

## Public Interest Exceptions in Copyright: a Comparative and International Perspective

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**[A] fundamental objection to information feudalism is the threat it poses to the supply of knowledge as a public good at a time when people around the world are becoming more and more dependent on knowledge goods as public goods.<sup>1</sup>**

### Introduction: Some surprising developments

On April 22, 2005, the Court of Appeals of Paris issued a decision in a case, *L'UFC-Que Choisir v. Studio Canal*, declaring that the use of the CSS ("Copy Scrambling System") encryption technology was unlawful in connection with DVD's sold in France. The case was brought by a national consumer organization on behalf of an individual who had been frustrated in an attempt to copy the contents of a purchased disc (David Lynch's *Mulholland Drive*) to a video cassette so that he could view the film at the home of his mother. In arriving at its decision, the court held that the use of this common technological protection constituted a violation of the "right of private copying" provided for among the limitations and exceptions to copyright in the French Intellectual Property Code.<sup>2</sup>

And last year, Hungary amended its Copyright Act to bring it into compliance, in various respects, with new European Union Directives on the topic. Among the new provisions inserted in the law were a number that dealt with the topic of "free use" – i.e. use of copyrighted materials insulated from potential infringement liability – and one of these may be of some special interest to the library community. One recent report describes this provision as follows: "... in the lack of a stipulation in the license agreement to the contrary, the works constituting part of the catalogues of public libraries, educational institutions, museums, archives as well as video and audio archives, can be freely display, and for this purpose freely communicated to members of the public, on the screens of internal computer terminals."<sup>3</sup> What this account misses is the fact that the subsequent government decree implementing the legislation specifically provides that "the collection of the beneficiary institution shall be freely connected to the collection of any other beneficiary institution for accessibility purposes (connection to target-oriented network). For users, the collection of the beneficiary institution shall be transmitted to the public through the computer terminal set up at the beneficiary institution it is

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<sup>1</sup> Peter Drahos with John Braithwaite, *Information Feudalism* 216 (2002).

<sup>2</sup> The exception is codified at Art. L.122(5)(2) of the Code, and the case is reported at <http://www.01net.com/editorial/274752/droit/la-justice-interdit-de-proteger-les-dvd-contre-la-copie/>

<sup>3</sup> Csaba Sár, Hungary: Limits on Owners' Rights in New Hungarian Copyright Regulation, 18 *World Copyright Report* 9 (Oct. 2004).

connected to.”<sup>4</sup> With these words, the regulation authorizes the creation of a national system of libraries sharing digital content freely with one another and with members of the public on their premises. Although this remarkable innovation is vulnerable to attack as a violation of international copyright norms, at least for now it goes farther than any other national law of which I am aware, including that of the United States, to authorize a national network of non-profit cultural institutions freely sharing content with one another and their patrons without concern for potential copyright liability.

The French decision, which differs so profoundly from U.S. courts’ pronouncements in similar cases,<sup>5</sup> may or not stand up on appeal. And the Hungarian legislation and regulation may or may not prove broadly influential beyond the boundary’s of that country. But I begin with these examples to make a particular point, which will be the major theme of this paper: Although there is much to be said for the approach taken in U.S. law to the articulation of limitations and exceptions to copyright law, and for its lynchpin doctrine of “fair use,” we should take care to avoid simplistic claims of “U.S. exceptionalism” in this field, as in so many others. At a minimum, the United States has as much to learn from the experience of other national nations with limitations and exceptions to copyright as they have to learn from us. And it is not out of the question that the future of doctrines favoring public access to, and reasonable public use of, copyright materials may be found in models other than that with which U.S. lawyers and information practitioners are most familiar. Those who are committed to the cause of “balance” between owners’ and users’ interests in the field of intellectual property law need to recognize this possibility.

That said, it will be useful to summarize briefly the case, as it is generally made, for the superiority of U.S. law on copyright limitations and exceptions. Briefly, it is composed of three elements. First, U.S. doctrine on this subject (and particularly that of “fair use”) is intimately connected to a robust constitutional tradition emphasizing the instrumental public purposes of copyright law, on the one hand, and the independent importance of freedom of expression as a guarantor of democratic values, on the other. Second, the U.S. has, almost uniquely in the world,<sup>6</sup> consigned much of its jurisprudence on the topic to the category of “fair use,” as codified in 17 U.S.C. Sec. 107; thus, U.S. law has a special capacity to adapt to changing social and technological circumstances that foreign statutes, which specify permitted uses in greater

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<sup>4</sup> Government Decree 117/2004 (IV.28)

<sup>5</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d. Cir. 2001), discounting the information access interests of end users in upholding the application of the Sec. 1201 anti-circumvention provisions to the distribution of software that enabled avoidance of the CSS encryption scheme.

<sup>6</sup> Intellectual Property Code of the Philippines, Sec. 185. In addition, Sec. 184 of the Philippine copyright law also includes a relatively generous list of specific exemptions from liability.

detail, do not. Third, just as the U.S. has for the most part rejected the conception of literary and artistic property as a “natural right” of creators, which is prevalent in countries of the civil law tradition, it has limited dramatically its recognition of so-called “moral rights,” the implementation of which tends toward greater absolutism than that of more flexible “economic rights.”<sup>7</sup> Thus, the argument runs, U.S. copyright law in the area of limitations and exceptions generally goes farther in securing the public interest than do the statutes of other nations, and should be considered to be a sort of “international gold standard” in the area.

The preceding narrative of comparative law in relation to copyright limitations and exceptions may have some genuine explanatory power. But its utility can be easily overstated. In fact, as we have recently seen, constitutional oversight of expanding protectionist tendencies in U.S. copyright law is surprisingly weak, both with respect to the rationale of public purpose and the copyright-First Amendment connection.<sup>8</sup> Although progressive U.S. copyright lawyers may anticipate and advocate the birth of a substantial constitutional copyright jurisprudence,<sup>9</sup> both in general and with respect to “fair use,” there are no recent signs that their hopes are likely to be fulfilled in the foreseeable future. And although it certainly is the case that U.S. “fair use” is an open-ended and adaptable doctrine, this coin has another face: by comparison with most of the rest of the world, our Copyright Act identifies relatively few specific exemptions to copyright, and these often are of frustratingly narrow scope – as anyone recently has grappled with construing the distance education provisions of Sec. 110 can testify.<sup>10</sup> Finally, while it is true that the United States has avoided, for the most part and at least for the time being, the

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<sup>7</sup> For detail on the distinction between “moral” and “economic” rights, see Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 *Colum.-VLA J. L. & Arts* 377 (1995); for the contrast between robust European “moral rights” and their relatively anemic U.S. counterpart, see Edward Damitch, *A Critique of the Visual Artists Rights Act of 1989*, 14 *Nova L. Rev.* 407 (1990).

<sup>8</sup> See generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which the United States Supreme Court rejected a variety of constitutional challenges to the Copyright Term Extension Act of 1998, choosing instead to defer broadly to congressional authority.

