
Better a sword than a shield: the case for statutory fair use right in place of a defence

Warren Chik

Singapore Management, University School of Law
E-mail: warrenchik@smu.edu.sg

Abstract: This paper endorses a reinvention of the general and flexible fair use doctrine through the simple powerful elevation of its legal status from a legal *exception* to that of a legal *right*, and identifies all the benefits that a fair use right entails.

Keywords: intellectual property; information technology; copyright law; fair use; infringement; defence; exception; Digital Rights Management; DRM; anti-circumvention.

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Biographical notes: Warren Chik (LLB (Hons) NUS, LLM (IBL) University College London, LLM (ICL) Tulane University) is an Assistant Professor of Law at the Singapore Management University School of Law, Advocate and Solicitor (Singapore), Solicitor (England and Wales), and Attorney and Counsellor at Law (New York). He is a member of the Law Reform Committee of the Singapore Academy of Law, and the Executive Director of the International Law Society of Singapore. He was the Deputy Public Prosecutor, Attorney-General's Chambers, from 1996 to 1998 and the State Counsel (International Affairs), Attorney-General's Chambers from 1998 to 2003.

1 Introduction

The relatively recent prominence of information technology in relation to the duplication and dissemination of creative works and the concomitant use and abuse of technology in relation to such works have created a state of disequilibrium into the delicate equation of balance that underlies the international copyright regime. Copyright holders have sought to redress the apparent disfavour to their interests by successfully lobbying for greater extensions of their legal protections over works in several key regards – time, space and matter. The speedy, overzealous and untested manner in which the legal response has taken has resulted in overcompensation such that the interests of individuals and society have been compromised to an unacceptable degree.

Considered *in vacuo*, information technology is beneficial to human kind as it provides for new and additional channels for human interaction and have all but erased the impediments of time, distance and format that persist in the physical plane. However, the reality is that the function of such technology taken in context has very diverse effects. For example, Peer-to-Peer (P2P) technology encourages the greater exchange and

reuse of works; others have emerged to constrain access and use of works, such as Technical Protection Measures (TPMs), which is a form of Digital Rights Management (DRM). Thus, technology can be developed with the objective of a freeing as well as of a limiting effect.

Although self-help and private remedies are available for all the stakeholders concerned to promote their interests, often at the expense of the other, the law has remained the primary instrument of copyright regulation and in a sense the final arbiter of fair apportionment of rights. However, inevitably, politics and economics have skewed the quest for legislative equilibrium. Recent amendments to the international and domestic copyright regime have tipped the balance of interests in favour of copyright holders. The problem lies not only in the existence of such new law but also in their construction, particularly where they relate to technology, as well as in the failure to consider the possibility that the virtual dimension has fundamentally shifted the theoretical foundations of the copyright regime itself.

One of the strongest criticism against the current protectionist climate relates to the general and wide 'double protection' offered by DRM and Anti-Circumvention Laws (ACLs), which have inadvertently caused the displacement of the important fair use exemptions that many consider the last bastion for the protection of civil rights to works, through its preemptively preclusive nature. This has even greater practical and policy concerns especially in jurisdictions that retain narrow purpose-specific fair dealing exceptions as a defence against copyright infringement. This is not merely an academic problem as it clearly evinces the greater influence industry lobbyists have over the character of copyright law and its controls over the exploitation of creative works, which is not representative of the interests of individuals and society.

Moreover, the increasing penetration of electronic forms of storage and communication, the borderless nature of the internet that provides the gateway to the World Wide Web (WWW) and the invention of enabling technologies such as P2P is evidencing a general social shift towards more open collaborative creativity and the rise of a new global consciousness of sharing and participation across national, physical and jurisdictional borders. This new model of human intercourse (behaviour) and the new mindset (expectations and attitudes) should strongly inform law and policy-makers when considering the suitable apportionment of rights over creative works in the digital age, which is fundamentally different from the industrial age context in which the copyright regime was created.

The main thesis in this paper is not to propose the destruction or even a radical overhaul of the copyright regime; but rather it endorses a no less significant reinvention of the general and flexible fair use doctrine through the simple powerful elevation of its legal status from a legal *exception* to that of a legal *right*, with all the benefits that a legal right entails. This is not merely an exercise in semantics, and the simple change in legal status of fair use, it will be shown, will go very far in recalibrating the scale and go some way towards offsetting the imbalances caused by the combined prohibitive effect of the protectionist revisions, in particular the double threat, which DRM/ACL have posed on individual creative reuse and other societal fair uses. Such a change will render copyright law more accurately reflective of an electronically interconnected global society and also acknowledge the importance and benefits of enabling technologies and its role in human integration, progress and development. It promotes the consistent adoption of this standard in both the international and national copyright regimes.

In Section 2, I will establish the trend towards greater copyright protectionism including the worldwide proliferation of ACL provisions. I will also show how largely unfettered and permissive DRM provisions have emboldened copyright holders in their bid to control the access and use of their creative products and services to the extent that it has led to abuses such as the proliferation of unfair End User Licensing Agreements (EULAs) and the infamous Sony BMG CD Copy Protection scandal in 2005.

In Section 3, the negative effects of existing DRM/ACL provisions on fair use will be critically examined in the context of a representative group of jurisdictions across continents including the USA, the European Union (EU) and some Commonwealth countries. Some country-specific solutions to the problem that have been suggested or implemented will also be canvassed and evaluated as to their compatibility with the notion of a fair use right, in spirit as well as in form, with a view to their inclusion into its umbrella of coverage.

In Section 4, I will finally present the procedural and substantive changes that a 'fair use right' should entail and explain the extent it can go towards remedying the current imbalance wrought by the protectionist actions of recent years. The legal, social and policy implications of a fair use right as opposed to an exception will be laid out in the form of a Charter of Rights omnibus.

Although the fair use doctrine and proposed solution is examined primarily in the North American context, the arguments are applicable to other jurisdictions, and in fact the changes proposed are meant for international and national copyright regime. In the technological age where boundaries no longer exist and in the age of globalisation where cooperation and consistency are key to the greater benefits of transborder transactions and equal treatment for all, international harmonisation of law and policy is fundamental. Hence, the proposal for a fair use right should preferably be considered and implemented in the international *fora*.

For the purposes of this paper, 'fair use' refers to a general non-purpose-specific analysis of the uses of a creative work that is found not to, or that does not constitute, an infringement of copyright. Also for the purposes of this paper, the author/creator, collecting societies and the media industry (*e.g.*, music, movie, literary), whether amateur or professional, are collectively known as the 'copyright holder' and 'individuals' refer to consumers, users and the user-creator unless otherwise distinguished.

2 Copyright protectionism and the inflation of holders' rights

2.1 The stakeholders and the balancing of interests

The copyright regime of protection was established on the basis of a balance of interests between stakeholders to creative works.¹ The traditional private interest parties remain relevant, namely, the copyright holders that include both industry players and individual or groups of creators on the one hand, and individuals such as consumers and users on the other. Overarching these private interests is the public interest in the generation of creative works and in other interests such as civil rights interests that advises public policy in this area.² Governments oversee the creation and regulation of an optimal balance, which is an ongoing process, particularly given the onset of the digital age and in the acceleration of global connectivity and technological progress (see generally Hering, 2004).

With the rise of electronic media, new parties and interests have emerged, which complicate the balancing matrix thereby contributing to the current state of imbalance – one that necessitates a realignment of interests. With the evolution of digital technologies, what was once the prerogative of the few is now the privilege of many as the cost of creation, storage, reproduction, adaptation and distribution continue to fall and the power over them is dispersed, and as the tools and outlets for doing so become more sophisticated and the general population more tech-savvy. There are fundamental changes to the creative landscape and its players such as in the increasingly prominent profile of the user-creator in participatory media and in valuable forms of secondary creativity as well as technology creators and producers.

2.2 *Copyright in the context of new media*

Many of today's copyright battles are not over new issues; instead, they involve old issues *in the context of new media*. The digital age has produced both socioeconomic and philosophical challenges to copyright law and policy. Moreover, the copyright implications are exacerbated as the forms of creation susceptible to digitisation and digital transfer have extended from literary to musical and visual works as well as other forms of creative expression. Thus, it is not surprising to see the increasing frequency of amendments to copyright statutes and in the rise of copyright issues in the courts, seeking to cope with the changes wrought by digital technology. Most of these changes are reactive rather than proactive and many of them have been subject to scathing criticisms of copyright protectionism and monopoly. What is clear is that the 'perpetual pendulum' swinging between society and users on the one hand, and copyright holders on the other, is now largely on the latter's side,³ to the detriment of the conflicting interests of users, user-creators and technology producers.

The notion of a creative work that is susceptible to legal conceptualisations of property, ownership and control and to vertical transfer is challenged owing to its unique features that distinguish the digital form from its more traditional tangible counterpart upon which they were based upon. For example, music is technologically rendered 'non-rival' as its use by one does not reduce its value for another; it is 'infinitely expandable' as the quantity of the work as a market good can quickly become infinitely larger at zero marginal cost (due to the zero cost of expansion); it is 'aspatial' as it can have no fixed location in space, and the costs of storage and distribution are very low; it is 'discrete' since one will consume a discrete number of units of fixed size; and it is 'malleable' as it can be customised, modified and recombined at near zero cost (due to cheap and widely available technology).

2.3 *The creeping vines of copyright protectionism*

The perceived threats to the largely commercial interests of the media industry have led to 'knee-jerk' laws in the form of wild net-casting wide provisions through successfully lobbying of government and organisations.⁴ Copyright holders seek control over time (period of protection and extensions), space (method of transfer and operability) and matter (control of access and use). The ever widening scope of protection under the copyright regime is making it a copyright holder's world. Meanwhile, the digital age has challenged the preconceived and entrenched notions of property,

ownership and control. It has also produced a hybrid between the creator and the user, the breed known as the user-creator, that is increasingly independent of industrial control and that has overlapping interests as both creator and user.

The significance of referring to the 'copyright holder' is due to the fact that in the industrial age, creativity is an increasingly nurtured, if not manufactured, product in a primarily profit-generating industry. Copyright does not always belong to the creator. In such an environment, the author may not have as much control over his creative works except to the extent stated under contract, whether with the industry in question or with a collecting society or both; and to the limited extent reserved under law, such as his moral rights over his works, the protection of which varies across jurisdiction.

2.3.1 Time extensions: the Disney effect, the Timeflux Vortex and the shrinking public domain

Copyright protection is time-limited, but in recent years, copyright holders, particular industry lobbyists and big corporate entities with strong commercial interest in the monopolistic exploitation of creative works that they 'own' have managed to have the time limitation extended (DePoorter, 2004). For example, in the USA, the temporal limit for copyright monopoly have become rather elastic resulting in generous extension of protections through the Sonny Bono Copyright Term Extension Act (CTEA) of 1998 (see also McJohn, 2003),⁵ which lengthened the copyright protection term to life of the author plus 70 years and the Copyright Renewal Act (CRA) of 1992, which made copyright renewal automatic (see Goldman, 2006).⁶ We see such extensions transposed to other countries, obviously influenced by the US practices and as a trade concession in trade packages and agreements.

2.3.2 Rights protection: controlling access and use through delivery and form

As traditional laws and policy appear to them as inadequate to resist the tide of social norms against the existing exclusive package of rights held by copyright holders caused by new media, the media industries seek to reverse the trend through 'norm manipulation' (or 'norm entrepreneurship') (see Jensen, 2003)⁷ through private practices that they sought to be sanctioned, supported and legitimised by force of law. These measures come under the umbrella term of Digital Rights Management (DRM) and include the promulgation of licences over the use of creative works (in lieu of full sale or transfer of ownership) and the use of Technical Protection Measures (TPM).

While the acronym 'DRM' is often bandied about, no generally accepted definition for it exists. Various other terms are also used to describe the same or similar things. For example, 'Electronic Copyright Management System' (ECMS), 'Copyright Management System' (CMS), 'Automated Rights Management' (ARM), 'Electronic Rights Management System' (ERMS), and 'Intellectual Property Rights Management' (IPRM). For the purposes of this paper, 'DRM' is an umbrella term to describe any measures to manage, secure and control access to and use of digital content including all forms of Technical Control Measures (TCM) (see Bechtold, 2004, p.331),⁸ ranging from simple copy-prevention technologies to comprehensive secure distribution systems, as well as the management and protection of digital content by various other legal instruments (Bechtold, 2004).⁹

This section relates mainly to the two-pronged offensive of DRM and ACLs, which legally prohibit the general development and use of measures to elude or counter DRM.¹⁰ Although TPM features most prominently in terms of usage and in this critique of DRM, other private and public methods of attack should also be noted including the extension of exclusive rights through the use and proliferation of licences (*e.g.*, End User Licensing Agreements (EULA)) and increasingly draconian civil and criminal sanctions that are prescribed and enforced against enablers and individuals.

TPM can come in many forms. They developed as a counterreaction to enabling technology and attempts to control the permissive nature of the latter. Its technological manifestation largely controls access by (qualified) users and the forms of usages that are licensed to users. The 'long arm' type of control measure can range from a simple lock preventing copying to more intricate measures such as allowing certain specific uses for different consumers in accordance with the licences envisioned for them over a finite length of time and only in relation to certain devices.¹¹

DRM also consists of usage contracts and technology licence agreements,¹² as well as consumer contracts, EULA and other similar forms of licences. These often have a relationship with one another, as well as with relevant legislation. It gives rise to an intricate spectrum of issues including legal, sociological and economic (*e.g.*, the rise of new business models). Finally, DRM is not just about TPM or copyright protection, it also includes Rights Management Information (RMI) such as the collection of user information. These have implications beyond copyright laws and can clash with other laws and policies such as privacy and data protection laws (Suzor, 2004; Ter Doest *et al.*, 2003; Cohen, 2003b),¹³ which are featured prominently in many countries, in particular the EU. Thus, unless DRM (or RMI) can be limited to copyright protection only, there is even greater justification and force for a mechanism to guard against the abuse of DRM that can lead to the incursion of civil rights.

The introduction of DRM and ACL into the copyright protection regime is instituted at several levels and their transposition into domestic laws is facilitated by concessions at the table of trade negotiators. At the international level, the World Intellectual Property Organisation (WIPO) produced copyright treaties; and at regional and national levels, legal instruments have also been produced to promote these measures and prohibitions. Free Trade Agreements (FTA) have accelerated the spread of their incorporation into law, largely through the influence of the USA. For example, broadly drafted DRM/ACL provisions that are substantively similar to those under the US Digital Millennium Copyright Act (DMCA) of 1998¹⁴ have been adopted into the copyright legislation of trade partners such as Australia and Singapore (see Hiaring, 2005).¹⁵

The identified negative effects of DRM and ACL go beyond the obvious (*i.e.*, their negative effects on fair use). These include other short, mid- and long-term negative effects on secondary forms of creativity, technological inventions and future access to information,¹⁶ as well as effects against the market (*e.g.*, anticompetition and monopolistic tendencies),¹⁷ and against users and society.¹⁸ Other public policy concerns are also implicated, including the public interest in security research and development, public disclosure and surveillance.¹⁹ ACL additionally have a chilling effect on technological creativity (Imfeld, 2003),²⁰ which is 'motive neutral'.²¹ On the other hand, freedom from ACL can lead to a healthy competition to develop technology and technological innovations leading to an overall benefit for society.²² In their eagerness to enact DRM/ACL into copyright legislation, the jurisprudence relating to fair use in relation to new technology, in particular personal use, appear to be largely overlooked.²³

International treatment: the WIPO copyright treaties

On the international level, pro-DRM/ACL provisions may be found in two treaties adopted in 1996, under the aegis of the WIPO. The ‘WIPO Internet Treaties’ as they are known consists of the WIPO Copyright Treaty (WCT)²⁴ and the WIPO Performances and Phonograms Treaty (WPPT).²⁵ These treaties include a provision requiring all member states to prescribe “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with their rights in copyright works” at the national level.²⁶ Unfortunately, the WCT sheds little light on how to achieve ‘adequate legal protection’ while accommodating user privileges. More than 40 countries have already ratified the WCT and have implemented it in their domestic laws.²⁷

Furthermore, Articles 2, 3 and 6 of the Convention on Cybercrime of 2001,²⁸ which was negotiated by the Council of Europe and to which many European countries as well as the USA, Canada and Japan are signatory countries, may have the effect of criminalising the circumvention of DRM security measures and related preparatory activities as well.²⁹

Regional example: the European copyright directive

The European Union implemented the WCT in Directive 2001/29/EC of the European Parliament and of the European Council of 22 May 2001 concerning the harmonisation of certain aspects of copyright and related rights in the information society (the Copyright Directive).³⁰ Just like its US counterpart,³¹ the EU’s Copyright Directive was passed by the European Parliament in 2001 after heavy lobbying by and on behalf of copyright holders, in particular the publishing, music, film and software industries. As such, it also contains strong protections for copyright, digital rights management information and technological measures,³² with very narrow exceptions. Article 6 of the Directive is the counterpart to Section 1201 of the DMCA,³³ requiring member states to generally prohibit circumvention activities.

