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The Uncertain Future of Fair Use in a Global Information Marketplace

MARSHALL LEAFFER*

The author of this article forecasts an increasingly troubled future, if not the demise of the doctrine of fair use in copyright law. Legal developments, both at home and abroad, driven by technological change, and the push toward the international harmonization of legal norms, threaten the very survival of fair use. Given these realities the doctrine will, of necessity, be reconceptualized. Although fair use values will always be inscribed in copyright law, these values will have their practical manifestation in decentralized form, and effectuated, in large part, through industry agreement. They will exist in conjunction with certain bright line exceptions and limitations to copyright that will resemble the fair use conception in civil law countries. It may take several years to assess whether this reincarnation of fair use will adequately mediate the needs of users and copyright owners in a global information marketplace. But the on-going process leading to a new fair use paradigm is firmly in place as manifested by the Digital Millennium Copyright Act (DMCA) establishing an administrative oversight process for determining fair use in this context.

I. INTRODUCTION

The message I bear in this article is a somber one and may even strike some as being unduly pessimistic. In short, I forecast an increasingly troubled future, if not the demise of the doctrine of fair use in copyright law. The reasons for this bleak future are manifold. Legal developments, both at home and abroad, driven by technological change and the push toward the international harmonization of legal norms, threaten the very survival of fair use. Given these realities the doctrine will, of necessity, be reconceptualized. Of course, fair use values will always be inscribed in copyright law. But I predict that these values will have their practical manifestation in decentralized form, in large part through industry agreement. They will exist in conjunction with certain bright line exceptions and limitations to copyright that will resemble the fair use conception in civil law countries. Indeed, the civil law model of fair use, based on specific exceptions, has already found its American counterpart in the Digital Millennium Copyright Act (DMCA), which has established an administrative oversight process for determining exceptions to the "anticircumvention provisions of the Act.[1] From a practical standpoint, it will take several years before we will be able to assess whether the reincarnation of fair use in some new mode will adequately mediate

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[1] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as scattered sections in 17 U.S.C.) (discussed further *infra* notes 29–32 and accompanying text).

the needs of users and copyright owners in a global information marketplace. But the on-going process leading to a new fair use paradigm is firmly in place.

It is no coincidence that the attrition of the doctrine of fair use comes at a time when the convergence of digital technologies has reordered our lives. As we all know, the United States has evolved from an industrial to an information and services based economy in a relatively short time frame. This postindustrial era is marked by rapid technological change in which our ability to reproduce and receive information grows exponentially. It is hard to believe that motion pictures first appeared little more than seventy-five years ago; many of us can remember a time when cable and satellite communications belonged to a hazy future. Who can predict what new information-based technologies lie ahead? From all indications, the communications revolution is only in its infancy.

As the value of information grows, so does the law of copyright—the legal structure that governs the rules concerning its ownership. The numbers are staggering. In 1997, the core copyright industries—pre-recorded music, motion pictures, home videos, books, computer software, etc.—achieved foreign sales and exports of over 66 billion dollars, surpassing all other sectors including agriculture, chemicals, and automobiles.[2] Clearly, we live in an era where informational products are of prime economic importance and are becoming ever more so. It is also an era in which anyone can be a publisher and where our ability to reproduce works of information increases exponentially while the cost of copying information approaches zero. Much to the chagrin of the music companies, with a few strokes of the computer I can download any music I want in MP3 format.[3] Unauthorized copies of expensive software are sold on the street for a few dollars. The list could go on, but the message is clear. Today's "copying problem" presents challenges that transcend qualitatively anything in history, and the economic stakes are greater than ever.

So how should the creator or owner of information proceed in this technological frenzy? For one thing, information technology can provide methods to exclude others; software companies encrypt their products, creating digital fences against unauthorized access. Some providers may even structure their businesses so that designated content is free for copying. One might call this the "Yahoo! strategy" whereby firms aim to recover their revenue from tied services and advertising by attracting "eyeballs" to their websites. At the end of this list of methods to resolve the "copying problem" one finds the law, the most important of which is that branch of intellectual property law called copyright. Information providers may have had trouble with recalcitrant unauthorized users of their

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[2] STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 1999 REPORT 3 (1999) (prepared for the International Intellectual Property Alliance).

[3] *See* Amy Harmon, *Patent Software Escalates Music Industry's Jitters*, N.Y. TIMES, Mar. 7, 2000, at A1 (discussing the technology of music file compression formats (MP3) and Internet file sharing systems and the legal problems involved).

works. They have had much more success in the courts and before Congress in tailoring the law to their advantage.[4]

Historically, the law of copyright has been a means by which we try to attain an optimal balance between the rights of producers and the needs of consumers. Here, the law creates a legal fence around certain information that meets the criteria for protection.[5] On the other hand, the boundaries of that property are not so impenetrable that access to information is rendered so costly that its optimal use will be jeopardized. Sure, we want to provide an incentive to create information but we do not want that exclusivity to undermine the ultimate goal of copyright, which is the dissemination of that information for the public benefit.