<sup>9</sup> See, e.g., L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 *Vand. L. Rev.* 1 (1987); Diane Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 *Wm. & Mary L. Rev.* 665 (1992); Yochi Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. Rev.* 354 (1999); and Neil Netanel, *Locating Copyright Within the First Amendment* Skein, 54 *Stan. L. Rev.* 1 (2001).

<sup>10</sup> For the shortcomings of this legislation, see Kenneth D. Crews, *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act*, available at [http://www.ala.org/Content/NavigationMenu/Our Association/Offices/ ALA Washington/Issues2/Copyright1/Distance Education and the TEACH Act/ teachsummary.pdf](http://www.ala.org/Content/NavigationMenu/Our%20Association/Offices/ALA%20Washington/Issues2/Copyright1/Distance%20Education%20and%20the%20TEACH%20Act/teachsummary.pdf).

worst excesses of “moral rights” doctrine, our Copyright Act has other features that – to a far greater extent than elsewhere – operate in practice to chill exercise of “fair use” and other limitations and exceptions. To expand briefly on this last point, which will be treated at greater length below, U.S. law with respect to copyright remedies exposes individual and institutional users who make the wrong determination, even in complete good faith, about the scope of a limitation or exception to extraordinary and uncertain levels of risk, under what are (in comparative perspective) unusual and exceptionally punitive doctrines relating to remedies for infringement. Practically, then, a potentially broad exception under U.S. law may be worth less to prospective users than its “narrower” counterpart under a different national law.

*Claims for the superiority of U.S. law on limitations and exceptions (I): The constitutional connection.*

The justifications for “U.S. exceptionalism” in the field of limitations and exceptions now can be examined more closely in comparative perspective, beginning with the frequently made claim that “fair use” is somehow superior because of its constitutional roots. As already has been noted, the law of U.S. acknowledges, in general terms, a relationship between copyright in general, including “fair use” in particular, and the constitutional values encoded in First Amendment. As also noted, this relationship is not well-developed in U.S. jurisprudence, and where it is discussed at all it tends to be with emphasis on the potential for copyright interference with the speech rights of reporters, critics, and others. In part because the First Amendment theory of information access is not well-developed, the cases contain little discussion of the possibility that users of information may have rights that should be implemented in copyright if this regulatory scheme is to be considered immune from serious constitutional critique. This represents a serious limitation on the future development of U.S. law relating to limitations and exceptions, since it leaves out of the analysis, in many particular cases, the dimensions of public interest that argue more powerfully for increased access.

By contrast, in Europe we see the rise of an approach to copyright limitations, based squarely on a human right of access to information, that has the potential to bear significant doctrinal fruit in years to come. In order to appreciate the significance of this development, some background on the position of intellectual property in the field of human rights is necessary. Thus, for example, Article 27.2 of the Universal Declaration of Human Rights sets out that ‘[everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author’;<sup>11</sup> and Article 15.1. of the International Covenant on Economic, Social and Cultural Rights provides that

The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life (b) to enjoy the benefits of scientific progress and its applications

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<sup>11</sup> Article 27.1. states that ‘[e]veryone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’.

(c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>12</sup>

Notably, and unfortunately from a public interest perspective focused on information use rights, these traditional formulations emphasize the human right of intellectual property ownership, rather than rights of access.

However, in the legal environment of European human rights law, the story of copyright in relation to fundamental rights has taken another, somewhat unexpected turn, as is well illustrated in the 2002 case *Ashdown v. Telegraph Group*.<sup>13</sup> The case involved unauthorized newspaper quotations from the unpublished diaries of a prominent political figure; the decision (which ultimately finds against the newspaper) canvasses the statutory fair dealing exception in British law, but also considers the possibility of a non-statutory public interest defense to allegations of copyright infringement in relation of the as well as the import of the coming into force of the Human Rights Act of 1998, implementing (among other things) Sec. 10 of the European Convention on Human Rights, which provides (at Art. 10.1) that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The decision of the Court of Appeal was that at common law there did exist a public interest defense; that the court could envisage a situation in which an individual’s right to freedom of expression might in effect “trump” the rights of a copyright owner; and that the public interest defense could provide the mechanism for accommodating just such a situation.<sup>14</sup> Thus, there is now the prospect, in Europe, of a new jurisprudence of public access to copyrighted materials that may prove more robust, in some respects, than either the British “fair dealing” exception *or* its transatlantic cousin, “fair use.”<sup>15</sup>

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<sup>12</sup> Notably, however, in November 2000 the United Nations Committee on Economic, Social and Cultural Rights did issue a statement on “Human Rights and Intellectual Property Issues,” suggesting that intellectual property should be understood instrumentally as a “social product” with “a social function,” and “a means by which States seek to provide incentives for inventiveness and creativity from which society benefits.” Although this analysis certainly does not *require* the acknowledgment of access rights, as such, it seemingly would not exclude it.

<sup>13</sup> [2002] 1 Ch 149.

<sup>14</sup> I am indebted for this succinct formulation of the *Ashdown* holding, and for the general framework in which it is discussed here, to Dr. Ronan Deazley of the the University of Durham.

<sup>15</sup> There has been vigorous disagreement in the French courts about whether Art. 10 of the ECHR provides the basis of a non-statutory exemption to copyright infringement liability. See André Lucas and Pascal Kamina, France, in Paul Geller and Melville Nimmer, I *International Copyright Law and Practice* [hereinafter Geller & Nimmer], Sec. 8[2], n. 57 (2004), at FRA-122.

Claims for the superiority of U.S. law on limitations and exceptions (II): “Fair use” v. narrower exemptions

This leads naturally to the second claimed ground for the superiority of the U.S. law’s treatment of copyright limitations and exceptions: the flexibility and vitality of “fair use,” when contrasted with doctrines that fulfill similar functions in other natural laws. On this point, at least, the claim may have some real merit. Broadly speaking, for example, “fair use” has proven to have greater reach than its counterpart in other common law jurisdictions, including the United Kingdom. There, in several recent cases, British courts have rejected defenses of “fair dealing” in circumstances where U.S. courts might well have arrived at a different result under our law. *Ashdown* itself is one such case. Another good example is *Hyde Park Residence Ltd v Welland* [2001] Ch 143, a decision that (in turn) comes in for some criticism in *Ashdown*, where it is summarized as follows: That case concerned an unusual breach of copyright—the publication by ‘he Sun’ of photographs of Princess Diana and Mr Dodi Fayed, with times recorded, taken by a security video camera owned by Mr Al Fayed. ‘The Sun’ claimed that it was in the public interest to publish these photographs as they gave the lie to claims being made by Mr Al Fayed that the two had enjoyed a lengthy tryst at his house in Paris.” In finding against “fair dealing,” the court gave considerable weight to the critical fact that the photographs were unpublished,<sup>16</sup> and that their use wasn’t strictly necessary to make the point about the Princess’ romance that the newspaper wished to convey – even though they were a highly effective means of doing so, and the fact that the story (which ran some months after the events) was not a report of current events, strictly speaking.. In comparison to “fair use,” conventional “fair dealing” analysis (in the U.K. and elsewhere) puts relatively less emphasis on the interests of the user (and, incidentally, the public), and more emphasis on those of the copyright owner.

