide more details to implement the clause. The anti-circumvention rules first applied to persons who circumvent technological measures, and were then expanded to apply to persons who produce and offer devices or services that assist circumvention.

The Copyright Law Amendments provide that willfully circumventing or destroying technological measures employed by a copyright holder that protect copyrighted works, sound or video recordings, without the copyright holder's permission, shall be subject to civil, administrative, or criminal liabilities.[1126] The Regulations on Protection of Computer Software of 2002 (Software Regulations) contain an almost identical provision.[1127] Both provisions only apply to circumventing acts, not devices or services having circumventing functions. The Information Network Regulations provide that a person who knowingly provides circumventing devices or services to others is subject to administrative penalties or criminal liability. The Internet Copyright Disputes Interpretation of 2006[1128] imposes criminal liability on an ISP that knowingly provides circumventing devices or services.[1129]

The Information Network Regulations provide the most comprehensive anti-circumvention rules. It defines a technological measure and stipulates the circumstances under which a person is liable for breaching a technological measure, or is liable for assisting others to circumvent such technological measure. It also provides a number of exemptions for users who circumvent a technological

[1125] L Jin "Anti-circumvention of Technological Measures Legislation: A Copyright or Sui Generis Protection?" (2000) 9 *Intellectual Property Studies* 225 225-333.

[1126] Art 47(6) of the Copyright Law Amendments of 2001.

[1127] Art 24(3) of the Regulations on Protection of Computer Software of 2002 Order of State Council [2001] No 339 , and effective as of 1 January 2002.

[1128] See the Supreme People's Court *Decision on the Amendments of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in Relation to Copyright Disputes over Computer Network of 2006* Judicial Interpretation [2006] No. 11, as effect on 8 December 2006 http://www.chinalaw.gov.cn/article/fgkd/xfg/cfjs/200904/20090400132154.shtml (accessed 01-06-2010) (Chinese version).

[1129] Art 6 of the ISP Interpretation.

measure.

7 2 2 Key notions in the Information Network Regulations

7 2 2 1 Technological measures

The Information Network Regulations define a measure that is technological as well as prescribe a device or a component that prevents the public from browsing and appreciating copyrighted works, performances, or sound and video recordings. The Regulations also define a measure that prevents anyone with information networks from providing such works, performances and recordings to the public.[1130] The definition does not distinguish access-control and copy-control technological measures. It follows DMCA's section 1201 in having a "basic prohibition" and an "additional prohibition". The basic prohibition prohibits circumventing acts and the provision of circumventing devices. With the additional prohibition, a person who is legally exempted from circumventing a technological measure is prohibited from providing the method or device used for circumvention to the public.[1131]

Technological measures should be defensive to the extent that they prevent copyright infringement rather than positively protect computer programs, as that could be a threat to network security.[1132] For example, a technological measure can prevent a pirated software user from updating the software, but should not technically prevent a user from using his or her computer simply because the computer runs pirated software.

7 2 2 2 Prohibited Activities

Under the Information Network Regulations, fault liability applies to a person who circumvents a technological measure or provides a circumventing device to the public.[1133] In other words, a user is only liable when he or she intends to conduct a circumventing act or provide the public with technological means for circumvention. The application of fault liability makes the law less harsh than DMCA, which simply imposes liability on a user who breaches a technological measure, without considering the person's intention.

[1130] Art 26 of the Information Network Regulations.

[1131] Art 4.

[1132] J Wang "Anti-circumvention Rules in the Information Network Environment in the US, UK and China: A Comparative Study" (2008) 3(1) *Journal of International Commercial Law and Technology* 55 59; Liang *Digital Copyright* 67; ZG Ma "Legal Protection for Technological Measures Protecting Copyright in an Information Network Environment" (2001) 2*Science Technology and Law* 41 41-46 (Chinese version).

[1133] Arts 4, 8 & 19 of the Information Network Regulations.

The fault liability principle also applies to a person breaching an "additional prohibition". This means that a person who is exempted from circumvention is only liable when he/she knowingly provides a circumventing technology or device to others. In China, joint intention is not a prerequisite for contributory infringement. This is because it is very difficult for a plaintiff to prove that someone indirectly infringing, assisting or facilitating an infringement intended to do so.[1134] Therefore, if a person uses a circumventing device, which is provided by another person legally exempted from using the device to access a copyrighted work and infringe on the copyright, it could be difficult for a copyright holder to maintain that the circumventing device provider is liable. Therefore, it would be more appropriate for the Regulations to apply limited liability to a person violating the "additional prohibition".

A person who manufactures, imports and provides devices or components primarily to circumvent or impair technological measures has contributory liability along with the direct infringers.[1135] The provision is too broad, as it simply prohibits all devices that are designed with a circumventing function. It may well be the case that Sony produced a DVD device that could also copy content and decrypt DVDs that were intended for different world markets. This capability has legitimate uses that could be quite useful. The problem arises as to whether the device is primarily geared towards circumvention. In comparison, DMCA has a three part test to determine whether a device with a circumventing function should be prohibited. The test is as follows: first, determine whether a device is designed or produced primarily for circumvention; second, whether a device only has limited commercial significance other than being used for circumvention; and third, whether the device is marketed for the purpose of carrying out circumvention. The Information Network Regulations' blanket prohibition of all devices that can be used primarily for circumvention is much too broad since devices having a circumventing function can be used for other non-infringing purposes such as decrypting works not subject to copyright.[1136] A broad prohibition is a disservice to device manufacturers and consumers. The Regulations can follow DMCA and have a test consisting of specific requirements and only prohibit the devices that meet the test's requirements.

7 2 2 3 Exemptions

The Information Network Regulations provide a general exemption for all circumventing activities

[1134] YL Zhang "Copyright Owners' Rights over the Internet" (2006) 20 *China Law & Practice* 80 80-81.

[1135] Arts 4 & 19 of the Information Network Regulations.

[1136] JC Ginsburg "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience" (August 2005) *Columbia Public Law Research Paper* No 05-93 http://ssrn.com/abstract=785945 (accessed 27-10-2013).

permitted by laws and administrative regulations. In addition, the Regulations specifically list the following exemptions: 1) circumvention of works, performances, video and audio recordings for education and scientific research if they are only available from an information network; 2) circumvention of literary works for non-commercial purposes for the blind if they are only available from an information network; 3) circumvention for judicial and governmental activities; and 4) circumvention for computer and information network security tests. Exempted users are prohibited from providing others with technologies, devices or components used for circumvention. Moreover, they should not prejudice other legitimate rights of copyright holders.[1137]

The four exemptions are restrictive in scope and inconsistent with other administrative regulations. In particular, the first exemption is so limited in application that it may not be able to meet the legislative intent to effectively advance education and research. With the first exemption, educators and scientific researchers can only circumvent materials available solely from an information network. Moreover, the activities that constitute "scientific research" are unclear. It is likely that legislators wanted to make the provision flexible enough for judges to apply. However, the exemption needs to be more specific in order to let educators and researchers know how to use the exemption.