The balance between the exclusive rights of a copyright owner and the public's need for access has been struck by the delicate tissue of rights and limitations codified in the Copyright Act.[6] We provide the copyright owner a set of exclusive rights to reproduce, distribute, display, and perform the copyrighted work. These rights, however, are subject to a series of exceptions and limitations that create a breathing space around what would otherwise be airtight exclusive rights.[7] They insulate users of copyright works from liability and enhance the public welfare by allowing access to information. The most famous of these exceptions and limitations is known as fair use.[8]

So what is fair use? The doctrine traces its origin to nineteenth-century case law. Although recognized for over one hundred years as a defense to an action of copyright infringement, it was not codified until the current 1976 Copyright Act. As codified, the fair use doctrine begins with a preamble, which reads: "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[9] After stating its purposes, the Act enumerates four factors to determine whether fair use applies. The four factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;

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[4] *See* discussion of the legislative front, *infra* note 28.

[5] These boundaries are represented by the exclusive rights to copyright the reproduction, adaptation, distribution, performance and display. *See* 17 U.S.C. § 106 (1994 & Supp. IV 1998). In 1998, Congress substantially beefed up those rights by the passage of the DMCA. *See* discussion *infra* notes 29–32 and accompanying text.

[6] *See* Copyright Act, Pub. L. No. 94-553, 90 Stat, 2451 (1976) (codified as amended in scattered sections of 17 U.S.C.).

[7] The "gates" or entry points are represented by the exceptions and limitations to the exclusive rights. *See* 17 U.S.C. §§ 107–21 (1994 & Supp. IV 1998). Section 107 is the fair use defense, the subject of this paper.

[8] § 107.

[9] *Id.*

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[10]

These factors are particularly fact sensitive. That is, the circumstances of each case shape the outcome of the application of the doctrine. At its best, this formulation provides the flexibility and capacity to evolve and adapt to changing needs. As we will see, fair use values are found in copyright laws around the world. All countries have exceptions and limitations to copyright law, but none has such a broadly stated doctrine as does the United States. Inevitably, there exists a flexibility/certainty tradeoff in formulating any legal doctrine. Thus, given its vague contours, it comes as no surprise that fair use cases are hardly predictable. In fact, fair use has the dubious reputation as the most troublesome doctrine in copyright law. And for good reason. The lack of consensus over the basic contours of the doctrine represents more than mere doctrinal messiness. After all, fair use is the principal doctrine that users of copyrighted works must struggle to apply as they seek to resolve whether their activities are permissible without the intervention or authority of the courts.

II. THE CASE LAW AND THE MARKET FAILURE THEORY OF FAIR USE

To illustrate how recent fair use case law has operated, let us take some examples that hit close to home for those of us in the academic and research communities. In July 1992, the U.S. District Court for the Southern District of New York held in *American Geophysical Union v. Texaco, Inc.* that a scientist at Texaco went beyond the limits of fair use when he made individual copies of journal articles for his personal research needs.[11] The case was affirmed by the Second Circuit Court of Appeals.[12] Both courts found that even though Texaco purchased multiple subscriptions to the journal, the photocopying evidenced a need for more. Consequently, Texaco should have ordered original subscriptions or paid a royalty fee for copying.[13]

The case was a warning for many private companies. It signaled that common photocopies—even under the most auspicious and isolated conditions—could be the basis of a copyright infringement case. Many of the practices that researchers, librarians, and others within a company may previously have taken for granted were thereafter subjected to heightened scrutiny. Reaction to *Texaco* was immediate. Some companies simply instituted a "no copying" policy throughout

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[10] *Id.*

[11] Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1 (S.D.N.Y. 1992).

[12] Am. Geophysical Union v. Texaco, Inc., 37 F.3d 881 (2d Cir. 1994).

[13] *Id.*; *Texaco*, 802 F. Supp. at 1.

the organization. In fact, surveys indicate that hardly any company will even publicly admit to exercising the fair use privilege.[14]

If *Texaco* was not enough, two years later the educational and research communities suffered another blow to customary practices that they had justified as fair use. In *Princeton University Press v. Michigan Document Services,* the Sixth Circuit Court of Appeals held that a copy shop's reproduction of copyrighted materials in course packs is not a fair use.[15] Much as in *Texaco,* the court rendered illegal a customary practice that many universities had taken for granted. The court found that the commercial nature of the use and the fact that the authors of the works taken were losing licensing fees weighed heavily against fair use.[16]

I have just examined two celebrated cases concerning the fair use doctrine that are particularly troublesome to many in academics and others needing ready access to information—a trend that has continued in the recent case law.[17] This poses the fundamental question. From a larger standpoint, why are the courts less amenable to finding fair use, even in situations such as research and education, that appear to be the most appropriate for its application? Why are they willing to find infringement in circumstances hitherto recognized as proper and customary practice in the scientific and educational communities?

Some critics of fair use argue that the privilege is no longer warranted in most situations.[18] Their most telling point is that our current technologies have largely rendered obsolete its principal justification, known as the market failure theory of fair use. Under this theory, fair use allows the dissemination of copyrighted works in situations of market failure.[19] This would occur where transaction costs—the

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[14] Kenneth D. Crews, *Copyright at a Turning Point: Corporate Responses to the Changing Environment,* 3 J. INTELL. PROP. L. 277, 279 (1996).

[15] Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1383 (6th Cir. 1996).

[16] *Id.* at 1386.

[17] *See, e.g.,* Images Audio Visual Prods., Inc. v. Perini Bldg. Co., Inc., 91 F. Supp.2d 1075 (E.D. Mich. 2000) (holding that the fair use doctrine may not be invoked to permit a construction company's reproduction of copyrighted construction site photos).

[18] This is the position of the 1995 "White Paper," which concluded that "it may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine." INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 82 (1995).