This critique of “fair dealing,” as exemplified by its treatment in the law of the United Kingdom, is appropriate as far as it goes. But it leaves several considerations out of the account. One is that, as already noted, statutory “fair dealing” is supplemented in the law of the United Kingdom by a potentially broader (though somewhat ill-defined) “public interest” defense.<sup>17</sup> The other is that “fair dealing” beyond the United Kingdom has taken on a different coloration in some of its former colonial possessions. In Hong Kong, for example, the 1997 revision of copyright, undertaken in anticipation of the handover of the territory to the People’s Republic of

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<sup>16</sup> In this connection it is instructive to contrast the final sentence of Sec. 107 of the U.S. Copyright Act – “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors – which was added in 1992 after an extended congressional discussion of what limits, if any, the unpublished status of a work should impose on the availability of a “fair use” defense in connection with its unauthorized use.

<sup>17</sup> A non-copyright example of an analogous case in which this defense was successfully employed is *Lion Laboratories Ltd. v. Evans* [1985] QB 526, where an injunction was refused in connection with the unauthorized publication of confidential documents relating to the reliability of breathalyzer technology.

China, borrowed explicitly from U.S. law (rather than its U.K. counterpart) in its formulation of standards for assessing “fair dealing.”<sup>18</sup> Another notable example of national “fair dealing” provisions that diverge from the law of the United Kingdom and (at least to some extent) converge with that of the United States, is to be found in Canadian copyright law, which is discussed in the conclusion to this paper.

Broadly speaking, however, general or residual provisions of this kind are not the dominant feature of most national law provisions on limitations and exception; by contrast, lists of specific exemptions are. This approach is particularly prominent in countries of the civil law (and “authors rights”) tradition, which place considerable general emphasis on the importance of legal codification, although it also has importance in common law (or “copyright”) jurisdictions. On its face, this approach has some apparent drawbacks when contrasted with more general provisions, as well as some possible advantages: Clearly, it lacks flexibility; other the other hand, the relative certainty it promotes may actually encourage activities that users might be unwilling to undertake in reliance of “fair use.”<sup>19</sup> In other words, the theoretical scope of users’ rights in

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<sup>18</sup> The relevant provision of Hong Kong law, Sec. 38(3), provides that : “In determining whether any dealing with a work of any description is fair dealing, the factors to be considered include-

- (a) the purpose and nature of the dealing;
- (b) the nature of the work; and
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole.”

This formulation tracks three of the four “criteria” for “fair use” under Sec. 107 of the U.S. Copyright Act. For background on the legislation, *see* Jonathan Band, Gunboat Diplomacy on the Pearl River: The Tortuous History of the Software Reverse Engineering Provisions of Hong Kong's New Copyright Bill," *The Computer Lawyer*, Feb. 1998, at 8. How long this will be the case remains to be seen. “Fair use,” Hong Kong style, is under considerable external pressure, as evidenced by an April 1, 2005, release from the U.S. State Department: “The Hong Kong Government has initiated a consultation process aimed at amending provisions in the Copyright Ordinance dealing with criminal liability for end-use piracy, ‘fair use’ exemptions from such liability, and related matters. The United States has urged the Hong Kong Government to take the steps necessary to achieve effective deterrence against end-use piracy.” U.S.-Hong Kong Policy Act Report, available on LEXIS.

<sup>19</sup> It should be noted, that the “fuzziness” of “fair use,” which has been noted by noted commentators (including Lawrence Lessig in *Free Culture* [2004]) is not inevitable. It can be addressed through various techniques, including test litigation and (perhaps more promisingly) the development of disciplinary codes or standards of “best practices” within different use communities. For an example of a current project that aims to develop such a statement for the use of (and reflecting the consensus views of ) documentary filmmakers, *see Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, at

such a regime may be diminished, but their practical availability may be enhanced. The comparison of approaches becomes still more difficult when it is recognized that not all “specific” exemptions are truly closed in their articulation. Thus, some may actually function as mini “fair use” provisions in practice.

French law provides an excellent example of these phenomena, drawn from one of the best developed national systems of authors’ rights (or copyright) legislation, and one with a well-known bias toward the protection of authors (and by extension, other rights holders) as its primary goal.<sup>20</sup> Today, French law includes general exceptions for private copying and private communications (the latter limited to the “family circle”); illustrative uses (typically brief quotations); parody, pastiche and caricature; and quotation in news reports, and public speeches. More pointedly, it permits outright the reproductions of art works in catalogues and back-up copying of computer programs, while providing compulsory licenses (subject to the payment of equitable remuneration) for a range of other unauthorized uses, including home taping, photocopying and non-profit performances.<sup>21</sup> Taken all together, and along with the considerable body of case law interpreting it, this list is certainly more than trivial in its scope. The same can be said for the national laws of other civil law countries.

Perhaps unfortunately, there is little uniformity, at a meaningful level of granularity, between the specific exceptions incorporated in the laws of different European civil law countries, to say nothing of those found in the continent’s common law jurisdictions.<sup>22</sup> In an attempt to address this disparity of approaches, the drafters of the 2001 European Union “Directive on the harmonisation of certain aspects of copyright and related rights in the

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<http://centerforsocialmedia.org/rock/index.htm>, and (in particular) its FAQ document at [http://centerforsocialmedia.org/rock/backgrounddocs/Updated\\_BPFAQ.pdf](http://centerforsocialmedia.org/rock/backgrounddocs/Updated_BPFAQ.pdf).

<sup>20</sup> For the history of French copyright law, with special reference to the evolution of limitations and exceptions, see Gilliam Davies, *Copyright and the Public Interest* [hereinafter “Davies”] 129-177 (2d ed. 2002). Davies notes that former characterizations of French law as an absolutist system that fails to recognize an independent public interest no longer apply at the turn of the 21<sup>st</sup> century, if they ever were truly apt. *Id.* at 176-77.

<sup>21</sup> See “France,” in Geller & Nimmer at FRA 122-133.