The Information Network Regulations and the Software Regulations are inconsistent. Article 17 of the Software Regulations provides exemptions for researchers by allowing them to install, display, transmit or store software in their computers to study or research design ideas or their inherent principles. With this exemption, researchers do not have to seek permission or pay a copyright owner for the software. Copyright scholars argue that since Article 17 lists permitted activities non-exclusively, reverse engineering and other research activities can be considered to be exempted.[1138] They also point out that the software exemption does not require usage to be non-commercial. As long as a person legally obtains software, the person is entitled to conduct research with it.[1139] Reading Article 17 of the Software Regulations together with the first exemption of the Information Network Regulations, it can be deduced that scientific researchers have an exemption to circumvent technological measures involved with software that conduct reverse engineering and research on interoperability. However, since the Software Regulations came about prior to the Information Network Regulations, it is questionable whether the software exemption is still applicable under the

[1137] Art 12 of the Information Network Regulations.

[1138] Z Yang "On The Legality of Computer Software Reverse Engineering" (2004) 1 *Science of Law (Journal of Northwest University of Political Science and Law)* 116 120 (Chinese version with English abstract).

[1139] 121.

Information Network Regulations.

Therefore, the scientific research exemption should be amended to enumerate permitted activities in a non-exclusive manner. In order to develop the software industry and computing science, which is of particular importance for China to enhance its innovation capability, the exemption should specially clarify that the following situations are exempted: software developers, researchers and students conducting reverse engineering and computer program research on interoperability, as well as other computer science research and research for network security.[1140] In this way, the exemption can provide the education and research sectors with more legal certainty while retaining a degree of flexibility.

A Chinese circumvention law could allow researchers to circulate their research results on circumvention technology and security flaws found in technological measures with peer researchers for non-commercial purposes. China urgently needs to develop its digital technology and software industry. So, it is critical that software developers and researchers be able to share their research results and fix computer programs flaws in a timely manner.[1141]

7 2 2 4 Conclusion

The Information Network Regulations established a framework of anti-circumvention rules. However, the rules need to be further developed. First, they should distinguish access-control and copy-control technological measures and protect access-control measures. In a separate section,

[1140] A great detail of discussion on the importance of reverse engineering is found in TC Vinje "Threat to Reverse Engineering Practices Overstated" (1994) 16 *European Intellectual Property Review* 364. Also see *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1523-1524 (9th Cir 1992), the Court noted that de-compilation techniques have been used widely in the software industry, and stated that

"an attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression".

[1141] An US example is that in 2001, a team of researchers led by Professor Felton participated in a public event called the Hack SDMI Challenge. After learning that they would present a paper explaining they had discovered that the SDMI (Secure Digital Music Initiative) technology was insecure and would be defeated upon its introduction to the public, the Recording Industry Association of America (RIAA) sent a letter threatening DMCA legal action if they present their findings. Fearing legal liability, the scientists withdrew their paper from the Conference. For comments on this case, see RD Gross "Digital Millennium Dark Ages: New Copyright Law Used to Threaten Scientific Research" (7-11-2001) *Electronic Frontier Foundation* http://www.eff.org/IP/DMCA/Felten_v_RIAA/20011107_eff_felten_article.html (assessed 27-10-2013). To avoid the chilling effect of anti-circumvention rules on the development of technology, Chinese anti-circumvention rules should have an exception allowing researchers to circulate their research results within an academic community.

they also should provide exemptions for the circumvention of access-control measures.

Second, the Regulations can narrow the scope of prohibited devices, and prohibit those devices solely used for circumvention. A sole purpose test enhances "certainty and ease of application" of the law thus providing judges with clear guidance to determine whether a device is prohibited.[1142] Alternatively, it could follow DMCA and provide a test with specific requirements to determine whether a device is to be prohibited or not. In short, narrowing the definition of a circumventing device is advantageous both to device manufacturers and to software developers.[1143]

Third, in order to protect copyright owners, the principle of limited liability should apply to users who breach an "additional prohibition". A user legally exempted from circumvention would be liable if the user leaks a circumventing technology to others unless the user can prove that he/she fulfilled the duty of care when using the technology. For instance, if a user leaks a circumventing method simply because his or her computer was hacked, the user does not have to provide compensation but should take measures to prevent a right holder's continuing loss.

Fourth, the anti-circumvention rules need a general exemption.[1144] Some Chinese scholars advise that the Information Network Regulations learn from DMCA and adopt an on-going rule-making procedure to assist the legislature to review and adjust statutory exemptions in a timely manner.[1145] However, the Information Network Regulations do not have a provision on establishing an on-going

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[1142] Lai (1998) *IPQ* 35 47.

[1143] Singapore also proposed the sole purpose test for circumvention devices at the WIPO Diplomatic Conference, see World Intellectual Property Organization & Chairman of the Committee of Experts on a Possible Protocol to the Berne Convention & Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms *Basic Proposal for the Substantive Provisions of the Treaty on Certain Question of Literary and Artistic Works to be Considered by the Diplomatic Conference* (1996) CRNR/DC/12.

[1144] JH Blavin argues that

> "that copyright statutes are inherently bent in favour of status quo interests and biased against absent interests (eg, the public), thus resulting in inflexible laws that lack long-term stability as new technologies emerge",

see "*Digital Copyright* — by Jessica Litman Amherst, NY: Prometheus Books" (2001) 14(2) *Harvard Journal of Law and Technology* 741 745. To avoid the legal inflexibility, with the development of technology, Chinese anti-circumvention rules should have a general exception that allows judges flexibility to interpret and apply the law in different situations.

[1145] SH Cao "The Comparison and Reflection: The Legislation of the Anti-circumvention Right in Digital Time" (2006) 4(3) *Presentday Law Science* 27 36 (Chinese version); Liang *Digital Copyright* 90.

rule-making procedure to assess the anti-circumvention exemptions.[1146] Moreover, China does not have experience in reviewing and adjusting legislation regularly in such a manner. Therefore, there needs to be a provision stating that acts of circumvention for legitimate and non-infringing uses of protected works are exempt.[1147]

Finally, the law needs to clarify a number of issues. It should be made clear that an effective technological measure should be a defensive move that only passively prevents circumvention. A right holder who employs technological measures on a product is obligated to inform consumers about the adoption of the measures. This helps to prevent consumers from unknowingly triggering technological measures that threaten the security of their computers and the network. The law also should clarify that non-copyrightable materials protected by technological measures are not protected by copyright.[1148] However, to encourage publishers and database collectors to put copyrighted and non-copyrighted materials together for users, they should enjoy a *sui generis* right in their works of compilations.

7 3 Shrink-wrap and click-wrap Licenses

7 3 1 Relevant laws

Since the Copyright Law of 1990 and the Regulations on the Implementation of the Copyright Law[1149] (Implementation Regulations) do not have specific principles relating to shrink-wrap and click-wrap licenses, contract law principles apply to these licenses. The Contract Law of 1999[1150] (Contract Law) set out basic principles such as freedom of contract and acting in good faith. Article 7 of the Contract Law provides that contracting parties shall obey laws and administrative regulations as well as follow social ethics in contracting and fulfilling contractual obligations. A contract should also not conflict with the public interest. Article 329 of the Contract Law maintains that a contract that monopolizes a technology or impedes technological progress is null and void. This no-monopoly principle is particularly relevant to shrink-wrap and click-wrap licenses.