[19] For the seminal article advocating the market failure theory of fair use, see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors,* 82 COLUM. L. REV. 1600 (1982). Professor Gordon suggests that a court will ordinarily not grant a defendant fair use treatment unless the facts of the case give reason to mistrust the market. She suggests a three-part test for fair use analysis. First, is there a reason to mistrust the market? Second, is the transfer to defendant wealth maximizing, as determined by weighing plaintiff's injury against defendant's social contribution? Third, if both the first and

costs of negotiation—are so high that an otherwise mutually beneficial exchange would not take place. For example, if a literary critic were forced to obtain consent for quoting pertinent portions of an author's work, the costs of the transactions—that is, negotiating a license—would deter a mutually beneficial exchange. And, as a result, the work would not be created. Here, fair use is appropriately applied to avoid market failure, facilitating a productive use of copyrighted work.

But as new technologies are introduced to make the tracking and licensing quick and practical, the market failure justification of fair use operates with less force.[20] Today, we can find people and companies easily on the Internet and with a few clicks of a mouse and a Visa card number we can pay for a copyright license. The fair use doctrine was developed in an era when the American society knew nothing about Visa cards, much less e-commerce. Times have changed radically, and one might conclude that fair use is now obsolete in a networked world. Indeed, both the courts and Congress appear to have adopted this reasoning. In the *Texaco* case just discussed, the court specifically noted that there existed a workable market, primarily through the Copyright Clearance Center for obtaining licenses for the type of photocopying at issue.[21]

At least for the moment, I believe that this view overstates the ease with which licenses may be negotiated. Alas, market failure still exists. Despite technological advances, at least for now, licensing markets are hardly perfect. But even a skeptic such as myself admits that there might come a time in the not too distant future where this is no longer the case and the cost of transactions approaches zero.

I also believe that the market failure justification for fair use, in its more extreme form, misses the point. Viewing fair use as a market perfecting mechanism is too narrow as it trivializes the doctrine designed for larger purposes. It ignores uses that are vested with a public interest. The existence of transaction costs may justify as fair use various de minimis uses that no reasonable copyright holder would object to, such as copying a story from the day's newspaper to send to a friend, or a schoolteacher who wants to photocopy a chapter from a copyrighted book for use in class. Under the market failure approach to fair use, the newspaper photocopier or schoolteacher would have to obtain a license for the use. This appears to me to be an uncomfortably narrow approach that ignores the more commodious purpose of the doctrine. Fair use has always served a broader, more flexible role than that admitted by the market

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second conditions are satisfied, would a grant of fair use cause substantial injury? If it would not, and if the prior conditions are satisfied, then fair use should be awarded. *Id.* at 1626.

[20] *See* Robert P. Merges, *The End of Friction? Property Rights and Contract in the Newtonian World of On-Line Commerce,* 12 BERKELEY TECH. L.J. 115 (1997).

[21] Am. Geophysical Union v. Texaco, Inc. 802 F. Supp. 1, 19 (S.D.N.Y. 1992). For an overview of the operation of the Copyright Clearance Center, see MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 449 (3d ed. 1999).

failure justification. Thus, a public benefit approach might well allow these uses. By this view, the value to society of having a well-educated citizenry, in addition to the private value enjoyed by the users, would outweigh any loss to the publisher.[22]

The debate about the proper role of fair use continues and the legal literature proliferates.[23] Academic and scholarly users insist that the changing technology ought not to affect the scope of their statutory privilege under fair use. With equal verve, copyright owners assert that fair use should continue to be a legal factor in the digital environment but that its need should recede over time. These same content providers have successfully argued that copyright merely establishes a set of default rules that can be modified by contract. Recent case law has supported this proposition. The leading case is *ProCD, Inc. v. Zeidenberg,* which held that consumers can sign away their rights, despite substantial arguments that "shrinkwrap" or "clickwrap" license restrictions are either preempted by federal copyright law or are invalid under state contract law.[24] The courts are by no means uniform on the enforceability of these licenses that would allow copyright owners to opt out of the system en masse. To say the least, the issue is in a state of flux.[25] Ultimately, Congress may be forced to decide whether copyright policy should allow copyright owners to circumvent by contract copyright law's balance of rights and limitations.

The truth is that in American law the ambit of fair use has receded; its contours ever more uncertain. Determining what constitutes a fair use of a copyrighted work in a given situation is a hazardous undertaking. Providing guidance on fair use is the last thing that a practicing lawyer, even one versed in copyright, would prefer to do. Despite the uncertainty, the clear tendency as manifested in the case law is becoming apparent: in cases that really count, that is, anytime large group rights are involved, courts have progressively sided with information providers against the user's right to access.[26]

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[22] For a statement of the public benefit interest justification, see PAUL GOLDSTEIN, COPYRIGHT § 10.1.3 (2d ed. 2000).

[23] The articles are simply too numerous to enumerate as any Lexis or Westlaw search of law review literature will reveal.

[24] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).

[25] *See* Mark A. Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing,* 87 CAL. L. REV. 11 (1999) (analyzing the cases and issues); Maureen A. O'Rourke, *Copyright Preemption after the ProCD Case: A Market-Based Approach,* 12 BERKELEY TECH. L. J. 53 (1997).