<sup>22</sup> Thus, for example, in addition to “fair dealing,” the 1988 Copyright, Design and Patents Act in the United Kingdom includes provisions that operate specifically in favor of libraries and education; these include both outright exemptions for instructional uses, the inclusion of short passages in educational anthologies, school-based performance and display, the educational recording, as well as statutory authorization for blanket licensing schemes covering activities (such as the making of multiple photocopies) that are not exempt. See Davies, Secs. 4-037-38, at 69-70.

information society”<sup>23</sup> set out to, among other things, bring national laws on the topic of limitations and exceptions into greater overall conformity. Whatever else may be said of this Directive,<sup>24</sup> it did not achieve this particular harmonization objective. With respect to Art. 5 of the Directive, which speaks to limitations and exceptions, Gillian Davies writes “neither achieves its aim of harmonisation nor produces any legal certainty; nor is the public interest well-served. It establishes only one mandatory exception [for temporary acts of reproduction<sup>25</sup>] but permits no less than 20 optional exceptions, thus failing to achieve any degree of harmonisation” and quotes Bernt Hugenholtz: “Of course, the whole idea of drawing up a finite set of limitations was ill-conceived in the first place. The last thing the information industry needs in these dynamic times is rigid rules that are case in concrete for years to come.”<sup>26</sup>

Common law countries outside Europe also have accommodated the public interest by adopting specific exemptions from copyright. Not the least among these is the United States, which provides for miscellaneous specific exemptions (including those for face-to-face and electronically mediated teaching) in Sec. 110, and details exemptions for the benefit of libraries and other cultural intermediates in Sec. 108. In fact, the library exemptions in U.S. law are among the more generous to be found anywhere in the world. In many jurisdictions, activities in which libraries are permitted to engage freely in the United States are authorized only subject to a scheme of equitable remuneration, while in others the institutional activities that are fully exempt from liability are defined relatively narrowly.<sup>27</sup>

*Claims for the superiority of U.S. law on limitations and exceptions (III): A concern for context*

The third perspective from which U.S. law approaches to copyright limitations and exceptions may appear superior to those of other national laws is in a broad frame that includes other features of copyright law as well. Thus, for example, the “moral rights” provisions of most civil law countries and many common law countries are an apparent impediment to otherwise

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<sup>23</sup> Directive 2001/29/EC (OJ 2001 L 167/10).

<sup>24</sup> For an analysis and critique, see Bernt Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, 22 *Eur. Intell. Prop. Rev.* 499 (2000).

<sup>25</sup> Art. 5(1)

<sup>26</sup> Davies, Sec.12-008, at 316.

<sup>27</sup> For the description of a relatively restrictive regime of library and archival exceptions, see Herman Cohen Jehoram, Netherlands, in Geller & Nimmer, Sec. 8[2][c][ii], at NETH-70; by way of comparison, see the somewhat more liberal provisions described in Gunnar Karnell, Sweden, *id.*, Sec. 8[2][b], at SWE-48, and Alberto Bercovitz and Germán Bercovitz, Spain, *id.*, Sec. 8[2][b], at SPA-60 (the latter including a free right of reproduction for research purposes benefitting museums, archives and libraries).

lawful uses (including uses permitted under “fair dealing” provisions or specific exemptions) of copyrighted material. Because “moral rights” such as paternity (the right to be identified with his or her work), “integrity” (the right to prevent distortion of the work), “first publication,” and “withdrawal” are personal to the author or his or her successors, and operate outside the ordinary economic domain, they may, under some circumstances, “trump” limitations and exceptions. Thus, in an extreme example, an otherwise permissible quotation in a review may be actionable if the reviewer’s choices from the work are so partial and biased that they fundamentally and completely misrepresent its character and/or the author’s intentions. But the true difference between accommodations of private and public interest in the differing domains of rights may be less than first meets the eye. Professor Goldstein, relying on the work of Dr. Adolf Deitz, puts it this way:

Moral rights are not nearly as monolithic as is commonly thought, and actions against third parties are tempered in civil law and well as common law countries by a balancing of interests akin to the balance struck for economic rights by doctrines such as fair dealing and fair use. Reviewing legislative exceptions to moral rights in the civil law countries, Adolf Deitz has concluded that they “only exemplify the concept that moral rights questions have always to be judged in their individual context and that correspondingly different solutions have to be found for different categories of works and manners of work uses.”<sup>28</sup>

Many national laws, for example, recognize “parody” exceptions to the right of integrity.<sup>29</sup> Another good example is the treatment, in various national laws, of the problem of “waiver.” Although it is axiomatic that moral rights cannot be bought or sold, because of their personal character, there are a variety of circumstances in which their assertion may, in some particular circumstances, be effectively estopped. Thus, for example, a writer who chooses to publish his or her work can generally be regarded as having waived the right to complain about misleading or incomplete quotation, except in the most extreme cases.

If the real or likely impact of “moral rights” provisions on the potential for exercise of limitations and exceptions diminishes as one becomes better acquainted with those provisions, the opposite is true of the damages provisions of U.S. law. The more one understands about the nature and the extent of the risk to which unauthorized users may be exposed in the U.S., the easier it is to understand the practical considerations that chill the exercise of “fair use” and other exceptional doctrines. Broadly speaking, the remedial provisions of most national copyright laws emphasize reasonable compensation for harm, or the disgorgement of undeserved profit, rather

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<sup>28</sup> Paul Goldstein, *International Copyright* 292 (2001), at Sec. 5.4, quoting Adolf Deitz, *Legal Principles of Moral Rights in Civil Law Countries*, 11 *Copyright Reporter* I, 14-15 (No. 3, 1993).

<sup>29</sup> See André Françon, *The Copyright Aspects of Parodies and Similar works*, 24 *Copyright* 283 (1988).

than deterrence.<sup>30</sup> In many countries, for example, it is common for infringement damages to be calculated in the form of a “reasonable license fee” for the challenged use, often calculated by reference to standard industry practice. Thus, these laws generate relatively little chilling effect on the exercise of potentially available use privileges.<sup>31</sup> Moreover, criminal law plays a minor part in the copyright enforcement schemes of most developed countries.

By contrast, the law of civil copyright infringement in the United States has evolved so that today, proof of infringement can lead, at least theoretically, to high awards of damages even where no actual harm to the copyright owner or gain to the user has been – or can be – established.<sup>32</sup> The awards available under these so-called “statutory damages” provisions has been increased in successive rounds of legislation; under the copyright law in effect until 1978, the overall cap on such awards generally was \$5,000;<sup>33</sup> today, by contrast, awards of up to \$150,000 *for each work infringed*, are authorized by the statute<sup>34</sup> – and copyright owners are not slow to point this out in cease-and-desist letters and other communications designed to leverage threats of potential litigation. The chilling effect generated by these provisions, even where uses that may well be sheltered under “fair use” or another limitation on copyright protection, hardly can be overstated. Adding to that chill is a panoply of potential criminal penalties, the severity of

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<sup>30</sup> See, e.g., Adolf Dietz, Germany, in Geller & Nimmer, Sec. 8[4][a][ii], at GER–127 (“Of course, in practice, damages are normally calculated according to the so-called “license analogy.” The amount of damages is generally the license fee that is usually paid in the particular industry for similar types of uses. However, if there is no established license fee, the Court may base the calculation of damages on the actual fees the copyright owner has previously received as compensation for similar authorized uses of his or her work”).