[1146] Art 47(6) of the Copyright Law Amendments of 2001 simply states that administrative organs are authorized to stipulate exemptions for anti-circumvention rules. However, the Copyright Law does not have a provision designating a particular organ to assess exemptions on a regular basis.

[1147] Gasser "Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model" research paper of Harvard Law School, Berkman Center, Research Publication No 2006-04 50-51.

[1148] Cao *Frontier Issues i*150-151.

[1149] Promulgated on 2 August 2002 and effective as of 15 September 2002.

[1150] Contract Law of the People's Republic of China, promulgated on 15 March 1999.

Two issues need to be clarified about the validity of shrink-wrap and click-wrap licenses. First, shrink-wrap and click-wrap licenses are standard contracts with contractual terms a customer cannot alter. The Contract Law's Article 40 provides that a contract's standard clauses are invalid if they fall under any of the situations set forth in Articles 52 and 53. The situations are 1) a standard clause that exempts a contract offeror from liability; 2) a standard clause that imposes heavier liability on the other party, and 3) a standard clause that preclude the other party from using its principal rights. Second, click-wrap licenses have come about and are used in relation to electronic data. The Contract Law states that a contract made with electronic data is valid.[1151]

The Amendment Bill to the Foreign Trade Act of 1994, which was adopted on 4 June 2004, provides that administrative authorities may take measures against any intellectual property licensing contract that contains conditions preventing challenges to its validity. The same thing can occur if such a contract contains coercive licensing conditions or exclusive grant back conditions that have an adverse effect on fair competition in a country's foreign trade.[1152] These provisions are relevant to the above mentioned licenses under certain circumstances.

In short, a contract can be invalid both on a public policy level and a statutory law level. At the public policy level, a contract should not conflict with the public interest, monopolize technology or impede technological progress. At the statutory law level, a contract cannot exempt an offeror from liability, impose a heavier liability on the other party or precludes the other party from exercising its primary rights. In copyright law, a contract that precludes the second party from exercising a right granted under copyright law or that prohibits the other party from applying copyright limitations and exceptions should be held to be void.[1153]

[1151] Art 16 of the Contract Law of 1999 Order of the President of PRC [1999] No. 15.

[1152] Art 30.

[1153] Two exemptions found in Arts 22(4) & (5) of the Copyright Law of 1990 can be excluded from application by a contract. Art 22(4) provides an exemption allowing newspaper and periodical publishers, as well as radio and television stations to reprint or rebroadcast published articles and rebroadcast programs on current political, economic or religious topics. Art 22(5) provides an exemption allowing newspaper and periodical publishers, as well as radio and television stations to print or rebroadcast a speech delivered at a public gathering. The Information Network Regulations also allows a right holder to use a contract to preclude the two exemptions from being applied in an information network environment. Other copyright limitations and exceptions are presumably non-excludable by contract.

7 3 2 Suggestions for future amendments

Shrink-wrap and click-wrap licenses are generally valid under the Contract Law if they conform to the Contract Law's basic requirements.[1154] In particular, they should meet two requirements: first, a license must be readable so that a consumer can read and understand it, and decide whether to accept it or not.[1155] Second, a license only is valid when a consumer expressly consents to it.[1156] This is because a consumer may not have noticed the license and may have entered into a transaction without knowing its terms, while the licensor interprets the consumer's inaction as an implied consent to the license. In order to protect consumers, it is necessary to consider a contract valid only with an explicit consent from the consumer.

Legal practitioners suggest that the Consumer Protection Law of 1994 (Consumer Protection Law)[1157] should be amended to accommodate the needs of electronic commerce and the trade of digital products. A shrink-wrap license must be readable before a consumer purchases a product. Therefore, a shrink-wrap license would not be considered valid if it is inserted in a product's package and only can be viewed after a transaction is completed and the package material is stripped away.[1158] Moreover, the ordinary consumer should only be confronted with the terms of a shrink-wrap license that are reasonable.[1159] If this does not take place, a consumer may purchase software with a shrink-wrap license and view the licensing terms only briefly. At a later time this consumer may read the license carefully and discover that an additional payment is required to run the software. This kind of payment requirement is an unreasonable licensing term. Although the consumer can choose not to pay but to return the software and reclaim its payment, it is inconvenient for the consumer to do so.

Click-wrap and web licenses need to be regulated by legislation as well. The Consumer Protection Law should limit the text length of a click-wrap license since Internet users usually do not scroll a

[1154] Art 124 of the Contract Law of 1999.

[1155] Mo "On Shrink-wrap Contract" 2005 *Present-day Law Science* 101; Dong & Zhu "Law Effect of E-format Contract" 2005 *Journal of Shandong Institute of Business and Technology* 96 (Chinese version).

[1156] SP Dong & FJ Zhu "Law Effect of E-format Contract" (2005) 19(6) *Journal of Shandong Institute of Business and Technology* 96; YB Ren "An Analysis on the Validity of Shrink-wrap and Click-wrap Contracts" (2008) 23 *Technology Information* 94. Wan argues that the act of downloading means a consumer consents to a contract, see IH Wan *Legal Issues of E-commerce* (Beijing: Law Press China, 2001) 101-102 (Chinese version).

[1157] Consumer Protection Law of 1994 Order of the President of PRC [1993] No. 11 was adopted on 31 October 1993 and came into effect on 1 January 1994.

[1158] Dong & Zhu (2005) *Journal of Shandong Institute of Business and Technology* 96.

[1159] 96.

lengthy license to examine its terms and conditions. For example, eBay sued a user in China for not paying a service fee under a service agreement that the user had clicked to agree, when he registered with eBay in 2000. The service user argued that since the online agreement was 67 pages long, it was almost impossible for him to read it carefully before clicking to consent.[1160] The Court, however, held that the user breached the contract with eBay since the service agreement was readable. The case incited debates as to whether it is fair to presume Internet users should read a very long digital license with great care.

Lawyers suggested that licensors be required to put major contract clauses, especially the ones exempting or limiting their own liabilities, at the top of a license.[1161] Licensors should also be required to display all terms and conditions before a consumer reaches a click button.[1162] For web licenses not requiring users to click to consent, they can be considered valid as long as they are displayed prominently on a web page with readable terms.[1163]

Copyright scholars suggest that a license that excludes the application of copyright limitations and exceptions or purports to protect a copyrighted work in perpetuity should be invalid.[1164] For example, a license that restricts a purchaser of software from re-installing the software into another computer is invalid. Moreover, if a license protects some software for a period longer than the Copyright Law grants, the extra protection time period is invalid.