[26] For "de minimis" uses of copyrighted works that do not involve large group rights, fair use still has a role to play. *See, e.g.,* Baraban v. Time Warner, Inc., No. 99 CIV.1569 (JSM), 2000 U.S. Dist. LEXIS 4447 (S.D.N.Y. Apr. 6, 2000) (holding that a reproduction in a book of a photograph used in a political advertisement was a fair use because it constituted commentary on the message of the advertisement); Kelly v. Arriba Soft Corp., 77 F. Supp.2d 1116 (C.D.

We have just reviewed the thrust of the case law regarding fair use. Let us take a look at developments at the congressional level that in some way present an even more serious threat to fair use.

III. FAIR USE IN THE DIGITAL NETWORK ENVIRONMENT

No matter what position one takes, most would agree that fair use remains, perhaps more than ever, the most troublesome doctrine in copyright law. Nothing more illustrates this reality than the considerable uncertainty about how the fair use doctrine should operate in a digital networked environment. Academic and scholarly "users" insist that the change in technology should not affect the scope of their statutory privilege under section 107 of the Copyright Act,[27] and that the traditional "balance" of rights and privileges in copyright should be maintained in the digital world. With equal vigor, copyright owners insist that fair use should continue to be a legal factor in the digital environment.

This disagreement is more than just technical. It embodies strongly contrasting views about the dissemination and protection of information. As we have seen, the "user" community insists that the fair use doctrine is not simply a matter of economics. Instead, it performs a separate function, by facilitating the productive uses of copyrighted material that might not occur if subject to licensing. Alternatively, "content providers" regard fair use largely as an antiquarian relic of the print marketplace in which the transaction costs associated with clearing rights sometimes exceeded the value of the proposed use. Whatever the merits of these respective positions, we are entering an age where the dissemination of informational works is fundamentally changing. In the new information environment, where licensing of works may amount to a few clicks on a computer, the range of cognizable fair use claims would therefore be drastically restricted. In short, the significance of fair use can be expected to diminish as the line between "private" and "public" uses of information blurs and information commerce conducted through digital networks increases.

The assault on fair use has originated not only from the case law but from Congress as well.[28] The DMCA[29] passed at the end of 1998 would, among other things, prohibit the dismantling of technological safeguards against copying. These so called anti-circumvention restrictions are now codified as a part of a new

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Cal. 1999) (holding that the display of "thumbnail" versions of copyrighted images in a visual search engine was a fair use).

[27] 17 U.S.C. § 107 (1994).

[28] The year 1998 marked some of the most significant legislative changes since the passage of the 1976 Act. In addition to the DMCA, cited *infra* note 29, Congress extended the basic term of copyright to life plus seventy years. *See* Sonny Bono Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[29] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

chapter of the Copyright Act. These statutory provisions embody the following three elements: (1) prohibitions against "circumventing" technological protection measures to gain unauthorized access to protected works;[30] (2) prohibitions against the manufacture, sale, or importation of hardware and software that is designed to aid in circumvention;[31] and (3) civil and criminal penalties for violations.[32] Most importantly, both the prohibitions and the penalties are independent of copyright law: consumers could be liable even if their circumvention was done in aid of the exercise of the fair use privilege or another exemption. Similarly, suppliers of hardware and software could be liable even if their productions had a "substantial non-infringing use." [33]

The DMCA was passed to comply with the World Intellectual Property Organization (WIPO) Copyright Treaty[34] that required countries to provide "adequate protection" against the circumvention of technical measures used by copyright owners to protect their work against infringement. The DMCA, however, went far beyond the treaty requirements by broadly outlawing circumvention of access controls and technologies used to circumvent these controls. During the lively debate, critics expressed their concern that broadly drafted anti-circumvention legislation would result in suppressing the flow of information needed by the scientific and educational communities.[35]

These qualms were partly met by the final version of the DMCA, which specifically exempts many of the activities that critics felt were jeopardized by the administration's earlier proposal.[36] For example, the Act allows circumvention of technological measures for the purpose of reverse engineering to achieve interoperability of an independently created computer program. Also included are exceptions for encryption research and security testing.[37] In addition, the DMCA

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[30] 17 U.S.C. § 1201(a)(1) (Supp. IV 1998).

[31] § 1201(a)(2).

[32] §§ 1203–04.

[33] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440 (1984).

[34] *See* WIPO Copyright Treaty, Dec. 20, 1996, art. 11, *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 393 (Marshall Leaffer ed., 2d ed. 1997). The treaty will come into force when thirty countries accede or ratify it. *Id.* at 395. As of June 21, 2000, eighteen countries (including the U.S.) had either ratified or acceded to the Treaty.

[35] *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised,* 14 BERKELEY TECH. L.J. 519, 522 (1999) (characterizing the battle of the anti-circumvention provisions as one between Hollywood (supporting the strongest protection) and Silicon Valley (supporting a more open position for the purpose of engaging in lawful reverse engineering, encryption research, and computer security testing)).

[36] *See* Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?,* 21 EUR. INTELL. PROP. REV. 236 (1999).

[37] 17 U.S.C. § 1201 (Supp. IV 1998).

includes a fair use preservation clause.[38] This "fair use preservation clause," however, would come into play only when, despite technological safeguards, an information consumer had somehow gained unauthorized *access* to a protected work. Unless consumers are able to avoid technological protection measures to gain *access* to safeguarded content, where appropriate, they will be deprived of exercising their various copyright-based use privileges.