<sup>31</sup> In rejecting “fair dealing” in *Ashdown*, for example, the British court noted that “[t]he fair dealing defence under section 30 should lie where the public interest in learning of the very words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account for profits. When considering this question it is right to observe that, as damages are compensatory and not at large, they may produce a relatively mild chill.” *Id.* at Para. 69.

<sup>32</sup> See *UMG Recordings, Inc. v. MP3.com, Inc.*, Copy. L. Rep. (CCH) Para. 28,141 (S.D.N.Y. 2000), where the court assessed damages at a minimum of \$118,000,000 after a company’s incorrect assumption that a new business plan was based on “fair use” led to it to infringe – this despite the fact that neither actual harm nor actual profit could be proved. See generally J. Cam Barker, Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement 83 *Tex. L. Rev.* 525 (2004).

<sup>33</sup> Sec. 101(b), Copyright Act of 1909.

<sup>34</sup> 17 U.S.C. Sec. 504(c).

which stands out in comparative perspective. As the United States Department of Justice has noted:

[C]ongress has acted to significantly enhance criminal penalties. The penalties for criminal infringement of certain copyrights were increased dramatically in 1982, under 17 U.S.C. § 506 and 18 U.S.C. § 2319, and were extended in 1992 to cover all types of copyrighted works. Copyright infringement now may constitute a felony under federal law if at least ten infringing copies of any type of copyrighted work with a value of \$2,500 or more are made or distributed in a 180-day period. See 18 U.S.C. § 2319. Further, on September 13, 1994, Congress made a violation of 18 U.S.C. § 2319 a "specified unlawful activity" for the purposes of the money laundering statute, 18 U.S.C. § 1956, and on July 2, 1996, Congress amended 18 U.S.C. § 1961 to include copyright violations as predicate offenses under RICO.<sup>35</sup>

Legislation awaiting Presidential signature as this article is written is legislation. S. 167, that would make the posting of a single copy of a work to the Internet a felony under certain circumstances, even where it is done without any commercial motivation.<sup>36</sup>

In sum, when viewed in full context, the contrasting approaches of national laws to the objective of balancing public and private interests in copyright law each has notable limitations; by the same token, each has something to recommend it. If one could imagine an optimal, hybrid approach, it might well be one that combined a flexible core doctrine such as "fair use," rooted in a recognition of information access as a human right; an adequate list of specific use exemptions; a skeptical attitude toward far-reaching "moral rights" claims, and a relatively conservative approach to penalties for copyright infringement, which emphasized compensation over deterrence. Whether such a hybrid approach might be achievable in the current international law environment, however, is another question, to which this paper now turns.

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<sup>35</sup> U.S. Department of Justice, *Federal Prosecution of Violations of Intellectual Property Rights (Copyrights, Trademarks and Trade Secrets)*, Sec. 2.A.1, at [http://www.usdoj.gov/criminal/cybercrime/intell\\_prop\\_rts/toc.htm#II](http://www.usdoj.gov/criminal/cybercrime/intell_prop_rts/toc.htm#II) (last updated 1997). The extent of the department's activities in the field may be gauged from information provided at the website of its Computer Crime and Intellectual Property Section (CCIPS), at <http://www.usdoj.gov/criminal/cybercrime/ip.html>. See Attorney General Alberto R. Gonzales *Renews Commitment to Justice Department's Intellectual Property Task Force* (March 9, 2005), at <http://www.usdoj.gov/criminal/cybercrime/iptaskforce.htm>.

<sup>36</sup> Family Entertainment and Copyright Act of 2005, agreed to by the House of Representatives on April 19, 2005.

Threats to the development of public-interested oriented limitations and exceptions (I): The evolution of international standards

Broadly speaking, there are two tendencies in the international intellectual property environment that put at risk the further development, or even the maintenance, of existing provisions for limitations and exceptions to copyright at the national level: the increasingly restrictive treatment of this issue in multilateral intellectual property agreements, and the development of international mandates for new “paracopyright” (or anti-circumvention) regimes as a minimum required feature of adequate national legislation.

Limitations and exceptions have been a topic in international copyright agreements for decades, but until recently they received relatively unsystematic (and legally inconsequential) treatment. Today, they are an increasing focus of sustained attention, and it is important to note, at the outset, the one modest bright spot in the otherwise overcast contemporary vista of international law.. In 1996, at a diplomatic conference called by the World Intellectual Property Organization to act on new treaties to supplement the Berne Convention and other standing agreements in the field, the delegates agreed to unprecedentedly explicitly acknowledging the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.” Unfortunately, this language appears in the Preamble of the Agreement, rather than in any of its operational provisions. So while it may have some importance as a guide to the interpretation of other ambiguous provisions, it does not in itself authorize (or prohibit) any concrete action at the national level.

The reference to the Berne Convention in the just-cited passage should remind us that the 1971 Paris Act incorporated language authorizing (although generally not requiring ) parties to recognize various so-called “small exceptions” in their national law, including rights of quotation and utilization for teaching purposes (Arts. 10[1] and [2]), exceptions for quoting material from and in connection with news reporting (Arts. 10*bis*[1] and [2]), and compulsory licenses for certain acts of broadcasting (Art. 11*bis*[2]) and the mechanical reproduction of musical compositions [Art. 13].<sup>37</sup> Moreover, it provided in more general terms for unspecified further exceptions to copyright owner’s crucial exclusive right of reproduction. These are the subject of Art. 9(2) of the Convention, which states that “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” Notably, Art. 9(2) did not extend, by its terms, to authorize national laws that granted exceptions to other exclusive rights (such as

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<sup>37</sup> See generally Sam Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986* [hereinafter “Ricketson”] 489-522 (1987) In addition, the Convention was interpreted to imply the possibility of other exceptions, *id.* at 527-541, and included an Appendix permitting developing countries to adopt certain further exceptions to promote the circulation of books in their territories, *id.* at 590-662.

distribution or performance). Nevertheless, it was pursuant to this provision and its so-called “three-step test” (or by analogy to it) that many national law provisions carving out exceptions to copyright (including many aspects of the U.S. “fair use” doctrine) conventionally were justified, as a practical matter,

Through the early 1990's, the actual meaning of the Berne Convention provisions relating to limitations and exceptions received relatively little attention, in large part because disputes about their meaning were non-justiciable – that is, no institutional entities were empowered to interpret these (or other) Berne provisions, or to settle disputes among parties as their applications.<sup>38</sup> What information was available concerning the scope and intent of the treaty's provisions derived from the records of the diplomatic conferences at which they originally were agreed upon, but even this was sketchy at best.<sup>39</sup> About all that could be said with certainty was that depending on the nature and scale of the use, it might be impermissible, permissible if a compulsory license fee (or other “equitable remuneration”) were available to the copyright owner, or permissible without condition.