7 4 The Copyright Law of 1990 under reform

The Copyright Law of 1990 is currently undergoing review in order to meet the challenges in a digital environment. The Revision Draft of the Copyright Law Amendments (Revision Draft) has been prepared for public consultation.[1165] The Revision Draft is now in its second version. The major reasons for the revision are that with the advancement of ICT and the development of the national economy, China needs to promote cultural prosperity and to synchronize its domestic laws

[1160] 98.

[1161] 98.

[1162] LN Li & Y Zou "A Tentative Approach to the Click-wrap Contract in E-commerce" (2006) 4(2) *Journal of Huainan Institute of Technology* (Social Science Edition) 34 37 (Chinese version).

[1163] ZY Feng "The Consumer Protection in an Information Network Environment" (1998) 10(7) *Zixun Fawu Touxi Zazhi* (Analysis on Information and Leal Practice) 30 30-38 (Chinese version).

[1164] XL Jia "An Analysis on Shrink-wrap License" (2008) 13 *Economic Research Guide* 110 112.

[1165] http://www.ncac.gov.cn/cms/html/309/3502/201207/759779.html (accessed on 30-07-2012) (Chinese version). The first round of public consultation on the 1st Revision Draft closed on 31-03-2012.

with international copyright conventions and treaties.

The major structural changes of the legislation are that the limitations on copyrights become an independent chapter with more elaborated provisions,[1166] and the regulations on technological protective measures and rights management information have been rewritten as a free-standing chapter.[1167]

The revisions focus on the information network communication right and the collective management model of digital technology related rights. In the second version of the Revision Draft, according to the means of communication, the broadcasting right is made applicable to two-way communication while the information network communication right applies to interactive communication. [1168] This is a welcome approach which grants copyrights based on the communicative means rather than the medium of communication. It will help protect copyright holders' interests under such situations as on-demand broadcast, online live broadcast and rebroadcast among different technological platforms.

In the first version of the Revision Draft, lawmakers attempted to grant a compulsory license to allow all kinds of users to reproduce and remix music works after three months of the work's first release, so long as they pay royalties to a CMO.[1169] This was meant to unfetter the fast growing information networks from tedious copyright clearance procedures and to promote the dissemination of music. However, facing fierce protests from song writers, singers and the music industry, in the second version of the Revision Draft, the provision on the compulsory license has been deleted. Copyright owners still have exclusive control of the reproduction of their music works. On the one hand, the idea of granting a compulsory license covering music works which will turn an exclusive copyright into a right to be paid would help create a more competitive cultural market.[1170] On the other hand, a big obstacle to the proposed compulsory license is the inefficient collective copyright management system. It would be better to keep the rights of reproduction and broadcast exclusive to copyright owners until an extended collective management system has been

[1166] The stipulation of limitations on copyrights used to be a part of Chapter Three of the Copyright Law of 1990, now relevant provisions have been put together as Chapter Four in the 2nd Revision Draft.

[1167] Chapter Six of the 2nd Revision Draft.

[1168] Art 11 of the 2nd Revision Draft.

[1169] Art 46 of the 1st Revision Draft.

[1170] Geiger (2006) *EIPR* 366 376.

well established.

As far as the limitations on copyrights are concerned, a significant change is that the fair dealing provision now allows more legal flexibility. In addition to the specific situations under which certain acts are considered fair dealing, the phrase of "other situations" has been inserted to make the provision open-ended, allowing for future fair dealing situations that lawmakers may not have been envisaged at the time of drafting. Moreover, a three-step test has been introduced as a bottom provision.[1171] In this way the copyright legislation complies with the Berne Convention and the TRIPS Agreement while maintaining flexibility to accommodate the future development of digital technology.

7 5 Open licenses

China has a knowledge sharing culture that has a long historical tradition. Open licenses reflect this tradition and make it possible for people to share knowledge under certain licensing rules. The CC license concept introduced in mainland China in 2006 arose from a tradition of communal ownership of property that developed into moderate copyright protection.[1172] The CC licenses have been widely accepted by new kinds of media such as websites. As of 31 July 2007, 493 000 Chinese websites have adopted local CC licenses.[1173]

CC licenses have been applied to a variety of copyrighted materials such as photographs, literary works, educational materials and research papers. Examples include a pioneer open education program called the China Open Resources for Education,[1174] and Songshuhui, a blog that welcomes all papers on scientific topics.[1175]

Software open licenses such as Open Source Software (OSS) have also developed quickly. The

[1171] Art 42 of the 2nd Revision Draft.

[1172] CY Wang "Creative Commons Licence: An Alternative Solution to Copyright in the New Media Arena" in B Fitzgerald, FP Gao, D O'brien & SX Shi (eds) *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (Sydney: Sydney Univ Pr, 2008) 305 309.

[1173] Wang "Creative Commons Licence" in *Copyright Law* 312.

[1174] Creative Commons "China Open Resources for Education" *Creative Commons* http://wiki.creativecommons.org/China_Open_Resources_for_Education_(CORE) (accessed 27-10-2013) .

[1175] Songshuhui "Homepage" *Sciencenet* http://www.sciencenet.cn/blog/songshuhui.htm (accessed 27-10-2013). The blog encourages scientists to use plain Chinese to answer scientific questions to lay persons who browse the blog.

China OSS Promotion Union established in 2004 is a non-government organization formed by public and private enterprises, communities, colleges, research institutions, customers, industry organizations and supporting agencies, with guidance from several government industrial administration departments.[1176] The focus of the Union is to promote the development and application of Linux/OSS in China and to promote co-operation on the open source movement among Chinese, Japanese and Korean developers.

7 6 Conclusions

In 2009, the number of Chinese Internet users soared to the first place in the world.[1177] The Internet and other information networks make instant and widespread distribution of learning and research materials possible. At the same time, easy online transmission threatens copyright holders' control of their works in cyberspace. This is one reason which compelled Chinese lawmakers to reform the copyright law system at the beginning of the 21st century. Another reason for copyright law reform is that China entered into a number of international treaties and is obliged to synchronize its national copyright law with these treaties.

China amended the Copyright Law in 2001 and introduced a number of administrative regulations and judicial interpretations to implement it. This chapter examines a number of copyright issues related to digital technology, focusing on the right of reproduction, the right of communication through an information network and ISPs' liability for copyright infringement. It also examines the Chinese anti-circumvention law modeled on the WIPO Internet Treaties, and the validity of shrink-wrap and click-wrap licenses.

The Copyright Law Amendments of 2001 had a detailed right regarding reproduction and introduced a new information network communication right. When the reproduction right is redefined, copyright law should clearly stipulate that copyright holders have a right to digitize their works. However, the Copyright Law should afford protection only for temporary reproduction having commercial significance. For transmission of material over information networks, the Copyright Law Amendments introduced a new information network communication right that is

[1176] China OSS Promotion Union "Homepage" *China OSS Promotion Union* http://www.copu.org.cn/ (accessed 27-10-2013).