From a fair use perspective, the DMCA marks a significant change from past practice. The fair use preservation clause, allowing acts of circumvention of a rights management system to gain access to a copyrighted work, is subject to an administrative oversight process. The Act provides a two-year moratorium to determine the specific practices that would constitute fair use in the rights management context.[39] During this two-year period, the DMCA directs the librarian of Congress, in consultation with the register of copyrights, to assess the impact of the circumvention ban on fair use practices.[40] The DMCA authorizes the librarian and register to issue rules exempting users of certain categories of works from the ban on circumvention.[41] During each succeeding three year period, the librarian and register are to reassess the effect on fair use, and proclaim new exceptions where needed.[42]

This rule-making process signifies a major divergence from the traditional nature of the fair use inquiry. The authority vested in the librarian of Congress to identify and exempt specific categories of works differs sharply from the flexible open-ended fair use process. This will inevitably lead to a number of discrete, narrowly drafted, bright line exceptions. In some ways, this oversight process

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[38] § 1201(c)(1)–(2).

[39] § 1201(a)(1)(A).

[40] § 1201(a)(1)(C) (establishing the criteria for the assessment of the circumvention ban's impact).

[41] § 1201(a)(1)(B), (D). As required by law, the librarian of Congress and the Copyright Office issued a final rule on October 27, 2000, exercising its authority in modest fashion. Having reviewed the testimony, the Copyright Office settled on just two classes of works eligible for statutory exemption, as codified in 37 C.F.R. § 201.40. The two classes are: (1) Circumvention of filtering mechanisms that block access to compilations consisting of lists of web sites. The Copyright Office asserted that such software presents a problem for users who want to make noninfringing uses of such web sites compilations for the purpose of criticizing them. (2) Circumvention of protected access control mechanisms that fail to permit access because of malfunction, damage, or obsoleteness. As explained by the Copyright Office, inability to circumvent in this situation would, for example, impede libraries from engaging in noninfringing uses of archiving and preservation of works protected by such malfunctioning access controls. *See* 65 Fed. Reg. 64,553, 64,562–67 (2000).

[42] § 1201(a)(1)(C)–(D). The exceptions declared by the rule-making proceedings do not provide a defense against technologies manufactured, sold, or imported that can be used to circumvent rights management systems if they are marketed expressly for use in circumvention. *See id.* § 1201(a)(1)(E).

resembles the European model of identifying fair uses of copyrighted works.[43] Only time will tell whether this administrative process will adequately preserve traditional fair use values.

The question remains whether the net effect of the DMCA will be a proper reconciliation of the rights of owners and the privileges of users—the role traditionally played by the doctrine of fair use. In other words, to what extent does the implementation of new technological safeguards threaten important "access" values embodied in the fair use doctrine?

With the explosion of digital technology, copyright owners have been attempting to create technological barriers to prevent unauthorized use of materials available over digital networks. A totally secure system would confer obvious advantages to copyright owners. If works can be circulated safely over digital networks accessible only to authorized users, copyright owners would profit from an efficient distribution mechanism without the risk of "piracy" or "leakage" of their content. Several promising technologies for achieving this goal, including various forms of encryption and "stenography" (or digital watermarking) already exist. Moreover, new technologies may soon make copying virtually impossible without the permission of the copyright owner. The trade-off, sometimes forgotten, is the effect that technological safeguards or anti-copying devices may have on fair use. After all, such safeguards or devices, when effective, operate to prohibit copying, including copying that is fair use. Additionally, even non-mandatory technological safeguards could, in the digital environment, negate the exercise of certain rights of the public historically protected by copyright law. With so many technological advances made in the past two decades, the question now is—what role would fair use play in a world where copyrighted content as well as pubic domain material is under electronic lock and key, with access available under electronically mediated terms and conditions?

IV. INTERNATIONAL TREATIES AND THE FUTURE OF FAIR USE: THE BERNE CONVENTION

So far, I have concentrated on domestic developments that challenge the existence of fair use. However, significant challenges to fair use also arise from abroad. Whether the United States will be able to maintain its unique position on the issue of limitations and exceptions may depend on how the governing instruments in the field of international intellectual property law are interpreted.

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[43] *See* Council Directive 91/250 EEC art. 5, 1991 O.J. (L 122) 42. *See also* Pamela Samuelson, *Comparing U.S. and E.C. Copyright Protection for Computer Programs: Are They More Different Than They Seem?*, 13 J.L. & COM. 279 (1994) (suggesting that while a certain level of harmony exists between U.S. copyright law and that of the European Union, there are still sources of discord that cannot be disregarded).

The U.S. became a member of the Berne Convention in 1989, the last major country to do so.[44] The U.S. resisted entry into Berne for over one hundred years, but with the increasing importance of export markets for information to the U.S. economy, it could no longer resist. Unfortunately, one problem with joining treaties is that existing national laws may have to be changed in order to comply. In order to comply with Berne, the U.S. was required to significantly change its copyright law. On the other hand, the U.S. conveniently ignored an important provision of the Convention dealing with rights and limitations.

Article 9(2) of the Berne Convention provides the following standard for granting exceptions to the reproduction right:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] 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.[45]

This so-called "three-part test" was intended to provide a general formulation.[46] The idea was to strike a balance between public and private interests in the use of copyrighted works to resolve the problem of photocopying.[47] The test's open-ended quality, however, clearly promised controversy both in its application to national laws creating exceptions to the reproduction right for technologies other than photocopying and in relation to the supple U.S. doctrine of fair use. Under the terms of the Berne Convention, every would-be party is the final arbiter of whether its laws meet treaty requirements. When the United States became a party to the Convention in 1989, the question of whether various judicial applications of fair use could be viewed as fully consistent with article 9(2) was averted.[48]

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[44] For an overview and background on international copyright matters, see generally LEAFFER, *supra* note 21, at 501–21.