No exceptions are specifically provided for under EU law, but member states can implement exceptions from the list in Article 5, or retain those that were already in force on 22 June 2001.³⁴ However, no new exceptions may come into force after that date,³⁵ and existing exceptions may only be applied in “certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the copyright holder”.³⁶ It was agreed at the time of drafting of the WPPT that this wording “neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention” (WIPO, 2000).³⁷ The list of permitted acts is specific in nature.

It is more difficult to predict the full negative impact of the Copyright Directive on fair use because it only provides a general framework for member states.³⁸ Thus, it is the specific national laws of the member states that will ultimately determine whether and to what extent fair use has been diminished in their respective jurisdictions.³⁹

National example: the US Digital Millennium Copyright Act

The USA implemented its anticircumvention requirement in Section 1201 of the US Copyright Act,⁴⁰ which was passed on October 1998. The DMCA prohibits three categories of circumvention acts on copyright protected digital works: circumvention of controls over access to the protected works, trafficking in technologies or devices that circumvent access controls, and trafficking in technologies or devices that circumvent rights protection. First, Section 1201(a)(1) prohibits circumventing a technological protection measure that effectively controls access to a copyrighted work (*i.e.*, it bars the actual act of circumventing or bypassing an access control). Second, 1201(a)(2) prohibits manufacturing or making available products or services for circumventing technological access controls.⁴¹ Third, 1201(b)(1) prohibits manufacturing or making available products or services for circumventing technological measures that protect rights controls (*e.g.*, copying restrictions).⁴²

The law includes various purpose-specific exemptions, each with its own requirements.⁴³ These exceptions are overly narrow and there is no general purpose exception to circumvent for other legitimate reasons.⁴⁴ Moreover, while the exemptions excuse the act of circumventing technological access controls, most allow only limited distribution of circumvention devices and some do not permit it at all. Ironically, Section 1201(c) explicitly states that the anticircumvention provisions in Section 1201 are not intended to alter any rights, remedies, limitations, or defences to copyright infringement, including fair use under the Copyright Act.⁴⁵ Nevertheless, it has the effect of doing so.

The DMCA is the forerunner of its progeny. As noted, the US copyright policy has been transposed to other countries through free trade agreements. The USA has concluded several bilateral trade agreements with countries such as Singapore and Australia that include detailed provisions regarding the circumvention of technological protection measures (for an overview, see Wunsch-Vincent, 2003). The export of US policy in this area expands the unruly fist of DRM/ACL to other jurisdictions. The unfettered nature of such laws has emboldened copyright holders to develop such measures to the extent that they are causing not only an imbalance of rights in the copyright regime but also the contravention of other policy and laws such as those relating to privacy and trespass.

Case study: the Sony BMG rootkit fiasco

The Sony BMG CD Copy Protection scandal in 2005 provides a good illustration of the use of DRM 'gone wild' owing to the freedom of its use derived from widely drafted legislation and permissive DRM provisions. In short, Sony BMG installed hidden DRM rootkit software into the computer files of buyers of DRM-protected CDs. The software tracks consumer information and controls access to content. Sony BMG did disclose the existence of the software in the End-User License Agreement (EULA), but the EULA did not come with the CD but is available to be read online. The EULA was also not exactly reader-friendly and said very little about how the software was installed. It was also difficult for consumers to remove the hidden software even if they were aware of it and wanted to do so.

The problem was that the ‘cloaking approach’ and the rootkit software used by Sony BMG also enabled other not so benign entities to hide their software in the same hidden area of the consumer’s computer. Thus, the existence of the Sony BMG cloak made it possible for a malware author to hide his malware when he otherwise may not be able to do so (see Picker, 2006). Sony BMG’s actions and the possible consequences of the rootkit were discovered and it faced a barrage of criticisms and backlash that led to threats of action from civil rights groups. However, the case was settled before the causes of action could be brought before the courts and tested. Sony BMG finally capitulated and made a settlement after negotiations, thereby tacitly acknowledging that it had overstepped its legal boundaries.⁴⁶

Although the case did not proceed, it is clear that as a consequence of its actions, a whole host of non-copyright laws are potentially implicated, such as trespass to property and privacy, unfair contract terms and non-incorporated terms, consumer protection laws and so on. It is also clear that the use of DRM is still subject to existing laws even if the law sanctioning its use does not state any limitations as to its uses. DRM itself can involve the use of spyware and even malware depending on the nature and function of the program used, or it can facilitate such abuses by others as the Sony BMG case illustrates.

Summary of the general negative effects of digital rights management and anti-circumstances laws

What we see here is how the permissive and non-technological-specific or purpose-specific nature of DRM and ACL legislative provisions have emboldened the privatisation of copyright protective measures and the actions stemming from it.⁴⁷ Rather than leave the consequences of abuse unchecked (as in the case of ACL) or to an existing hodgepodge of laws to resolve it (as in the case of DRM), more specific purposes of its use or even specifying the types or functions of technology that are permissible should be made, or at least a factor analysis should be provided as guidance as to whether a DRM measure constitutes, for want of a better term, ‘fair use’ of rights management measures themselves (especially technological ones). In other words, just as fair users are subject to having to justify the legitimacy of their use of copyrighted materials without having to seek the consent of the copyright holder; DRM purveyors and users should be subject to the same responsibilities, justifying the use and type of DRM, for example by showing that it is reasonably proportionate to the ills it is supposed to address and by ensuring that it is not abusive.

Among other restrictions, DRM should not be effected through trespass on electronic devices by the implantation of devices that may affect the user’s device or the use of privacy invasive software such as spyware; cause user’s electronic devices to become vulnerable to attacks by others such as malware writers; involve unfair contract or licensing terms or be incorporated through unreasonable means; and conflict with consumer rights. Civil and even criminal consequences should result from such actions.

2.3.3 Vigorous enforcement: using the iron fist of criminal liability on primary infringers

The reinforcement of strong civil actions with the prescription and enforcement of criminal liability can only produce a dampening effect on fair use and also cultivate mistrust among users in society towards copyright holders. This will only serve to widen

the divide between copyright holders and other segments of society. For example, in the USA, criminal liability has been extended to copyright infringement in the No Electronic Theft Act (NET) of 1997 (see Goldman, 2003),⁴⁸ which also extended infringement of copyrighted material to personal as well as commercial use; and the DMCA itself criminalised acts that may lead to infringement (see Clark, 2006; Moore, 2003).⁴⁹ Profit motive and commercial purpose (*i.e.*, actual profiteering or expectation of financial gain), which was not a crime before, have become one in the recent legislation of some countries just as it has under the NET. Not only have penal sanctions been extended, punishment provisions have also increased in severity (Szott Moohr, 2003). In effect, these are extensions of the rights of copyright holders.

The enforcement of civil actions and criminal prosecutions of copyright infringements have also become more draconian and elicited criticisms in some countries for 'strong arm tactics' (see Sag, 2006).⁵⁰ There have been stronger and greater enforcement and threat of action against individual consumers and users irrespective of the profile of the user. In the past, enforcement was largely restricted to 'enablers' such as blatant copyright pirates, and then to technology creators such as developers of P2P technology, but now strategy and tactics have changed and individuals are now facing the wrath of copyright holders for their individual acts of infringement.⁵¹ Even without considering the merits of infringement (and the *de facto* extended scope of copyright protection), the threat itself can affect fair use to some extent, precisely because the fairness of use cannot always be clearly predetermined, alienating users and consumers in the process.

2.3.4 *Expanding rights: through the nature and form of use of works in the digital realm*

Much has been said about the DMCA, but there are other laws that also directly extend the copyright holder's rights. Again, in the USA for instance, the Semiconductor Chip Protection Act of 1984,⁵² extended copyright protection to 'mask works', and the Digital Performance Right in Sound Recordings Act of 1995,⁵³ grant to copyright holders the exclusive right to perform their copyrighted works by means of digital audio transmission.

Many commentators also argue that the anticircumvention provisions of the DMCA actually created a new form of exclusive right for content owner: right of access (see Ginsburg, 1999). This right facilitates the licensing of copyrighted materials, but at the same time permits the licensing of access to non-copyrighted materials (see Burk, 2003). A technological infringer can violate Section 1201 independently of the exclusive rights of copyright holders under copyright legislation. It has been dubbed as 'para-copyright' provisions by some critics (Burk, 2003, p.1095).

2.3.5 *Self-help: private measures to extend the long-arm of control over a work*

Under property law, there are legal instruments used by the seller such as the lien or mortgage for the retention of an interest in a property, as a security interest in a property to secure payment of a debt or performance of another obligation by the buyer. It appears that a similar form of control is being cast over copyright as 'intellectual property' through restrictive licences in lieu of a simple contract of sale or transfer of a piece of work in tangible form. Personal use, interoperability, first sale and other doctrines that

worked in favour of the user-consumer are now threatened, if not taken away, by the increasing use of licences in the 'sale' of works, both in digital as well as in tangible form. The ambiguity under the law exacerbates the problem. The rise of the EULA is clearly a problem, particularly as they serve the same purpose as contracts except that they incorporate terms, the fairness of which in relation to the same consumers and largely the same uses, are questionable, and they remain unchallenged in the courts as to their legality.

3 The diminishment of fair use

3.1 The function of fair use and its role in the digital age

'Fair use' in the USA and its 'fair dealing' equivalent in many Commonwealth countries and common law jurisdictions permit the release of copyrighted works to society without the need to seek the copyright holder's permission or for consideration for their use (see Gasaway and Ray Patterson, 1997, p.351; Moore, 2004; Nimmer, 2000).⁵⁴ One dictionary defines 'fair use' concisely as a "reasonable and limited use of a copyrighted work without the author's permission".⁵⁵ In other words, it embodies a government-sanctioned justification and legitimacy to engage in acts that would otherwise be an infringement on the copyright holder's exclusive rights, mainly relating to the copying and distribution of a work, and in some cases and particular media type, other rights such as the adaptation of a work.

The doctrine has existed in common law for some time as an equitable defence designed to avoid the rigid application of the exclusive rights reserved for the copyright holder under copyright statutes in situations and instances where it will stifle the creative and leaning environment that it was meant to nurture and produce, or where it will cause detriment to other societal benefits that outweigh the private interest in protection. Because it is impossible to predict the fact situation in every case, it remains a legal test for court application, albeit with some statutorily built-in factors, which offer some guidance for fair users to determine the likely legitimacy of their actions in the absence of first seeking copyright holders' consent.

Fair use in the USA is a measure that has served a useful role both as a general as well as a purpose-specific protection against the threat and stigma of copyright infringement and its consequences (see *Eldred v. Ashcroft*, 2003).⁵⁶ Owing to the catch-all provision, fair use is a malleable and adaptable doctrine, which is not confined to any specific purpose, unlike the traditional fair dealing doctrine. The courts apply the doctrine in the changing context of society guided by some factors provided by legislation and judicial common sense. The factors determining fairness are non-exhaustive, and the courts have come up with some new and important factors in recent years to adapt its function to the electronic age such as the 'transformative use test'.⁵⁷

Fair dealing as it exists in other common law countries was predominantly purpose-specific until more recently when some jurisdictions have seen fit to amend their legislation to render it open-ended much like fair use as a counterweight against expansions in protection. For example, Singapore has amended the fair dealing provision under its copyright legislation significantly just by a small but significant amendment to

that provision. Hence, open-ended fair use/dealing obviously operates more favourably than the traditional closed-list fair dealing for the wider segment of societal and individual interests.

The fair use/dealing doctrine facilitates the development of taxonomy for determining the rights of all interest parties both in real-space and in cyberspace. It is adaptable to the latter context as it is neither be frozen in time or space (although existing purpose-specific fair dealing exemptions in some jurisdictions should be subject to statutory amendment and inclusions in order to take into account changes in context, preferably with the inclusion of a residual 'safety-net' provision) nor limited by the type of outcomes we have come to expect of its application in the real world (in its application to the context, facts and circumstances of each case) (see Okediji, 2001).

There are various types of fair uses, and an expansion of the types and nature of fair use in the digital context, including the classic productive use and pure personal use (see Litman, 2007), as well as personal productive use (see Madison, 2005).⁵⁸ Increasingly, we see a boom in a reuse and remix culture, particularly in relation to audio and visual media, which is fostered by the functions offered by information technology.

For convenience, from this point, the reference to 'fair use' will also refer to 'fair dealing' as a test (*i.e.*, the open-ended or purpose-specific difference shall be ignored until it is once again taken up as an issue for reform later in the paper). This will dovetail into the proposal in Section 4 to harmonise them under a singular broad-based non-purpose specific right (under the rubric 'fair use right') for users. Of course, substance is more important than form, and a broad-based fair dealing right is synonymous to a fair use right provided that they serve the same function and have the same broad scope of application.

3.2 *The threat to fair use and its importance and continued relevance*

The importance of fair use cannot be understated. Some of it has been touched on in Section 1, but this section will elaborate more on its importance and on the threats posed by DRM/ACL provisions, particularly by ACL, to such uses, as well as of the search for solutions. It has been used invariably in response to new forms of information technology that have benefited society in terms of the cost-effectiveness, time efficacy and labour efforts relating to the creation, storage, duplication, distribution and adaptation of creative works.⁵⁹ It is the champion of all interests other than the copyright holder's with which it is in constant tension and conflict.⁶⁰

So far, it has only been refined with the addition of four factors in the USA⁶¹ to determine what is fair, and even then it is not a mathematical formula. Although courts do canvass the factors and determine which favours which party more, it remains a flexible and equitable rule of reasoning for the courts determine in whose favour the final equation falls (Denning, 1972, p.94).⁶² This is where the uncertainty lies and where courts can provide important lawmaking in the form of interpretation and guidance, while allowing the law to respond quicker and more flexibly to changes in the creative and technologically innovation landscape.

3.2.1 *Digital rights management: first salvo – taking away control over use*

Much has been written on the blind threat to fair use through the use of DRM, including TCM and EULAs.⁶³ For the objective of the doctrine of fair use to work, both legal and actual access to a work, whether in physical or digital form, is required. If access to a work is prohibited or restricted, and if the access to and use of software or devices that facilitate such access is categorically denied, then fair use is defeated along with 'unfair uses'. This brings us to the problem with ACL.

3.2.2 *Anti-circumstances law: second salvo – taking away instrument to overcome control over use*

Anticircumvention provisions as they currently exist under the DMCA and similar legislation elsewhere still do not distinguish between fair and unfair use and take away the fair use potential of all DRM protected works.⁶⁴ This is especially real when one takes into consideration the fact that most users lack the technical know-how or facility to circumvent locking technologies in order to exercise fair use, while those that do are prevented or dissuaded from creating and using such technologies because it is now even a crime to do so (see Therien, 2001).

3.2.3 *The USA*

It has already been noted in Section 2 how the DMCA has legally ushered DRM and ACL into the US copyright law (see Heneghan, 2002).⁶⁵ The adverse effect of these provisions in impeding fair use have been acknowledged in cases such as *Universal City Studios, Inc. v. Reimerdes*,⁶⁶ where the judge stated that:

“Technological access control measures have the capacity to prevent fair uses of copyrighted works as well as foul. Hence, there is a potential tension between the use of such access control measures and fair use...Proponents of strong restrictions on circumvention of access control measures argued that they were essential if copyright holders were to make their works available in digital form because digital works otherwise could be pirated too easily. Opponents contended that strong anti-circumvention measures would extend the copyright monopoly inappropriately and prevent many fair uses of copyrighted material. Congress struck a balance.”⁶⁷

US cases such as *RealNetworks, Inc. v. Streambox, Inc.*⁶⁸ have also already shown that fair use can be prevented through an anticircumvention provision.