[1177] China Internet Network Information Center "CNNIC publishes 24th Statistical Report on Internet Development in China" (17-6-2009) *China Internet Network Information Center* http://chinatraveltrends.com/cnnic-publishes-24th-statistical-report-on-internet-development-in-china (accessed 27-10-2013).

similar to the WCT "right of making available". With this new communication right, Chinese copyright holders would be able to effectively protect their copyrighted works distributed over information networks such as the Internet and mobile phone services.

Since ISPs provide various services for Internet users, they risk indirectly infringing on copyright as a result of the actions of a direct infringer, usually an end user. Copyright legislation should include a part dealing with the liability of ISPs. An examination of *Baidu* and *Alibaba* demonstrates that ISPs should not be over-regulated when they provide search and linking services, which enables Internet users to locate information efficiently. In particular, since search and linking service providers deal with voluminous amounts of information, copyright law should not presume that providers have an obligation to examine the legality of material being sought without a clear indication of a copyright infringement from a copyright holder.

China has established basic anti-circumvention rules to protect copyright holders' interests by placing a number of prohibitions on people who circumvent technological measures and those who produce devices or provide services assisting circumvention. The rules need to be further developed to take into account not only the interests of copyright owners, but also the interests of users, device producers and ISPs. In particular, more exemptions should be given to teachers, students and researchers to balance the interests of copyright proprietors and the societal needs for education and research.

The Copyright Law does not specifically deal with shrink-wrap and click-wrap licenses. Consumers are at a disadvantage because they cannot negotiate licensing terms with vendors when purchasing digital products or using online services. Consequently, they quite often enter a contract without a sufficient understanding of its terms. Therefore, consumers such as software purchasers are not fully able to use copyright limitations and exceptions if a licensing term prohibits them from doing so. This chapter puts forward a number of suggestions to protect consumers, particularly copyright product users.

Finally, open licenses have been widely used in China for educational and research material as well as software. Open licenses would be an alternative for educators and researchers to share information and distribute learning material widely. Since China has a relatively well-constructed Internet infrastructure and the largest number of Internet users to the world, to distribute educational and research material online is an economical way for both copyright holders and end users. The software industry, researchers and software users also benefit from open licenses since they can

share source codes and develop software in a timely manner.

China has made some progress in amending its copyright law system to accommodate the development of digital technology and the Internet. However, a major deficiency is that the regulations and judicial interpretations that have been put together in a piecemeal way inevitably lead to legal inconsistency and uncertainty. Moreover, different legal instruments regulating the same issue have inconsistent provisions. Several regulations and judicial interpretations are sketchy and lack enforceability. At the moment, the Copyright Law of 1990 is undergoing a comprehensive revision. It is an opportunity for the legislature to revamp the legislation to make it more systematic and precise for judges to apply, as well as accommodate future technological developments.

Chapter Eight

Conclusion

8 1 The need to revisit copyright law

The rapid development of ICT and global information networks give developing countries, such as South Africa and China, unprecedented opportunities to provide quality education and research to their people. Copyright law plays an important role in regulating materials, used for education and research, which are subject to copyright protection. In order to avoid an overprotective copyright regime curtailing research and development, copyright law needs to maintain a dynamic balance among authors, derivative copyright proprietors and users to ensure that it nevertheless promotes societal access to knowledge.

Copyright has traditionally sought to strike a balance between private proprietors and the public. Copyright laws in different jurisdictions have very different limitations on copyright, in terms of duration and scope, as well as exceptions enabling people to access and use copyrighted works and to develop derivative works. Not only is promoting education and research in the public interest, but access to copyrighted learning and research materials also needs to be guaranteed with appropriate copyright limitations and exceptions.

Nevertheless, restrictions on copyright are facing unprecedented challenges in the digital era. Copyright law is tilting the balance in favor of copyright proprietors, particularly corporate right holders such as publishers and entertainment companies.[1178] Nationally, copyright holders not only use copyright law to protect their rights, they also employ technological measures and contractual agreements to restrict and prohibit usage of copyrighted works, even usage which is legitimate under copyright law.[1179] Internationally, developed countries have actively participated in shaping international treaties while developing countries have been relegated to merely following the general protective standards of the treaties.[1180] However, many developing countries have neither a copyright tradition nor a well-established legal system. They usually borrow copyright laws from countries where copyright laws are more advanced, and adopt such laws into their own legal system without sufficiently understanding the consequences of transplanting such laws. Moreover, they do

[1178] Boyle (2004) *Duke L & Tech Rev* 2-10; Hugenholtz (2000-2001) *Brook J Int'l L* 77-89.

[1179] Hardy (1996) *U Chi Legal F* 224; Netanel (1996) *Yale LJ* 382-384.

[1180] May (2003) *EIPR* 1-5.

not have effective enforcement measures to implement the borrowed laws.[1181] Therefore, although ICT and information networks enable instantaneous dissemination of information at low cost, users could not, under an overprotective copyright regime, fully take advantage of digital technology to distribute learning and research materials.[1182] This has reduced developing countries' ability to close knowledge gaps by using inexpensive electronic educational materials.

It is time to rebalance copyright law and ensure that on the one hand, copyright law protects copyright holders' legitimate interests and encourages them to create more works; while on the other hand, copyright law needs to allow the public to have wide access to information and knowledge with carefully devised limitations and exceptions. In order to strike this balance when revamping copyright laws, policymakers need to take into consideration the interests of authors, copyright holders, end users, electronic and digital product manufacturers and information network service providers.

8 2 Comparative approach

This study employs a comparative approach in an exploration of how South Africa and China, two developing countries with different legal traditions, should construct and develop their copyright laws to better accommodate their increasing need for quality education and research. To better understand the development of copyright law, this study begins by examining countries that are more experienced in this field of law.

On the one hand, taking lessons from jurisdictions with an established legal system helps lawmakers to identify relevant elements when establishing laws to regulate similar issues.[1183] This is particularly the case for countries that share a similar cultural background and legal tradition. On the other hand, it is clear that direct transplantation of foreign laws may not always have the desired effect because of different cultural values and social-economic levels.[1184] Written law can only be respected and enforced when it recognizes a country's culture and legal tradition, and is able to meet

[1181] Black *Intellectual Property* 115-116.

[1182] Litman (1996) *Or L Rev* 20-48.

[1183] J Gordley "Comparative Legal Research: Its Function in the Development of Harmonized Law" (1995) 43 *American Journal of Comparative Law* 555 555-560.

[1184] PJ Kozyris "Comparative Law for the Twenty-first Century: New Horizons and New Technologies" (1994) 69 *Tulane Law Review* 165.

the country's national needs.[1185] In order to avoid a "cut-and-paste" approach when adapting law from one legal system to another, this study takes South Africa and China's legal traditions and national needs into account and provides suggestions for the two countries to amend their copyright laws accordingly .

In summary, this thesis assumes a critical and cautious attitude in undertaking a comparative study that borrows ideas from long-standing and well run legal systems. At the same time, this study is also sensitive to the specific issues faced by a country which is learning from another more experienced legal system, and endeavors to work out suggestions that will fit into the country's existing legal system and tradition.