[45] Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), 1161 U.N.T.S., July 24, 1971, 3 [hereinafter Berne Convention], *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 34, at 364.

[46] Before 1967, the various acts of the Berne Convention had addressed the question of limitations in a piecemeal fashion, either through requiring member states to permit certain uses (such as brief quotations in news reports) of works protected under the Convention, or through provisions permitting those states to craft other particular exceptions under their national laws (e.g. for certain educational uses).

[47] *See* STEPHEN STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 316 (2d ed. 1989).

[48] *See generally* The Ad Hoc Working Group, *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention,* 10 COLUM.-VLA J.L. & ARTS 513 (1986) (discussing the compatibility of U.S. copyright law with the copyright provision of the Berne Convention).

Subsequently, however, serious reservations have been raised about the conformity of U.S. fair use law with the "three-part test," especially where the doctrine is applied to new technologies. Most can agree that the international law challenge to fair use may be of trifling significance where analog means of distribution and reproduction are concerned. Others, however, would argue that a different calculus should apply in the digital environment. After all, article 9(2) was adopted a quarter-century ago in response to the media, marketing conditions, and technological challenges of the day.[49]

V. THE TRIPS CHALLENGE: ARTICLE 13

All the discussion about the Berne Convention and article 9(2) might well be an abstract exercise if it were not for developments in the area of international trade agreements that place intellectual property foremost on their agenda. Whether U.S. fair use case law complies with the "three-part test" of the Berne Convention has generated mounting concern in light of the successful U.S.-led effort in negotiating the World Trade Organization Agreement that incorporated the TRIPS Agreement.[50] A major goal of the negotiation was to stem the potential proliferation of exceptions and limitations in the laws of nations with poor records of copyright enforcement. Article 13 of the TRIPS Agreement reflects the basic norm: "members 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 author."[51]

Article 13 is a reformulation of article 9(2) of the Berne Convention, but with two significant differences. First, unlike article 9(2), the TRIPS Agreement formulation of the three-part test applies to all *exclusive* rights.[52] Second, the TRIPS Agreement test is *restrictive in intent.*[53] Article 9(2) merely permits

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[49] *See* Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method,* 13 UCLA PAC. BASIN L.J. 199, 215 (1994); Ruth Okediji, *Toward an International Fair Use Doctrine,* 39 COLUM. J. TRANSNAT'L L. 39, 117 (2000) (asserting that the interminacy, and breathe of the fair use doctrine may violate Berne 9(2)).

[50] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement], *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 34, at 585.

[51] TRIPS Agreement art. XIII, *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 34 at 593.

[52] *See id.*

[53] *See id.*

nations to provide for limitations on copyright in certain circumstances.[54] It leaves open the possibility that other limitations may be allowable on the basis of other treaty provisions. By contrast, article 13 expressly restricts allowable limitations and exceptions to those that comply with its standards.[55] Like article 9(2) of Berne, its counterpart in article 13 of Trips suffers from an inherent vagueness. Despite this hazy formulation, the consensus is that article 13 of TRIPS proscribes additional exceptions and limitations that would have arguably been permissible under Berne.[56]

Apart from these differences in formulation, the TRIPS Agreement, unlike the Berne Convention, has a built-in enforcement mechanism. The dispute resolution system of the World Trade Organization stands ready to consider allegations that the national laws of WTO countries do not comply with Article 13.[57] This consideration, as one observer has noted, "will become increasingly important as protected works and sound recordings are transmitted on advanced computer networks, and unauthorized copying by the recipient—arguably justified under a private copying exemption—is challenged by copyright owners as incompatible with normal exploitation."[58]

While the battle over the TRIPS formulation was still waging, an even more recent battle over U.S. fair use was fought at the 1996 WIPO Diplomatic Conference. As part of the conference's consideration of the various new international agreements in the field of copyright and neighboring rights—with

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[54] *See* Berne Convention, art. 9(2), *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 34, at 364.

[55] TRIPS Agreement art. XIII, *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 34 at 593.

[56] For an emerging consensus supporting this view see e.g. Paul Edward Geller, *International Copyright: An Introduction, in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller & Melville B. Nimmer eds., 1998); Lawrence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act,* 80 B.U. L. REV. 93, 147–50 (2000).

[57] The U.S. has experienced the teeth of the TRIPS Agreement in an action brought against the exception to performance rights for nondramatic musical works under section 110(5)(A) of the Copyright Act, 17 U.S.C. § 110(5)(A). The regulatory scheme for nondramatic musical works under section 110(5)(B) did not withstand the first challenge in a decision rendered by a dispute resolution panel of the WTO. The three member panel concluded that § 110(5)(B) did not qualify for a TRIPS exception and was inconsistent with article 11 of the Berne Convention, which grants authors the exclusive rights over the public communication of their works. *See* Panel Report on the United States—Section 110(5) of the U.S Copyright Act, June 15, 2000, WT/DS160/R available at http://www.wto.org/wto/ddf/ep/public.html; *see also* Berne Convention, art. 11, *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY, *supra* note 34, at 365.