Pressure for clarification of the somewhat confusing guidance of Berne came primarily from major copyright exporting countries (the United States, Europe and Japan), in response to shared concern that developing nations (including some identified as hotbeds of intellectual property “piracy”) were taking advantage of the Convention's open-textured provisions and the absence of meaningful dispute settlement mechanisms to justify excessively broad limitations and exceptions in their national laws.<sup>40</sup> The international response to this pressure came in the TRIPS Agreement which forms part of the 1994 World Trade Organization Agreement, concluded at the culmination of the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade. Although TRIPS incorporates the “small exceptions” and Art. 9(2) of Berne by reference, it does not stop there. Instead, it includes a new provision, Art.13,

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<sup>38</sup> Although Art. 33 of Berne confers potential jurisdiction to decide such disputes on the International Court of Justice, it has never been utilized, in large part because the same article also permits parties to opt out of this ICJ jurisdiction and many (including the United States) have done so.

<sup>39</sup> An important example is the Art. 9(2), which was agreed to at the 1967 Stockholm Conference, where it was the subject of some discussion in the Report of the Main Committee I, where Prof. Ulmer stated that “... a rather large number of copies for use in industrial undertakings...may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual and scientific use.” See Ricketson at 484-488, where the evidence for the extension of Art. 9(2) to judicial and administrative use, private use, research and scientific use, copying for teaching purposes, and other permissible purposes also is canvassed.

<sup>40</sup> See generally Michael J. Ryan, *Knowledge Diplomacy* 67-89 (1998).

that restates the “three-part test” – but with two crucial differences. Art. 13 provides that “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”<sup>41</sup> Thus, what was in Berne only one of several *permissive* standards *authorizing* the adoption of limitations and exceptions became a *restrictive* test apply across the board to all limitations and exceptions of any kind or character.

Moreover, unlike the provisions of the Berne Convention discussed above, Art. 13 of TRIPS is fully justiciable, in that the Dispute Settlement Body of the World Trade Organization is empowered to hear and decide disputes concerning its interpretation and application among member countries. Indeed, the first such dispute, *United States – Section 110(5) of the U.S. Copyright Act*,<sup>42</sup> was decided on June 15, 2000. There, the dispute settlement panel was assigned to evaluate a special (and highly politicized) U.S. exemption (the so-called “Fairness in Music Licensing Act”) for the use of amplified broadcasts music in some commercial establishments; in finding against the U.S. law provision, the panel adopted a relatively restrictive understanding of the “three-part test,” which turned in significant part on whether the exception under consideration “causes or has the potential to cause an unreasonable loss of income to the copyright owner.”<sup>43</sup>

Obviously, the *Section 110(5)* decision is far from conclusive on the question of how the WTO dispute settlement process will interpret Art. 13 of TRIPS in connection with future challenges to limitations and exceptions that are specifically conceived to promote reasonable access to copyrighted works. What is “unreasonable” in the context of an exception benefitting primarily commercial operators may yet prove “reasonable” in connection with one explicitly designed to further the public interest or promote balance in copyright. By the same token,

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<sup>41</sup> See Daniel Gervais, *The TRIPS Agreement* 147-152 (2d. ed. 2003) This provision, incidentally, is echoed in the formulation of the two agreements concluded at a diplomatic conference convened by the World Intellectual Property Organization in 1996 and intended to supplement the Berne Convention and other international intellectual property agreements. Thus, for example, Art. 10(2) of the WIPO Copyright Treaty provides that “Contracting Parties shall, when applying the Berne Convention, confine any limitations and exceptions to” those that satisfy the “three-part test.” See Reinbothe & von Lewinski at 118-134.

<sup>42</sup> WT/DS160/R.

<sup>43</sup> See Laurence Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 *Boston Univ. L. Rev.* 93 (2000) and J. Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 *Columbia J. L. & Arts* 119 (2002). Notably, the United States did not take the opportunity provided under WTO dispute settlement procedures to appeal the panel decision; this has suggested to some that the U.S. government may have been content to accept the panel’s restrictive reading of Art. 13 for its possible future precedential value.

however, that rationale of that decision easily could be applied to invalidate various limitations and exceptions, both newly minted and longstanding, including some applications of “fair use” in the United States.

*Threats to the development of public-interested oriented limitations and exceptions (II): Anti-circumvention regimes*

Another threat to public interest-oriented provisions of copyright law must also be taken into account. As we know, traditional copyright law incorporates a number of mechanisms designed to harmonize the means of private intellectual property protection with the goal of public benefit. Broadly speaking, these are limiting or exceptional doctrines which, though they are referred to by different terms in different national law systems, all combine to play the same role: to assure the availability of reasonable levels of access, with or without license, to protected works. The list of such mechanisms includes copyright term limitation, the distinction between a work’s protected expression and its unprotected content (sometimes termed its idea), the exhaustion doctrine, specific educational and cultural exemptions, compulsory licensing (for purposes such as signal redistribution or the making of sound recordings), and catchall or residual access-oriented doctrines such as “fair use” or “fair dealing” (depending on local copyright terminology). Although some of these doctrines (e.g. term limitation) are threatened in the modern copyright environment, and recent international agreements (i.e Article 13 of TRIPS) make some effort to check or control the growth of others, the dynamic balance they represent has survived more or less intact into our era. Broadly speaking, we may say that this array of balancing mechanisms exists to assure that a legal regime intended to promote cultural progress by providing incentives to authors will not be used to monopolize materials necessary to assure reasonable levels of follow-on creativity. The need for such balancing mechanisms became increasingly acute as the protections afforded by copyright became more intense and the range of subject-matter to which copyright applied became broader. In particular, the decision to protect computer programs in machine-readable format under copyright generated new urgency around the goal of ensuring the access required to enable subsequent generations of innovation in software engineering.<sup>44</sup>

To a significant extent, the balance just described has been founded on the existence of a relatively stable distinction between public (typically commercial and consumptive) uses of copyrighted works, as to which copyright owners have an intense and legitimate interest in exercising strict control, and private (typically productive and non-commercial) ones as to which copyright owners have had fewer reasonable grounds of practical concern. In the electronically networked communications environment, the public/private distinction has come to be as a less and less reliable guide to policy choice, just as the anxieties of copyright owners (especially companies with large inventories of protected material) have become more acute.

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<sup>44</sup> See, e.g., *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9<sup>th</sup> Cir. 1993) (applying “fair use” to decompilation in connection with reverse engineering of software).