8 3 Concluding remarks

The thesis discusses the theoretical structure and philosophical outlook of copyright, copyright limitations and exceptions at national, regional and international levels. It also deals with anti-circumvention rules, ISPs' liability and the laws regulating contractual agreements that exclude copyright exemptions. The alternatives to limitations and exceptions that allow wide access to copyrighted materials, such as collective copyright management and open licenses, are also covered.

Employing a comparative approach, six elements are highlighted. First, there is not a "One-Template-For-All" copyright law model which is appropriate for all jurisdictions; second, when stipulating copyright limitations and exceptions, lawmakers need to explore and develop an approach that combines certainty and flexibility; third, a delicate balance needs to be maintained between restricting copyrights and creating new ones in a digital era; fourth, various stakeholders' interests need to be taken into account when amending the existing copyright law; fifth, economics plays a role in policy assessment; and finally, policymakers need to seek alternatives to copyright limitations and exceptions to allow wide access to knowledge.

8 3 1 No "One-Template-For-All"

Since copyright is universally recognized, this thesis evaluates national copyright laws in the light of international treaties, with particular reference to the impact of copyright on research and development in developing countries. Unfortunately, the global copyright regime is often markedly

[1185] Örücü "Unde venit, quo tendit comparative law?" in *Comparative Law* 13.

skewed in favor of developed countries, resulting in high costs to developing countries. An examination of the philosophies related to copyright demonstrates that a nation's culture and legal tradition affect its citizens' attitude towards copyright protection. Moreover, a review of the evolution of copyright protection in the West between the 19th and 20th centuries shows that effective copyright enforcement tends to rise with a nation's income level.

Therefore, although harmonizing copyright law at regional and international levels is necessary for transnational trade, there is no single template that can be used for national copyright legislation.[1186] As South Africa and China develop their copyright laws further, each country needs to take into account its own economic-social conditions and national needs. Both countries need to pay special attention to promoting education and research, which are in the public interest.

8 3 2 Formulating limitations and exceptions: combining certainty and flexibility

This study focuses primarily on copyright limitations and exceptions at a time when copyright law is being rebalanced. Since different legal systems stipulate limitations and exceptions differently, regional and international treaties have rules that clearly specify the bottom line for copyright protection. This study points out that an internationally recognized rule on copyright should have certainty when stipulating protective standards. Such a rule should also have the flexibility to allow countries to devise limitations and exceptions according to their specific needs.[1187] A widely accepted international rule is a three-step test that first appeared in the Berne Convention and later adopted in a number of international treaties, such as the TRIPS Agreement. The test has certainty, for it has three factors that countries must observe when stipulating limitations and exceptions. At the same time, the test offers flexibility since it does not have a quantitative requirement for an exception.[1188] Moreover, the three factors can be interpreted with latitude by a national judiciary.[1189] Since the three-step test is a result of compromise between an open system that provides an open-ended fair use test and a closed system that enumerates copyright exemptions specifically and exclusively,[1190] countries can adopt the three-step test without radically changing their laws. Therefore, countries can draft the three-step test into their copyright legislation to ensure that they do not risk breaching international obligations. Meanwhile they still retain the discretion to

[1186] May (2003) *EIPR* 4-5.

[1187] Hugenholtz & Okediji *Conceiving an International Instrument* 25.

[1188] Article 9(2) of the Berne Convention.

[1189] Ngombe (2007) *EIPR* 64-65.

[1190] WIPO & Sirinelli *Exceptions and Limits* 3-4.

determine what kinds of restrictions they wish to impose on copyrights.

Developing countries can adopt a three-step test to ensure that their national copyright law operates within the framework of international treaties. This is what China is attempting to do by inserting the three-step test into the rights limitation section in the latest Revision Draft of the 1990 Copyright Law. Since Chinese copyright legislation employs a closed system that specifies copyright limitations and exceptions exclusively, a three-step test would give judges more flexibility to determine whether a use, which is not specifically stated on the exception list, is legitimate or not. Developing countries should also make maximum use of the flexibilities provided in the Berne Convention and other international treaties, and give generous exceptions to the education and research sectors.

Moreover, it is possible for a country to have hybrid copyright legislation combining features from different legal systems under the guidance of a three-step test. Australian copyright law is such an example. Commonwealth countries have a tradition of fair dealing, while US copyright law enshrines the fair use doctrine providing judges with the flexibility to determine whether a use is fair. Australian copyright legislation, with its fair dealing provisions, incorporates an open-ended test similar to the fair use doctrine to give judges more latitude to determine whether making use of a work can be considered fair dealing. Since South Africa has a fair dealing tradition, Australian copyright legislation provides South Africa with an example of providing greater flexibility for fair dealing where research, teaching and private study is involved.

8 3 3 A balance between protection and restriction on copyrights

Developing countries urgently need to amend their copyright law to adapt to a digital environment. While traditional copyright law focuses on the protection of reproduction rights, digital copyright law needs to pay more attention to regulating the transmission of copyrighted materials over information networks. On the one hand, digital reproduction of a work that is not disseminated would have little effect on a copyright holder's economic interest.[1191] On the other hand, much of the exploitation of information in digital form is not possible for many activities other than information searches. For instance, database service providers, such as Westlaw, primarily sell access to information, not the copying of information. Internet search and linking services also enhance users' ability to locate information, but not to copy it. It is clear that copying-oriented

[1191]E Miller & J Feigenbaum "Taking the Copy out of Copyright" in T Sander (ed) *DRM'01 Revised Papers from the ACM CCS-8 Workshop on Security and Privacy in Digital Rights Management* (London: Springer-Verlag, 2002).

copyright law is somewhat outdated.[1192] In particular, the protection of technological measures afforded by copyright law enhanced copyright proprietors' control of the access to information. Thus, copyright law needs to redefine a number of traditional copyrights such as the reproduction right and create new copyrights for right holders so that they can control their works that are made available to the public over an information network.

Both South Africa and China have established an information network infrastructure enabling people to reproduce and distribute digital materials conveniently. Since most educational and research materials are subject to copyright, lawmakers should ensure that copyright law does not block the flow of knowledge in cyberspace. Therefore, both countries need to fully understand the implications of the WIPO Internet Treaties when developing their copyright and copyright-related laws.

Once again, a delicate balance is needed between revamping copyrights and restricting them with newly devised limitations and exceptions. In particular, a number of exemptions should be granted to allow teachers, educational institutions and libraries to employ an information network to transmit a wide range of copyrighted materials to promote societal learning, such as non-commercial distance education. Students and self-learners should also have exemptions to use copyrighted materials in digital form.

Moreover, traditional copyright limitations and exceptions need to be adjusted and developed to keep pace with the development of digital technology. In order to develop copyright exceptions in a timely manner, whether to maintain traditional exemptions in a digital environment is a thorny question. In making such a decision, it is necessary to distinguish copyright exceptions based on economic factors from ones based on political factors and public policy. That is, an exemption that came into being because of market failure can be eliminated if innovative technology can resolve the market failure problem. However, an exemption based on public policy should not be abolished simply because a new technology or a licensing scheme is available in the market.

