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The Future of Copyright: Digitisation and Fair Use in the Digital Millennium

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Preface

Choosing copyright as the topic for my Master Thesis was never really optional. As a part-time musician with credits in, *inter alia*, political science and IT, I knew it had to be an interdisciplinary subject associated with some kind of technology and hopefully also with a political aspect. Enter fair use.

In the autumn of 2009, I did some preliminary research on fair use and spoke to an editor working for Swedish national television. I was surprised to learn that, in the creative process, editors and cutters relied upon fair use exceptions even though no such thing is justified under Swedish law. It would become clear to me that such a use was only the tip of the iceberg. Shrouded in uncertainty, fair use had become an exception in almost all kinds of media ranging from portable music players to e-books. And it all seemed to function very well; case law in the U.S. on digital content was sparse and the discussion was yet in its infancy in the E.U. I was fascinated. When I scratched the surface, a few cases emerged where the status of fair use has been challenged but without significance in relation to its immense area of effect. Fair use seems to be a de facto practice built upon legal salt and sand.

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Johan Cronqvist
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Summary

Fair use is a doctrine native to the U.S., but is with the introduction of the internet more than a decade ago now informally applied worldwide. It has become a potent tool for the digitisation of classic content, such as books and music. In a very debated area of law, copyright is now regarded not as a promotional tool for intellectual endeavours, but as a brake block obstructing the development of society.

The discussion in this thesis departs from why fair use is important and possibly vital to society, and if the American doctrine could be implemented in Europe. The boiler plate is Google Books which serves as a good example on both why the doctrine of fair use is desirable and how such a project could be exempted under European instruments. Google Books now contains more than a million digitised books and serves as a gigantic card catalogue and library. Economically speaking, Google creates revenue from books that were previously regarded as "dead" - orphaned or without a clear license holder. Human rights-wise, Google creates immense intellectual possibilities in providing something similar to a library, accessible worldwide. Google was sued for copyright infringement in the U.S. but settled the case before any of the fair use questions were properly answered. However, it is probable that the case would have survived a fair use scrutiny.

As regards the European statutes on copyright, the chances of a case such as Google Books prevailing in Europe is examined with the conclusion that, even though national differences in the implementation of exceptions to copyright, Google would with most probability not survive. The adoption of the Info-Soc Directive in combination with the Berne Convention provides an exhaustive list of requirements if an exception to copyright should be allowed which is not flexible enough for projects such as Google's. The exceptions are also implemented differently in each Member State which further complicates the matter. However, policies seems to be changing in the European area with new cases favouring digitised content. And with the E.U. Commission realising the potential of such a project in Europe, the winds may be changing in favour of internet users worldwide.

Abbreviations

| | |
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| AAG | American Authors Guild |
| CCIA | Computers and Communications Industry Association |
| CD | Compact Disc |
| CDPA | Copyright, Designs and Patents Act |
| DMCA | Digital Millennium Copyright Act |
| DRM | Digital Rights Management |
| ECHR | European Convention on Human Rights |
| GNU | General Public License |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| INFO-SOC | Information Society Directive (2001/29/EC) |
| IPR | Intellectual Property Rights |
| IT | Information Technology |
| MP3 | MPEG-1 Audio Layer 3 |
| TRIPS | Agreement on Trade Related Aspects of Intellectual Property Rights |
| USC | United States Code |
| WCT | World Intellectual Property Organization Copyright Treaty |
| WIPO | World Intellectual Property Organization |
| WTO | World Trade Organization |

1 Introduction

The digitisation of information and the development of computer networks are posing a new and far reaching challenge to copyright. The way in which it is finally resolved may have important implications for the access to and the use of information worldwide.

Since the "internet revolution" begun in the mid 1990's, the issues of intellectual property rights and copyright have gone from the fringe to the absolute centre of attention. File-sharing and illegal downloading of copyrighted media concerns no longer only lawyers and musicians – the society as a whole is engaged in questions ranging from the downloading of a song to the case against The Pirate Bay. Even though intellectual property law may never have been as publicly debated as now, the phenomenon is everything but new. The discussions seem to follow in the footsteps of technological revolution and inventiveness - the "technological evolution" if you will. The same debate followed when the gramophone was introduced and later on when the cassette tape for home recording became popular.

The main technological change behind this new revolution is improvements in data storage, manipulation and transmission of data. With digitisation, all kinds of data and copyright works may be recorded and compressed in the same, binary, format and allows reproducing copies without any degradation - every copy is perfect. The power of digital technology has transformed the way creators work and how authors and publishers deliver copyright works. It has blurred the lines between copying and reading, sale and reuse, performance and viewing a work. Underlying these developments is the capacity of the new technologies to create unauthorized, perfect and costless copies. In addition, as a result of the explosive growth of the internet, any work may be distributed worldwide, essentially instantaneously and at an insignificant cost. Data transmission is no longer limited to a one-to-one basis, but one-to-many or even one-to-all basis.

As the internet rapidly grew to comprise all aspects of society, the idea of intellectual property changed with it. Internet is driving down the cost of copying information, and the cost of diffusing such information is quickly approaching zero. Therefore, information can now be diffused instantly and globally at almost no cost. This is, in fact, not only common practice but also essential for its functionality. With the internet, images or sounds are downloaded and uploaded, edited, commented and linked back to their source or to other works. There are many aspects vital to the internet that from a legal point of view is unclear at best. It is obvious and has been obvious for quite some time that we are going to need new legal tools for dealing with this kind of technology.

These developments have polarized the opinions of the ways in which copyright law should react, in order to protect the producers and suppliers of

different kinds of works while preserving the interest of the public, particularly in relation to research and education. While many producers of intellectual property, especially programmers and artists, have formed groups such as the GNU project to provide free licenses under what is called "copyleft"¹, many traditional artists have done the complete opposite and tried to reinforce their copyrights with Digital Rights Management (DRM) and lengthy infringement procedures. However, the questions has evolved beyond simple piracy - knowledge and education is a human right well founded in the treaties and cannot be disregarded on the sole foundations of copyright. Even economists agree that, among other things, derivative works have a benefit to society.

A potent tool for the resolution of these questions is the doctrine of fair use. It allows for limited use of copyrighted works, such as for commentary, criticism, news reporting, research, teaching or scholarships. Native to the U.S., the doctrine has been highly acclaimed both by human rights groups and economists. It has shaped the internet and helped resolve important questions regarding licensing. Although Anglo-American common law and continental civil law have much in common regarding conceptions of intellectual property, there are also a number of striking divergences. Differences occur not only in the sense of object and duration of protection but also in theory. However, these theoretical divergences are not irreconcilable; there are many common points between the two legal systems.

¹ The easiest way should be to simply submit your work into public domain, however, material put into public domain can easily be converted into proprietary work. Submitting under a GNU license (copyleft) requires a free work, where all modified and extended versions to be free as well. This issue will be further discussed in chapter 2.

1.1 Purpose

The on-line environment which is becoming a larger part of society every day is shrouded in questions regarding the legality of its functionality. Few clear answers has been provided and while copyright seems to have come to a stand-still, the digital environments increases exponentially every year. Examples are found not only when discussing classic media content, such as art, pictures and text but platforms and technology upon which the new networks are based. To answer these questions and to allow the fast pace of IT, fair use is possibly vital.

This thesis will aim to provide solutions for existing problems with on-line copyright and usage and at the same time show the advantages in economic and human rights aspects through the fair use utilitarian rationale. Both of these points converges in the Google Books² project, which will be used as practical, albeit extreme example of where general interests of society clashes with existing copyright protection.

This thesis will also evaluate European legislation in terms of fair use exception possibilities. There are existing statutes in the European system that are comparable to the idea of fair use, such as the right to citations and quotes, however the fundamental utilitarian idea is unrecognized. As an example, Google Books will again be used to explore the possibilities of such a project in the E.U. system. The main questions dealt with in this thesis are;

1. Why is fair use important and possibly vital for the development of copyright?
2. Is an implementation of a similar doctrine possible under E.U. copyright instruments?

1.2 Method

To achieve the stated purpose and answer the questions above, this thesis will be based on both U.S. and E.U. intellectual property law and also the international conventions. In the U.S. case, both the Copyright Act and later amendments such as the Digital Millennium Copyright act will be discussed. The Copyright Act is in essence the foundations for the fair use exception, constructed upon two hundred or so years of case law. As regards the E.U. instruments, the primary source for analysis is the Info-Soc Directive in combination with the international conventions and treaties such as the Berne Convention and the TRIPS agreement.

² Previously known as Google Print and Google Book Search. Throughout this thesis, Google Books will be used to describe the project in full.

Regarding case-law, this thesis will focus upon the U.S. Courts judgments in fair use cases to provide an analysis of what can or cannot be deemed fair. Special attention will be given to cases in an on-line environment because of the major digitisation aspect of the thesis. By given circumstances, E.U. case law is sparse on the subject, but there has been recent developments in the Member States Courts which will be discussed as well. The U.K. has an exception to copyright similar to that of the U.S. - fair dealing - although equipped with an exhaustive list of criteria's that must be fulfilled to permit an exception, which will be analysed from an international point of view.

The Google Books project will take a considerable part of space in this thesis because of its nature as a challenge to copyright and possible fair use exception. There are without a doubt other projects that could be described the same way, but none so notable or heavily discussed. Google Books provides an excellent example of utilitarian values opposed to copyright, a project that makes economists and human rights lawyers want to shake hands. The book scanning project was unfortunately never subject to a Court analysis of fair use, but will in this thesis be exposed to the same way of reasoning as other fair use cases. Finally, Google Books will be analysed under European instruments to provide possible ways for the implementation of such a project in E.U., and with that, a discussion on fair use generally in international law.

This thesis will take a *de lege ferenda* approach to the subject matter. The relatively unclear nature of fair use makes doctrine sporadic, especially in the European area. There is much written in the U.S., but a good deal is speculation, particularly about the international status of fair use and its future application in cases such as Google Books, including the settlement.

1.3 Delimitations

As regards fair use case law in general, there is much written in the U.S., but there are a few cases that are more important than others to the subject. Those cases concern digital content and will be analyzed in depth, leaving a few of the others as references for understanding the steps involved in the fair use analysis.

The purpose of this thesis is not descriptive in the sense that it tries to explain national exceptions to copyright or possible fair use implementations worldwide. The focus is on the international instruments, conventions and especially the E.U. directives. Only the essential parts of these statutes will be examined in-depth and requires the reader to possess some prior knowledge in that particular area of law. The same goes for the WTO and the TRIPS agreement which will be addressed for the purposes of the Berne Convention. The United Kingdom's fair dealing exception will be described as the exception that confirms the rule, due to its unique application in Europe.

There is also a very social and political aspect of fair use as it concerns not only lawyers and copyright owners, but millions of users. For example, file-sharing is nowadays so common that we risk criminalizing big parts of the European population. This aspect will not be discussed as a major theme in this thesis even though it is another factor weighing in for the fair use doctrine, it will however briefly be touched upon in the conclusion.