The DMCA and its counterpart in other jurisdictions even prohibit the very creation of circumvention devices that can be used to circumvent DRM.⁶⁹ So too are the manufacture and availment of measures to circumvent access and copy control measures. This does not take into account the many legitimate uses of circumvention devices *and* the benefits of developing such new technologies.⁷⁰ The availability of such devices is fundamental to the ability to exercise the many types of fair uses that would otherwise be easily performed *if not for* DRM.⁷¹ We need both the legal and technological tools in order to make fair use work. The risk and threat of litigation for such technology creators and the lack of resources available to users are very real. Meanwhile the DMCA exemptions to the general prohibition against circumvention are currently purpose-specific and too limited.⁷²

In *Eldred v. Ashcroft* (see Leaffer, 2004),⁷³ the US Supreme Court reaffirmed fair use as a ‘built-in free speech safeguard’ to copyright protection (p.221). Unfortunately there is a lack of procedural protections for potential fair users, which the US First Amendment currently provides for other types of protected speech. The ACL provisions under the DMCA have been roundly criticised for its adverse effects on curtailing legitimate fair use on many levels including the practical,⁷⁴ theoretical or jurisprudential,⁷⁵ and constitutional.⁷⁶ ACL can also have potential long-term adverse effect beyond the legitimate period of copyright protection, by locking-in works indefinitely. For instance, in the Reimerdes case, it was stated that,

“technological means of controlling access to works create a risk, depending upon future technological and commercial developments, of limiting access to works that are not protected by copyright such as works upon which copyright has expired.” (Nimmer, 2000; Travis, 2000; Benkler, 1999)⁷⁷

On 27 February 2007, a tentative step was taken to readjust the imbalance created by the DMCA against fair use. Representatives Rick Boucher and John Doolittle introduced a Freedom and Innovation Revitalizing US Entrepreneurship (FAIR USE) Bill in the House of Representatives. The Bill aims to amend the DMCA “to promote innovation, to encourage the introduction of new technology, to enhance library preservation efforts, and to protect the fair use rights of consumers, and for other purposes”.⁷⁸ Some of the significant changes that the Bill will introduce, if it is passed in its current permutation, are as follows:

- It will limit the availability of statutory damages for secondary liability (*i.e.*, infringement, inducement of infringement, vicarious liability or other indirect infringement),⁷⁹ and allow innovators to make reasonable business decisions and manage legal risk.⁸⁰
- It will codify the US Supreme Court’s decision in *Sony Corp. v. Universal City Studios, Inc.*,⁸¹ in relation to hardware devices, making it clear that manufacturers cannot be held liable based on the design of technologies with substantial non-infringing uses.
- It will codify 12 more specific exemptions to the general anticircumvention rule, including the ability to circumvent for classic fair use purposes such as news reporting, news reporting, teaching, research, commentary and criticism.

This does not fully redress the ills that the DMCA have wrought (EFF, 2006), but it will go some way to temporarily alleviate some of the hardships, while continued monitoring and additional copyright reform are required to do so. It is no more a temporary levee (*i.e.*, stopgap measure) against the potential flood of litigation (or the threat of it) against the actions of fair users. On the other hand, it does not go far enough to fully protect and legalise all fair uses of digital goods legal regardless of anticircumvention laws (see Fisher, 2007; Lee, 2007),⁸² which would have been the case if the earlier stronger permutations (*e.g.*, in the form of the Digital Media Consumers Rights Act (DMCRA))⁸³ were successful. In the meantime, fair use proponents can only hope for more statutorily enacted purpose-specific exceptions over and above the general fair use exemption,⁸⁴ and (in common law countries) to continue to rely on the courts to produce case law to further redefine and clarify the boundaries of fair use in the context of the new technological landscape.

Meanwhile, other proposals for offsetting the imbalance abound. One suggestion is the enactment of legislation requiring a fair use defence under the DMCA framework to protect legitimate circumvention technologies and activities such as the incorporation of automatic fair use defaults into access control technological measures (Burk and Cohen, 2001; Singer, 2002). Of course, an ideal solution would be to produce technology that can serve the purposes of DRM while at the same time preserving fair use.⁸⁵ This presupposes that it could be done and that technology can make an accurate determination of what is fair use even when humans are unable to define any limits. So this approach is quite difficult, if not impossible, to achieve unless and until such intelligent technology can be developed (see Burk and Cohen, 2001; Armstrong, 2006).⁸⁶ Another suggestion is the introduction of controlling technological measures to protect users through both legal and market solutions, existing or otherwise.⁸⁷ Hence, for example, in the Sony BMG rootkit situation, the violation of existing laws led to legal action and eventual settlement.⁸⁸

3.2.4 The European Union

The EU Copyright Directive adopted a unique approach to the aforementioned DMCA provisions. The amendments were made to cater to a more comprehensive legal protection for technological systems.⁸⁹ The Copyright Directive also contains obligations for the protection of electronic Rights Management Information (RMI) set out in Article 7, and for the improvement of sanctions and remedies. Article 7 of the Directive requires adequate legal protection against any person knowingly removing or altering any electronic RMI or distributing or making such works available to the public.⁹⁰

3.2.5 Commonwealth jurisdictions

Although Commonwealth countries have the same common law legal system as that of the USA as we have observed, their equivalent to fair use are, except for some recent amendments in certain jurisdictions, generally more purpose-specific than fair use. In the wake of the strengthening of copyright protections and US transposition of its pro-copyright policy through Free Trade Agreements,⁹¹ many jurisdictions are starting to see the imbalance and the need for a countereffect, which is even more compelling given the narrow construct of the fair dealing exception.

Some seek equilibrium by, ironically, substantively adopting the more open-ended fair use exception. Singapore, for example, have done so just by a simple amendment of Section 35 of the Singapore Copyright Act through the removal of the precondition of 'research' and 'private study' and making 'research' and 'study' (also no longer required to be 'private') only an example of a fair use purpose.⁹² Other jurisdictions take a more gradual and incremental approach. The Australian Copyright Act allows fair dealing with copyright material for certain purposes.⁹³ A new hybrid 'flexible dealing' exception was enacted by the Copyright Amendment Act of 2006⁹⁴ (under Subsection 200AB(1)) (see de Zwart, 2007),⁹⁵ and there is also a new exception allowing fair dealing for parody or satire,⁹⁶ among other minor changes to its list of defences (see Khan and Hancock, 2001).⁹⁷ However, its regime is still not open-ended like it is in the USA. Unexceptionally, criticisms of DRM and remedial measures also abound in Australia. It has also been noted that the fair dealing defence in Australia is rarely used,

perhaps signalling the difficulties faced by users in relation both to the availability of resources and the uncertainty of outcome, which in turn can dissuade acts that may in actuality be fair.⁹⁸

In 2005, an attempt was made to amend the Canadian Copyright Act to render Canada compliant with the WIPO Copyright Treaties (*i.e.*, the WCT and WPPT) with a view to ratification (see Gervais, 2005).⁹⁹ The Canadian government also faced pressures from the USA and private industry lobbyists to fortify copyright protections and, in particular, to address DRM and ACL issues. Bill C-60 was proposed to amend the Canadian Copyright Act in the 1st Session of the 38th Parliament.¹⁰⁰ It was introduced by Liza Frulla, the then Minister of Canadian Heritage and Minister responsible for Status of Women, and David Emerson, the then Minister of Industry. It only managed to pass its First Reading in the Canadian House of Commons on 20 June 2005 before opposition, particularly from civil rights groups,¹⁰¹ stopped it from proceeding further.

Even then, it is interesting to note that the proposed amendments are less draconian than the DMCA. A positive feature in the proposed amendment was the direct link between circumvention and copyright infringement. It is an offence only if the act of circumventing copy protection technology was for the explicit purpose of infringing copyright (*i.e.*, aiding in such compromise or being aware of such material in one's possession); unlike the DMCA that targets makers and distributors of such devices as well as all forms of circumvention irrespective of the intentions of the actor. Meanwhile, the Supreme Court of Canada has shown the most progressive and liberal judicial thinking on the role, function and power of fair use, which will be further considered in Section 4 in the context of the growing awareness of the need for a stronger fair use doctrine.

3.3 *The growing awareness of the need for a fair use right*

While the nascent idea of a 'positive fair use' was earlier espoused by the UK-based Campaign for Digital Rights, the idea has since gained momentum in Canada and attracted the attention and interest of the academia, civil society and even the courts and the Canadian legislature. The Supreme Court of Canada has since recognised fair dealing in Canada as a user right.

Section 29 of the Canadian Copyright Act contains the main and most important fair dealing provision in Canadian copyright law.¹⁰² Recently, the interpretation of this provision, and the judicial attitude and approach towards establishing fair dealing in general, have become more liberal and proactive. The Supreme Court of Canada took the lead on this initiative in a series of cases since the cusp of the new millennium beginning with *Théberge v. Galerie d'Art du Petit Champlain inc.* (the *Théberge* case).¹⁰³ Justice Binnie, giving the judgement of the *Théberge* court, spoke on the importance of balance in Canadian copyright law by stating that:

“The proper balance among these and other public policy objectives lies not only in recognising the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorised copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilisation. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and ‘ephemeral recordings’ in connection with live performances.”¹⁰⁴

Soon after affirming the need for balance in Canadian copyright law, a unanimous Supreme Court proceeded to highlight and recognise the importance, and in the process open the door to elevating the status, of fair dealing in the seminal case of *CCH Canadian Ltd. v. Law Society of Upper Canada*,¹⁰⁵ by describing it as a ‘user right’. Justice McLachlin, giving the judgement of the court, stated that:

“[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair-dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.” (Vaver, 2000, p.171).¹⁰⁶

4 The legal, social and policy implications of a fair use right

“I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defence, as it is defined in the Act as a use that is not a violation of copyright.”¹⁰⁷

The user of a copyrighted work currently do not have a natural or positive right to fair use under the existing copyright regime at both the international and national level. The proposal in this section is for the entrenchment of fair use as a ‘right’ and the real differences that will result in its status as well as the benefits that that entail. The distinction will be made between a ‘first class’ right versus a ‘second class’ privilege; and between the ‘entitlements’ of a right versus the ‘pardon’ of a defence. Many commentators speaking of and writing on fair use refer to it interchangeably as an ‘defence’, ‘exemption’, ‘exception’, ‘limitation’ and sometimes even as a ‘right’ without making a distinction or considering the subtle conceptual and jurisprudential differences between each of those words; in particular the ‘right’ as compared to the former descriptions.¹⁰⁸ This failure to distinguish and the ensuing confusion must be avoided. In this section of the paper, the proposed fair use ‘bundle of rights’ will be examined in detail.

4.1 Approach

4.1.1 Comprehensive treatment preferred over incremental approach

It is patently clear that the digital age, new media and modern technology, particularly in relation to communications innovation and format changes, present challenges to the media industry and a model of regulation that are entrenched in the more traditional (and physical) transactional and packaging of content. As we have seen, this has led to the

knee-jerk and protectionist reaction in the enactment of new constraints, both legal and extralegal, in the attempt to dam the burgeoning tide of works and information that threaten to overflow and go beyond their control.¹⁰⁹ Their objective is to preserve an existing practice rather than to change their practices to conform to the brave new digital world context. The result is an uneasy set of laws that is ill-suited to changes in human interaction facilitated by advances in information technology. In the alternative, critics have argued for a paradigm shift, but this is also quixotic and unrealistic, and it can be highly disruptive and risky if an entirely new scheme of creative protection fails. Hence, a step-by-step method of recalibration is still the most realistic and acceptable solution, and as suitable compromise between the different interest groups.

The court is not the ideal primary forum to rely on to make these changes because it involves a slower incremental process, has to work within the confines of a case, is reliant on the right issues to be raised by litigants, and it may not have as much resources to consider wider social and policy implications. On the other hand, legislation is more immediate and the legislature has the resources to consult, research, study and carefully design and remodel a system on a periodic basis. So far we have seen the legislature create an imbalance of rights, and it is this writer's opinion that it should be the legislature that should be tasked to correct it. In short, the legislative approach is faster, reflects policy and can be more immediate and reactive (depending on the process). Judges interpret legislation and although they can make law in common law legal systems they can only do so if the correct legal issue is raised before it, which is neither immediate nor proactive.

4.1.2 International harmonisation preferred over piecemeal domestic approach

Codification or progressive development of the law is also preferable on an international platform for harmonisation (whereas court decisions are domestic and there is yet to be an authoritative international court for copyright affairs. International dialogue and harmonisation of systems is important owing to the fact that the geographical localisation and distinction that may have existed in the past between parties and in relation to the creation and distribution of works do not exist now. Hence, the approach to change should be multilevel and multipronged. Law and policy changes will have to be effected at the international level to be consistent with the arguments of universality wrought by cyberspace and to produce the fairest result among parties as well as a penetrative and consistent effect among different jurisdictions (Okediji, 2000).

4.2 Proposal for an open-ended 'fair use'

Fair use is still the most important instrument to counterbalance the weight of copyright protection and it has shown versatility through time.¹¹⁰ The point here is that, as one writer put it, "fair use should be rescued, and rebuilt" (Madison, 2005) and not discarded as it has not outlived its usefulness. It readdresses the issues relating to the extent of copyright protection and encapsulates the concept of balance (fair) and it also describes the main interest of others in the nature and types of uses (sharing, reuse, remix, personal use, *etc.*). Here, I am talking about the substantive characteristic of fair use rather than the label 'fair use'. Hence, from this point, the reference to 'fair use' is not so much a suggestion as to a change of form in countries that already call it 'fair dealing', but rather a change in the scope and substance of the test. The support here is towards a

more flexible and open-endedness test as opposed to a purpose-specific list approach that is confining and myopic, especially given the technological and social changes in the last decade or so. In fact, as we have seen, countries using the latter fair dealing test have either already adopted or are considering the adoption of the open-ended fair use approach.¹¹¹

Fair use is flexible and still relevant.¹¹² What use is fair can evolve with the times and with advances in technology. One need only look back at the representative cases in the last decades that have remoulded and reigned in copyright protection in the light of technological development using the fair use instrument. In the 1980s, there was the *Sony Corp. v. Universal City Studios, Inc. (Betamax case)*,¹¹³ in the 1990s, the *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*,¹¹⁴ and in 2000 the P2P line of cases. Thus, there is no reason why it cannot still meet the challenges posed by new technology and the needs of the global digital society. Moreover, fair use has already been established as an important organ of the copyright body of law. It will be less threatening, and hopefully more acceptable, to copyright holders to modify something familiar than to suggest the introduction of more radical changes. It is to be noted that most of the changes that entail from the fair use right are procedural rather than substantive,¹¹⁵ which is meant to level the playing field for individual users and other members of society *vis-à-vis* copyright holders.

It is especially urgent to repair and reinstate fair use with a new polish given the myriad threats besides DRM and ACL that are posed to user rights in the digital age. They include: The downgrading of the expression–idea dichotomy given the ease of expression in digital form including audio, visual and typed form; the threat to the first-sale doctrine (see Calaba, 2002; Graham, 2002), and exhaustion of rights (through replacement of ‘sale’ with ‘licences’); and other issues and uncertainties relating to personal use, such as the backing-up of files, replication, time/space/format shifting, interoperability of files across devices, and so on.

4.3 *From legal exception to ‘legal right’*

In legal jurisprudence,¹¹⁶ generally a ‘right’ is the legal or moral entitlement to do or to refrain from doing something or to obtain or refrain from claiming or obtaining something (such as an action, thing or recognition) in civil society (for an overview, see generally Campbell, 2005). Rights serve as rules of interaction between people; as such, they place constraints and obligations upon the actions of individuals or groups.¹¹⁷ The philosophy of copyright relates to the jurisprudential basis for copyright law and policy. Copyright is largely defined by the statutory laws of a legal system or systems and in the interpretation and application of the statutory provisions by its courts, particularly in common law countries. Philosophical and jurisprudential disagreements surrounding copyright act as ‘proxies’ for policy differences. Legal rights cannot exist *in vacuo* but owes its existence to the rules of legal systems.

Philosophically, the conceptual analysis of legal rights has been approached in many different ways. Although not all philosophers can agree on what constitutes a legal right (White, 1984),¹¹⁸ there has not been a lack of approaches to its analysis that have resulted in several main approaches, which may be loosely categorised into two schools of thought: first, those who consider rights as special and that takes priority over other considerations (an approach that is simplistic in its complexity) (see Dworkin, 1973;

1978; 1975; 1977a–b; 1981; 1985; 1986; Raz, 1978) and second, those that choose to analyse rights with reference to other concepts as duty, liberty and powers or any combination thereof. In the case of the latter, taking the view that the right is only given effect by these other concepts but is not confined or defined by them means that rights are flexible and can be manifested in new ways or form to meet the needs of changing conditions or circumstances. What is essential for our purposes here is that despite the different approaches to conceptualising legal right and whatever the relationship it has with duty, liberty and power (all of which connote strong priority under law), all jurists agree that rights are of primary importance and strength and takes precedence over lesser legal concepts and certainly non-legal privileges.

In the context of this paper, we do not equate rights with duties but rather with voluntary entitlements that the right holder can choose to enforce but that remains an option until it is exercised against another. For our purposes, the significance is that irrespective of the philosophical approach, recognising fair use as a right definitely gives it something more than relegating it to an exception.