When an exemption is based on both economic and policy factors, policymakers need to balance the different interests to determine whether to preserve the exemption. For instance, a private use exception is partially based on economics since it would be so costly to monitor each copy of a copyrighted work for non-commercial purposes that it would not be financially worthwhile to

[1192] RT Nimmer & PA Krauthaus “Copyright on the Information Superhighway: Requiem for a Middleweight” (1994-1995) 6 *Stanford Law & Policy Rev* 25 30-32; Miller & Feigenbaum *Taking the Copy out of Copyright*.

protect the work. However, it is becoming easier for a copyright holder to monitor and charge for each copy of a work with DRMs.[1193] Thus, the exception can be abolished when DRMs are available in the market at an affordable price. Nevertheless, there may be a political basis for a private use exception. That is, citizens in a democratic society normally have a right to access information that could possibly affect the public interest, even if the information is contained in a copyrighted work.[1194] Here, a private use exception should not be removed simply because technology enables copyright holders to monitor the personal usage of works.

Copyright exceptions for education and research can be justified on political and public policy grounds. First, distributive justice requires that the most disadvantaged groups in society be compensated to ensure that they have an equal opportunity to access societal resources such as a public education.[1195] In particular, Timothy Brennan writes that fair use for educational purposes is justified as a redistribution of wealth away from copyright holders to students with little money. This helps equalize educational opportunities.[1196] Second, the right to an education is a human right that is constitutionally guaranteed in most countries.[1197] Copyright exceptions allowing students and the public to access copyrighted materials for self-study serve to fulfill the constitutional right of education. In South Africa, the fundamental constitutional rights of equality and dignity also entail the mandate to furnish students with access to quality education. Third, a number of jurisdictions have a public policy that allows free uses of particular copyrighted materials in the public interest.[1198] Education and research supported by state and public funds are carried out on the basis of the public interest. Therefore, exceptions allowing teachers and researchers to use certain works freely for teaching and research should not be repealed simply because a licensing scheme is available that enables them to pay to use works. Rather, an exception that guarantees access to education and research materials at an affordable price should be preserved.

[1193] MJ Stefik "Letting Loose the Light: Igniting Commerce in Electronic Publication" in MJ Stefik (ed) *Internet Dreams: Archetypes, Myths, and Metaphors* (Cambridge: MIT Pr, 1996) 219 230-234; Clark "The Publisher in the Digital World" in *Intellectual Property Rights and New Technologies* 97-101.

[1194] Netanel (1996) *Yale LJ* 283.

[1195] Rawls *Justice* 60; Crocker (1977) *Phil & Pub Aff* 266; Fleischacker *Distributive Justice* 109-115.

[1196] Brennan "'Fair Use' as Policy Instrument" in *Economics of Copyright* 80 83.

[1197] For China, see Art 19 the Constitution of 1982, as amended in 1988, 1993, 1999 and 2004, and for South Africa, see Ch 2 of the Constitution of the Republic of South Africa 1996.

[1198] Senftleben *Copyright, Limitations and the Three-Step Test* 198-205.

8 3 4 Taking the interests of stakeholders into account

Rebalancing copyright law in an information network environment requires policymakers to consider the interests of a variety of stakeholders, particularly the interests of device manufactures, ISPs and licensors of copyright products.

Copyright holders increasingly employ technological measures to protect their works in digital form. Developed countries were the first to include anti-circumvention rules within the framework of copyright law. At the international level, the WIPO Internet Treaties require its members to insert anti-circumvention rules into their copyright legislation. This is a challenge for developing countries, since they usually do not have a well-developed digital product industry and are unfamiliar with anti-circumvention law. South Africa has anti-circumvention rules for electronic commerce activities, but they are not directly related to copyright.[1199] Although China does have copyright related anti-circumvention rules,[1200] different administrative departments were involved in their formulation, thus the anti-circumvention rules in a variety of different legal documents are inconsistent. Moreover, the rules generally are tilted to favor the copyright proprietors and the exemptions are much too limited for users to apply.

Based on a comparative study of the anti-circumvention laws in the US, the UK and the EU, five general rules are proposed for South Africa and China to construct an anti-circumvention law. First, core concepts and terminologies such as a “technological measure” and a “circumventing device” should be precisely and clearly defined. Second, copyright law should distinguish access-control technological measures from copy-control ones. Copyright law could protect both types of technological measures and provide exemptions for the circumvention of copy-control measures for legitimate purposes. Third, an anti-circumvention law could adopt a sole purpose test to define a circumvention device as a device that is produced or marketed solely for circumvention. Fourth, an anti-circumvention law would have more flexibility if it had a general exemption for circumventing acts with a legitimate purpose other than the specifically prescribed ones. Finally, copyright law does not need to protect technological measures dealing with non-copyright materials.

When regulating ISPs, lawmakers need to recognize that the risk is high that ISPs will be charged with contributory liability for assisting end users to infringe on copyright. It must be noted that ISPs

[1199] Ss 85 & 86 of the ECTA.

[1200] The major legislative pieces dealing with anti-circumvention acts are Art 47(6) of the Copyright Law Amendments of 2001; Art 24(3) of the Regulations on Protection of Computer Software; and Art 4 of the Information Network Regulations.

play an important role in transmitting and locating information. Globally, teachers, students and researchers increasingly depend on the Internet and other information networks to share knowledge. Therefore, copyright law needs to balance the interests between ISPs and copyright owners, and carefully demarcate ISPs' liability when providing different kinds of services. Copyright rules determining an ISP's liability should ensure that the interest of copyright holders is sufficiently protected in cyberspace while ensuring that access to information is not adversely affected.

This study suggests that South Africa and China should develop copyright law to regulate ISPs' activities by referring to the US and the EU legislative experiences. South Africa does not deal with ISPs' liability in the Copyright Act of 1978. Rather, it is ECTA that deals with electronic commerce and network security which has provisions regarding ISPs. However, the ECTA provisions are irrelevant to copyright issues. Since access, transmission and storage of electronic information could raise network security and copyright issues simultaneously, the Copyright Act and ECTA should have compatible rules on ISP liability. In China, a number of copyright regulations deal with ISPs. However, since legal documents employ different liability standards for ISPs infringing copyright, case law suggests that an ISP only should be liable for assisting end users who infringe copyright when it has actual knowledge of copyright infringement. Again, a set of more systematic and consistent rules on ISP liability needs to be developed to replace the current piecemeal administrative regulations.