It was necessary to include some fundamental concepts of copyright, such as orphan works and what this thesis will describe as "dead licenses", to provide an example of how unfit current statutes are with digitisation. To describe these issues, it was also necessary to include an economic analysis of fair use remedies.

2 The Concept of Fair Use

In the past, common law enabled limited protection for authors. Copyright was a monopoly, limited in time, granted to protect authors in the exclusive exploitation of their creative works. Thus, in common law, the general rule was that there was no legal protection, with the exception of works which were both published and listed a copyright notice. Even then the work had to be creative and original, and the duration of the copyright was limited to fourteen years. By statute in the U.S., this presumption is reversed; there is now a presumption of protection - notice of copyright and publication are no longer required. Furthermore, the duration of protection has been extended in time to the life of the author plus seventy years, as in the European system.³

The US copyright Act of 1976 is the backbone in U.S. intellectual property law. It has been amended several times since this date to cope with evolving society. Title 17 of the U.S.C. contains the provisions on what the copyright act protects, the scope of this protection, and the exceptions and limitations of the exclusivity of the authors' rights. One of the most fundamental provisions is the doctrine of fair use which is incorporated under section 107. Under the fair use doctrine, one may use copyright protected works without it amounting to an infringement of the right holders exclusivity, given that the use fulfils certain criteria.

Fair use is an affirmative defence to an action for copyright infringement. It is potentially available with respect to all manners of unauthorized use of all types of works in all media. When it exists, the user is not required to seek permission from the copyright owner or to pay a license fee for the use. The doctrine of fair use is rooted in some 200 years of judicial decisions.⁴ The most common example of fair use is when a user incorporates some portion of a pre-existing work into a new work of authorship. For example, quotation from a book or play by a reviewer, or the incidental capturing of copyrighted music in a segment of a television news broadcast is fair use. In the *Campbell* case, the U.S. Supreme Court expressly accepted the proposition that such "transformative" uses are more favoured in fair use analyses than uses that amount to little more than verbatim copying.⁵

³ See generally Bielefeld, A., Cheeseman, L. (2007) *Technology and Copyright Law*, page 42.

⁴ U.S. Government, *White Paper on Intellectual Property and the National Information Infrastructure*, page 75.

⁵ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994). "A copyright owner need not prove an accused use not fair, but, rather, the defendant must prove its fairness." (Quoted from the U.S. Government *White Paper*.)

2.1 The Copyright Act

Section 107 of the U.S. Copyright Act provides that when assessing whether a use can be considered fair use, the Courts will analyze; (i) the purpose and the character of the use, and whether the use is of commercial nature or of non-profitable nature; (ii) the nature of the protected work; (iii) the amount and the substantiality of the portion used in relation to the copyright protected work, and; (iv) the effect of the use upon the potential market value of the copyright protected work.

2.1.1 The purpose and the character of the use, and whether the use is of commercial nature or of non-profitable nature

The first factor deals with "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes". In early case-law the wording "commercial nature" and "non-profitable nature" was interpreted as meaning that commercial use of copyrighted material was presumed to be unfair.⁶ This interpretation, however, was later rejected in *Campbell v. Acuff-Rose*.⁷ While reversing the Circuit Court's decision the Supreme Court stated that the commercial use should not be "dispositive".⁸ With this clarification that fair use does not depend on the commercial character solely, but is merely one factor that gives some weight to the plaintiff's argumentation for finding an infringement, a balance between user and right holder was restored.⁹ Practically speaking, this factor gives a presumptive advantage towards fair use when the copyrighted work is used for educational purposes instead of commercial purposes. This does not mean, however, that an educational use is *de facto* fair use. The educational nature of the use must still be balanced against the remaining three factors. The purpose factor also generally leans toward a fair use if some new value or utility is added to a work - so called "transformative" uses - as opposed to a user merely making an exact reproduction of the work. In regard to the purpose and character of the work, the 2nd Circuit Court found an infringement of the plaintiff's copyrighted picture of puppies on which another artist had made a parody. The Court rejected fair use as to the parody argument since the main point with the parody was not the puppies in the picture but rather any puppies. According to the Court, the artist could have used any other picture with puppies since the parody did not relate specifically to the protected work.¹⁰

⁶ *Sony Corp of America v. Universal City Studios Inc* 464 US 417 (1984)

⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.. 569, 579 (1994)

⁸ *Ibid.*

⁹ D'Agostino, G. (2007) *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, page 36. (Available through SSRN.com)

¹⁰ *Rogers v. Koons* 960 F 2d 301 (2d Cir 1992)

The Court found that the copying did not have any link to the protected work other than profit making motives.¹¹

2.1.2 The nature of the copyright protected work

This factor assesses the nature of the work that has been copied. Generally, uses of copyrighted works that contain factual information are more likely to lean toward fair use than works that have a higher level of creativity and originality. The Court also examines factors such as if the work has been published or not, whether it is factual or fictional and whether the protected work possesses substantial creative efforts from the creator.¹² In the beginning, the U.S. Supreme Court was of the view that unpublished works were outside the scope of the fair use principle.¹³ In *Harper & Row*, a magazine had published quotations from former U.S. President Ford's unpublished memoirs. The Supreme Court argued that the right holder should be able to control the first appearance of the work to the public as a consequence of the right of first publication.¹⁴ This interpretation by the Supreme Court was however reversed by Congress stating that there should be no presumption that unpublished works were outside the scope of fair use.¹⁵

2.1.3 The amount and the substantiality of the portion used in relation to the copyright protected work as a whole

At this point, the Court analyses the different factors in every case which relates to quantity and quality of the protected work that is used. With regard to the amount of a work used, it should be noted that, while Section 107 does not discuss any bright line rules, using an entire work without permission does not constitute fair use. The question is rather how much less does "less than all" need to be in order to qualify as an acceptable amount under this factor? Not surprisingly, the more of a work that is being used, the less likely it is that this factor will favour fair use. In *Harper & Row* the Court stressed that the use made by the defendants was insubstantial but aimed at the heart of the protected work. In contrast, a substantial use can be considered fair use, as was the case in *Acuff-Rose*

¹¹ Ibid, Courts conclusions. (4:4)

¹² D'Agostino, G. (2007) *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, page 37.

¹³ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985)

¹⁴ Ibid.

¹⁵ D'Agostino, G. (2007) *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, page 38.

where the defendants had made their own lyrics but still copied the entire music part of the song.¹⁶

2.1.4 The effect of the use upon the potential market value of the copyright protected work

The emphasis in this factor is whether (and to what extent) the use deprives the copyright owner of potential income, either through potential diminishment of income in the current market or possible future markets. This element incorporates both the actual and the potential markets under which the protected work can be exploited which means that the analysis will often be hard to perform on factual basis since potential are not always obvious. In *Rogers v. Koons* the Court emphasized that the defendants use could harm the potential markets of the plaintiff.¹⁷ In *Basic Books, Inc. v. Kinko* the Court argued that the compendiums with excerpts of copyright protected material that the company used for educational purposes would in fact undermine the actual market for the full text works and was considered not to be fair use.¹⁸

The U.S. Courts have repeatedly identified "the economic effect of the use" as the most significant of the four factors. It is important to recall that it weighs against a defendant not only when a current market exists for a particular use, but also when a potential market could be exploited by the copyright owner. Harm in either market will, in most instances, render a use unfair.¹⁹

The U.S. Supreme Court's decisions demonstrate the significant weight given this factor:

- In *Sony*, the absence of any market for home taping licenses, combined with the testimony of some copyright owners that they were indifferent to home copying, led the Court to conclude that there was no cognizable harm.²⁰
- In *Campbell*, the Court - because the parody was "transformative" - rejected the Court of appeals' determination that the commercial purpose of the parody required the parodist to overcome *Sony's* presumption of market harm.²¹

¹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)

¹⁷ *Rogers v. Koons* 960 F 2d 301 (2d Cir 1992)

¹⁸ *Basic Books, Inc. v. Kinko's Graphics Corporation* 758 F. Supp. 1522 (1991)

¹⁹ U.S. Government, *White Paper on Intellectual Property and the National Information Infrastructure*, page 79.

²⁰ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

²¹ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994).

The fair use doctrine is to be described as a utilitarian economic equilibrium analysis; when the benefit to society outweighs the benefit of the author's monopoly, the information may be used despite the fact that it would otherwise exclusively belong to the author. This fact normatively describes the position of law and economics and empirically tends to demonstrate that position - that law is developed as a function of its tendency to maximize social wealth.²² In another example from the *Campbell* case, the U.S. Supreme Court explains that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfil copyright's very purpose, 'to promote the progress of science and useful arts'".²³ This is a concept unfamiliar to the European system.

2.2 Fair Use in On-line Environments

Even though fair use is widely debated in all applicable aspects, it is its on-line usage that in recent years has been most discussed. With the introduction of what is sometimes referred to as the "web 2.0" and its social community based infrastructure, all kinds of media available on the net were borrowed, linked and downloaded. Users present themselves through poems, art and music to which they can relate but not necessarily own the rights to. The use of thumbnails is a classic example and will be provided below. New-format media companies were also eager to try out new techniques on-line to satisfy a new user demand for easy access, but encountered much resistance. A good example of that will be provided in the next case.²⁴

2.2.1 Kelly v. Arriba Soft

The plaintiff, Leslie Kelly (Kelly), is a professional photographer of the American West. Some of his images are located on Kelly's web site or other web sites with which Kelly has a license agreement. The defendant, Arriba Soft Corp. (Arriba), operates an internet search engine that displays its results in the form of small pictures rather than the more usual form of text. Arriba obtained its database of pictures by copying images from other web sites. By clicking on one of these small pictures, called "thumbnails", the user can then view a large version of that same picture within the context of

²² Engle, E.A., (2007) *When is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, page 4. (Available through SSRN.com)

²³ *Campbell v. Acuff-Rose Music, Inc.*, at 575. (1994)

²⁴ Web 2.0 is commonly associated with web applications that facilitate interactive information sharing, interoperability, user-centred design and collaboration on the World Wide Web. Examples of Web 2.0 include web-based communities, hosted services, web applications, social-networking sites, video-sharing sites, wikis, and blogs. A Web 2.0 site allows its users to interact with other users or to change website content, in contrast to non-interactive websites where users are limited to the passive viewing of information that is provided to them.

the Arriba web page.²⁵ Kelly objected to the unauthorized use of his copyright protected works and sued Arriba. On the face of it, this was clearly an infringement of the exclusive right provided by copyright law if the use could not be considered to be fair use. Starting off with the fair use analysis the Circuit Court referred to the *Acuff-Rose* case and cited; “[t]he central purpose of this investigation is to see [. . .] whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative”.²⁶ If the infringing parties work is more transformative it is thus less likely that it will be considered an infringement even if the use is commercial. The use was considered commercial, but not in the sense that Arriba was trying to profit by selling copies of Kelly’s pictures, but rather exploiting the unlimited possibilities of the internet. The thumbnail images therefore served an entirely different function from that of the use of Kelly, even though Arriba did not add anything new to the pictures. However, the "functional distinction" was giving rise to improved access to information on the internet, which in turn benefited the society. The first criteria was thus said to be in favour of Arriba.