In the last decade, one of copyright owners' most significant responses to the uncertainty of the new communications environment has been to develop digital rights management ("DRM") tools (sometimes referred to as "technological protection measures" or "TPM"s) to control access and use of texts, images and sounds in electronic formats, with the aim of enabling new, and newly secure, forms of electronic information commerce on a "pay-per-use" model. Inevitably, however, the risk that such DRM's may be hacked has loomed large in the concerns of copyright owners. From this concern has grown domestic and international political pressure for the creation of a new species of intellectual property protection: the so-called anti-circumvention provisions that are the centerpiece of the 1998 "Digital Millennium Copyright Act" (DMCA) in the United States<sup>45</sup> and the 2001 European Union Copyright Directive. Anti-circumvention legislation also is mandated, though in far more general and permissive terms, in the two WIPO treaties concluded in 1996 after various stakeholders (including library organizations) successfully lobbied the WIPO Diplomatic Convention to adopt anti-circumvention provisions that would allow a reasonable latitude of choice in national law implementation.<sup>46</sup> This new family of legal norms is not a development of copyright law, though it is superimposed on copyright; rather, it provides for new rights, new remedies and – crucially – a new and exclusive set exceptions; copyright's traditional limiting doctrines do not apply in this evolving legal space.

Since 1996, states implementing the implementation of the anti-circumvention principle in domestic laws generally has not taken advantage of the considerable latitude that the treaties afford in choosing how to implement the general obligation to provide legal rights and remedies against the unauthorized evasion of DRM's. By and large, they have chosen to follow the general formula for anti-circumvention (or, as it is sometimes called, "paracopyright") legislation that was adopted by the U.S. devised by the United States in the DMCA. The various bilateral and regional Free Trade Agreements which the United States recently has negotiated (or currently is negotiating) with trading partners mandate the DMCA approach in considerable detail.<sup>47</sup> And in Europe, the 2001 Directive makes clear that states bound by its norms must prohibit both actual circumvention activity but also the making available of equipment or services that can be

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<sup>45</sup> 17 U.S.C. Secs. 1201 *et seq.* For a discussion of the DMCA in context, *see* Micheal J. Madison, Rights of Access and the Shape of the Internet, 44 *B.C. L. Rev.* 433 (2003).

<sup>46</sup> Anti-circumvention is treated in Art. 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty. *See* Reinbothe von Lewinski at 135-47, 409-414. *See also* Pamela Samuelson, "The U.S. Digital Agenda at WIPO," 37 *Va. J. Int'l L.* 369 (1997).

<sup>47</sup> *See, e.g.*, United States-Singapore Free Trade Agreement, Art. 16.4.7, at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/asset\\_upload\\_file708\\_4036.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf).

employed for purposes of circumvention.<sup>48</sup> Thus, even when limited exceptions to the bar on circumvention activities may be available, they are likely to be unavailing – since most information practitioners will not have the capability to take advantage of these “access privileges” without technological support or assistance.

One characteristic of the U.S. legislation that is becoming the international pattern in this area is that it makes few concessions to the access interests of follow-on creators and innovators. This problem already is acute in fields (such as software development and encryption research) where basic information is incorporated in copyright works that are made available only in digital formats.<sup>49</sup> It will become increasingly significant in other fields (including scholarship, criticism and education) as literary texts and (especially) audiovisual works migrate to exclusive digital formats. The problem is exacerbated by the fact that, by design, anti-circumvention regimes are insensitive to the distinction between the protected and unprotected elements of copyright works. In other words, when a digital rights management technology is deployed to safeguard a work in its entirety, the general rule is that this technology fence cannot be breached even for the purpose of gaining access to what is otherwise public domain information. Again, this problem is currently sub-critical in fields other than software-related research, but is likely to become increasingly severe as the amount of “born digital” and “digital only” content increases.

This said, there has been some variation in how and to what extent countries implementing the anti-circumvention principle have attempted to incorporate some recognition of public interest-based limitations and exceptions.<sup>50</sup> For example, Art. 6 of the 2001 European Union Directive (referred to above) does not mandate any of the specific, albeit narrow, exceptions to prohibitions on circumvention provided for in Sec. 1201 of the U.S. DMCA.<sup>51</sup> Instead, it favors a free market approach, relying on rights holders’ willingness to act voluntarily in affording reasonable levels of access to protected works. In the absence of voluntary action, however, governments are required to “take appropriate measures to ensure that rightsholders” do honor the specific exceptions of limitations provided for in Article 5 of the Directive. What those measures may be, and how they will be triggered, is not addressed; nor is there any reason

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<sup>48</sup> Art. 6(2).

<sup>49</sup> See Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 *Berkeley Tech. L.J.* 501 (2003).

<sup>50</sup> The following discussion relies extensively on an excellent summary of national law approaches to anti-circumvention prepared for the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization: Jeffrey P. Cunard, Keith Hill and Chris Barlas, *Current Developments in the Field of Digital Rights Management* [hereinafter “Current Developments”], SCCR/10/2 (August 1, 2003).

<sup>51</sup> These include, among others, exceptions for reverse engineering to achieve interoperability, encryption research, and security testing.

to think that various European countries will act in a harmonized manner to identify and implement them.<sup>52</sup> To date, most national legislation on the subject in Europe is either silent or vague on this point. An illustration are the changes in the law of the United Kingdom brought about by the Copyright and Related Rights Regulations, (2003)<sup>53</sup>, which came into force on October 31, 2003. These provide, in general terms only, for a complaint to the Secretary of State by any person who believes that he or she is being denied access unreasonably; no procedure is specified, and apparently no right of appeal exists from an adverse decision. The process is cumbersome, inefficient and unlikely to be widely employed in practice.<sup>54</sup> Needless to say, perhaps, neither the U.S. nor the European approaches to anti-circumvention provide any meaningful recognition for the special roles played by libraries and other cultural intermediaries.

Japan has taken a somewhat different, though not necessarily more flexible, approach to the implementation of prohibitions relating to circumvention. Thus, for example, the legislation there (consisting of amendments to both the Copyright Act and the Unfair Competition Prevention Law) does not prohibit the act of circumvention generally, concentrating instead on providing penalties for the making available of devices or programs that have circumvention as a “principal function.”<sup>55</sup> Interestingly, however, Japan *does* bar the act of circumvention itself when it is undertaken to reproduce a work for private non-commercial purposes, which Japanese copyright law otherwise allows. In this case, the anti-circumvention provisions trump the private copying exception – more or less the opposite of the outcome in the French *L’UFC-Que Choisir* decision mentioned at the outset of this paper! More broadly, the Japanese law contains limitations and exceptions of any kind, although it is legal to sell devices for use in testing or research on digital rights management technology. Taken altogether, the Japanese approach to anti-circumvention appears to be among the most restrictive anywhere.

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<sup>52</sup> Even this provision, moreover, is subject to a further important limitation pursuant to Art. 6(4)(4): It does not apply to works made available by means of interactive on-line delivery models.

<sup>53</sup> SI 2003/2498.

<sup>54</sup> See Aashit Shah, UK’s Implementation of the Anti-circumvention Provisions of the Eu Copyright Directive: an Analysis, *2004 Duke Law & Tech. Rev.* 0003, at <http://www.law.duke.edu/journals/dltr/articles/2004dltr0003.html>. The author notes (at Para. 41) that “Other member states, such as Denmark, Greece, France and Italy have provided for an appeals process in their legislation and draft legislation respectively.”