Another issue copyright law needs to address is the validity and enforceability of shrink-wrap, click-wrap and web licenses. Such licenses are often used to limit or prohibit consumers from exploiting a copyrighted work in many ways, even those which are permitted under copyright law. This study examines the US, the UK and the European approaches and summarizes two general rules that determine the validity of such a license. The first rule is based on the functional equivalent approach that is employed to deal with electronic commerce. This approach analyzes the purposes and functions of paper-based documents and determines how the purposes and functions can be fulfilled through electronic commerce techniques. Electronic records are as reliable as paper records as long as they meet technical and legal requirements under relevant laws. Once an electronic document is considered valid, the second rule, which determines whether such a document is enforceable as a contract, is that the licensing terms of a license must be displayed conspicuously and be readable.[1201]

South African and Chinese copyright laws do not deal with the legality of shrink-wrap and click-

[1201] Pistorius (2006) *Potchefstroom Electronic LJ* 16-18.

wrap licenses. This study explores the US, the UK and the EU's relevant laws and proposes two approaches to determine the validity of a license that purports to restrict exceptions granted under copyright law. The UK copyright legislation, the CDPA, employs a piecemeal approach that allows a copyright holder and a user to contractually state that the user would not make use of certain copyright exceptions when making use of a work. At the same time, the copyright law forbids the contractual exclusion of other exceptions. The approach provides legal certainty and avoids the rigidity of a blanket prohibition on licenses that restrict users from applying for copyright exceptions. Alternatively, in the US, the judiciary has the discretion to determine whether a license is valid or not. A US court may be willing to invalidate a license that overrides a statutory copyright rule, but may be less willing to nullify a license overriding a legal principle which is not written in law, or to overturn a license that contradicts public policy. South Africa's and China's copyright lawmakers could clarify in the legislation that a copyright holder is not allowed to contract with users to exclude copyright exceptions for education and research purposes. This would give the judiciary the discretion to determine the validity of a license that precludes other kinds of exceptions.

8 3 5 Economics plays a part in policymaking

This study makes it clear that the financial interest of copyright holders should be limited, but not sacrificed, when rebalancing copyright law to support education and research. Therefore, not only is there an examination of copyright law, there is also an examination of economics theories to explore how copyright limitations and exceptions should be constructed. This is done in such a way that users can have greater access to copyrighted works without significantly affecting copyright holders' economic interests.

In general, consumers evaluate benefits and costs when deciding to purchase an original copy or a pirated one, and make their decision accordingly. The likelihood of punishment when committing piracy and a product's price set by a copyright holder, combine to determine a user's decision. When a product's price is significantly higher than a consumer's estimate of its value, the consumer's rational economic choice is to use an unauthorized copy. When the price is high and copyright law is stringent and well enforced, a consumer who cannot afford to purchase it is excluded from the market. It would be disastrous if this happened with materials needed for the education and research market.

In particular, there is much debate in South Africa on whether copyright law should broaden or

minimize exceptions and whether it should encourage users to contract with copyright holders to pay to use their works.[1202] From an economic perspective, exceptions for education and research would not significantly reduce the income of authors of textbooks and journal articles, or reduce the income of academic publishers.[1203] Broad exceptions would serve to subsidize students, particularly ones who live in poor areas, by giving them access to basic educational materials at an affordable price.[1204] Therefore, it seems quite feasible for South Africa to give broad copyright exceptions to the education and research sectors.

This thesis also proposes a new legislative model after an examination was made of the literature on economics and copyright policy. This model is quite different from traditional ones that merely stipulate a maximum amount of a copyright work that can be used and do not allow for any exceptions. Rather, this study presumes that it would be better for copyright law to give copyright holders discretion to determine how much of their works they wish to give up for free use.[1205] This right holders' freedom needs to be backed by provisions of compulsory licensing that guarantees users' access to basic copyrighted materials .

8 3 6 Alternatives that broaden access to copyrighted materials

In addition to exploring copyright limitations and exceptions, this study seeks other methods to reward copyright holders financially while allowing wide access to copyrighted works at low cost. One innovative method suggested in the Chapter Four is an electronic commerce platform model that levies no charge to a user to access a wide range of copyrighted digital music. Copyright holders are not penalized since they profit from advertising revenue generated by the online platform. Although this example is only peripherally relevant to copyrighted materials for education and research, it provides a new perspective for copyright holders and policymakers to consider when formulating copyright policy.

Another method allowing wide access to copyrighted works is to use open licenses such as the GNU and the CC ones. In both South Africa and China, open licenses are recognized as an alternative to the “all-rights-reserved” copyright model. Open licenses have been widely used by

[1202] Gray & Seeber *PICC Report* 76-77.

[1203] Liebowitz (1985) *J Pol Econ* 956-958; Johnson (1985) *J Pol Econ* 160-174; Novos & Waldman (1987) *Contemp Pol Issues* 36-43; Besen & Kirby (1989) *JL & Econ* 256-278.

[1204] Brennan “'Fair Use' as Policy Instrument” in *Economics of Copyright* 82.

[1205] Johnson & Waldman (2005) *RERCI* 33-35.

academics and researchers, as well as public and private institutions, to release educational and research materials, including books and software. In order to promote open licenses, educational institutions, non-profit organizations and governmental sectors should play a role in providing a platform with an information network to make it easy for students, teachers and researchers to put their works into databases with open licenses.

Finally, an efficient collective copyright management system is important in guaranteeing the enforcement of copyright law. Copyright holders are able to use CMOs to license their works and collect royalties. Since copyright law provides for statutory licenses that allow users to pay to use certain works without being authorized, a well-functioning collective copyright management system assists users to pay to use statutory licenses and ensures income for copyright holders.

On the one hand, CMOs are able to significantly benefit a country after copyright-related industries and an export sector have been established.[1206] On the other hand, establishing and running a CMO in a developing country has high administrative costs and may result in an unequal flow of royalties to developed countries that are copyright product exporters.[1207] In South Africa, DARLO is a collective management organization licensing a wide range of copyrighted materials that can be used for educational purposes. Due to its quasi-monopolistic nature, consumers have to pay a higher licensing fee than in a perfectly competitive market. Therefore, to alleviate educational institutions' financial burden in paying copyright licensing fees and rights management fees, the country needs to consider creating at least one more collective management organization dealing with education and research materials. In contrast, China has a much larger market with a more competitive publishing industry. Therefore, China should establish more than one CMO to administer different fields of copyright products. This study examines the Chinese copyright laws that regulate collective copyright management, and makes a number of suggestions to improve the efficiency of the CMO system. This includes suggesting that China learn from Nordic countries and adopt an extended collective licensing system to allow a CMO to administer non-members' copyrights.

This thesis has shown that developing countries need to develop their copyright laws according to their legal and cultural tradition, as well as specific national needs, all within a framework of international treaties. Moreover, in an information network environment in which digital technology can lower the cost of basic learning materials, it is time for developing countries to reform copyright law to strike a balance among stakeholders and promote education and research, as these

[1206] CIPR *Integrating Intellectual Property* 98-100.

[1207] Adewopo (2001) *U Tol L Rev* 75; CIPR *Integrating Intellectual Property* 98 &140.

are basic components of the public interest.

Based on a thorough examination of South African and Chinese copyright laws, this study endeavors to provide developing countries with well thought out suggestions. These suggestions can be used as guidelines when reforming copyright law to accommodate South Africa and China's national needs for education and research in a digital era. It is hoped that the impact of this thesis will extend beyond merely being a study on national laws, but will provide a stepping stone for copyright law reform in the developing world.

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