As to the second element, the Court considered that photographs used for illustrative purposes, such as Kelly's, are generally creative in nature. The fact that a work is published or unpublished is indeed a critical element of its nature. Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred. Kelly's images appeared on the internet before Arriba used them in its search image. When considering both of these elements, it is found that this factor only slightly weighs in favour of Kelly.

The third criteria, as regards the amount used by Arriba, the Court considered that the copying was necessary to achieve the purpose of the use. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine. The permissible copying therefore varies with regard to the character and purpose of the use as stated in *Acuff-Rose* and does not in this particular case weight in favour of any party.

The last criteria requires the Court to consider "*not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant [...] would result in a substantially adverse impact on the potential market for the original*".²⁷ A transformative work is less likely to

²⁵ *Kelly v. Arriba Soft Corp.*, 9064, T.G. Nelson Opinion. (2003)

²⁶ *Ibid.* See also *Campbell v. Acuff-Rose Music*.

²⁷ *Ibid.* The Court is quoting from Nimmer, N., Nimmer, D., (1978) *Nimmer on Copyright*, at §13.05[A][4].

have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work. Kelly's images are related to several potential markets. One purpose of the photographs is to attract internet users to his web site, where he sells advertising space as well as books and travel packages. In addition, Kelly could sell or license his photographs to other web sites or to a stock photo database, which then could offer the images to its customers. Arriba's use of Kelly's images in its thumbnails does not harm the market for Kelly's images or the value of his images; by showing the thumbnails on its results page when users entered terms related to Kelly's images, the search engine would guide users to Kelly's web site rather than away from it. Even if users were more interested in the image itself rather than the information on the web page, they would still have to go to Kelly's site to see the full-sized image. The thumbnails would not be a substitute for the full-sized images because when the thumbnails are enlarged, they lose their clarity. If a user wanted to view or download a quality image, he or she would have to visit Kelly's web site. This would hold true whether the thumbnails are solely in Arriba's database or are more widespread and found in other search engine databases. Arriba's use of Kelly's images also would not harm Kelly's ability to sell or license his full-sized images. Arriba does not sell or license its thumbnails to other parties. Anyone who downloaded the thumbnails would not be successful selling the full-sized images because of the low-resolution of the thumbnails. There would be no way to view, create, or sell a clear, full-sized image without going to Kelly's web sites. Therefore, Arriba's creation and use of the thumbnails does not harm the market for or value of Kelly's images. This factor weighs in favour of Arriba.

Having considered the four fair use factors and found that two weigh in favour of Arriba, one is neutral, and one weighs slightly in favor of Kelly, the conclusion dictates that Arriba's use of Kelly's images as thumbnails in its search engine is a fair use.²⁸

2.2.2 UMG Recordings v. MP3.com

The technology known as "MP3" permits rapid and efficient conversion of compact disc (CD) recordings to computer files easily accessed over the internet. Utilizing this technology, defendant MP3.com, on or around January 12, 2000, launched its "My.MP3.com" service, which it advertised as permitting subscribers to store, customize, and listen to the recordings contained on their CDs from any place where they have an internet connection. To make good on this offer, defendant purchased tens of thousands of popular CDs in which plaintiffs held the copyrights, and, without authorization, copied their recordings onto its computer servers so as to be able to replay the recordings for its subscribers.

²⁸ *Kelly v. Arriba Soft Corp.*, 9076 [10], Courts conclusions. (2003)

Specifically, in order to first access such a recording, a subscriber to MP3.com must either "prove" that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-Rom drive for a few seconds (the "Beam-it Service") or must purchase the CD from one of defendant's cooperating online retailers (the "Instant Listening Service"). Thereafter, however, the subscriber can access, via the internet, from a computer anywhere in the world the copy of the plaintiffs' recording made by the defendant. Thus, although the defendant seeks to portray its service as the "functional equivalent" of storing its subscribers' CDs, in actuality, the defendant is re-playing for the subscribers converted versions of the recordings it copied, without authorization, from the plaintiffs' copyrighted CDs.²⁹ When this was realized by the right holders of the copyrighted CDs, they sued MP3.com for unlawfully making copies of their work. MP3.com argued that it was fair use. The Court started out in its analysis identifying a commercial character of the use. However, as opposed to the case with *Kelly v. Arriba Soft* the Court did not consider that the use was transformative even though the argument from MP3.com that the shifting from one medium (CDs) to another (internet) was to be considered transformative use. This element weighted against MP3.com.

As to the second factor, the Court stressed that creative recordings were at the core of what the protection for copyright and related rights were all about (in contrast to the pictures in *Kelly v. Arriba Soft* which are not considered as necessary to give copyright protection) and was thus weighing in favour of the record companies.

Regarding the third factor - "*the amount and substantiality of the portion [of the copyrighted work] use [by the copier] in relation to the copyrighted work as a whole*" - it is undisputed that defendant copies, and replays, the entirety of the copyrighted works here in issue, thus again negating any claim of fair use.³⁰

As regards the fourth and last element of the fair use analysis, MP3.com argued that the record companies did not themselves wish to exploit the same service as MP3.com was providing. Moreover, MP3.com argued, its activities can only enhance plaintiffs' sales, since subscribers cannot gain access to particular recordings made available by MP3.com unless they have already "purchased" (actually or purportedly), or agreed to purchase, their own CD copies of those recordings. The Court however disagreed stating; "[s]uch arguments -- though dressed in the garb of an expert's 'opinion' (that, on inspection, consists almost entirely of speculative and conclusory statements) - are unpersuasive. Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works. This would be so even if the copyright holder had not yet entered the new market in issue, for a copyright holder's 'exclusive' rights, derived from the Constitution and the Copyright Act, include the right,

²⁹ *UMG Recordings v. MP3.com Inc.*, 92 F. Supp. 2d 349. Jed S. Rakoff Opinion (2000)

³⁰ *Ibid.*

within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable". The Court recognized the right holders right to license their works to other services and thus MP3.com was making this licensing market less profitable. The use by MP3.com was considered not to be fair.³¹

2.3 Developments: a Dying Doctrine?

The Digital Millennium Copyright Act (DMCA) is the latest amendment to title 17 of the U.S. copyright code for the purpose of extending the reach of copyright. It criminalizes production and dissemination of technology, devices or services intended to circumvent measures that control access to copyrighted works (DRM).³² It was passed on October 12, 1998 by a unanimous vote in the U.S. Senate and signed into law by Bill Clinton on October 28.

The DMCA is a result of the growing concern of copyright owners in the 1990's that their content in digital format would be copied and distributed on-line without permission. The owners threatened to withhold their products from the market unless the U.S. Congress afforded them some kind of protection against digital piracy.³³ This strong lobbying by the content industry led the U.S. Congress to consider expanding existing copyright protection in an effort to encourage the growth of copyrighted content available to the public. The DMCA would become the single greatest addendum to the Copyright Act since its passage in 1976. The Act added six new sections and two new chapters to the Copyright Act.³⁴ The new chapter 12 to title 17 of the U.S. code, implements an obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works. It involves a triple-threat approach. First, circumventing the protection technology to gain access to the work is prohibited: "*[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title*".³⁵ Second, the statute prohibits helping someone else actually circumvent the technology to acquire access to the work, whether by providing tools or expertise.³⁶ The third provision, while very similar to the second, appears to have a focus broader than circumventing access. It too states that "*[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device*

³¹ *UMG Recordings v. MP3.com, Inc.*, Courts conclusions.

³² Digital Rights Management is a term for access control technologies used by copyright holders to impose limitations on the usage of digital content and devices. For example, encryption algorithms in DVD's and audio CD's making them unplayable on computers and in certain media players.

³³ Barker, D. (2005), *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, page 48.

³⁴ The Act added chapters twelve and thirteen to the Copyright Act. Chapter thirteen addresses vessel hull design and is not covered in this thesis.

³⁵ 17 U.S.C. §1201 (a)(1)(A)(2001)

³⁶ *Ibid.*

component, or part" that is primarily designed or produced for the purpose of circumventing technology.³⁷

One of the more debated effects of the DMCA is that subsection 1201(b) will mean that, while it remains legal under the DMCA to make fair use of a lawfully accessed work, there probably will be no device available that is legally capable of making the copy. Manufacturing or distributing such a device, a near necessity for making fair use of an encrypted work in a digital environment, violates subsection 1201(b). This effect will render the fair use doctrine virtually useless. Another concern is the lock-up effect of materials residing in the public domain. David Nimmer was one of the first to publish concerns and he uses nineteenth century cookbooks as an example. Under current law, anyone can take material from the public domain - add some original material to it - and claim a new copyright in the entirety. What if someone collected all the cookbooks from this era and put them in a copyright protected digital form? If we experience a shift in which traditional lending libraries no longer exist, those desiring access to the recipes will be required to pay a fee to the copyright owner for digital access to what was in the public domain.³⁸

The DMCA has been heavily criticised by the fact that instead of creating legal tools designed to stop digital content pirates, its approach assumes that everyone will infringe digital copyrights if given the opportunity. It creates prohibitions against certain technologies without regard to infringement. The effect of the provisions described means that digital copyrights now trump fair use.³⁹

³⁷ Barker, D. (2005), *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, page 50-51.

³⁸ Nimmer, D. (2000) *A Riff on Fair Use in the Digital Millennium Copyright Act*, page 710-712.

³⁹ Sharp, J. (2002) *Coming Soon to Pay-Per-View: How the Digital Millennium Act Enables Digital Content Owners to Circumvent Educational Fair Use*, page 77.

3 The Utilitarian Rationale

In this chapter both the economics and the human rights aspects of fair use will be discussed. It is a common delusion that these areas are incompatible and contradictory, and with new technology this will hopefully be proven. As will be discussed below, new research from economists have shown that fair use exceptions employ thousands of people and generate millions in revenue. Fair use in combination with new technology is also a prominent way to promote human rights. Public libraries has always been regarded as embodiments of human rights and consequently the library exception provided to copyright is of fundamental value. New technology combined with very low transaction costs, on-line libraries may in the long term prove more valuable than any of its physical predecessors. Not only will information and education be available at very low cost worldwide, in long term it may very well improve understanding and living standards and in short term it will, in combination with fair use, spur creativity.

It would seem that both economists and human rights organizations have one point in common when it comes to copyright: fair use. This commonality is manifested as an example in the Google Books project which will be discussed in chapter four.