What is an ‘exception’ as opposed to a ‘legal right’? (see Scheuerman, 1997) At the outset, it must be made clear that the main tenor of this paper is on the practical justifications for strengthening the function of fair use, particularly procedurally, and basing and distinguishing it from the existing functionality of the doctrine on a legal rights-based perception (*i.e.*, ‘user right’, as some would prefer). The reference to fair use as a limitation, exemption or exception,¹¹⁹ or in any other term that has a limiting connotation and that conjures a somewhat second-class status to copyright has given way, in some quarters to the more affirmative and recognised quality of a right, with an essential role in counterbalancing copyright protection. This approach is relatively new and partly a reaction to the wave of protective measures adopted under legislation.¹²⁰

As noted, the concept of user rights has been recognised by courts, in particular the Canadian Supreme Court in *CCH Canadian Ltd v. Law Society of Upper Canada*,¹²¹ which classified ‘fair dealing’ as a ‘user right’. It has also become the rallying call for civil rights groups like Digital Copyright Canada.¹²² The real practical importance of making fair use a right, and the danger of not doing so, is encapsulated in this comment by one writer that:

“the fair use doctrine is no longer necessary as applied to controlled digital content...DRM or encoded content no longer fits the definition of a pure public good...[and] fair use remains an affirmative defense, not a direct cause of action. Therefore, there is rarely a need or ability to invoke fair use privilege for DRM or encoded content.”¹²³ (Fernandez, 2005)

The exclusivity of rights is in its primary and remedial function. The right to start a legal action (sword) to enforce a right cannot be based on an exception (shield) to defend an act.

An example of the problem with legal exception is illustrated by the Paris *Cour de Cassation* decision in the *Mulholland Drive* case, which decided that there is no right to the private copy that can forbid the presence of the DRM, but that the private copy can be a good argument for defence in cases of counterfeiting. The case was brought up in 2003 by a consumer in a complaint against the producers of the movie *Mulholland Drive* because the legally acquired DVD was protected by DRM that did not permit the consumer to make a copy of it in order for him to watch it on a VHS cassette

(format/space shift) at his parents' home. The DVD did not have any clear notice that it could only be used with specific devices. The case was finally determined on 4 April 2007 by the Paris *Cour de Cassation*. The court held that the private copy of a certain work is not a right but a legal exception and that no one can start a legal action based on an exception, which can, however, be used as a reasonable defence in the case of alleged counterfeit, if the other legal conditions are fulfilled (Anon., 2007b).¹²⁴ The *Cour de Cassation* has remitted the case to the *Cour d'appel*, which must rule again in relation to the clarified law.¹²⁵

The starting premise is that the copyright holder has private rights over his work *ab initio* (see Mintoff, 2003),¹²⁶ whereas exceptions are not 'as of right' but only exist when proven to exist. This relates to the issue of legal proof, which will also be considered in more detail later. In the context of copyright laws, as an example of the lower status of a legal exception, to 'use' a copyrighted work, you must either have the copyright holder's permission, or you must qualify for a legal exception such as 'fair use'. Seeking permission and showing that you qualify for an exception (and hence have not infringed copyright) are placed on the same plane. There is *prima facie* infringement until proven otherwise. Also, looking at copyright legislation and how it is structured, even though there is no indication that there is a hierarchy in the numbering and order of the provisions, it is still a telling sign and reflects the level of importance given to copyright over exceptions that the nature of copyright protection and infringement provisions appear before fair use provisions.

In short, it is thus not a mere exercise in semantics when considering whether fair use should be a right or exception. Loosely analogising it to criminal law, it is, for example, the difference between 'innocent until proven guilty' (non-infringement unless proven otherwise), and 'guilty until proven innocent' (infringement unless proven otherwise).¹²⁷

We have earlier already considered the developments in Canada that is consistent with the thesis of this paper for 'fair use right'. The Canadian approach is significant in that it equates fair use with user rights rather than treating it as a mere defence to infringement. There is no infringement if there is fair use, which is quite different from saying that there is infringement but fair use excuses it. In the case of the former, the scope of the copyright protection itself is constantly redefined by the amorphous fair use.

In the seminal landmark Canadian Supreme Court decision of *CCH Canadian Ltd. v. Law Society of Upper Canada*,¹²⁸ the court established the bounds of fair dealing in Canadian copyright law. In that case, the Law Society of Upper Canada was sued for copyright infringement for providing photocopy services to researchers. The Court unanimously held that the Law Society's practice fell within the bounds of fair dealing.¹²⁹ In the course of their judgement, the Court rejected the unduly restrictive construction of fair dealing that had characterised judicial consideration of the defence and acknowledged the centrality of fair dealing in copyright policy. In considering fair dealing the court made the following general observation:

"It is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance

between the rights of a copyright owner and users' interests, it must not be interpreted restrictively...[as u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."¹³⁰

Although the court spoke of 'exception' and 'right' in the same sentence, the allusion to a 'right' taken in the context of that statement is a tacit acknowledgment of the equal importance of fairness to user as compared to the creator. Moreover, a user can also be a creator, even if a secondary creator of derivative works. While its full significance is still to be defined or tested, the case is a good theoretical basis to launch the proposition of a stronger 'fair use right' for users.

It is time for the legislature to compensate for the extensions in copyright protection by providing a corrective procedure to reinstate to fair use/dealing its integral role in the furtherance and promotion of the fundamental objectives and purposes of copyright and to maintain the proper balance between the interests of copyright holders, users and society as a whole; also taking into account new interests and parties, namely technology creators and the user-creator. The rigid confines of existing copyright legislation worldwide continue to reflect a vision of fair use as a marginalised exception that must be strictly construed and enjoyed as a privilege. Moreover, purpose-specific fair dealing should, if not already so, be replaced with an open-ended concept similar in substance to the US' open-ended fair use. In Canada, such a statutory revision is necessary to cement the significance of the CCH case in the development of a robust fair dealing right; it is therefore an essential step towards furthering the public purposes of the copyright system.¹³¹

Having christened a new universal 'fair use right', I must now take it further (beyond the semantics) and actually tailor a legislative solution that offers practical benefits to the fair user, which acknowledges that 'fair use right' is on equal footing with, and not inferior to, 'copyright'.¹³² This is done by addressing it through practical provisions and measures to offset its current weaknesses, particularly in light of the DRM/ACL provisions that directly attack such uses.

4.4 The legal, social and policy implications of a 'fair use right'

4.4.1 Positive rights for fair users

Why is it significant to elevate fair use formally to the status of a right? It is a mere acknowledgement that both private interests and public interest of stakeholders on both sides of the equation are on equal footing and should be treated equally. As between rights to the same subject matter, the apportionment of rights should be formulated in such a manner that they are of equal standing by establishing mutual exclusivity of rights in creative works and to avoid conflict. As noted, there is a difference between the status in law of a right as opposed to an exception. Giving someone a right empowers the person in many practical and real ways than if his actions are merely tolerated as an exception.

It is important not only to label fair use as 'right' but to consciously recognise it as such with the attendant entitlements (as opposed to privileges)¹³³ and powers that come with that status. It is trite to state that substance is more important than form. This is especially important because, as we have seen in the USA, simply loosely calling fair use a right but at the same time easily eroding it by new laws can give a false sense of security to users while actually insidiously undermining the very underpinnings of that

right if it is indeed one. This is dangerous and should be avoided.¹³⁴ This paper is meant as a timely reminder of that danger and to address the imbalance that currently exists in balancing the interests of all stakeholders. It is also meant to address the realities of changing expectations and attitudes owing to new media in the digital age. Social practices and behaviour can and should influence copyright policy, and in the process, fair use analysis.

The institution of change through international harmonisation of laws and through legislation will translate into other lawmaking forums such as the courts in common law jurisdiction by influencing the mindset the premise of judges (which we have seen develop independently in Canada), leading to expansive and generous interpretation (as opposed to a narrow and strict interpretation) of the fair use doctrine,¹³⁵ and to the evolution of the factor analysis, especially taking into account new developments, in both description and application.

To formally acknowledge fair use as a right is also symbolically significant as an expression of society's value of, and the government's policy towards, fair use. It is about recognising and acknowledging changes in the social paradigm. The digital age has changed expectations, attitudes and behaviour towards the treatment of creative works. These should be acknowledged inasmuch as they should influence policy-making, and there should be the reempowerment of society and the re-invigoration of individual's rights. One must avoid the fallacy of treating all uses merely as 'taking' because in the modern context with the sharp increase in User-Generated Content (UGC) and the like. Fair sharing between artists, amateur or professional, independent or industry-based, can generate intercreativity and greater creativity generally.

Fair use right will also serve to reconcile the copyright regime with public expectations and practices such as the recording of television shows, the transfer and sharing of media (*i.e.*, time, space and device shifting and interoperability), Consumer-to-Consumer (C2C) interaction and expression through new social media such as through platforms as Facebook, MySpace, Bloggers and YouTube. Even the media industry, other industries and governments as well as politicians are getting into the act. It is against the interests of copyright holders to widen the gap between copyright law and user norms, which will weaken the respect and 'norm-reinforcing function' of the law (Jensen, 2003).

Fair use right addresses the idea of an emerging 'shared global consciousness' and the 'user-producer' dichotomy. It also acknowledges and subsumes new norms in the form of changes in expectations and attitudes towards copyright in general in the electronic age. Substitution of right for defence is an expression of popular shift in such expectations and attitudes that we have started to see with the decentralisation of powers of creativity (through easier and less costly means of both duplication and distribution) and the breakdown of barriers and taboos of various levels of sharing from imitation to reconstitution (*i.e.*, copying and adaptation) (Goldstein, 2003).¹³⁶ As the permissive norms naturally emerge from the popular use of information technology, these should translate into law and policy.

Added to the fact that the general fair use test is inherently uncertain in the first place is the net prohibition against circumvention, which indirectly (some would call it directly) denies or blocks fair use. Hence, the contronym 'sanction' best expresses the confused state of fair use under current copyright laws and the mixed signals that is sent

out owing to its uncertain legal boundaries added to its limited protection under law. Depending on the situation or context, a sanction can apply to a use – as a permission or as a punishment. This uncertainty discourages many socially beneficial uses. We remove the *de facto* barriers to maximising socially beneficial uses since the existing legal framework is not producing a conducive environment for many such uses. Fair use functions more effectively when users are assured of the legality of their use or, in the modern case, when they can get away with it without having to face adverse legal consequences of their actions.

There are also other reasons for adopting fair use right. First, there are those who believe in the self-corrective nature of information on the internet, transparency and constructive criticisms. Allowing and encouraging exchanges in the form of correction, criticisms, citizen reporting and so on can achieve these purposes. Taking the power of reportage from a few and redistributing it to many can counter the dangers of censorship and one-sided reporting through the control of access to, and the manipulation of, information. Second, it can also force the restructuring of otherwise stagnant business models which can be seen in the move towards more digital media and sale, subscription-based, advertisement-supported and so on. Finally, just as an aside, although it is not essential or even important, but as part of the symbolism of the importance of a fair use right over infringement, it may be a good idea to elevate it to a section of the legislation above infringement. Currently, fair use and other exceptions are often, if not always, at a later segment of the copyright legislation in many countries.

4.4.2 *From shield to sword: procedural overhaul*

Fair use as affirmative right

Fair use is currently an *affirmative defence* (*Campbell v. Acuff-Rose Music*, 1994), which means that a defendant has to proactively claim protection under its exemption, rather than the court automatically deciding whether the exemptions applies. As it currently stands, fair use cannot be raised as a defence unless the plaintiff brings an action on copyright infringement and shows a *prima facie* case of infringement. If it is a right, the courts (or an administrative body) can automatically consider its merits if called upon to do so and a fair user can also bring an action to affirm the right, perhaps with a view to obtaining a declaratory judgement or to extinguish an infringement threat or preempt an infringement action. The copyright holder must then disprove fair use. A right to a cause of action and the standing to assert the right to fair use against measures, which interfere with such a right, including TCM and ACL, is essential to its existence and continued relevance.

This, as an affirmative right, there should be the standing to bring a cause of action to assert fair use. It is to be noted that under Article 6 of the EU Copyright Directive, circumvention requires a subjective element of knowledge or bad faith. Hence, accidental circumvention is excused. Article 6(4) of the EU Copyright Directive tries to reconcile ACL with user rights by relying on voluntary measures taken by the copyright holders to ensure the users' fair use rights, or in the absence thereof, it requires the member states to take 'appropriate measures' to ensure that copyright holders make available to the public 'the means of benefiting from that exception or limitation'. However, it only refers to certain exceptions and limitations and member states cannot go beyond the protection intended by Article 6(4) and privilege other fair uses. Although this still fall

short of re-balancing interests and has its own problems of clarity,¹³⁷ the EU legislation at least evidences a greater awareness than the DMCA of the problem of preserving the fair use rights of public users.¹³⁸

As an example of how this has been implemented, German law currently provides for most of the exceptions and limitations included in Article 5 of the Copyright Directive.¹³⁹ The German approach to Article 6(4) is to oblige copyright holders to provide beneficiaries with the necessary means to use the rights under the exceptions. Under § 95b(1) of the Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (UrhG),¹⁴⁰ if copyright holders fail to provide the beneficiaries with the necessary means to exercise an exempted act, the individual beneficiary has a claim against the copyright owner. The law provides for a new group litigation right for associations, which allows them to sue copyright holders violating their duty for an injunction.¹⁴¹ The compromise is that although it does not permit the user to resort to circumvent the technological measures through self-help or with assistance from technology developers, it still provides an avenue for the user to make a claim against the copyright holder through legal means.¹⁴²

Action for decryption

As a right, the fair user should have the power to require or compel the copyright holder to decrypt or facilitate access to a protected work for fair use purposes (Lipton, 2005).¹⁴³ On other words, there is a duty on the copyright holder to offer decryption services under the right circumstances. The mechanics of how this can be done can be developed. For instance a process can involve the potential user first approaching the copyright holder for access. If the latter obliges, then the matter ends there, but if not, a speedy administrative determination can be made (*e.g.*, by a registrar or expert) which can provide an impetus for the copyright holder to comply, failing which an appeal can then proceed to be initiated before the courts (which will take into consideration the administrative decision). There will be attendant appropriate distribution of costs upon determination based upon the merits of the case and the reasonableness of the request for use and the denial of use. Unless and until automatic fair use defaults can be built into access control technological measures (see Burk and Cohen, 2001; Singer, 2002), this is a solution to the problem of access. DRM should also be made illegal, and the circumvention of DRM technology should automatically cease being illegal, once copyright has expired. Adverse legal consequences should follow if they are not rendered so.

'Reenfranchisement' of circumvention technology makers

Affirming 'right to access' for fair use extends to 'right to means of access' for such purposes (see Sadd, 2001). Making it more difficult to prosecute the primary fair user will also make it more difficult to do so for secondary parties who may be caught under the statutory provisions on vicarious, contributory or authorisation infringement or the like (as the case may be). Hence, fair use right should extend to secondary parties developing and providing the means to the extent that the use is likely to be non-infringing. As it currently stands, there is primary and secondary infringement; hence there should also be primary and secondary fair use rights.

Fair use right is not only a right of the user but should also extend to intermediaries, in particular technology innovators. It will allow them to legally and legitimately create such technologies that are beneficial to society and digital advancement, create competition and improvements in technology, and produce technologies that also provide for other uses beyond DRM and circumvention measures. In particular, in this context, creators of circumvention technologies can exercise either their own secondary fair use rights (in connection with the invention provided that it relates to the support of primary fair use, such as if it were done at the behest of a primary fair user), or to exercise vicariously the rights of the primary fair user.¹⁴⁴ This will alleviate the deterrent effect and the current prohibitory environment that they work in Gibbons (2004).¹⁴⁵ In the meantime, it will also have the incidental but no less important effect on the ordinary user as he will avoid the burden and difficulties of self-help decryption or having to resort to unreliable qualified services or illegal ACL software.

Adjusting the burden of proof

Currently, a copyright holder alleging infringement of the copyright in a work simply has to prove the existence of a valid copyright, his ownership of that copyright, and the use of the work by the defendant without permission.¹⁴⁶ The legal burden of proof then shifts to the defendant,¹⁴⁷ who may then take the opportunity to make the claim of fair use by proving on a balance of probability and satisfying the court that he satisfies it in terms of the manner of use as well as the type of use, if the exception is purpose-specific.¹⁴⁸ Hence, the defendant encounters two levels of uncertainty at two points in time – his own judgement that his use is fair at the time of actual use, and subjecting that judgement to the court's determination if a case is brought against him. These cumulatively have the effect of deterring a lot of potential fair uses that are of benefit to the individual and to society at large, because the risks and uncertainties to potential fair users are high.

In the infringement action, once the defendant introduces evidence on the factors that will be favourable to a finding of fair use, the burden shifts to the plaintiff to rebut the defendant's case. However, the shifting of the burden from plaintiff to defendant is not so simple. Some courts appear to acknowledge the need to alleviate some of the hardships facing fair users in relation to having to defend their actions in court. The US Supreme Court has indicated that some specific elements of fair-use proof may, under some circumstances, be placed on the plaintiff and not necessarily lie with the defendant.¹⁴⁹ The US Supreme Court has allowed the onus of proof for some elements of fair use to be shifted from the user-defendant to the owner-plaintiff.¹⁵⁰ This shifting of the factual burden of proof also places the burden of proof on the party that may be in a better position to bring in the relevant evidence. This practice shows that even though it does not fit the label of a defence, the courts are starting to acknowledge that fair use should be a right, albeit in a piecemeal and tacit manner, by taking incremental steps to subtly shift the burden of proof to improve fairness and efficiency anyway. Formally recognising it as such will render its application in a court of law more consistent in future cases. To make it a general rule will achieve consistency and eliminate ambiguity,¹⁵¹ especially among the generally less legally savvy users to whom the subtleties and intricacies of elements of fair use and on legal presumptions and burden of proof are lost, and who has less by way of the means or resources to gather and elicit proof.