<sup>55</sup> See Arts. 2(xx), 30(1), and 120bis, Copyright Law of Japan, and Art. 2(1)-(5), Unfair Competition Prevention Law. See also Japan Patent Office, Asia-Pacific Industrial Property Cenetr and Japan Institute of Innovation and Invention, *Outline and Practices of Japanese Unfair Competition Law* 22 (1999).

Finally, there is the case of Australia, which in the Copyright Amendment (Digital Agenda) Act of 2000 (effective in March 2001) set out to define its own approach to the anti-circumvention issue; there, the deliberations were strongly influenced by consumer organizations that emphasized Australia's position as a net copyright importing country. The legislation did not prohibit circumvention copyright, and its definition of prohibited devices, cast in terms of interference, with "copy protection mechanisms," initially suggested a narrower scope of coverage than other national legislation.<sup>56</sup> Even more significantly, perhaps, the legislation permitted the making, importing and distribution of circumvention technology which is supplied for a "permitted purpose" to a "qualified person" who gives the supplier a signed statement. "Permitted purposes" include lawful copying by libraries, but exclude private copying by individuals.<sup>57</sup> For all its limitations, this statute did represent an effort to come to grasp with the obvious tension between anti-circumvention rules, on the one hand, and traditional limitations and exceptions to copyright on the other.

In early 2004, however, the Australia concluded a sweeping Free Trade Agreement with the United States, under which it was required, among other things, to bring the anti-circumvention provisions of its national law into conformity with a standard derived from the U.S. DMCA. Accordingly, Australia is preparing (though not without significant domestic opposition) to broaden to definition of prohibited circumvention technology, provide for sanctions against the use of circumvention technology as well as its distribution, to replace the "permitted purposes" exception with a series of more narrowly defined exceptions.<sup>58</sup> It seems all too likely that by the January 2007 deadline, Australia will have adopted a "paracopyright" regime that is no more sensitive to the need to achieve balance in copyright than those of other countries

### Conclusion: Looking North

This paper has ranged relatively far afield in search for examples of how limitations and exceptions have been implemented in different national laws and different copyright cultures, and of instances illustrating how the goal of "balance" in copyright is under attack at the international level. I would like to conclude with a reference that is closer to home, to recent developments (and non-developments) in the law of Canada. To begin, at the level of general precept, it is important to note that the Canadian Supreme Court has endorsed the notion that copyright doctrine in general, and the law relating to limitations and exceptions in particular,

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<sup>56</sup> Despite this language, in *Kabushiki Kaisha Sony Computer Entertainment v. Stevens*, 2003 FCA 157, the Federal Court of Australia embraced a broader definition of prohibited technology, substantial similar in its coverage to those employed in other countries.

<sup>57</sup> The provisions of the 2000 legislation are codified in Sec. 116A of the Copyright Act of 1968.

<sup>58</sup> See Australian Copyright Council, *Information Sheet G-85: Free Trade Agreement Amendments*, February 2005.

must be evaluated with explicit reference to the “public interest.” Thus, in a recent decision concerning the potential liability of Internet Service Providers, the Court opined that:

This Court has recently described the Copyright Act as providing "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)" (*Theberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 30, *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, at para. 10). The capacity of the Internet to disseminate "works of the arts and intellect" is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.<sup>59</sup>

This explicit balancing approach, in which public figures directly as an element in calculating how the level of protection (and public license) should be set with respect to any particular doctrine, has no counterpart in U.S. law, where the factor figures only as part of the constitutional background – often with more rhetorical than real significance.

The previously-reference decision in *CCH Canadian Ltd. v. Law Society of Upper Canada* provides a example of how an explicit focus on interest balancing can breath powerful life into limiting doctrines. In that case, the issue was a familiar one – a professional library’s practice of “custom photocopying” articles from copyrighted sets on request from on-site patrons or remote users (who could receive the copies by mail or fax transmission). While acknowledging that the plaintiffs commercial law reports did contain copyrightable material, the Court went on the find that the uses made of them fell within the “fair dealing” provisions of Sec. 29 of the Act, stating that

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 Professor Vaver... has explained, "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."

As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

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<sup>59</sup> *SOCAN v. Canadian Assn. of Internet Providers*, 2004 S.C.C.D.J. 2155, 21\_

In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

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 Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research." Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case.... At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on [Canadian precedent] as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

And, in this particular case, it led (though an extremely instructive analysis) to a finding that "fair dealing" had, in fact, occurred. In part, this was the result of the Court's willingness to consider the research purposes of the end-users of photocopied material as relevant to the provider's defense – something U.S. courts have been unwilling to do in equivalent circumstances.<sup>60</sup> More generally, it need hardly be said that a similar result would not necessarily have been forthcoming from a U.S. court on these facts, either under the Sec. 107 "fair use" provision or the Sec. 108 library exemptions.

In this connection, we should not be surprised that Canada continues to hold out against pressures to ratify the 1996 WIPO Conventions, and – by doing so – to take on an obligation to enforce prohibitions against the circumvention of digital rights management technology. Among Canadian policy-makers, a central dilemma relating to the treaties is the question of how they might be implemented in national law in a way that would preserve balance of public interest and

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<sup>60</sup> See, e.g., *Princeton University Press v. Michigan Document Services, Inc*, 99 F.3d 1381 (6<sup>th</sup> Cir. 1996).

private reward.<sup>61</sup> When and if this conundrum is resolved in Canadian legislation, the solution should be of interest to both the United States and the rest of the world.

Having begun the preparation of this paper in the firm (and firmly blinkered) confidence that I would find the U.S. approach the limitations and exceptions superior to its foreign rivals, I conclude both humbled and enlightened. The nations of the world, including those of the common law and civil law systems, have much to learn from one another's copyright systems generally, and contrasting approaches to achieving recognition for the public interest in particular. At the same time, balance in copyright is threatened everywhere in the world, from the least developed countries to the major copyright exporting nations. Those who care about its preservation have much work to do, and among the first projects should be the development of model provisions on limitations and exceptions that mix and match provisions from all the laws of the world.

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<sup>61</sup> A suggestion of the approach that may be taken is found in the joint Government Statement on Proposal for Copyright Reform by the ministers of Industry and Canadian Heritage, issued on March 24, 2005, and announcing forthcoming legislation that would, *inter alia*, provide that:

In conformity with the WCT and WPPT, the circumvention, for infringing purposes, of technological measures (TPMs) applied to copyright material would itself constitute an infringement of copyright. Copyright would also be infringed by persons who, for infringing purposes, enable or facilitate circumvention or who, without authorization, distribute copyright material from which TPMs have been removed. It would not be legal to circumvent, without authorization, a TPM applied to a sound recording, notwithstanding the exception for private copying.

At [http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement\\_e.cfm](http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm). The Statement marks another step in an extensive deliberative process around digital copyright issues, including the implications of the 1996 WIPO treaties, in Canada. *See* [http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index\\_e.cfm](http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index_e.cfm).