3.1 Copyright exceptions and market effects

Since the Statute of Anne from 1709, copyright has been viewed as a very important tool for artists and authors to earn a living and promote intellectual and cultural growth. The technology of printing brought a new era of information much like the one we have seen just a few years ago with the introduction of the internet, albeit on a much more fundamental scale. Printing allowed for multiple exact copies of a work, leading to a more rapid and widespread circulation of ideas and information. While, in hindsight, this was a fundamental part of the development of human society and its progression, we may now have come to a point where the exceptions to copyright is as important as copyright itself.

Recently, economists and lawyers have started to re-examine the statutes on copyright as a response to the growing internet economy. In a study prepared for the Computer and Communications Industry Association (CCIA) in the U.S., the authors claim that “*companies benefitting from fair use [exceptions] generate substantial revenue, employ millions of workers and in 2006 represented one-sixth of total U.S. GDP*”.⁴⁰ The industries represented in this study are of course industries that are expected to benefit

⁴⁰ Rogers, T., Szamosszegi, A. (2007) *Fair use in the U.S. Economy – Economic Contributions of Industries Relying on Fair Use*, page 4.

from copyright exceptions, such as education, programming, IT and software industries. However, these industries are, and will continue to be, very important in the knowledge based economy. According to the same study, nearly 11 million, or one-eighth of U.S., workers are currently employed by industry that is benefitted by fair use.⁴¹

On the other hand, economists tend to see occurrences in black and white which is easy enough when you deal with numbers. As an example, when music first became available on the internet as illegal MP3⁴²-files, the industry for portable players flourished resulting in many new innovations which offspring still dominates the market today.⁴³ Although an obvious copyright infringement with severe effects on the music industry as we knew it, the economists would probably note this phenomenon with a green pen. However, new industry does not need to come from such legally dramatic background. Google's search engine, the fundamental piece in Google's current emporium of services has been legally debated since its arrival. Most recently, their thumbnail service was under scrutiny by U.S. Courts.⁴⁴ In this case, the plaintiff, an adult men's magazine and online advertising company, requested a preliminary injunction for Google to stop creating and distributing thumbnails of its images in its Google Image Search service, and for it to stop indexing and linking to sites hosting such images. In early 2006, the Court granted the request in part and denied it in part, ruling that the thumbnails were likely to be found infringing but the links were not. However, on 16 May 2007 the U.S. Court of Appeals reversed the District Court on appeal on its fair use and contributory infringement findings. "*We conclude that Perfect 10 is unlikely to be able to overcome Google's fair use defence and, accordingly, we vacate the preliminary injunction regarding Google's use of thumbnail images*".⁴⁵ This case provides a good example of how a basic service benefits from the fair use exception and is not only able to generate revenue and employment opportunities but also becomes of fundamental use to internet users everywhere. Even though the occasional company, just like adult men's magazine in this case, are precautionous with their property, a reversed judgment from the Court would be a devastating blow to internet creativity and efficiency as we know it today.

⁴¹ Rogers, T., Szamosszegi, A. (2007) *Fair use in the U.S. Economy – Economic Contributions of Industries Relying on Fair Use*, page 5.

⁴² MP3, short for MPEG-1 Audio Layer 3, is a technique for compressing media making originally huge files transferrable over limited bandwidth without any or a very low loss in quality.

⁴³ An obvious example is the iPod and the iPhone from Apple. But the immense spread of illegally distributed music has affected most aspects of IT and media, ranging from recordable DVD-players to mobile phones with media support.

⁴⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)

⁴⁵ The opinion of the Court of Appeals for the Ninth Circuit is captioned *Perfect 10, Inc. v. Amazon.com, Inc.*

3.2 The Inefficiency of Copyright - Dead Licenses and Orphan Works

One of the most debated issues of copyright is the term for protection. In most of the world, the default length of copyright is the life of the author plus either 50 or 70 years. Many countries have extended the length of their copyright terms (sometimes retroactively). International treaties establish minimum terms for copyrights, but individual countries may enforce longer terms than those.⁴⁶ Many critics claim that this is the result of intense lobbying from branch organizations and the media industry, just like DMCA.⁴⁷

The effects of such long term protection have unveiled in the last 20 or so years, where the issues of dead licenses and orphan works are indeed problematic. Orphan works are copyrighted works whose owner cannot be located for reasons such as failure to register a work, the owner sold rights in a work and did not register the transfer, the owner died and his heirs cannot be found, etc. For copyright to work as intended, the licensing process is fundamental. Without licensing, no value or revenue is created and copyright becomes a utilitarian obstacle. Dead licenses are associated with very high transaction costs, often too high for a specific license to be of any value. One solution that has been proposed by economists is a system for renewal of old copyrights (for example, more than half a century old) where the owner would have to reregister them in order for them to still be valid. Failure to reregister would be treated as abandonment and the work would fall under public domain. If reregistered, it would have to be in a new form to make the owners of the copyright easily identified. This would not only enlarge the public domain but would also reduce the cost of creating new and expressive works.⁴⁸ Another proposed solution is the fair use doctrine, which already allows for some copying of copyrighted works. Courts could rule that if a user had made a reasonable but unsuccessful effort to find and negotiate with the owner of a copyright, unauthorized copying could be deemed fair use.⁴⁹

Regarding transaction costs, one has to bear in mind that even though the effort at first glance seems trivial, such costs could greatly outweigh the benefits with the intended license. For example, if a book reviewer would have to pay a license for a quote from the work in question, even a very low fee would greatly increase the cost of publishing such a review. Even further, suppose that the book reviewer had to make an extensive effort to find the owner of the copyright, the costs would indeed outweigh the gain of the review. Very often, orphan works become obscure no matter how valuable the material contained in them may be. No future creator is willing

⁴⁶ Nimmer, D. (2003) *Copyright: Sacred Text, Technology and the DMCA*, page 63.

⁴⁷ Hesmondhalgh, D. (2007) *The Cultural Industries*, page 152.

⁴⁸ Posner, R. (2005) *The Law and Economics Approach*, page 62.

⁴⁹ Ibid.

to use the orphan work in fear that he will have to pay a very large amount of damages if the owner emerges.

3.3 Human Rights Justifications

One of the objectives in protecting intellectual property is to provide economic incentives for those who would direct their labours and financial resources to creative pursuits. Yet, this protection is not absolute. In particular, there is an important public interest in the dissemination of information. Lord Mansfield's explanation of this tension represents the precursor to the policy set forth: "*we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward for their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded*".⁵⁰ The preambles of both WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty reflect this idea, stating that the Contracting Parties "*recognize 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*". For the purpose of ensuring such a balance, the states introduce exceptions and limitations to the exclusive rights of authors and other right holders, including ones for the benefit of libraries and similar institutions.

The rights of authors may also be limited by a justification for the obligation of states to ensure the human rights of their citizens, such as right to privacy, right to education or freedom of expression. The right to take part in cultural life is enlisted in the International Covenant on Economic, Social and Cultural Rights⁵¹. In order to achieve this right, the states shall take steps including "*those necessary for the conservation, the development and the diffusion of science and culture*"⁵² as well as "*respect the freedom indispensable for scientific research and creative activity*"⁵³. The International Covenant on Civil and Political Rights, as well as the European Convention on Human Rights and Fundamental Freedoms provide for the freedom of expression, including in this right the "*freedom to seek, receive and impart information and ideas*" and "*freedom to receive and impart information and ideas without interference by public authority*".⁵⁴ These obligations are highly relevant to supporting public interest institutions, which main activity is to accumulate, preserve and make available to public of cultural heritage (libraries, museums, etc.).

⁵⁰ William Murray, 1705-1793, 1st Earl of Mansfield, was a British barrister, politician and noted for his reform of English law. Quote from case *Sayre v. Moore*, 102 Eng. Rep. 138, 140 n. 6 (1785).

⁵¹ Article 15(1)(a) of the ICESCR.

⁵² *Ibid*, Article 15(2)

⁵³ *Ibid*, Article 15(3)

⁵⁴ Article 19(2) of the ICCPR and Article 10(1) of the ECHR.

Noteworthy, all the Member States of the European Union are parties to all the mentioned documents.

The British copyright law was the first law in the world which included an exception from copyright for the benefit of libraries in 1956. Nowadays more than 120 countries have introduced an exception for the benefit of libraries in respect of at least the right to make copies of copyrighted works.⁵⁵ This is the first and most obvious exception to copyright and it was justified on human rights grounds.

The first criterion of assessment in section 17 of the Copyright Act regarding fair use mentions "non-profit educational purposes" which very much resembles the wording in the above mentioned documents on human rights. This makes the fair use doctrine a potentially valuable tool to promote human rights not only where similar exceptions are codified in law, but also in areas where the use would be deemed non-profit and educational. One of those areas could be in on-line environments where no library exception is allowed but the usage of the protected work is similar or identical. Another use is through Google Books which will be further discussed in chapter four.

⁵⁵ WIPO (2008) *Study on Copyright Limitations and Exceptions for Libraries and Archives*, Standing Committee on Copyright and Related Rights, SCCR/17/2, page 14.

4 Google Books

In October 2004, Google introduced an entirely new method of searching for material in physical books. It was the Google "Print" tool. The thought was the same as that of Gutenberg in the 15th century - to make the written word, i.e. the world's knowledge - more accessible to the society.⁵⁶ Google withholds that the foremost objective of the Book project is to make a "twenty-first century card catalogue"; an information search tool providing one with the names of the books, where the relevant information can be found, and in turn where one can find these books. Google argues that it is not a substitute to libraries and book shops, but rather a complement.⁵⁷ In the very beginning Google made an agreement with several of the U.S. largest libraries such as the Harvard, Stanford and University of Michigan libraries. They agreed to digitize their entire library collection for free, at that time over 10 million books. However, Google also reserved the right to index all the books in its new search feature Google Print for making it possible to search all the books online.⁵⁸ As Google started scanning books the American Authors Guild (AAG) filed a complaint against Google with the District Court of New York for copyright infringement.⁵⁹ The case rapidly got big headlines around the U.S. and the rest of the world as most people would realize the great benefit in efficiency and accessibility by making books searchable on the internet. The case was described by many newspapers as the new innovative Google who wished to provide mankind with "*easy accessible information for free, but was hindered by traditionalistic, old fashioned publishers and authors thinking more about themselves than the benefits of society, including the right holders*".⁶⁰ Unfortunately for lawyers and jurisprudence, Google and the right holders have chosen to settle the case leaving many questions on fair use unanswered.⁶¹ Under the settlement, Google would pay for the right to make up to 20 percent of copyrighted books whose author could not be found available to the public for free; and beyond 20 percent, the public could pay to access the full book, with the funds given over to a new non-profit organization charged with getting these royalties to the authors who want them. One-fifth of all the orphans (or one-fifth of each orphan) is made

⁵⁶ Google (2007) *Google Book Search – The Story*.

http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.co.uk/en/uk/press/files/book-search-en.pdf (Accessed May 3rd 2010 11:44)

⁵⁷ Ibid. Page 1.