Recognising fair use as a right will shift the legal onus of proof to the copyright holder to show unfair usage of his copyrighted work by any user. In fact, the copyright holder should be charged with the burden of proving not only the basic elements of copyrightability, ownership, and infringement, but also that the use is not fair use, before the onus shifts to the defendant to satisfy the court that the use is indeed fair. This proposal goes further than just creating specific exempt class of users by shifting the burden of showing unfair use or circumvention for infringing purpose to copyright holders for a broad swath of users on the basis of intended use rather than based on specific purposes when we factor in the open-ended fair use right.¹⁵² Socially, shifting the burden of proof protects the freedom of speech and expression that already underlie many types of fair use such as the use of existing works for criticism, parody, research and study. The ‘fairness’ analysis¹⁵³ (onus on the copyright holder) should be separated from the ‘purpose’ analysis¹⁵⁴ (onus on the user defendant). In the latter case, as long as a main purpose is legitimate it should be sufficient. Also the purposes should be more open-ended to allow for its development by the courts and the flexibility of the doctrine.

There can also perhaps be a graduated burden of proof for different purposes or objectives related to the use. For example, some suitable specific purposes, particularly those already in existence as exceptions, can be deemed a permitted purpose for straightforward cases based on the facts (*e.g.*, criticism, review or news reporting under a commentary or column in a magazine); while for others it is presumed as it will depend upon the circumstances of each case whether it is so (*e.g.*, study and research); whereas for a purpose claimed under the general rubric that does not qualify or fall under a purpose-specific category, it will remain to be proven by the user defendant.

In summary, rather than giving copyright holders the sword and fair users a mere shield or vice versa, this is merely creating an equal ground by arming both parties with both the sword and the shield for a fair battle before the courts. It will also allow the manufacture, distribution and the commission of devices and software that make it possible for consumers to exercise their rights under copyright law as the makers and distributors of such devices or software.

Countering abuse of copyright

There are notable trends of tactical or strategic lawsuits made to dissuade uses irrespective of the fairness of the equation. Some copyright owners frequently make infringement claims even under circumstances where the likelihood of fair use is high with a view to deter uses without permission, most often with a view to preserving profits. These are frivolous lawsuits and the misuse of a legal right. Another example is the increasing overutilisation, overintrusiveness and ‘dangerous’ uses of TCM such as in the *Sony BMG Rootkit case*, which should also entail sanctions under the copyright regime, on top of other civil or criminal laws that may be implicated. Just as the user has a responsibility to fairly use a copyrighted work or else face infringement sanctions; consonant with elevating the fair use to a right, the copyright holder who misuses his copy right should also face sanction should his actions constitute an abuse or overreaching of statutory rights (see Harris, 2004). Examples include requiring the strengthening of control over TCM by providing that they must accommodate rights that are established by existing legislation, including but not limited to copyright law exemptions; and allowing for the loss of ACL protection in the case of an abuse such that

and all users may legally circumvent it. The failure to remove DRM, in particular TCM, after the expiry of statutory protection should also be sanctioned as it is a detriment to society to have works permanently locked from the public domain after it has fallen out of the period of protection.

4.4.3 *From shield to sword: an institutional approach*

Elevating fair use to a right justifies institutional support to encourage and support fair use. An administrative institution will be useful as a fast-track and inexpensive recourse for individuals. It can also function as a watchdog with its own powers of initiating review and achieving fairness.

An administrative institution will be useful if registration or other requirements are imposed for copyright protection (*i.e.*, non-automatic protection or non-automatic extended protection), or as a fast-track and inexpensive recourse for individuals for some of the purposes listed below. The institution can also function as a watchdog with its own powers of initiating review and achieving fairness (*e.g.*, championing user contract rights). In most, if not all countries with an Intellectual Property (IP) regime, there is an agency dealing with IP matters, in particular the registration of trademark and patent applications. Hence the suggested duties that are suited to an administrative organisation can be an additional function for such an existing, governmental or non-governmental, IP agency.

Also, with new technology and the rise of e-governance, some of these functions can even be performed on the WWW on the internet through automatic agents, particularly if they relate to registration (of copyright, extension of copyright or of a use as fair).¹⁵⁵ Other than mere administrative function, the agency can also provide a first point of adjudication such as that in relation to challenges to a DRM, decisions relating to affirmation of fair use rights (such as a declaratory judgement of the fairness of a certain use), an action for decryption and so on. This is not unlike arbitration panel decisions and similar panels that serve other existing decision-making functions requiring speed and efficiency adjudication at low cost.¹⁵⁶ An appeal to a court of law should be possible if meritorious.

A registry for copyright, fair use and fair development of circumvention technology

Perhaps one thing to do to rebalance the scale is to require the registration and the use of the copyright symbol © as an expressed intention to accept protection rather than to continue with automatic protection. A less radical alternative is to require such an act for extended or additional protection that recent amendments to legislation accord to copyrightable works.¹⁵⁷ Hence, the default is that any work falls within the public domain for societal benefit unless copyright is otherwise asserted, whether *ab initio* or within the period of protection. Lawrence Lessig has argued that copying a work should be deemed fair use if the copyright owner has not taken reasonable steps to provide notice of his continued rights (*i.e.*, for the extension of the copyright term) such as by entering his name and address in a copyright registry.¹⁵⁸ Such registries will not be difficult to maintain given the efficient functionality of the digital age where administrative action can be transacted electronically (through e-governance). It will be high speed, low cost, up-to-date and convenient for operators and users alike. Made openly accessible, if after

consultation of the register a work is not found registered or listed, then a user can presume that the work is in the public domain and it can be published without having to seek permission.¹⁵⁹

This is in effect advocating an ‘opt-in’ approach to extended copyright protection. Taking the argument even further, the requirement for registration can be reconsidered for copyright protection *ab initio*, mirroring the registration process that is already applicable to patent and trademark protection. Hence, the idea of a registry can be applied for the protection of fair use by preempting the threat of infringement action against the user. It will also remove to some extent the deterrent factors of high litigation costs and awards and alleviate the uncertainties and vagaries of trial for the fair user in relation to use of the work and of circumvention measures (that can also entail criminal consequences).¹⁶⁰ As noted, actual implementation may not be difficult since national registries already exist for IP-related matters and in the light of modern technology and the increasing use of e-governance.¹⁶¹ In addition, supporting evidence may be required to show the copyrightable nature of a work or its eligibility for copyright protection, if it is seen fit to include prerequisites for copyrightability under the international copyright regime.¹⁶² This change is a more fundamental change to the regime, and can be considered as a form of recognition and acknowledgement of fair use rights, by accommodating such a right in the copyright system itself, affecting the scope of the opposing right that is the right to exclusivity.

Alternatively or additionally, there can also be a registration system for users to assert fair use. If registered after administrative consideration, it can be taken as proof of fair use and be taken in favour of the user if the matter is later disputed. This may lead to action for decryption of the work if it is under a DRM. Also, as noted, technology creators should also be able to register their creations for the purpose of fair use if that is indeed the case. The copyright holder can then make use of a complaints or objection procedure to challenge the assertion of fair use, which can then lead to an adjudicatory role for the agency. This will be a precursor to court action if the matter has to be taken that far, but it can serve to remove many cases from court adjudication. Registration for fair use is closely linked to the adjudication to assert fair use, which will be examined by the following.

Adjudicatory determination of fair use rights

The procedural changes necessitated by fair use right were posited mainly in the context of the courts and civil procedure; but the functions relating to asserting fair use can also be performed at an initial stage at low cost and more speedily, by an administrative agency including hearing and deciding on fair use rights assertions (*e.g.*, by providing a forum for a declaratory administrative judgement of fair use, which will serve to protect a user from a subsequent action for infringement or at least require the copyright holder to actively challenge the fairness of the use,¹⁶³ or a ‘fair circumvention application’ procedure);¹⁶⁴ and on user claims against copyright holders for failure to provide the means to perform fair use (*e.g.*, through a ‘notice and take down’ procedure),¹⁶⁵ complaints of an overreaching DRM or abusive use of copy right, and so on.

Oversight body to protect and preserve fair use

The French government has established an oversight body to protect and preserve fair use. On 6 April 2007,¹⁶⁶ the French government put in place a regulatory body as a form of remedial measure to ensure that DRMs are compatible with copyright exceptions and do not, inadvertently or intentionally, prevent users of copyrighted works from fair use. This approach of using a national DRM watchdog bears monitoring with a view to transposition and implementation in other countries (and even provide the prototype/vanguard for an international watchdog) if it proves to be successful. The independent administrative agency known as the *Autorité de Régulation des Mesures Techniques* (Regulatory Authority for Technical Measures or ARMT) was a main feature of the new French copyright law (the DADVSI) that was passed in August 2006 (Jondet, 2006; 2007).¹⁶⁷ A supervisory role similar to that adopted by the regulatory body instituted in France can be put in place to actively oversee and ensure, even in the absence of complaint or dispute, that DRM are compatible with copyright exceptions and do not in any way prevent users of copyrighted works from fair use. The inspection can also be given bite if the legislation provides it with the ability to impose fines or even to suspend or take away protection in more serious cases.

In the context of the internet and other portals or network for the (largely) free exchange of information, we already see concessions and adaptations made to the digital era under copyright law, particularly in relation to the release of personal copying and distribution rights. There are provisions made on duplication of digital work, (in particular information) such as over the internet, in updated copyright laws of many countries in order to reconcile copyright protection with modern forms of electronic interaction. Hence, copying as a function of the internet is customarily; and legally, where statutorily provided, not considered an infringement. There should be additional guidance on what is considered fair use, particularly personal use in relation to paid products or services in this context, if it is not already legislated; such as the boundaries of fairness relating to time, format and space-shifting (such as recording a television programme to watch at another time, ripping music from a compact disc to a computer digital player, the reformatting and transfer of music files between devices). It will also be useful to specify and clarify freedoms specifically for user-creators and UGC, such as the freedom to reuse for non-commercial purposes (*e.g.*, automatic share-alike function, as the same freedoms will apply to similar subsequent reuses).¹⁶⁸

In this capacity, the agency can also help to remove the confusing distinctions between licence types, perhaps through recommended templates for copyright holders and explanations of popular licence terms for users with a view to the standardisation of licences to reduce proliferation of licence permutations or variations and to educate users to better understand terms of agreement. Its work here can also have a recommendatory effect for future amendments to copyright legislation.

Fair contract and user-consumer protection body

Third parties with fair use rights should not be required to negotiate for that right when their activities satisfy the fair use analysis.

“[A]n action to enforce a contractual limitation on fair use rights is equivalent to a copyright infringement action against a particular party, because in such an action the copyright holder necessarily would argue for a more limited fair use right (to the point of complete absence of fair use), whereas the copyright infringer would argue for broader fair use rights.” (Douma, 2001)

There should be some baseline user rights, similar to consumer rights that cannot be contracted out of. This is to counter the dangers of licence proliferation. For example, for consumer use alone (which is only a component of fair use), fair use needs to be clearly defined to educate them on what are their rights in relation to their digital media in order to overcome the real and perceived restrictions on consumer limitations in the use of such digital media, which they have paid for. As a right and for public policy reasons, fair use rights should be inalienable particularly as a method of protecting the more vulnerable party – the user-consumer, from the increasingly unfair contract and licensing terms offered by copyright holders (O'Rourke, 1995). Both a user-consumer protection body and some form of digital consumer protection legislation can be enacted to resolve the relationship between even more restrictive private forms of protection with public interest in fair use and private user interests.

5 Conclusion

“It should not be the case that ‘uses are unlawful unless expressly exempted’ (Litman, 2007),

but rather, uses should be lawful unless otherwise asserted.”

Sometimes it is important to return to basics and revisit fundamental concepts in order to take stock and keep in check the changes to legal rules in order to ensure that they are theoretically and philosophically sound. This is especially important in a field, namely, the intersection between IP and IT, that is progressing rapidly and where the need to keep the law in pace with contextual changes is particularly compelling, but without sacrificing its main objectives. In an attempt to readjust the perceived imbalance created by technology against copyright holders, lawmakers have created more protective measures that have only served to perpetrate a copyright regime that is against the interests of society in general and other stakeholders including users, user-creators and technology innovators. In order to bring some balance back to the equation, we can look to the ever-useful fair use doctrine by elevating it to a right with a view to strengthening it as a counterweight to a currently stronger copyright protection regime.

5.1 *An open-ended fair use*

As we have seen, fair use is the permissive and open-ended doctrine in US copyright law,¹⁶⁹ a formulation that has been adopted by other jurisdictions including Germany and Singapore. It allows the public to access and use copyrighted works that would otherwise be considered infringing unless the permission of the copyright holder is obtained. Although often couched in terms of a ‘right’, it is in effect treated as a limitation or exception from general copyright exclusivity to its holder. Fair usage evolves over time and in changing context and circumstances, and hence in the face of a robust copyright protection regime, the arguments for the safety net of a broad-based general fair use test are rendered more compelling.

If the copyright holder, the content user and technology companies are considered all equal parties and stakeholders to intellectual creativity, and well they should, then they should be treated on equal footing. The entitlement to bring a court action should be

available to the copyright holder as well as to the other stakeholders for the protection of their interests. Currently, fair use only formally exists as a defence to an action of copyright infringement. This is because fair use is negatively defined (see Anon, 2007a). This is no longer enough because fair use itself is threatened particularly by the combined effect of the current legislative incarnation of DRM and ACL. Fair use should exist in the law as something that one should be able to assert and be protected from being sued for doing.

Currently, one cannot initiate a court action to assert, retain or get back an entitlement that one is entitled to under the fair use doctrine. This is especially a problem because, as we have seen, it is possible to take away or obstruct fair use by the use of law or technology, and an even more potent force when combined. There is even greater imbalance if we factor in the additional measures taken by copyright holders, especially the profit-making creative industry, to further extend and control copyright protections. Governments should legislate fair use as an entitlement that cannot be overridden. The current formulation of the law, where fair use entitlements are only protected by providing them as a defence to a lawsuit, is inadequate. This is where elevating fair use as a right comes in.

5.2 *The fair use right*

The idea of the right is not new, it has appeared in various mutations and referred to in different terms by writers, for example, ‘positive paracopyright’ (see Loos, 2007)¹⁷⁰ or ‘user rights’ (see Litman, 2000; Lessig, 2002; Christie, 2001).¹⁷¹ I have sought to go beyond jurisprudential and philosophical underpinnings to propose a set of practical implications for such a change in mindset and policy. These give real force to the idea of the fair use right with practical implications for all parties concerned. Elevating fair use to a right serves many purposes. It is a symbolic affirmation of its power and significance. It acknowledges the forces at work in cyberspace and the new consciousness and personalities that have an interest in the release of works for use, reuse and sharing.

Currently, fair use is not a right *per se*, but rather it is an affirmative defence, which means that if a user is sued for copyright infringement, he can make a defence to dig himself out of liability. Rendering it a right has a practical effect in making it an affirmative right that can be enforced against the copyright holder and at the same time make it more difficult for the threat of infringement to be carried out arbitrarily or for copyright protection to be abused. Making fair use a right will make it an affirmative course of action and also take the taint of infringement out of an action unless otherwise proven by the accuser. It is not just about the legal ability to enforce, but the availability of that recourse alone can embolden fair use rather than dampen it. This can provide a greater impetus for the exercise of artistic and policy freedoms that underlie current purpose-specific fair use, which should similarly apply to other types of uses that evolve as fair according to the norms of the day. It will also ensure that fair use cannot be contracted out of, or that user rights can be adversely manipulated by the greater bargaining power of the media industry.¹⁷²

Recognising it as a right can also serve as a basis and impetus for institutional changes that support fair use and that can serve to achieve a fair balance between stakeholders. Readjusting the balance will also have other positive incidental effects. For

example, it will be an impetus for the content industry to embrace new permissive technologies (with a positive effect) and create new business models (see Abrams, 2004), and to eschew restrictive and prohibitive technologies (with a negative effect).

Thus, the effect of a 'fair use right' is not just a semantic change. It serves both as a fresh affirmation of fair use rights and its importance to society (encouraging the full exercise of fair use), a recognition of the changed context in the information age (countering the negative effects of DRM/ACL and other extensions of copyright protection), and as a guidance to interested parties, administrators and judges of the manner in which to proceed with their differences, administrative determinations and judicial decisions, respectively.