[58] Eric H. Smith, *Worldwide Copyright Protection Under the Trips Agreement,* 29 VAND. J. TRANSNAT'L L. 559, 577–78 n.36 (analyzing both the impact and the problems surrounding the TRIPS Agreement).

special reference to the digital information environment—the issue of limitations and exceptions, including those of fair use, received considerable attention.[59] Draft language put to the assembled delegates would have further curtailed the TRIPS "three-part test." The potential challenge to U.S. law, had the proposed language been adopted, was apparent. In the end, the proposed language was defeated, largely through the efforts of the U.S. delegation. Instead, a statement of purpose was adopted to the WIPO Treaties that is more hospitable to fair use in the digital environment. In sum, fair use experiences an increasingly insecure subsistence in the international arena.

VI. FAIR USE IN COMPARATIVE PERSPECTIVE

Ultimately, the fate of the fair use doctrine in the United States may be determined even more by outside influences than internal politics. The fact remains, where limitations and exceptions on copyright are concerned, the U.S. does things differently than other countries. Today when "harmonization of law" has become the catchphrase in international copyright, we should take a closer look at how other countries have accomplished their own "fair use policy."

Even in U.S. copyright law, fair use is not the only way in which we allow access to copyrighted works. As its basic structure, United States law contains specific exemptions to copyright as, for example, those contained in sections 108 and 110 of the Copyright Act.[60] Fair use operates as a general, residuary provision designed to reach cases of worthy, unauthorized uses that do not fall comfortably within any of the exemptions. In most civil law countries, however, the situation is different. One might look, for example, to countries such as Germany and France, under whose laws fair use does not exist in name, but whose law accomplish in other ways much the same values that fair use tries to achieve.

In specifying limitations of copyright, one can find the functional equivalent in certain exceptions specifically embodied in the German Act.[61] These specific exemptions include the making of single copies for strictly private use, reproducing small parts of works for instructional purposes, a narrowly restricted

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[59] For a discussion on the U.S. digital agenda on the draft treaties submitted during the 1996 WIPO diplomatic conference in Geneva, see Pamela Samuelson, *The U.S. Digital Agenda at WIPO,* 37 VA. J. INT'L L. 369 (1997); *see also* Neil Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement,* 37 VA. J. INT'L L. 441 (1997) (discussing the difficulties that lie ahead as to the interpretation of the TRIPS copyright provisions, but concluding that the Berne Convention should be the starting point for any attempt to interpret the provisions incorporated into the TRIPS Agreement and the WIPO Copyright Treaty).

[60] 17 U.S.C. §§ 108, 110 (1994 & Supp. IV 1998).

[61] *See* Adolf Dietz, *Germany, in* INTERNATIONAL COPYRIGHT AND PRACTICE, § 8[2][a], at GER-105 (Paul E. Geller, et al. eds., 1988 & 1999 ed.).

quotation privilege, copying of judicial opinions, reproduction of works in news reports, and certain reproductions of works of art in exhibition or auction catalogues.[62] In addition, German law provides that other unlicensed private and educational uses of protected works may be permissible if the copyright owner's so-called "right of remuneration" is recognized.[63] For example, home taping of broadcasts is exempt from liability for copyright infringement. A levy on equipment and blank media, however, creates a fund to remunerate copyright owners and creators through collective organizations.[64] Treated similarly are exceptions and limitations that apply to photocopying, the creation of religious and instructional anthologies, and free, noncommercial performances.[65]

Similarly, the French copyright law limits the "economic rights" of authors in specifically enumerated cases but does not recognize a broad fair use privilege. The reproduction rights are limited in situations involving certain reproductions, including home taping, for private noncommercial use.[66] In addition, reproductions intended for public distributions are given a more limited scope.[67] These exempted public uses are restricted to analyses and brief quotations, press reviews, and media dissemination of public speeches so long as the author and the source of the passages quoted, reviewed, or disseminated are clearly indicated. Like Germany's copyright law, France's provides for financial compensation for private audio and audiovisual copying.[68]

Despite certain differences in conception, doctrines such as free utilization under German and French law may lead to results similar to those one would find under the fair use doctrine in U.S. law. For example, the German courts have given some leeway to forms of artistic expression, such as parody, that incorporate other protected works while only partially transforming them so that they remain clearly recognizable in the allegedly infringing work. Similarly, French law allows "parodies, pastiches, and caricatures,"[69] so long as comic intent is proven.[70]

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[62] *Id.* at GER-106.

[63] *Id.* at GER-107.

[64] *See id.*

[65] *See id.* at GER-108–11.

[66] Law No. 92-597 of July 1, 1992, J.O. July 3, 1992, *reprinted and translated in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, Supplement 1991–1995, Art. L. 122-5(2). The law exempts "copies or reproductions reserved strictly for private use of the copier and not intended for collective use, with the exception of copies of works of art not intended for collective use, with the exception of copies of works of art intended to be used for purposes identical with those for which the original work was created."

[67] *Id.* Art. L. 122-6.

[68] *Id.* Art. L. 311-11.

[69] *Id.* Art. L.122-5(4).

[70] *See* Andre Lucas & Robert Plaisant, *France, in* INTERNATIONAL COPYRIGHT AND PRACTICE, § 8[2][a][iii], *supra* note 61, at FRA-121.