⁵⁸ Participating libraries include those at the University of Michigan, Harvard University, Stanford University, Oxford, and the New York Public Library. For details, visit <http://books.google.com/googlebooks/partners.html> (Accessed May 2nd 2010 15:33)

⁵⁹ *McGraw-Hill Companies, Inc. v. Google*, No. 05 CV 8881 (2005); *The Author's Guild v. Google*, No. 05 CV 8136 (2005)

⁶⁰ Toobin, J. (2007) *Google's Moon Shot: The Quest for the Universal Library*. http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin (Accessed 12th April 2010 13:13)

⁶¹ *The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google*. Case No. 05 CV 8136-JES (2008) Settlement agreement.

available for free. And Google got the chance to build an eighteen-million-book in total digital library.⁶²

4.1 The Categories: a Spanner in the Works

There are three different categories of works included in Google Books, depending on the availability of the work and whether it is actually protected under copyright or if it is in the public domain. The books that are in the public domain lacks protection and can be copied and distributed freely, with certain reservations depending on the expiry of the copyrighted material in different countries.⁶³ On the other end of the scale are books that are in print and copyrighted. For these works Google has adopted an opt-out strategy, which essentially leaves the question on how much, if any, of a protected work is going to be available to the public. Right holders can in this situation stop Google from showing the book to the public, but they cannot stop the preliminary digitizing of that book, i.e. the physical copying.⁶⁴ Only approximately 25% of all books are in either public domain or in print and the remaining 75% are books that are still protected by copyright but are out of print, i.e. they cannot be bought at a book store anymore. For these books Google is providing so-called "snippet access", which means that even though the whole book is searchable, only two or three lines surrounding the actual search word is displayed.⁶⁵

The right holders were of the view that the copying of the books in itself was illegal. They had two main concerns if the digitizing was allowed to continue. The first being that hackers would get access to Google's library and "steal" copyright protected material that would no-doubt start to circulate the web, and secondly that they should be entitled to get royalties of Google's use since Google was going to make millions on advertising in the book search portal.⁶⁶

4.2 The Google Settlement

Google Books involves two stages in which each is an *prima facie* infringement of copyright. First is the scanning of the books, second is the issues of making the books available to the public. Both are typical infringements of copyright. In previous case law such as *Arriba Soft* and

⁶² Professor Lawrence Lessig states his opinion about the settlement agreement: "*There is much to praise in this settlement. Lawsuits are expensive and uncertain. They take years to resolve. The deal Google struck guaranteed the public more free access to free content than 'fair use' would have done*". For Love and Culture, The New Republic Magazine, 2010. <http://www.tnr.com/article/the-love-culture?page=0,2> (Accessed 27th April 20:00)

⁶³ See Supplement, figure 1.2

⁶⁴ See Supplement, figure 1.3 and 1.4

⁶⁵ See Supplement, figure 1.1

⁶⁶ Fisher, W., McGeveran, W. (2006) *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, page 10.

MP3.com, the question of fair use was not easily answered. The purpose of the use must be considered to be of commercial character since Google makes its money on advertisements. However, the use of the protected works are more similar to the "more incidental and less exploitative" type described in *Kelly v. Arriba Soft*, since Google does not make any revenue if users use the link "buy this book" and later buys the books from another source. As regards the transformation criteria it is possible to argue that Google are actually transforming the material in the same way as Arriba did with Kelly's pictures by enhancing access to information. The protected works are not just being retransmitted, like in the *MP3.com* case, since the user can only access a tiny portion of the text from a protected work, with the exception of the books in the public domain. The argument that the use is transformative should therefore most likely prevail making the first element favour fair use.⁶⁷

As regards the nature of the work it is clear that books are at the core of what copyright is all about. In *Kelly v. Arriba Soft* this factor only weighted slightly in favour of Kelly, but photographs are not considered to be in the core of copyright, unlike books. It is more likely that the Court would weighed this factor in favour of the plaintiffs.⁶⁸

The third element is different depending on what one would consider. If one considers the preliminary copying, it would most definitely amount to infringement and thus strongly favour the plaintiffs. But if one considers the second stage where Google makes the works searchable, only a tiny fraction of the work is actually displayed. When evaluating these two uses, as the Court did in *Kelly v. Arriba Soft*, it is apparent that the preliminary copying is necessary to achieve the purpose of the project. The Court in *Kelly* linked the amount of use in the third element to the purpose in the first element finding that the even though Arriba copied the entire work this would not prejudice the greater purpose. This factor was considered to favour neither party. In the present case one could argue the same, or slightly in favour of the plaintiffs.

The last element, the impact on actual and potential markets, is again, a very demanding analysis. As regards the actual market for books it is not very likely that the project will have anything other than positive externalities. However, this fact does not constitute a reason for Google to foreclose any potential markets from the right holders as was made clear by the Court in *UMG Recordings v. MP3.com*. The dangers are that the copied material could leak out to the market if hackers could penetrate the firewalls of Google. This argument could be countered with the fact that there are other

⁶⁷ Ganley, P. (2006) *Google Book Search: Fair Use, Fair Dealing and the Case for Intermediary Copying*. The author also argues that the opt out mechanism provided by Google is unnecessary since the use made by Google still can be considered fair use. (Available through SSRN.com)

⁶⁸ *Kelly v. Arriba Soft Corp.*, 9076 [10], "some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied". (2003)

legal tools for remedying such a situation if it was to happen. The second argument is that right holders might want to license their works to other search engines in the future, and Google's use is effectively foreclosing that possibility. There are some arguments countering that in the legal context such as the overall effect will be positive on actual and potential markets. Nevertheless, the strongest argument for finding fair use seems to be the one argued by Professor Lessig - "the more practical one".⁶⁹ If one has to ask permission, or license, to be able to use the works that are out of print but in copyright, then you must be able to identify the right holders. The same problem discussed earlier as regards dead licenses. The utilitarian rationale tells us that even though a use might be *prima facie* an infringement, a use that actually benefits everyone can be justified. Google Books can be justified on both economic and human rights grounds.

4.2.1 The Economic Argument

Through Google Books, both public domain and dead license works can be accessed. By making these titles available, Google makes a revenue from something that would otherwise be dead. It also creates employment opportunities and thus increases GDP. As for the works in print and with a clear copyright, Google Books allows for a worldwide register. Even though the book may not be available near you in any library or shop, Google suggests links where you can purchase it on-line. This enables consumers to browse and sample different books all to their taste which in the long run could also help increase the quality of books and literature.

In addition, a project such as Google Books remedies future situations with orphan works. Functioning as an immense index, all literature submitted is registered and credited to each respective author and publisher. Transaction costs would be minimized, encouraging new or derivative works without the fear of having to pay damages if the owner emerges.

4.2.2 The Human Rights Argument

Human rights is very well represented through fair use. Section 107 of the U.S.C. mentions "non-profit educational purposes" as a presumably major factor when assessing if a use is fair. Even though Google Books earns an indirect revenue from advertisement, the wording should favour the human rights argument. And even though Google Books is not a public library, the similarities are many, and as discussed earlier libraries are the cornerstones of human rights. Google Books makes available for free many works from public domain which can be accessed globally even where no public

⁶⁹ Lessig, L. (2006) *Is Google Book Search "Fair Use"*. Podcast found at <http://www.youtube.com/watch?v=TmU2i1hQiN0> (Accessed 19th February 2010 15:30)

libraries exist. With a database of over 18 million books, it may have more impact on society than can be foreseen.

4.2.3 Google Books: a Utilitarian Pipedream?

In the long term, Google Books may provoke serious changes in the way we experience media. At this point, some see it as a pipedream that every book could be immortalized through Google Books. Other similar projects have more or less failed.⁷⁰ But Google is extraordinary in that sense; they have the technology, the reputation and the incentives for making such a literary behemoth possible. In the future we might see authors only publishing books on e-shops, which you download directly to your portable reading device such as Amazons Kindle or Apples iPad, similar to what is happening now in the music industry. The possibilities with digitized content are many if it is allowed to prosper. The right tool for that job is the fair use doctrine, and the fact that Google builds upon something that can be described as utilitarian should justify fair use for the project as a whole.

It should be noted that the Authors Guild who sued Google only represents a fraction of the authors represented in the electronic library. The opt-out mechanism should be appreciated as promoting the legitimate interests of the right holders and not unreasonably prejudicing the same. Evidence suggests that copyright owners agree that Google Books has a significant social utility. Authors participating in the Authors Guild lawsuit acknowledge that Google Books will provide them with a helpful research tool. The objection is not that Google is creating a full text search index; it is that Google is creating the index without their permission.⁷¹ Perhaps they are gunning for a piece of the cake which Google can easily afford to give in view of its immense financial success.⁷²

⁷⁰ For example, two projects from the 90s: The Internet Archive and Project Gutenberg. Both have collected a respectable amount of data, but are non-profit and are limited to what is available in the public domain. More info at <http://www.archive.org/about/about.php> and http://www.etudes-francaises.net/dossiers/gutenberg_eng.htm (Accessed 3rd May 2010 12:02)

⁷¹ Band, J. (2006) *The Google Print Library Project: Both Sides of the Story*. Available at <http://www.plagiarism.org/Google-Library-Project.pdf> (Accessed 3rd May 2010 10:55)

⁷² Agarwala, A. Prasad, A. (2008) *Armageddon on the digital superhighway: Will Google's e-library project weather the storm?*, page. 259.

5 The European System

U.S. copyright law is based ultimately on an economic theory - that copyright should be defined by the economic effects of that right which should be to encourage wealth creation and distribution, and that U.S. copyright law is consequently ambiguous because it is based on "balancing tests", which weigh different factors, and can be manipulated. A comparison to the E.U. scheme of intellectual property law will demonstrate that the U.S. law is somewhat less proprietary than European law in that the fair use exception can be very wide.

As stated, there are both theoretical and practical points of commonality between the Anglo-American "copyright" and the continental European *droit de la propriété littéraire / Urheberrecht*. The U.S. perspective on intellectual property is utilitarian and economic; copyright is granted because it encourages authors and inventors by rewarding them for their acts of creation. According to this rationale, copyright serves, and should serve, to maximize social wealth. The economic foundations of U.S. copyright law explain why the protection of authors in the United States is less extensive than in Europe.⁷³ U.S. copyright law contains only very limited rights of authors to the integrity of their person as expressed in the work. While the U.S. views intellectual property from an economic and utilitarian perspective, continental civil law considers intellectual property from a perspective of the author's moral rights. Thus, rather than social wealth, the focus in Europe is on the integrity of the person.