In the end, the real question is what we consider a fair balance and what role fair use has to play in this regard. I am arguing that fair use has a central role and that a fair balance must mean a recalibration in favour of the user, society and technology innovators, as well as the user-creator, in the constantly shifting context that is the brave new digital world. 'Fair use right' will serve this purpose.

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Notes

- 1 For an account of the origins of copyright law, see Samuelson (2003), an attempt by the writer to look back at its background with a view to predicting its future. See also, Fernandez (2005), for a background analysis of the fair use doctrine in the US context.
- 2 See Bohannon (2006), for a more detailed discussion on private and public interests.
- 3 See Brogan (2002), for the US Digital Millennium Copyright Act (DMCA) context, a problem that has also infected the copyright regime of other countries. See also, White (2004).
- 4 For criticism of the trend of extension and expansion of rights, see generally, Lessig (2000). See also, Merges (2000), stating that recent Copyright Act amendments create more specific and “highly elaborated property rights [that] reveal an excessively protectionist bias”; Lunney (2001), calling the post-DMCA copyright regime a ‘guild monopoly’ for private interests; and White (2004), giving an account of the dangerous shift in balance of power in favour of private over public interests.
- 5 Pub. L. No. 105–298, 112 Stat. 2827 (1998), codified at 17 U.S.C. 302 (2000). The CTEA was challenged before the US Supreme Court on its constitutionality (it was argued that it was in violation of the Copyright Clause), but the challenge was unsuccessful. See *Eldred v. Ashcroft*, 537 US 186, 193 (2003). See also, Patry and Posner (2004), considering ways to alleviate the outcome in *Eldred* and of the problems of excessively long copyright terms due to the CTEA. See further, McJohn (2003).
- 6 Generally time extensions have elicited criticisms, but for a different outlook, see Goldman (2006), arguing for indefinitely renewable time extensions.
- 7 See Jensen (2003). The writer explores the origins and consequences of internet users’ widespread failure to obey copyright laws. The emergence of a new global consciousness challenges the traditional ideas behind the existing copyright regime; and in such a situation, should “the social meaning of an individual’s conduct...[not] shape the content of the positive law itself”? (Ronald Dworkin’s ‘interpretative attitude’) (see Dworkin, 1986, p.47). See also, Pound (1907), where he asserted that where the standard of the law and public diverge, the latter will prevail.
- 8 “DRM is a general term for a set of intertwining technologies that may be used to establish a secure distribution chain for digital content.”
- 9 The writer clarifies that DRM is not merely synonymous with technological measures (or TRMs), it is an umbrella term for an objective, which is the control of creative works and commercial exploitation of rights in creative product, more than merely a descriptive term for a measure.
- 10 For an overview and succinct history of developments, see Bechtold (2004).
- 11 *E.g.*, consider the different and varied EULA used by the music industry in relation to the sale of digital music. See also, Harrang (2007), assessing the Apple Inc. experience.
- 12 These are typically contracts or agreements made between DRM technology providers and consumer device manufacturers to control access and usage of copyrighted works. *Bechtold* (2004) pp.339–351.
- 13 DRM and ACMs have been identified as two of the three main threats to privacy. See also, Greenleaf, *IP, Phone Home: Privacy as Part of Copyright’s Digital Commons, in Hong Kong and Australian law*, featured in Lessig (2003), Cohen (2003a), Bygrave (2002) and Cohen (1996).
- 14 Pub. L. No. 105–304, 112 Stat. 2860, codified at 17 U.S.C. 1201–1205 (Supp. IV 1998). The full text of the DMCA is available at: www.copyright.gov/legislation/dmca.pdf.
- 15 Freeing trade but shackling user rights. The writer noted that Most Favoured Nation (MFN) provisions under U.S.-concluded FTAs could have a ‘viral effect’ on the extension of DMCA ‘norms’ to even more countries beyond those it has trade agreements with (Hiaring, 2005, p.173). See also, in relation to Australia, Gettens (2005), Gonsalves (2005) and EFF (2006a).

- 16 *E.g.*, the denial of creative reuse and secondary creativity (through adverse impact on fair use), the categorical denial of technological creativity (through ACL laws) and the perpetual locking up of information beyond legal protection (through TCMs).
- 17 Including the interoperability issue, which has already led to heated debate in France in relation to the drafting and enactment of the *DADVSI* law of 2006, and to discussions in other *fora*, governmental (*e.g.*, the OECD) and non-governmental (*e.g.*, law and technology conferences), with momentum building at the official level in Scandinavian countries (see, Valimaki and Oksanen, 2006). This article analyses DRM interoperability in the light of EU copyright, competition and consumer laws. The DMCA's anticircumvention provisions, for instance, have been used against more than just digital pirates of copyrighted works. Consider also the anticircumvention suits that may have anticompetitive effects, for example, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 528 (6th Cir. 2004) (suit against printer cartridge manufacturer) and *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1168 (E.D. Mo. 2004) (suit against an online gaming community).
- 18 Including the lack of interoperability of devices, the restrictions of EULA, the refusal to license DRM technology, unfair contract terms and practices such as bad labelling or notice and so on.
- 19 For an alternative view supporting ACM provisions, see Espana (2003), where the writer argues that the DMCA's Section 1201 do not hinder fair use or threaten the balance of rights and the public domain.
- 20 There are already some US cases that demonstrate the chilling effects of the DMCA ACL provisions on technological research and development and on free speech generally. See USDOJ (2001), available at the US DOJ website at: <http://www.cybercrime.gov/sklyarovAgree.htm>. See also, the EFF archive site at: http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html; the Sklyarov Archive on the EFF website, available at: http://www.eff.org/IP/DMCA/US_v_Elcomsoft/; and other similar cases including *MGM v. 321 Studios*, *Universal v. Corley* and *Felten v. RIAA*, available at the EFF website at: <http://www.eff.org/IP/DMCA/>. All these cases involved alleged violations of the anticircumvention provisions of Section 1201 of the DMCA, which prohibit the development and distribution of circumvention tools. Some involved civil lawsuits (*e.g.*, the *Corley* and *Felten* cases) while others (such as the *Sklyarov* case) were criminal actions. Both make it a strong disincentive to research and develop useful technology.
- 21 Band and Issihiki (1999, p.2), stating that "virtually any technology can be used for good or evil; the person operating the technology determines the role that technology plays".
- 22 This is tied to the issue of a reverse engineering circumvention right which has been argued as a necessary exception to ACL. The exception exists under the DMCA but is too limited in nature to be useful or effective. For more detail, see the Chilling Effects website at: <http://www.chillingeffects.org/reverse/>. ACL are likely to dampen research and development in this field and hence prevent the publication of articles about digital protection, encryption, or cryptography technologies.
- 23 See *e.g.*, the *bona fide* use and potential non-substantial infringement use tests that have emerged from cases like *CBS Songs v. Amstrad Consumer Electronics* [1988] 2 All ER 484 and *Sony Corp. of Amer. v. Universal City Studios, Inc.* 464 U.S. 417 (1984). TPM were not necessary for those forms of technology and yet creativity still flourished. The same arguments can also apply to modern forms of technology that similarly eases usage and transfer, and that incidentally benefits not just users but also entrepreneurs, for example, by offering them potentially new business models.
- 24 CRNR/DC/94 (23 December 1996), <http://www.wipo.int/documents/en/diplconf/distrib/pdf/94dc.pdf>.
- 25 CRNR/DC/95 (23 December 1996), <http://www.wipo.int/documents/en/diplconf/distrib/pdf/95dc.pdf>.
- 26 However, the treaties do not provide for specific enforcement mechanisms, thereby leaving the form and nature of enforcement to the individual countries. See Articles 11 and 18, respectively.

- 27 The WIPO Copyright Treaty required ratification by 30 countries to take effect. This occurred late in 2001. A list of all contracting parties is available at the WIPO website at: <http://www.wipo.int/treaties/en/ip/wct/index.html>.
- 28 Provided, of course, that it is transposed into domestic law of the signatory state in question. See the full text of the Cybercrime Convention, which is available at the Council of Europe website at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>. Article 2 is in illegal access, Article 3 is on illegal interception and Article 6 is a provision on the misuse of devices.
- 29 For more on the Convention on Cybercrime, see Baron (2002).
- 30 Council Directive 2001/29/EC, 2001 O.J. (L167/10), available at the EUROPA website at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=32001L0029&model=guichett&lg=en, and http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/L_167/L_16720010622en00100019.pdf. The Copyright Directive was made under the Treaty of Rome internal market provisions and implements the WIPO Copyright Treaty to which the EU is a party. See the European Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WCT and the WPPT (2000/278/EC), OJ no. L089 of 2000-04-11, pp.6–7. The EU is also a party to the TRIPS Agreement of 15 April 1994 and other international copyright treaties. Other than the Copyright Directive, the EU also has a list of more specific copyright-related directives. See Article 5. The Copyright Directive was designed to be transposed into national laws.
- 31 For a comparative account, see Blythe (2006).
- 32 Article 7 protects the former while Article 6 provides protection for the latter. Article 7(2) states “digital rights management” as “any information provided by rightholders which identifies or information about the terms and conditions of use of, the work or other subject-matter”. Article 6(3) describes technological measures as “any technology, device or component...designed to prevent or restrict acts...that are not authorised by the rightholder”. Member states must provide ‘adequate legal protection’, which may be civil, criminal or both.
- 33 However, unlike the DMCA, the Copyright Directive requires an additional mental element, that is, a person must have *knowingly* committed the circumvention. Article 6(1) of the Copyright Directive requires member states to protect against the act of circumventing any effective technological measures. Article 6(2) requires them to protect against the manufacture or distribution of circumvention products or services.
- 34 For an overview on the implementation of the Copyright Directive, see Brown (2003).
- 35 Art. 5(3)(o) of the Copyright Directive.
- 36 Article 5(5) of the Copyright Directive. See also, Article 13 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT.
- 37 WIPO, Agreed statement concerning Article 10 of the WIPO Copyright Treaty, CRNR/DC/96, (23 December 1996).
- 38 For example, Article 6(4) is very general and relies on private initiative. The history of the Copyright Directive also evidences vagueness rather than clarity in its stance on the relationship between circumvention and copyright infringement. See *Blythe*, (2006) pp.125–128.
- 39 On the German experience, see Basler (2003).
- 40 17 U.S.C. 1201. ‘Title 17 – Copyrights’ is available at the Legal Information Institute, Cornell University Law School website at: http://www4.law.cornell.edu/uscode/html/uscode17/usc_sup_01_17.html. See the full text of the U.S. ACL provisions only, which is available at the U.S. DOJ website at: <http://www.usdoj.gov/criminal/cybercrime/17usc1201.htm>.
- 41 However, products or services that have a commercially significant purpose or use other than to circumvent such controls and are designed and marketed for such other purposes are permissible.
- 42 See Tian (2005), for a detailed summary and description of the scope of these provisions.

- 43 Exceptions to the prohibited act of circumventing access controls are contained in Section 1201(d)–(j). Exceptions for the antidevices provisions are contained in Section 1201(f)(2), (g) and (j).
- 44 Although to keep the categories flexible, Section 1201(a)(1)(B)–(E) established an administrative rule-making process authorising the Librarian of Congress to periodically exempt certain ‘classes of works’ from the prohibition on access circumvention. But see, Hartzog (2005), criticising this allegedly ‘fail-safe’ mechanism as faulty (describing it as little more than a ‘placebo mechanism’), especially for its refusal to consider granting exemption to a class based on the use of the work.
- 45 17 U.S.C. 1201(c)(1).
- 46 See the dedicated SonySUIT website at: <http://sonysuit.com/> for the background and the latest news and developments on the matter. The EFF, which brought a class action suit in the U.S. against Sony also have an archival website at: <http://www.eff.org/IP/DRM/Sony-BMG/>. As part of the settlement, customers in the USA and Canada can now make claims from Sony.
- 47 See Jackson (2003) and Lessig (2004) (“code becomes law; code extends the law; code thus extends the control that copyright owners effect”) (see also the EFF (2006c). It documents actual cases where anticircumvention provisions have been used to stifle legitimate uses of copyrighted works by consumers, scientists and competitors, among others.
- 48 Pub. L. No. 105–147, 111 Stat. 2678, codified as amended in various Sections of 17 and 18 U.S.C. (2000). The full text of the NET Act is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ147.105.pdf and <http://judiciary.senate.gov/special/netact.pdf>. See also, the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109–9, 119 Stat. 218, codified as amended in various Sections of 17 and 18 U.S.C. (2005), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ009.109.pdf, which states that anyone who has a copy of an unreleased film, software program or music file in a P2P shared folder could be subjected to criminal penalties of imprisonment of up to three years and fined. The offence is made out regardless of whether that file was downloaded or not.
- 49 *E.g.*, acts of circumvention and the trafficking in such technology relating to copyrighted works. See 17 U.S.C. 1204 (“Any person who violates Section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain...”). “Although both of these bills have been either temporarily dropped from consideration or tabled for further review, bills like the Privacy and Deterrence Education Act (PDEA) and the Inducing Infringements of Copyright Act (INDUCE) would mean more possible punishment for seemingly innocent behavior” Clark (2006, p.397). The PDEA aims to switch the burden of prosecution to the government and even deem infringement owing to volume of ownership of songs. “The problem is that the DMCA punishes people for making devices which have uses that are not only noncriminal, but in many cases, essential to an individual’s ability to exercise his rights” (Moore, 2003, p.1468). This relates to the problem with ill-defined, and in some cases even undefined, personal user rights in the digital context and new uses and devices through advancements in technology.
- 50 This article focuses on the rational aspects of end user litigation for the recording industry (private interest) rather than the broader issue of its social utility (public interest). The writer supports not only end user litigation but also the controversial tactic of targeting a diverse array of end users (‘marginal file sharers’) rather than just high-volume uploaders.
- 51 At the time of writing of this paper, the US music industry won a song-download case against a Minnesota woman who claimed trial rather than settled with the industry (*Virgin Records America, et al. v. Jammie Thomas*) and the penalty was a hefty USD 222,000 for the 24 songs that was pursued in the action on infringement. This case set a precedent for such actions and spelt out the seriousness of the industry in pursuing actions against individuals in its new strategy to stem music file downloads (see, Krauskopf and Haycock, 2007).
- 52 Pub. L. No. 98–620, 98 Stat. 3347, codified as amended at 17 U.S.C. 901–914 (2000).
- 53 Pub. L. No. 104–39, 109 Stat. 336, codified as amended at 17 U.S.C. 106(6) (2000).

- 54 “The rule is fair use, the principle is the right of access, and the policy is the promotion of learning” (Gasaway and Patterson, 1997, p.363).
- 55 Black’s Law Dictionary 634 (2004) 8th ed.
- 56 In fact, it functions as a counterweight to copyright and harmonises it with the US First Amendment free speech principles. See *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).
- 57 Lewis (2005), the writer concludes that, in the light of the relationship between the copyright objectives and the increasing influence of postmodern expression, the fair use defence can and should be adapted to protect the creators of new recontextualised works of music and art. See also, Tehranian (2005), suggesting a transformative use test as an intermediate liability option between infringement and fair use (see further, Gonzalez, 2003; Bunker, 2002). The transformative use test has been applied in the context of the factor analysis in US cases. See *e.g.*, *Kelly v. Arriba Soft Corporation*, 311 F.3d 811 (9th Cir. 2003), a US court case between a commercial photographer and a search engine company on the fairness of using thumbnails and in-line linking in the context of image search engines.
- 58 The writer endorses more certainty such as in the form of a Fair Use statute. That may have benefits of certainty but the flipside is that flexibility may be compromised. An alternative can be the creation of more lucid guidelines or factors as well as basic tenets of application that serve as guidance on the determination of fairness. See *e.g.*, Klingsporn (1999) (but only within the USA). This will also have the advantage of producing a harmonisation effect, especially if it is done on an international plane, while retaining the essential flexibility of the test.
- 59 The challenges posed by technology to copyright protection began as early as the 1980s from the US Supreme Court case of *Sony Corp. v. Universal City Studios, Inc.* (the *Betamax* case), and fair use has since been adapted and used to answer the question regarding the legitimate role of P2Ps and the right to the production and use of other similar models and forms of technological software and devices. See Abrams (2004), where the author discusses the functionality of the Personal Video Recorder and predicts how the law of copyright may react to it. Fair use was applied to predict the legality of aspects of its functionality.
- 60 This also includes its role on determining fair use of software and gadgets such as those that allow for time, space and format shifting, as well as defining what is fair, such as in relation to information, in the electronic information highway *i.e.*, the internet (Bagley, 2007).
- 61 The factors may vary in the copyright laws of different countries. Similar and additional factors have been added in other jurisdictions. For example, in Singapore, Subsection 35(2)(e) was included relating to “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price”, and including the purpose, character and amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work. In Canada, the landmark Canadian Supreme Court case of *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 defined six factors to determine fairness: The purpose, character and amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work.
- 62 As Lord Denning in the UK case of *Hubbard v. Vosper* (1972) 2 QB 84, stated, “It is impossible to define what is ‘fair dealing’. It must be a question of degree...a matter of impression” (p.94).
- 63 See Handler (2007), Thomas (2006), Fitzdam (2005), Schaffner (2004) and Mendelson (2003) (analogising DMCA and fair use to ‘corporate surrogacy of government funding’ to public universities); Lampman (2002/2003), Sharp (2002), Lunney (2002) and Samuelson (1999). See also, Shih Ray Ku (2002) (asserting that advocates of limiting fair use with respect to digital materials have succeeded in having such restrictions enacted into law); and Shih Ray Ku (2003) (asserting that the principles of creative destruction, rather than market failure, define fair use analysis when dealing with consumer copying).
- 64 See Schaffner (2004), Robinson (2003) and Sullivan and Morrow (2003) (‘*sub silentio* statutory abolition’); Singer (2002) (“[I]llegitimate reasons for circumventing fall into two categories: (1) those justified by the user’s actions following the circumvention and (2) those

justified by the act of circumvention alone.”). The writer in the latter article canvasses the various options to preserve fair use in the face of anticircumvention provisions, through common law and legislation.