Questions of form aside, how different in functional terms are the German and French systems' specific exemptions from U.S.-style fair use? Overall, the use privileges secured by fair use are significantly broader than their European counterparts. The U.S. conception of fair use is, by its nature, a dynamic rather than a static doctrine. As patterns of exploitation and consumption for copyrighted works change, courts can adapt the fair use doctrine to new circumstances as they have tried to do, for example, for photocopiers, videocassette recorders, and software. Thus, the doctrine has the capacity to retain its relevance without the need for legislative enactment. By contrast, parliamentary action is required to keep the German and French law abreast of current developments. Many other civil law countries take the same general approach to limitations and exceptions as Germany and France do.

As for fair use, the United States presently stands alone in the world intellectual property community. Even countries of common law tradition rely heavily on enumerated statutory exemptions.[71] Although they typically recognize a general affirmative defense of "fair dealing," they have not given it the scope that the fair use doctrine has historically enjoyed in the United States. For example, the Canadian statute recognizes a fair dealing defense for purposes of private study, criticism, review, or news reporting if accompanied by certain source acknowledgements.[72] Although the Canadian fair dealing provisions resemble U.S. fair use, they have been given a narrow, if not grudging, interpretation by Canadian courts.[73]

VII. CONCLUSION: REFORMING THE DOCTRINE

In the abstract, there is much to be said for the vaunted flexibility of the U.S. doctrine. In reality, though, one can hardly characterize recent fair use case law as manifesting that flexibility. Debating doctrinal niceties concerning fair use resembles an arid exercise, because fair use as we have known it has already faded and the process will continue. Pressures arising out of our international obligations will no longer allow us the luxury of this flexible ideal. On the whole, I see little practical future for the doctrine as traditionally defined. What we need is a reformulation of fair use more akin to the continental system of exemptions and limitations to copyright, specifying a broad set of educational and research uses. As I have discussed above, the process of reformulation along civil law lines is in full force as specified by the oversight rule-making process of the DMCA.

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[71] *See, e.g.*, William R. Cornish, *United Kingdom, in* INTERNATIONAL COPYRIGHT AND PRACTICE § 8[2][a], *supra* note 61, at UK-64.

[72] Copyright Act R.S.C. 1985, C42 § 29(s).

[73] *See, e.g.*, Cie. Générale des Établissements Michelin v. C.A.W.-Canada (1996) 71 C.P.R. (3d) 348 (Fed. Ct.) (rejecting a fair dealing for a labor union that used a parody of a corporate logo, the Michelin Man, on Pamphlets designed to encourage employees to join the union because the parody could not be equated with criticism).

This departure from past practice represents a necessary development, one that supports favored uses of copyrighted works.

Picking and choosing which user groups get favored access to copyrighted works is an inherently political decision. If copyright is subsidy for authors, then fair use is a redistribution of wealth to meet the special needs of certain users. Determining fair use can often involve highly charged political issues, much like allowing tax breaks to encourage beneficial activities, a determination ill-suited for judicial disposition. It is hardly surprising that courts are reluctant to engage in this kind of law making best left to the push and pull of the legislative process. Bright line rules, established through the legislative process, have significant advantages over fair use balancing in a judicial setting when broad group rights are concerned. For one, they avoid the randomness of the legislative process. More importantly, legislation makes explicit these societal choices that involve important issues about the distribution of wealth among owners and users of copyrighted works.[74]

But new legislation cannot in itself adequately accomplish the redistributive goal underlying fair use. Just as important, we will need a more expansive set of industry-wide fair use negotiations, mediated by collecting societies such as the Copyright Clearance Center, as mentioned above.[75] As model of industry- wide agreement, one might also turn to the "classroom photocopying guidelines" inscribed in the House Report to the 1976 Copyright Act.[76] Although these guidelines have had limited impact on judicial decision-making, they have had a substantial impact on the actual practice of educational institutions.[77] In addition one could also point to the Conference on Fair Use (CONFU), a shifting group of copyright industry companies and trade associations, on the one hand, and representatives of educational and non-profit organizations, on the other. Admittedly, during its four-year existence (1994–1998), CONFU was unable to establish consensus on the important issues. But such attempts to forge agreements between industry and user groups must continue, and with perseverance, may well bear fruit in a latter day and in another context.[78]

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[74] The law-and-economics literature supports the proposition that redistribution is best served by direct taxes and subsidies, rather than by judicial rule making. *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

[75] *See supra* note 21.

[76] *See* AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS, H.R. REP. No. 94-1476, at 68 (1976).

[77] For a discussion see KENNETH CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION (1993). For a further elaboration of the role of guidelines see, CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER, PETER JASZI, COPYRIGHT LAW 893–95 (5th ed. 2000).

[78] Detailed information on the CONFU process and its outcome can be found in THE CONFERENCE ON FAIR USE: REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE FIRST

In sum, clearly drawn legislative rules and industry agreement may restore meaning to fair use in a practical way. Many user-groups will not be happy with this solution, but nostalgia for some past fair use utopia—that never really was—is ultimately self-defeating in today's world, given rapid technological change and the high stakes of information markets.

For the most part, fair use endures. But the doctrine as we know it faces an uncertain future. Only by legislative reformulation and private industry-wide agreements between users and owners will we restore the values of a public domain for information that fair use has always stood for.

PHASE OF THE CONFERENCE ON FAIR USE (Sept. 1997), *available at* www.uspto.gov/web/offices/dcom/olia/confu.