5.1 The Berne Convention and the International Treatises

All the different positions taken by different states, for the protection of authors and inventors under international law, called for a harmonization effort and so the universal Berne Convention was established.⁷⁴ The convention is the point of departure of any discussion on international intellectual property law. It is the centrepiece of a number of conventions on intellectual, literary, and industrial property. Other conventions on international IPR's either complete the Berne Convention, extend its application⁷⁵, clarify its meaning or apply it to new areas⁷⁶, such as

⁷³ Correa, C. (2010) *Fair Use in the Digital Era*, page 3-4.

⁷⁴ The Berne Convention for the Protection of Literary and Artistic Works, (Berne Convention), was first accepted in Berne, Switzerland in 1886.

⁷⁵ For example, The Paris Convention for the Protection of Industrial Property, (Paris Convention) of 1971 extends the Berne regime to industrial property

⁷⁶ WIPO Copyright Treaty is also implemented under Berne. See WIPO Copyright Treaty, Art. 1.

computers. The Berne Convention is also incorporated via reference into TRIPS⁷⁷ and enforced by the World Trade Organization (WTO).

5.1.1 The Berne Three Step Test

The Berne Convention is founded upon the presumption of a European law perspective of *droit moral*: intellectual property from this perspective protects, *inter alia*, the moral right of the creator to the integrity of their work. Protection of the economic rights of the creator is seen from this perspective as a secondary goal. The most important part of the Berne Convention for our purposes is the so-called "three-step test". The Berne three-step test is a clause that is included in several international treaties on intellectual property. It imposes on signatories to the treaties constraints on the possible limitations and exceptions to exclusive rights under national copyright laws. It was first applied to the exclusive right of reproduction by Article 9(2) of the Berne Convention in 1967. Since then, it has been transplanted and extended into the TRIPS Agreement, the WIPO Copyright Treaty⁷⁸, the Info-Soc⁷⁹ and the WIPO Performances and Phonograms Treaty.⁸⁰ The test is included in Article 13 of TRIPS and reads "[m]embers shall confine limitations and 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 rights holder".

To date, only one case has actually required an interpretation of the test.⁸¹ The creation of the test pursued the objective of enlarging the protection granted to authors by strengthening the reproduction right in the face of the threat of phonographic piracy. This project was undertaken on the assumption that restrictions on reproduction rights varied considerably throughout the European Union. Whereas the original version of the test provided by Article 9(2) of the Berne Convention, in its post-1967 version, referred to the sole exclusive right of reproduction, later versions of the test under international copyright law expanded its field of application to all

⁷⁷ The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property (IP) regulation. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.

⁷⁸ The World Intellectual Property Organization Copyright Treaty, (WIPO Copyright Treaty), is an international treaty on copyright law adopted by the member states of the World Intellectual Property Organization (WIPO) in 1996.

⁷⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (Information Society Directive), is a directive of the European Union enacted to implement the WIPO Copyright Treaty, to which the European Union is a party.

⁸⁰ Mazziotti, G. (2008) *EU Digital Copyright and the End-user*, page 80.

⁸¹ A WTO dispute settlement panel settled a case involving U.S. copyright exemptions allowing restaurants, bars and shops to play radio and TV broadcasts without paying licensing fees.

authors rights and neighbouring rights. The re-statement and extension of the three-step test under Article 13 of the 1994 TRIPS Agreement, in particular, considerably enhanced its degree of effectiveness. Unlike the Berne Convention, the law of the WTO has established an effective system for dispute settlement which enforces the TRIPS Agreement.⁸²

The Berne Convention, and the other international instruments, places almost no requirements on national governments to provide exemptions from exclusive rights, with two exceptions;

- Article 10 of the Berne Convention guarantees a limited right to make quotations from copyrighted works and also allows exceptions for educational reasons (although the extent of this exemption has been interpreted differently in different countries).
- Article 5(1) of the Info-Soc Directive provides for temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process.

5.1.2 The Info-Soc Directive

In Article 5(2) of the Info-Soc there are optional exceptions listed exhaustively, and one relating to reproduction in particular: “*Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: [...] (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned*”.

Very few Member States have introduced Article 5(2)(b) as such. As regards the regulatory core of Article 5(2)(b), most Member States have either implemented the provision literally or amended the law accordingly. Therefore, Article 5(2)(b) is reflected in all member states but both the regulatory framework and the details of the scope to which private copying is permitted differs.⁸³

In accordance with the EC Treaty, “*a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form or methods*”.⁸⁴ This formulation is the distinguishing factor between a Community directive and a regulation; however, the question of what are the actual "results to be

⁸² Mazziotti, G. (2008) *EU Digital Copyright and the End-user*, page 80-83.

⁸³ Westkamp, G., (2007) *The Implementation of Directive 2001/29/EC in the Member States*, page 15-16.

⁸⁴ Article 249 of the Treaty Establishing the European Community, paragraph 3.

achieved" is not clear. Do they include the "three-step test" or the requirement to ensure that the right-holders make it possible for users to benefit from such exceptions? Experts assigned by the Commission to conduct an independent research came to the conclusion that "*the Directive generally lacks concrete guidelines that Member States are to follow in order to determine the scope and conditions of application of the limitations. Since in many cases, simply reproducing the wording of the Directive was not an option, most Member States have chosen to interpret the limitations contained in the Directive according to their own traditions. [...] In practice, not only are the Member States free to implement the limitations they want from the list, but they are also free to decide how they will implement each limitation*".⁸⁵

From another study of the implementation of the directive 2001/29/EC it was found that diversities could initially be established between the droit d'auteur and copyright systems. The Queen Mary Intellectual Property Research Institute concludes in their paper from 2007 that "[t]he copyright systems (UK and Ireland) permit private copies made of broadcasts and of performances (Ireland only) for strictly private purposes, which fundamentally deviates from the droit d'auteur systems in that the purpose is specifically restricted to time shifting. All other systems permit the making of copies for purely private purposes, as is envisaged under Article 5(2)(b), but here additional difficulties appear to have arisen as regards more specific aspects. In contrast to the UK, Ireland also permits the private copying of performances by natural persons for private and domestic use. In Estonia, the fair compensation requirement applies to the copying of audiovisual works only".⁸⁶

The Info-Soc has been heavily criticized by scholars of being a result from intense lobbying. One may draw parallels to the farmers' lobbying organizations in the E.U., which has enormous influence on agricultural politics, due to the fact that they are easily organized. Many critics have ventilated the opinion that the same goes for the copyright owners interest organizations. Another critique of the Directive is that it was passed in a hurry.⁸⁷ Back in 1995 when the Commission published their Green Paper on copyright efforts, it was clear that harmonization was something that had to rapidly be dealt with: "[a] situation in which private copying is legal in some Member States and not in others will create serious difficulty. The fact that private copying is authorized in certain Member States means that some operators will be afraid to allow access to their services there. The technical arrangements needed to control private copying cannot be made compulsory in Member States which authorize private copying, but will be

⁸⁵ University of Amsterdam (2007) *Study on Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society*, page 63.

⁸⁶ Westkamp, G., (2007) *The Implementation of Directive 2001/29/EC in the Member States*, page 17.

⁸⁷ Hugenholtz, B. (2000) *Why the Copyright Directive is Unimportant, and Possibly Invalid*, page 501-502.

*required in other Member States. These differences will place barriers in the way of trade in the relevant equipment".*⁸⁸

The question remains if the Info-Soc is a directive that remedies the issues presented by the Commission in its Green Paper. Many questions are still left unanswered and Member States' different choices of implementation still polarize the issue of reproduction.

5.2 Fair Dealing in the U.K

The word "dealing" in the defence refers to use of the work and has no commercial undertones.⁸⁹ The U.K. fair dealing defences are contained in sections 29 and 30 CDPA⁹⁰ and take away liability where one can show "fair dealing" for the purposes of research or private study, for the purposes of criticism or review or reporting current events. It is thus irrelevant if the use could be fair for any purpose not listed in the 1988 Act.⁹¹ If a defendant can show that the use falls within one of the mentioned categories of use, the defendant must also show that the dealing is fair. This is where the U.K. and U.S. approaches somewhat converge since fair dealing will be subject to a review of certain factors by the Court where the specific situation will determine which factors are to be seen as the more important in the present case.⁹² The Court will indeed ask questions like; have the work been published? If yes, the fair dealing is more likely to be favoured. What amount of the work was taken? The Court uses a sliding scale where little amount is more likely to be fair dealing and entire works are almost considered per se prohibited with the exception if the work is very short.⁹³ The Court will also examine how the protected right has been used. The more transformative use, the more likely it is to be considered fair. What motives were there for the use? If the defendant can show that the use is altruistic or beneficial to society, the more likely it is considered fair dealing. Another important factor is the effect the dealing has on the involved markets. If the use has a negative impact on the right holders markets then it is less likely that the use will be fair. Lastly the Court will consider if the purpose could have been achieved in another way. If yes, then fair dealing is very unlikely.⁹⁴ These elements of review are very similar to the factors used under the fair use doctrine in the U.S.

However, unlike the U.S., where there is a general fair use defence, fair dealing in the U.K. is only permitted for the purposes specifically listed in the CDPA which means that the dealing must be fair for purposes of the exceptions or limitations expressly provided for in the statute. A

⁸⁸ Commission of the European Communities (1995) Green Paper, page 50 – 52.

⁸⁹ Bently, L., Sherman, B., (2008) *Intellectual Property Law*, page 202.

⁹⁰ Copyright, Designs and Patents Act 1988 (CDPA)

⁹¹ Bently, L., Sherman, B., (2008) *Intellectual Property Law*, page 202.

⁹² *Ibid*, page 203.

⁹³ *Hubbard v. Vosper* (1972). See also, Bently, L., Sherman, B., (2008) *Intellectual Property Law*, page 204.

⁹⁴ Bently, L., Sherman, B., (2008) *Intellectual Property Law*, page 205.

determination as to the fairness of the exempted dealing is a question of degree and impression. The term has not been defined in the Info-Soc (as seen above), nor in the CDPA and there are no fast or hard rules. Whether a particular use would be deemed acceptable would depend on the individual circumstances of the case.

The case-law of the U.K. has resulted in some guidance by enumerating a number of factors that might influence the direction taken, but as Bently and Sherman point out, the relative importance of each of these factors will vary according to the case in hand, and the type of dealing in question and considerations of public interests are paramount.⁹⁵

5.2.1 International Fairness Exceptions

Other nations in the world have similar instruments as fair dealing and fair use. The Canadian and Australian concept of fair dealing is similar to that in the U.K. The fair dealing clauses of the Canadian Copyright Act allow users to make single copies of portions of works for "research and private study". Unlike the fair use doctrine, fair dealing in Canada does not contain exceptions for parody and satire. In New Zealand, fair dealing includes some copying for private study, research, criticism, review, and news reporting. In South Africa, fair dealing is dealt with in the Copyright Act of 1978. Fair dealing itself is described in section 12(1) of the Act, whereas sections 13 to 19 explain various exceptions to copyright. Section 20 deals with the author's moral rights, which, if infringed, may also impact on a fair dealing ruling. In Sweden, the concept closest to that of fair use/dealing is found in the "citaträtt" - the right to quotation.⁹⁶

5.3 A Common European Notion of Fair Use

Continuing on the point of European countries different legal exceptions to authors' exclusive rights, a comment on the E.U. legislative activity in the area is desirable. The lengthy list of optional exceptions in the Info-Soc Directive can be explained by the compromise nature of E.U. legislative activity as dictated by the countless cultural and social differences between the Member States but is also arguable that the flexibility which it gives to the Member States detracts from its primary aim of harmonization in the first place.⁹⁷

This handicap may offer an advantage as well. The opportunity stems from the fact that the various peoples of the E.U. may be as diverse as nature

⁹⁵ Bently, L., Sherman, B. (2008) *Intellectual Property Law*, page 203.