- 65 Pub. L. No. 105–304, 112 Stat. 286 (1998) (codified at 17 USC § 101 et seq. (2000)). See also the No Electronic Theft (NET) Act, Pub. L. No. 105–147, 111 Stat. 2678 (1997) (codified at 17 USC § 101, 506–507, 18 USC § 2319–2320, 28 USC § 994, 1498 (2000)), which extended criminal penalties to acts of copyright infringement when to infringers that obtained no direct financial benefit. On the NET Act, see Heneghan (2002).
- 66 111 F. Supp. 2d 294 (S.D.N.Y. 2000), affirmed, *Universal City Studios, Inc. v. Corley* 273 F.3d 429 (2nd Cir. 2001).
- 67 111 F. Supp. 2d 294 (S.D.N.Y. 2000), affirmed, *Universal City Studios, Inc. v. Corley* 273 F.3d 429 (2nd Cir. 2001) “The compromise it reached, depending upon future technological and commercial developments, may or may not prove ideal.” Nimmer (2000), cited in the *Reimerdes* judgement, at No. 3. See also, Panas (2003), Ritchie (2000) and Sadd (2001), where the writer offers “an alternative and comprehensive reading of the DMCA that allows for a balance of copyright protection and fair use” after critically examining the *Reimerdes* decision.
- 68 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000), available at: <http://www.law.uh.edu/faculty/cjoyce/copyright/release10/Real.html>.
- 69 Section 1201(a)(1)(A) states that: “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” In contrast, the Canadian Bill C-60 does not do so. It remains to be seen what the final Canadian approach will be in alleviating the problem.
- 70 The chilling effects on technological development have already been noted earlier in this paper. For other similar cases, see McCullagh (2003) (the mod chip case).
- 71 The DMCA has been accused of jeopardising not only fair use, but also competition, innovation, freedom of speech and research and development (*e.g.*, scientific) among others. The threat of litigation is very real as illustrated elsewhere in this paper. See *e.g.*, Saltarelli (2002), for a typically critical analysis. See also, the EFF website on the DMCA at: <http://www.eff.org/IP/DMCA/>. The website contains criticisms and the archive of cases that show the adverse effects of the DMCA anticircumvention provisions.
- 72 See 37 CFR 201.40 (‘Exemption to Prohibition Against Circumvention’).
- 73 537 U.S. 186 (2003).
- 74 The hurdles that a potential fair user encounters exist at two levels. He cannot exercise fair use when it is illegal to gain access to a work in the first place; and even if there is lawful access, he may still not be able to make fair use of a work without decryption tools or the requisite knowledge to get around the TPM.
- 75 See *e.g.*, Jung (1998), on the chilling effect on free speech.
- 76 Schwartz (2005), Mitchell (2004), Quinn (2002) and Sheets (2000) (which also criticised the DMCA as anticompetitive).
- 77 111 F. Supp. 2d at 322, n.159.
- 78 The FAIR USE Bill dated 15 February 2007 for the 10th Congress 1st Session is available at the OpenCongress and EFF websites at: <http://www.opencongress.org/bill/110-h1201/show> and http://action.eff.org/site/DocServer/boucher_hr_1201.pdf?docid=461 respectively. See also, Garrow (2003) (for earlier efforts in relation to strengthening and preserving fair use); and Anon. (2002) (on an earlier permutation known as the Digital Media Consumers’ Rights Act, H.R. 5544, 107th Congress (2002)), and the Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Congress (2002) presented by Representative Zoe Lofgren that focused on giving fair use further statutory protection, and providing standards and safeguards directed to the lawful consumer.

- 79 This was done in response to the US Supreme Court's decision in *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005) (the *Grokster* case). However, on the other hand, an INDUCE Bill (short form for Inducing Infringement of Copyrights) was also proposed as an amendment to the Copyright Act by copyright proponents (to 17 U.S.C. Section 501(a) (2002)). It is available at the Library of Congress website at: <http://thomas.loc.gov/cgi-bin/query/z?c108:S.2560>. It targets 'whoever intentionally induces any violation' of copyright. Hence, we see that for every FAIR USE Bill proposed favouring others, there is an INDUCE Bill or an equivalent effort favouring copyright holders.
- 80 Copyright owners will still have the usual civil recourse to injunctions and damages.
- 81 464 U.S. 417 (1984) (the *Betamax* case).
- 82 *E.g.*, there is no clear protection for making personal use copies of encrypted materials, no allowance for consumers to make backup copies of DVDs, to strip encryption from music purchased online so that it can be played on any device, or to generally do any of the things that the DMCA categorically made illegal. Also, the exemptions apply only to the act of circumvention itself, *not* to the act of developing, distribution or trafficking in tools that would enable non-programmers to take advantage of them. The limitation of the *Betamax*-based statutory protection only to hardware manufacturers leaves software manufacturers such as internet-based P2P providers still subject to the test in the *Grokster* case.
- 83 The earlier versions of the FAIR USE Bill that have been unsuccessfully (*i.e.*, H.R. 107 (2003) and H.R. 1201 (2005)), would have permitted users to circumvent DRM protection in order to engage in an act that is protected by fair use. See ALA, *Copyright Fair Use Legislation*, available at the American Library Association website at: <http://www.ala.org/ala/washoff/woissues/copyright/fairuseleg/fairuselegislation.cfm#dmca>. Copyright proponents argue that the difference between hacking done for non-infringing purposes and hacking done to steal is impossible to determine and enforce.
- 84 These purpose-specific exceptions can be strengthened (and certainty rendered so) if they are deemed as presumptively fair although that appears not to be the approach in the USA (which reserves the discretion to the courts).
- 85 The assumption of DRM versus fair use is on the basis that fair use cannot be built into DRM technologies. If that can be done, many of the problems that we have today is moot, especially in relation to circumvention (which will not be necessary), and the erosion of fair use (which is not relevant). Perhaps in the future, technology can develop to that level.
- 86 Perhaps a less sensitive solution would be to produce baseline rights and to development technology to be sensitive to these rights?
- 87 *E.g.*, amending the DMCA to establish a general principle for the strengthening of control over TPM by providing that they must accommodate rights that are established by existing legislation, including but not limited to copyright law exemptions. To take it further, it may be provided that a TPM will lose ACL protection and all users may legally circumvent it. YiJun Tian (2005) pp.782–3. However, without any legal sanctions for failure to conform to the former and without the right or resources to challenge the latter, these suggestions will not be useful.
- 88 Since TPMs have been used in many non-copyright situations and have obviously exceeded the scope of traditional copyright law, changes in legislation should give the courts the power and discretion to decide whether a specific TPM conflicts with existing legislation or competition law and the power of sanction if that is the case.
- 89 Under Article 6(1), member states have to provide adequate legal protection against the circumvention of any effective technological measures, which the circumventor carries out knowing or having reasonable grounds to know that he is pursuing that objective. 'Technological measures' are defined in Article 6(3) as any technology, device or component, which in the normal course of its operation, is designed to prevent or restrict acts not authorised by the rights holder of any copyright, right relating to copyright or database right. It is to be noted that the act in question does not have to be an infringement of copyright.
- 90 As the terms of use can include the identity of the user, there are privacy concerns here.

- 91 The texts of the existing FTAs that the US has concluded with other countries are available at the Office of US Trade Representative website at: http://www.ustr.gov/Trade_Agreements/Section_Index.html. Many non-governmental FTA websites offer a different and often more critical perspective. For example, see the Global Trade Watch (Australia) website at: <http://www.tradewatchoz.org/AUSFTA/Media.html>.
- 92 In the 2004 amendment to the Singapore Copyright Act (Cap. 63), Section 35(1), which formerly limited fair use for the purposes of private study and research was changed such that under the new Subsection (1A), (not just private) study and research are now only examples, albeit prominent ones, of fair use purpose but they are not exhaustive and other purposes can also constitute fair dealing if the court determines it as such, applying the non-exhaustive five-factor test at Subsection (2)(a)–(e). See the full text of the Singapore Copyright Act available at the Singapore Statutes Online Database website at: <http://agcvldb4.agc.gov.sg/>.
- 93 See Flew (2005), containing a discussion about the significance of Creative Commons licences as an alternative to DRM and copyright law. See also, Butt and Bruns (2005), which offers a discussion on DRM systems, an argument of the importance of the user, a discussion about industry developments and DRM, and an identification of critical legal, economic and technical issues raised by DRM systems. See further, Khan and Hancock (2001), in particular on the expansion of the fair dealing exemption from ‘private study’ to ‘study’ (pp.510–513).
- 94 The text of the Australian Copyright Amendment Act of 2006 is available at the Commonwealth of Australia Law website at: <http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/framelodgmentattachments/AB9A6FF9AA316C8ACA25721000039342>. The Explanatory Memoranda is available at the same website at: http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2364&TABLE=OLDEMS.
- 95 Also, private copy exceptions were included for format and time shifting.
- 96 See Brudenal (1997), available at: <http://www.worldlii.org/int/journals/JILT/1997/3.html> (6.2.1 Broaden the concept of fair dealing). This is also recommended by the Electronic Frontiers Australia (EFA) and other liberal groups. See *e.g.*, EFA, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age* (1 July 2005), available at: <http://www.efa.org.au/Publish/efasubm-agd-fairuse2005.html>. It is a response to the Australian Commonwealth Attorney-General’s Department’s Issues Paper on Fair Use and Other Copyright Exceptions, available at: http://www.cr-international.com/2005_Australia_Fair_Use_and_Other_Copyright_Exceptions.pdf.
- 97 The Copyright Amendment (Digital Agenda) Act of 2000 amended many provisions of the Australian Copyright Act that deal with libraries, education and research giving them reasonable access to copyright materials on the internet, a concession not replicated in the USA. See the full text of the Australian Copyright Act available at the Commonwealth of Australia Law website at: <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4DE093BE7396F6CCCA25732300088A83?OpenDocument>.
- 98 Of interest are the eight principles identified as having emerged from authorities that provide some further guidance on what is ‘fair’ and how to determine fairness in dealing with, or use of, a copyrighted work (Handler and Rolph, 2003, pp.387–388). Citing Conti (2001) in his decision in the case of *TCN Channel Nine v Network Ten*. Lord Denning MR’s useful observations on the fairness of dealing in *Hubbard v. Vosper* [1972] 2 QB 84, 94, was also noted.
- 99 See the full text of the Canadian Copyright Act available at the Canadian Department of Justice website at: <http://laws.justice.gc.ca/en/showtdm/cs/C-42>.
- 100 For an overview, see the *Legislative Summary on Bill C-60: An Act to Amend the Copyright Act*, available at the Canada Library of Parliament website at: http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&ls=C60&source=library_prb&Parl=38&Ses=1. The amendments were also intended to address other copyright issues arising out of and relating to internet and information technology such as network service provider liability. See the *Government Statement on Proposals for Copyright Reform* (34 March 2005), available at: http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm.

- 101 See *e.g.*, the Digital Copyright Canada ('All Canadian Citizens are Rights Holders!') Petition at: <http://www.digital-copyright.ca/petition/>.
- 102 *I.e.*, fair dealing for the purpose of research or private study. Section 29 is available at the Canadian Department of Justice website at: http://lois.justice.gc.ca/en/showdoc/cs/C-42/bo-ga:l_III-gb:s_29/en#anchorbo-ga:l_III-gb:s_29. Other than study and research, criticism, review, and news reporting are also very important exceptions.
- 103 [2002] SCC 34, [2002] 2 S.C.R. 336, available at: <http://scc.lexum.umontreal.ca/en/2002/2002scc34/2002scc34.html>. It was a close 4–3 decision.
- 104 [2002] SCC 34, [2002] 2 S.C.R. 336, at para. 32 of the judgement.
- 105 2004 SCC 13, [2004] 1 S.C.R. 339, available at: <http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html> and <http://ipjustice.org/regions/namerica/cchvslawsociety.html> and. See also, Esmail (2005), where it is noted that the court held that the fair dealing exception, like all other exceptions in the *Copyright Act*, is a 'user's right' and should not be interpreted restrictively, thereby effectively expanding the scope of the fair dealing.
- 106 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 48 of the judgement. The court then cited with approval Vaver (2000) who stated that: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation" (p.171). The court also interpreted expansively the meaning of research or private study, stating that: "The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. 'Research' must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeals that research is not limited to non-commercial or private contexts" (p.51).
- 107 Per Birch, *SunTrust Bank v. Houghton-Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001).
- 108 This author has come across literally hundreds of articles referring to the 'fair use right' in a manner that does not distinguish at all between what that term can and should mean as opposed to the existing notion that it is still very much only an exception to copyright protection and a defence to infringement.
- 109 For an overview, see Murck (2006), the writer describing this reaction rather colourfully as consigning cultural works to 'intellectual purgatory' and disadvantaging consumers through the risk of 'technological obsolescence' (p.421).
- 110 One writer has suggested a 'fair circumvention doctrine' as a 'catch-all' exception that has a similar idea as the one promulgated in this article, but the problem is that it still couches the amendment as a 'privilege', creates another doctrine to deal with the same problem, and suggests exceptions even to this exception. See *YiJun Tian* (2005) pp.779–782.
- 111 *E.g.*, in Canada. See Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act, B2 (October 2002) at 33–37, available at <http://strategis.ic.gc.ca/pics/tp/section92eng.pdf>.
- 112 It is the very criticism of fair use (*i.e.*, that its boundaries are unclear) that is also its virtue (*i.e.*, that it is flexible and can change with the time and context).
- 113 464 U.S. 417 (1984). Videotaping of copyrighted television programmes was fair use ('time-shifting').
- 114 180 F.3d 1072, 1079 (9th Cir. 1999), where 'space-shifting', defined as the process of transferring content from one medium to another, was upheld as a fair use. Note also the Audio Home Recording Act, 17 U.S.C. 1008 (2000), forbidding certain infringement actions based upon the non-commercial copying of digital or analogue musical recordings by consumers and the right of consumers to make home recordings of music.
- 115 *E.g.*, *Carroll* (2007) p.1091, in describing his proposal of a Fair Use Board, stated that "[t]he proposal is fair use-neutral because it would not change the substantive entitlements granted by the Copyright Act. Rather, it would simply give fair use a fair chance". Copyright holders can still assert their rights in a court of law except that they must now be more discerning in the cases they pursue as the burden of proof, as we shall see, will lie on their shoulders. This

discourages the use of the threat of litigation to discourage fair use and also avoids civil cases being settled out of court, or guilty pleas in criminal cases from alleged infringers, by users who are intimidated from going to court or proceeding with a costly action.

- 116 It is not the premise of this paper to consider in detail the jurisprudential basis for a rights-based account of copyright law in support of both the creator's (not owner's) rights and public (domain) interests. For a more theoretical jurisprudential analysis of rights in relation to copyright law, see *e.g.*, Yen (1990; 1994, p.159), Gordon (1993) and Hughes (1988). See also Drassinower (2003), where the writer examines how a rights-based account of copyright law can address the balance between authorial and public interests just as the instrumentalist account can, in the context of the idea/expression dichotomy in copyright law. The author's premise is that "the rights-based account regards both the author's right *and the public domain* as a matter of inherent dignity" [emphasis mine] (p.21).
- 117 See also, McCloskey (1965) citing "rights as entitlements".
- 118 In fact, some philosophers, such as White (1984) have argued that it is an impossible task because the concept of a right is as basic as the other concepts into which it is often analysed such as duty, liberty and power, even though it may partly be understood with reference to those other concepts.
- 119 In fact, if one is to be picky, 'imitations' (*on* copyright) is somewhat stronger than 'exceptions' (*to* copyright) or 'exemptions' (*from* copyright). The former connotes more of a restriction on copyright whereas the latter conjures visions of a pardon from an otherwise sanctioned action. However, throughout this paper, they are used interchangeably and are distinguished collectively from 'rights'.
- 120 "If fair use is an affirmative right, for instance, then it ought to be acceptable to take positive actions, such as circumventing content protection mechanisms (*e.g.*, decoding an encrypted file), in order to exercise fair use. But taking such positive actions may well be illegal under the regime of fair use as a defense." Executive Summary to National Research Council (2000). "The 'defense' view of fair use holds that the literal copying, while a violation of the original author's exclusive rights, is excused by fair use and its public policy goal (namely, that society benefits from authors building on and critiquing previous work, even if they have to copy a small part of it). The affirmative right view of fair use, by contrast, holds the public policy goal as key and sees the copying not as a violation to be excused, but as a right that later authors have with respect to work that preceded them (as long as the copying stays within fair use guidelines) (p.1)."
- 121 [2004] 1 S.C.R. 339, 2004 SCC 13; available at: <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>.
- 122 See the Digital Copyright Canada website at: <http://www.digital-copyright.ca/>.
- 123 A consumer cannot sue a copyright owner for fair use. Thus, a licensee of DRM-protected content cannot sue the content owner under copyright law for failing to permit time-shifting of that particular content. The licensee can only assert a fair use defense if he copies the content and is sued for infringement by the content owner. But DRM does not allow the licensee to copy the content outside of the licence, so the licensee will have neither the need nor the ability to invoke fair use against the content owner (p.451).
- 124 On the issue of the lack of notice against private copying, the court held that it is not an essential feature of such a product, but noted that after the new DADVSI comes into force, such information will become an obligatory feature for any product with DRM.
- 125 In accordance with the Berne Three-Step Test established in the EU Copyright Directive to which France is a member state, such an exception cannot be applied when it conflicts with the normal exploitation of the work. Because the application of the private copying defence could unreasonably harm the interests of the author, it was determined that the DRM did not unlawfully disentitle users to benefit.
- 126 This is based on the Lyons' (1982) general understanding of rights that a person has a right over something when permitted to use it in any way he so wishes, and when others are permitted to use it (or interfere with its use) only with his permission. An exception is a carve-

out of a right. On the other hand, if we consider fair use as a right, it stands side by side with copyright, and although it may appear contradictory, in effect they are mutually exclusive if we look at it from another perspective, that is, a fair use right is not an infringement of copyright. Hence, by considering fair use as a right, we also dispel the fallacy that it conflicts with copyright. This may have a conciliatory effect for the two concepts and take away some of the existing tension that exists between fair use exception and copyright. Admittedly, the lack of clearly defined boundaries may prevent that effect from becoming a reality.

- 127 Or using another analogy, this time to human rights, the idea of the ‘human right’ to freedom of the person (and due process of the law) can also relate to the idea of the ‘user right’ to freedom of use (and freedom of speech and expression).
- 128 [2004] 1 S.C.R. 339, 2004 SCC 13; available at: <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>. See also, Howell (2003/2004), examining the case as a development in Canada with respect to ‘authorising’ copyright infringement.
- 129 More ordinarily and under the typical analysis which does not depart from the usual, the Supreme Court of Canada in the *CCH* case listed a set of factors, first proposed in the Federal Court of Appeals, that judges should consider as a ‘useful analytic framework’ in interpreting when is dealing fair including the purpose of use (*e.g.*, must be an allowable purpose, one mentioned in the act), character of use (*i.e.*, how was the infringing work dealt with), amount of the work used (*i.e.*, what was the amount and substantiality of portion used in relation to the whole work), alternatives (defence more likely allowed where no alternative available), nature of the work (*e.g.*, in this case there was strong public interest in access to legal resources) and economic impact on owner (how the market for the work is impacted by the use).
- 130 *Ibid.* at para. 48 of the judgement.
- 131 Compare the situation in Canada to that in the USA where 107 U.S.C. Act states that: “The fair use of a copyrighted work...is *not an infringement* of copyright.” [emphasis mine]. Ironically, it is the USA itself that exports DMCA provisions, which flourish in other jurisdictions, sometimes without the benefit of as expansive an interpretation of fair use (*i.e.*, dealing) in those other jurisdictions. Also, merely stating that it is ‘not an infringement’ or that it is a ‘right’ is still not enough as it can obfuscate exactly what that entails in practical terms.
- 132 *I.e.*, not only should it be defined as a ‘right’, we must go further to define the parameters of that right to ensure that it is not overridden by DRM and ACL such as what appears to be happening under the DMCA. Significantly, Canada has not yet taken on DRM-related legislation, but when that happens, what is theoretical will become practical. The drafting of copyright legislation should be done with a view to defining the relationship between the two in a constant effort to achieve equilibrium.
- 133 A privilege refers to something that can be (more easily) conferred and revoked.
- 134 It is precisely this problem of status that has led at least one commentator to declare that ACL provisions such as Section 1201 of the DMCA does not adversely affect fair use, by stating that the arguments to the contrary are based on two incorrect normative assumptions, the first of which is that “the presupposition that copyright owners and Congress have a duty to provide not only access for fair use purposes, but also provide it for free...[as] fair use is not a right or entitlement, as some commentators either mistakenly or intentionally have stated. Rather, fair use is merely a privilege. This distinction is very important because if fair use were a right then copyright owners and Congress would indeed have a legal duty to provide fair use to the public. Since it is only a privilege, neither copyright owners nor Congress have a duty to affirmatively provide it. Furthermore, these commentators seem to assume that the public has a right to free fair use because it has traditionally been free to the public. This misconception is a result of the inadequacies of traditional analogue mediums, such as books, magazines, and photographs to prevent copyright infringements” see Espana (2003).
- 135 *E.g.*, in the *CCH* case, it was confirmed that research for a commercial purpose qualifies for the research and private study exception and it also established the rebuttable presumption that a person who provides the means or equipment that may be used to infringe copyright only authorises its use insofar as it is consistent with the law.

- 136 Sometimes called the ‘zone of expressive opportunity’, including reporting, education, review, criticism, comment, parody and other socially beneficial forms of communication that may not occur if copyright holders are given complete control over the use of works.
- 137 Although Article 6(4) appears to preserve fair use rights, certain aspects of it can carry negative implications for fair use. It states that the beneficiaries of an exception or limitation under national law should be made available *unless* there are ‘voluntary measures’ put in place by rightholders (“including agreements between rightholders and other parties concerned”), which can mean that statutory exclusions can be contracted out of.
- 138 The DMCA should be amended to encourage voluntary measures, or to directly provide specific measures to enhance the enforcement of fair use doctrine. Just as future legislation in this area in other jurisdictions should do likewise.
- 139 As noted, it is in the discretion of the member states to choose the ‘appropriate measures’ to take under Article 6(4). In the course of implementation, some exceptions have been adopted with minor non-substantive changes, while others have been incorporated into law.
- 140 The provisions of Article 6 of the Copyright Directive are implemented in the §§ 95a, 95b of the Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), v. 9.9.1965, BGBl. I 1965, 1273 (UrhG), available at: <http://www.iuscomp.org/gla/statutes/UrhG.htm>.
- 141 It is noted, however, that such an injunction is likely to have no value for individual beneficiaries “because it only prohibits the rightholder from further violating their obligations”. “Whether such an injunction results in affirmative measures by the rightholders to give the means to the individual beneficiaries is open to question”. See *Besler* (2003) p.25.
- 142 But the true benefit and usefulness of this process may be very limited because it serves only the beneficiaries of the limitations and exceptions listed under § 95b UrhG, some of which require reasonable compensation to be paid to the copyright holder, while the remainder may still be liable under anticircumvention provisions even if they may be exempted from infringement. Any disjuncture in the relationship between ACL and copyright infringement is something that has to be avoided as they present not only uncertainty in the law but an even greater hurdle for users and society to benefit from a work independent from the control and whims of the copyright holder.
- 143 This might in fact be better for the copyright holder than to have fair users rely on third-party devices as they can monitor and keep track, and to that extent control, the amount and type of fair use and make the necessary assessment on protection.
- 144 The idea of a registry can extend to this category of persons, perhaps to a more important (or even greater extent) than to registration of primary fair use.
- 145 On the weighing of fair use factors, see (pp.558–566). This will have real effects on ACL. Positive reinforcements should still be sought to be set in the DRM/ACL-related legislation.
- 146 It is to be noted that, first, user-consumer/individuals as well as digital product/platform innovators have both been targeted by copyright infringement, primary and secondary liability, respectively; and second, the liability of proving fair use primarily rests on the defendant or user.
- 147 Under current law, the copyright holder need only prove ownership of a valid and existing copyright and that the defendant exercised one of the exclusive rights with respect to the work. See *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998).
- 148 It is then for the defendant to prove fair use as an affirmative defense. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) and *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003).
- 149 See *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984). For examples of lower courts following the lead of the Supreme Court by applying a presumption that shifts the burden of proof, see *Consumers Union of United States, Inc. v. New Regina Corp.*, 664 F. Supp. 753, 763 (S.D.N.Y. 1987); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 382 (S.D.N.Y. 1993); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 832 (S.D.N.Y. 1990) (“[A]lthough every commercial use of copyrighted material is presumptively

an unfair exploitation of the monopoly privilege that belongs to the owner of a copyright, noncommercial uses are a different matter.”) quoting the *Betamax* case (see p.451). Even before the Supreme Court identified the presumption in 1984, some lower courts were adopting a comparable position. See, e.g., *Pillsbury v. Milky Way Prods., Inc.*, 8 Media L. Rep. 1016 (N. Ga. 1981) (finding that the effect factor weighed in favour of fair use, because the plaintiffs did not introduce evidence of market harm). See also, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

- 150 The writer focuses on the issue in relation to unpublished works. On judicial precedents for shifting the burden of proof, see Crews (1999, pp.72–80). The use of presumptions in lieu of shifting the burden of proof, though well-intentioned, may exacerbate the problem of uncertainty and obfuscate the perennial answer as to what is indeed fair.
- 151 Contrast this approach to varying the allocation of BOP to the different elements of fair use or even of creating different presumptions in relation to different subject matters, parties, facts or situations as the case may be. See, e.g., Sinclair (1984), where the writer proposes that the allocation of burden of proof should vary with the different elements of the fair use defence. See also, the *Betamax* case, where the court placed the burden (albeit a factual one) on the plaintiff-complainant to prove that the consumer creation of non-commercial unauthorised copies of copyrighted works was harmful or could have an adverse affect on the market for the copyrighted work (p.451).
- 152 Proposed under 17 USC Section 1201(a). See 68 Fed. Reg. 62011 at 62012–62018 (October 2003). The proposal was rejected by the US Copyright Office.
- 153 The notion of fairness is not personal but should be assessed objectively. What is fair has to be considered based on relevant factors. See e.g., Lord Denning MR’s observation in *Hubbard v. Vosper*, [1972] 2 QB 84 at 94.
- 154 It is not necessary for the permitted purpose to be the only or even the material or most important purpose in order for fair use to be established. Motive is irrelevant, thus, the fact that the user may have been motivated by other purposes (e.g., parody or satire), should not itself disentitle him or her from relying on fair use, although it may be taken into consideration as a factor to evidence the actual fairness of the act.
- 155 In the light of international copyright treaties and mutual recognition of copyrights, interlinking of registration, logging and search functions and even country-specific adjudicatory decisions relating to a particular work in a one-stop information portal website is also not a remote possibility.
- 156 E.g., domain name dispute resolution and policy are common in many jurisdictions. Many government ministries and agencies deal with related disputes regularly at the regulatory or administrative stage before a matter may be brought to the courts if necessary.
- 157 This challenges the notion that the optimal/ideal default should be automatic protection with an ‘opt-out’ approach. The approach can be at the stage of protection by, for instance, redefining the nature and scope of copyright protection such as offering protection (or extended protection in time) only by registration (the ‘opt-in’ approach that already exists for trademark and patent protection).
- 158 See Lawrence Lessig’s blog site at: http://lessig.org/blog/2004/08/fair_use_and_licensing.html. In effect, he is arguing against the effect of the automatic renewal of rights created under the Copyright Renewal Act of 1992. It will work efficiently as media industries and those with an interest in maintaining protection for whatever reason, commercial or otherwise, will have the incentive, resources and interest to lodge such registration, while those with lesser or no interest in such extension will not do so (and hence their works will fall into public domain in the usual course of events for the benefit of all). The question that follows is whether to make non-registration perpetual or suspensory (i.e., allowing for subsequent registration as long as it is within the period of additional protection), and if the latter whether there should be a limitation period within which registration should be made before it is time-barred.

- 159 Whether it is better to make non-registration categorical within a grace period (*e.g.*, registration within 14 days of the run-out-date of the original period of copyright protection) or suspensory (*i.e.*, can be reinstated within the extension period upon registration but without prejudice to any uses in the interim) can be further considered on their merits to this model.
- 160 Described as a form of ‘anticipatory adjudication’ and likened to a ‘declaratory judgement’. The process should be as simple and cost-effective as possible to avoid it becoming prohibitively expensive for interested registrants.
- 161 It is just a matter of piggy-backing on existing infrastructure. The next step would be to maintain an international register, perhaps with the cooperation of countries under the auspices of an international organisation, such as member signatories to WIPO copyright treaties.
- 162 Perhaps there should also be more prerequisites for opting in such as making it a precondition to show or prove originality and tangible expression (including in digital form) or to explain the reason for requiring protection (*e.g.*, commercial exploitation, to protect moral rights, *etc.*). The more onerous the requirements, the more difficult it would be to register.
- 163 See Carroll (2007), where the author advances a legislative proposal to create a Fair Use Board in the US Copyright Office that would have the power to declare a proposed use of another’s copyrighted work to be a fair use. A favourable opinion would immunise only the petitioner from copyright liability for the proposed use, leaving the copyright owner free to challenge the same or similar uses by other parties. The copyright owner will receive notice and have an opportunity to challenge a petition. Fair use rulings would be subject to administrative review in the Copyright Office and to judicial review by the federal courts of appeals. See Carroll (2007, pp.1122–1149) for the proposal.
- 164 See *YiJun Tian* (2005) p.785.
- 165 The institution of a quick-determinative procedure or decision-making process to grant or order release of decryption key, perhaps with certain conditions, such as confidentiality agreements, or the inclusion of tracking or additional technology (*e.g.*, finger-printing or watermarking) to prevent counterabuse. Under the Copyright Amendment (Digital Agenda) Act of 2000 to the Australian Copyright Act, which prohibited devices capable of circumventing TPM, the legislation also provides an exception “if the recipient of the device or service makes a written declaration that the device or service is only to be used for a ‘permitted purpose’.” see Colangelo (2002). There have been suggestions that amendments under Canadian Copyright Act could provide similarly.
- 166 The decree setting up the agency was issued on 4 April 2007. See Décret n° 2007–510 du 4 avril 2007 relatif à l’Autorité de régulation des mesures techniques instituée par l’article L. 331–17 du code de la propriété intellectuelle, available at: <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCB0700270D>. The decree and DADVSI define the mission, power, composition and procedure related to the work of the ARMT by including articles in the French Intellectual Property Code (IPC).
- 167 See Loi n° 2006–961 du 1er août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information; parue au JO n° 178 du 3 août 2006, page 11529, available at: <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCX0300082L>. The two main concerns that it will have to address are the issues of interoperability of electronic formats on devices and the preservation of users existing (and perhaps future) rights to use copyrighted works as of right (*i.e.*, automatically and immediately), without having to seek the permission of the copyright holder.
- 168 The ease and universality of access and copying is effectively broadening common perceptions of what constitutes fair use. Also, there are other factors such as societal or public benefits from sharing and reuse that are not specifically stated although they remain relevant since the factors we listed earlier are non-exhaustive. Even then, they should be enunciated at the very least, if not considered with a view to a change of the fundamental scope of copyright protection, to accommodate modern notions of fairness between copyright holders and new users. The agency can provide some guidance in this respect as well.

- 169 “The flexibility inherent in fair-use...crucial for assuring that fair use can apply in the most meaningful manner to the enormous range of materials within the scope of copyright, and under the extraordinary and unpredictable diversity of situations in which fair use may arise. No one rule can anticipate all needs. Moreover, reliance on one rule removes the legal analysis from the equitable principles at the foundation of fair use. Fair use is not merely an ‘excused infringement’. ...A modest shifting of the burden of proof can return fair-use law to its proper balance in furtherance of the law’s constitutional mandate.” See *Crews* (1999) p.93.
- 170 See Loos (2007) “Fair use should be a positive paracopyright supported by both the First Amendment and the Copyright Clause” (p.615).
- 171 There have been various suggestions to create a ‘use right’ by academics observing the challenges that the advent of cyberspace have posed to the copyright regime and the increasing protectionist practices arising from it, even prior to the *CCH* case in Canada.
- 172 Parties should not be allowed to contract out of fair use as it has a greater societal/public interest than just a private (and potentially unfair) bargain between private parties.