⁹⁶ Upphovsrättslagen 22 §

⁹⁷ Hugenholtz, B. (2000) *Why the Copyright Directive is Unimportant, and Possibly Invalid*, page 499.

itself but they are also very much united in common ideals and principles some of which have developed into legislative norms and judicial determinations with legal force Europe-wide. Examples include the fundamental rights and freedoms and the ECHR. In other words, "united in diversity" can have legal significance in the pursuance of a common notion of fair dealing/use in copyright and related rights. As a starting point, such an endeavour would be informed by the fact that copyright and related rights necessary interact with and have implications both for the four freedoms and fundamental rights as enshrined in the ECHR. Further, public interests considerations founded on security and health concerns could also be allowed but subject to the usual supervision as to proportionality of any measure taken in furthering such restriction of the rights. A process of distillation could identify the areas of contact and evaluate such interfaces for conflict before announcing a set of rules which are to be applied uniformly in all the Member States in the determination of what is fair dealing/use.

Harmonization of the notion of fair dealing/use for private purposes are exemplified by the technology that Info-Soc sought to address. Information technology brought with new and dynamic vectors to accessibility, replication and distribution of works while at the same time offering new opportunities for exploitation. Failure to harmonize the law in relation to what amounts to fair dealing/use could lead to an intolerable but yet permitted private use in part of the E.U. which could rapidly end up in the hands of other people in the rest of Europe or even the world to the prejudice of the right-holder. Likewise, over-protection could be abused to defeat the aims of the community.

An approach that has already been communicated to the European Commission advocates for harmonization that involves the invocation of the principles of subsidiary and proportionality.⁹⁸ The current "optional" list would need to be replaced by a shorter enumeration of mandatory limitations, reflecting fundamental freedoms, internal market considerations and the rights of European consumers and the adoption of an open norm dictated by public interest in the Member States.

5.4 Fair Use in International Law

The status of fair use under international law is indeed uncertain. Some commentators argue that there is no doctrine of fair use in international law. Others argue that although there is no current conception of fair use under international law, international law should nevertheless develop such a standard. The better reasoned view is that a number of points under both the

⁹⁸ See generally *Study on Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society* (2007) Institute for Information Law, University of Amsterdam.

Berne Convention and the TRIPS evince the same considerations that justify the common law doctrine of fair use.⁹⁹

Intellectual property rights' law in the common law system is based on the perspective of an economic analysis of social wealth and not on the perspective of the author's moral rights and integrity of his personality expressed through his work. Thus, the common law system provides less protection for authors. It follows that the doctrine of fair use, at least as presently interpreted, is incompatible with TRIPS and the similar European instruments. Despite the fact that fair use as currently understood is contrary to the Berne Convention, the doctrine of fair use will not disappear immediately, but only after much litigation and reinterpretation.¹⁰⁰ One possible outcome could be to adopt a fair use standard internationally. The transposition of "fair use" to international law would, however, require reinterpretation of the doctrine to integrate an author's moral rights according to the civil law system. It seems that reinterpretation and transposition will not happen without pressure from the international community.

The adoption of anti-circumvention measures, such as under the DMCA and the Info-Soc Directive, can make illusory any fair use exceptions contained in copyright law. If the legislative model developed in the U.S. and in Europe on anti-circumvention measures become internationalized, the access to and fair use of works may be restricted on a global scale. This may widen the large technological gap that today separate developed and developing countries. Further, such an action may lead to so-called "data-havens" where less developed countries are used as a proxy to circumvent copyright protection. The notion of data-havens is not new - since the birth of file-sharing in the mid nineties servers with dubious content has migrated to countries where the copyright standards are significantly lower, or where there has been no recognition of jurisdiction. In the recently appealed *Pirate Bay*¹⁰¹ case from a Swedish District Court, four keepers of a file-sharing forum were sentenced to high fines and imprisonment for secondary copyright infringements. Since then, the servers running the forum have been moved outside the E.U. jurisdiction.

Eric Allen Engle, Dr. Jur. at Harvard University observes that "[b]ecause fair use as currently understood and applied is inconsistent with TRIPS, we will probably see a case before the WTO which would litigate section 107(c) of the U.S. Copyright Act. [...] [I]t is conceivable that the United States will be forced to abandon the fairness doctrine."¹⁰²

⁹⁹ General opinions by Engle and Correa (*supra* page 12). Also Okediji, R. (2000) *Towards an International Fair Use Doctrine*, page 87.

¹⁰⁰ Engle, E.A., (2007) *When is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, page 20. (Available through SSRN.com).

¹⁰¹ *The Pirate Bay*, Swedish District Court, Mål Nr B 13301-06 (2009)

¹⁰² Engle, E.A., (2007) *When is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, page 23. (Available through SSRN.com).

However, there is a possibility that with some modifications – such as the transposition of moral rights - the U.S. doctrine would not be incompatible with European standards. As noted earlier, the Berne Convention does provide a number of provisions that evince the same concern which is the foundation of the common law doctrine of fair use, namely freedom of information. In addition to Article 10(1) about the free use of quotations, Article 10(2) provides that "*[i]t shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice*".

The quote is a clear indication that the U.S. fair use doctrine and the current European law is not dissimilar, even though the fair use exception provides a far more extensive concept. Further, the right of reproduction is found in Article 9(2) and states that it is a matter for legislation in the countries of the Union to permit the reproduction of works, in special cases, which does not conflict with normal exploitation and does not unreasonably prejudice the legitimate interests of the authors. This is a similar economic interest balancing test found in the fair use doctrine, but with the interests extended to include the moral right of the author to the integrity of their work. Thus, these provisions of the Berne Convention could be used to justify a modified fairness doctrine which would consider not only an author's economic rights, but also their right to the integrity of their personality and the work which it expresses.

5.5 Google Books in Europe

It seems possible that Google Books could be allowed if one interprets the wording of the Berne Convention in a broad sense. However, all European states have implemented the Convention in such a way that the possibility for copying books for any other purpose than those listed in national law are prohibited. The European Union's interpretation of the WCT in the Info-Soc Directive confirms the interpretation and takes it even further in the online environment making it sometimes impossible to rely on exceptions provided for in the Directive. The entire copying of books (the first stage of Google's project) will neither be allowed with regard to UK fair dealing since the fairness criteria will not be considered if the user cannot show that the use is related to research nor private study, criticism or review or the reporting of current events. The preliminary face of the project probably fails under all European jurisdictions since there is no equivalent escape route for the Courts to use in situations that the national legislator has not approved of. With regard to the U.K. fair dealing it is a fact that the copying would not be allowed, but the second stage is far from clear since the Courts will take into account many of the same factors as the U.S. Courts do under the U.S. doctrine. The problem, as already described, is of course that the project does not fall inside either of the categories in the Courts preliminary investigation before considering the fairness criteria.

However, the European Commission has recently published a few memorandums where they express a positive attitude to the digitizing of books. Viviane Reding, Commissioner for Information Society and Media stated that even though digitisation of copyrighted works must fully respect copyright rules and fairly reward authors, "*we also need to take a hard look at the copyright system we have today in Europe. Is the present framework still fit for the digital age? Will the current set of rules give consumers across Europe access to digitised books?*".¹⁰³ The attitude set forth by the Commission sounds indeed promising and together with the German case described below, they might reflect major policy changes in the future.

5.6 Taking a New Turn: the Subito Case

As described, even though Google Books would in most likelihood not prevail if under European scrutiny, attitudes seems to be changing. The Info-Soc Directive contains two exceptions for the benefit of public interest institutions, both of them are optional, i.e. may or may not be chosen by Member States for implementation. One of them can be implemented under Article 5(2)(c) "*in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage*". The other exception refers to right of communication and making available to the public of copyrighted works. Under Article 5(3)(n) it can be introduced "*for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections*".

However, library exceptions do not cover "*uses made in the context of on-line delivery of protected works*".¹⁰⁴ Electronic delivery is nowadays a disputed issue; is the delivery of digital materials permitted by libraries without authorization of copyright owners? Publishers consider that the possibility of library patrons to obtain copies of works at almost the same speed as if they were available by subscription to an electronic journal would lead to massive cancellation of subscription and thus affect the normal exploitation of works and the legitimate interests of rights holders. Libraries, on the other hand, tend to see electronic document delivery as a natural development of the interlibrary loan service. Librarians want to be able to offer a document delivery service that meets their patrons increased information needs and expectations of quick delivery of the requested materials.¹⁰⁵

¹⁰³ European Commission MEMO/09/376

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&guiLanguage=en> (Accessed 21st April 2010 11:30)

¹⁰⁴ Recital 40 of the Info-Soc Directive.

¹⁰⁵ Vezzoso, S. (2006) *Subito and Beyond: New Challenges for Library Document Delivery in Europe?*, page 1.

The *Subito* case, dealing with delivery of copies of copyrighted works, addressed the issues of legality under German law of both delivery of reprographic and digital copies of copyrighted works.¹⁰⁶ *Subito* is a German non-profit document delivery service, cooperating with a number of university libraries in Germany, Austria and Switzerland, which scan scientific articles at the request of users and, in return to a fee, deliver them via mail, fax and e-mail. In 2004 the Börsenverein (Association of German Book Traders) and the International Association of Scientific, Technical and Medical Publishers brought a legal action against *Subito* questioning the compliance of its services with German copyright law and the Info-Soc Directive.

The decision, delivered in 2005, came as a surprise. The Court ruled that the delivery of reprographic copies is permitted under the German private copy exception, allowing reproduction for private use by analogy means. Considering the legality of digital copies, the Court distinguished between "graphic files" and electronic documents allowing digital uses. The Court ruled that copies of the materials sent by *Subito* to the users via e-mail permitted only reading on the screen and print-out, neither a search tool nor a "copy-paste" opportunity. The Court further concluded that such a delivery only functionally replaces the delivery in a physical form and thus equal to analogue copy delivery which is allowed. In respect to delivery of copies between libraries themselves, not from a library to a user, the Court concluded that such a delivery cannot be justified by the statutory private copy exception. However, mail and fax delivery between libraries is justified under customary rights. As e-mail is a relatively new technique, it cannot be yet justified by customary rights.

The publishers lodged a complaint to the European Commission against Germany for having not implemented the Info-Soc Directive properly. They claimed, that electronic transmission should be regarded as "communication to the public" and "making available to the public" which is not covered by library exceptions in Info-Soc. The Commission, however, refused to start the proceedings.¹⁰⁷

The *Subito* case represents a new aspect of what was previously regarded as the largest threat to copyright; digitisation and on-line distribution. This case together with the statement from the European Commission that lifting books and other media to digital format is regarded as beneficial, could very well represent a paradigm shift in copyright law. Fair use has been found in several occasions enhancing both human rights and economy, but this change is more profound. Even though the library exception is the prime fair use and the first one to be codified in law, the changes in attitude in terms of general copyright and its future is something that is perhaps more valuable.

¹⁰⁶ The *Subito* case was the second occasion for German Courts, after the *Kopierversanddienst* case, to address the issue of the delivering of copies.

¹⁰⁷ Mueller, H. (2006) *The SUBITO Case in Germany: Implications for Libraries*, page 3. <http://archive.ifla.org/IV/ifla72/papers/089-Mueller-en.pdf> (Accessed 3rd May 2010 12:28)

6 Conclusions

The question posed in the beginning of this thesis on why fair use is vital for the development of IP has been answered through Google Books. Fair use allows the digital society to prosper; both economically and human rights-wise. Google Books generates revenue from what would otherwise be dead, and proactively prevents future licenses from dying in the same manner. Most exciting are the possibilities that Google Books allows: not only the immortalization of books, but the way we will perceive media. From brick-and-mortar libraries to your smartphone, computer or portable reader, wherever you are, whenever. For industrialized countries in the west, there is the efficiency argument, for developing countries in the south and east, there is the human rights argument. Google Books is not a public library, but could be substituted for one: cheaper, more efficient and with multiple content. Perhaps with a system similar to new streaming music applications, i.e. you pay a royalty fee for viewing a book in full. Such a system could easily be funded through charities and access given to schools and universities worldwide.

Native to the U.S., the doctrine of fair use has shaped the internet since its arrival, even where such a doctrine is not recognized. Similar to *Perfect 10 v. Google*, the German Supreme Court recently ruled in favour of Google regarding their ever-litigated thumbnail service. This is all good and well, however, internet does not share the border of nations and cannot be contained by national judgments. A good example is, for instance, Facebook, with currently over 400 million users.¹⁰⁸ With about 70% of their users outside of U.S. borders, they still enjoy the benefits of a fair use system: sharing thumbnails, linking video, poetry and uploading pictures. It is not a doctrine desired, it *is* a doctrine already implemented and used in a system that the majority of the world accesses on a daily basis. It is simply the legislation that cannot keep up. It remains to be seen how legislators outside the U.S. will justify the exceptions: it will undoubtedly create discontent if they fail.

As regards the second question, much criticism has been brought down on the current European copyright instruments, especially since the introduction of the Info-Soc. The critique range from the “unclearness” of the Directive, to the intense lobbying from interest organizations that made the Info-Soc further safeguard the right holders interests; the fact that exclusive right holders are protected no less than seventy years after their death, and that the years have successively increased since the birth of the copyright statute. The pressure from lobby groups makes it easier to extend the protection than the other way around. The parallel drawn to the similar position of the farmer’s interest organizations in the E.U. is not farfetched. The economic rationale of transaction costs explains why it is easier for a limited social group to organize than the majority of the population and why

¹⁰⁸ <http://www.facebook.com/press/info.php?statistics> (Accessed 13 May 2010 10:06)

it is easier for them to influence policy makers worldwide. The tradition in European legislation of very limited exception to copyright is also an explanation for the continually wide protection of authors and composers. With the introduction of the internet, the possibilities of worldwide information transfers became apparent and the costs of getting information rapidly sunk towards zero. A decade later, freedom of information has come to be seen as a human right and a prerequisite of a democratic society. Many find it obvious that the archaic standard of copyright protection need to be re-evaluated and balanced to gain and benefit society. Instead of the *droit d'auteur*, derived from medieval morality and grandeur of personality, we need a statute of utilitarianism; for the need of the many outweigh the need of the few. At least an instrument that is capable of a balancing test.

The European way of treating exceptions to copyright is much more formalistic in its approach than the U.S. doctrine of fair use. The European way has been to rely on thought out exceptions which the legislator has been able to foresee when promulgating the law; the legislation cannot exempt use of copyright protected works other than what the law explicitly allows. This could be argued to be a problem in light of the greater purpose of copyright – to foster creativity and the development of the cultural arts and sciences to the benefit of society – not to give excessive protection to copyright holders. The conflict between user and right holder is in the E.U. balanced by the lawmaker in light of what he can foresee as interfering interests. In the U.S., that balancing is also provided for in law, but the lawmaker has made an escape provision giving the right to balance the interest of the right holder on the one hand, to the interests of the user and/or the public, on the other to national courts. This makes the U.S. fair use provision adaptable to the ever changing environment of IP law. However, there are drawbacks to the broad definition. The primary conflict concerns legal certainty; as the scope of use expands under U.S.C. section 107, legal certainty diminishes which has the ultimate effect of making litigation processes very expensive and thus reduces clarity. Keller & Cunard explains that "*[g]iven the subjective nature of the fair use doctrine [...] its exact contours are difficult to define precisely. In order to formulate proper advice [...] it is important to weigh the costs of obtaining rights from the copyright owner against the unavoidable uncertainties that arise when asserting an intrinsically subjective and case-specific 'fair use' defense*".¹⁰⁹ In contrast to the U.S. fair use, the European well defined exceptions faces the opposite problem, i.e. providing sufficient legal certainty while social benefits of other fair uses (than those explicitly mentioned in law) has to stand down to the benefit of right holder.

In later years, the evolution in law with regard to copyright protection in the digital environment has tended to shift in a direction towards higher protection for right holders, initiating a tense discussion about the Info-Soc in the E.U., and also in the U.S. with regard to the Digital Millennium Copyright Act. The introduction of the DMCA in the U.S. is a step away

¹⁰⁹ Keller, B., Cunard, J. (2001) *Copyright Law: A Practitioners Guide*, page 381.

from the doctrine of fair use. The U.S. are signatories to the international conventions on copyright and fair use is most likely contrary to international law. How this dispute will be resolved remains to be seen. One thing is clear; the double standard imposed by the U.S. and especially by its major corporations is not to be taken lightly. While U.S. companies enjoys the pros of the fair use doctrine and the strictness of the droit d'auteur overseas, its European counterparts does not. This enables the U.S. companies to benefit from the legal differences and engage in unfair competition.

Recent developments in the E.U. reveals a more positive attitude to copyright exceptions than has been seen before. There is no longer an excessive fear of digitisation but a realization of its potential. It seems possible that European legislation will be subject to new policy changes where the information society is highly valued. The *Subito* case, the new German ruling on thumbnails and the positive statement from the Commission regarding the digitising of books adds up to an exciting future in the Union. The question this far has really been about the fundamentals of law: is it created to reflect a desirable society for and by its users, or is it just something our elected comprised? Maybe it's not about getting the right answers, but about asking the right questions.

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SUPPLEMENT

Figure 1.1

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| ture, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." <i>Emerson v. Davies</i> , 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). Similarly, Lord Ellenborough expressed the inherent | nature or is for nonprofit educational purposes; "(2) the nature of the copyrighted work; "(3) the amount and substantiality of the portion used in relation to the copyrighted work | asks, in other words, whether and to what extent the new work is "transformative." Laval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, <i>See, supra</i> , at 455, n.40 ¹¹ , the goal of copyright, to promote |
| The fair use principle first solidified into statute in the Copyright Act of 1976. The law is worded vaguely, partly because the kinds of use that might be fair are so numerous and diverse and that no complete formal expression of what definitely is and isn't fair use was thought to be | turned down. They decided to put it out anyway. 2 Live Crew proved to the original court that as matters of law 1) their track was a parody of the older song, entitling them to claim fair use, 2) their appropriations were not excessive given <i>Pretty Woman's</i> nature as a parody, and 3) the | conservative, shaking off precedents of overprotective case law and reaffirming the primeval intent of copyright law; to encourage the creation of new, progressive works, with a refreshing and healthy acceptance of the inescapable fact that everything new is built in large part on something |

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Figure 1.2



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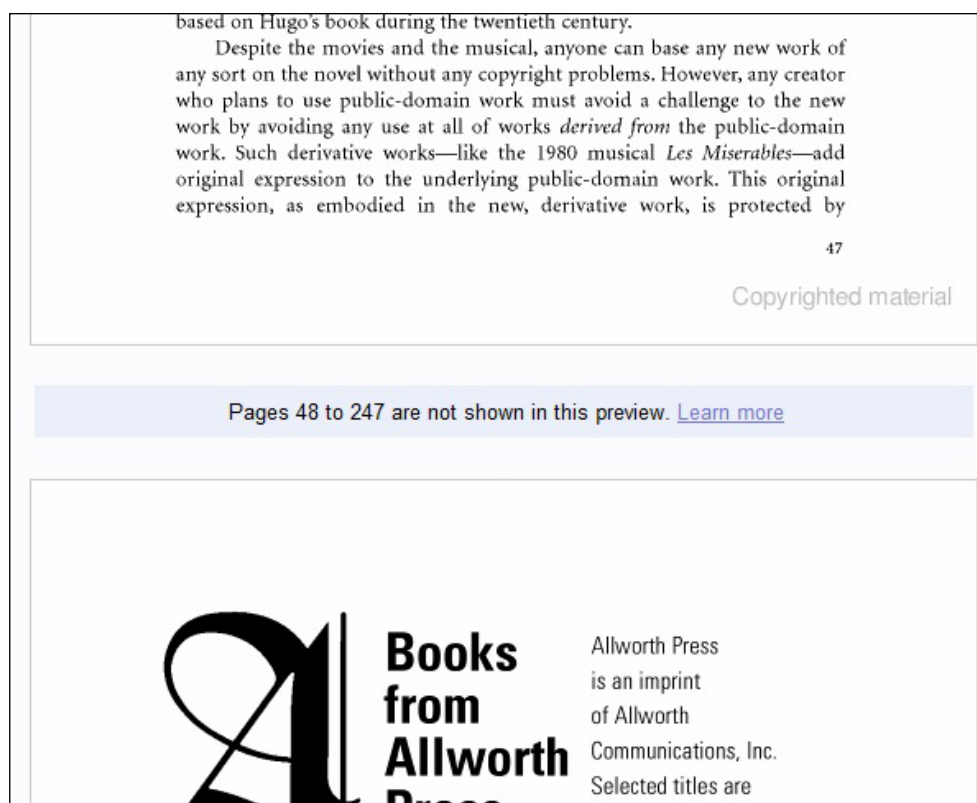
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