

# UNIVERSITY OF CAPE TOWN

Faculty of Law – School for Advanced Legal Studies

## The implications of digitizing and the Internet for “fair use” in South Africa

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.



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## **A Introduction**

Copyright law intends to benefit both the public and the copyright-holder of copyrighted material. While a copyright gives the copyright-holder a limited monopoly over the rights of the work to assure him or her a fair return, the work can be used to advance the public's knowledge, entertainment and cultural experience.

However, in the ancient world of Greece and Rome the copying of a manuscript was a slow process, since no mechanical means for making multiple copies existed. Therefore and despite the fact that some ancient scholars were concerned about being recognized as the authors of their works, there was no developed copyright law.<sup>1</sup> All this changed when Johannes Gutenberg invented the printing press around 1440 in Germany, and for the first time a form of copyright protection was devised.<sup>2</sup> At first States tried to control the distribution of printed material in order to protect the printing industry – not the authors - against piracy by granting printers local monopolies on publishing<sup>3</sup> and by establishing a register of licensed books. In England, for instance, the royal government granted a monopoly on the entirety of English publishing to a guild called the Stationers' Company of

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<sup>1</sup> Some scholars argue, however, that the first form of protection for intellectual property took place in ancient Egypt; see e.g. Mendis, *The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*, vol 7.5 Electronic Journal of Comparative Law, (December 2003), <http://www.ejcl.org/ejcl/75/art75-8.html>, accessed on 04 February 2005

<sup>2</sup> UK Intellectual Property on the Internet, *A History of Copyright*, <http://www.intellectual-property.gov.uk/std/resources/copyright/history.htm>, accessed on 16 August 2004

<sup>3</sup> In the fifteenth century, so-called 'privileges' were awarded in Venice for protecting mechanical inventions and (later) books.

London.<sup>4</sup> While the vast majority of privileges were issued to printers, only few were issued to authors.<sup>5</sup>

In the 17th century, discussions started in Western Europe to establish the principles of authors' ownership of copyright and a fixed term of protection of copyrighted works.<sup>6</sup> These discussions finally led to the first Copyright Act, the English Statute of Anne of 1710.<sup>7</sup> Subsequently, the United States of America introduced their first Copyright Act in 1790, and the French copyright laws of 1791 and 1793 were arguably<sup>8</sup> the first Continental European pieces of legislation dealing with copyrights.

On an international level the 'Berne Convention for the Protection of Literary and Artistic Works of 1886' (Berne Convention) and the International Copyright Treaty of 1891 marked the first multilateral copyright treaties and initiated international copyright protection.

Nowadays, O. H. Dean defines copyright as

"the exclusive right in relation to work embodying intellectual content (i.e. the product of the intellect) to do or to authorize others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit."<sup>9</sup>

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<sup>4</sup> See the English Licensing Act of 1662

<sup>5</sup> See *supra* note 1

<sup>6</sup> Website of the Association of Research Libraries (ARL), *TIMELINE: A History of Copyright in the United States*, <http://arl.cni.org/info/frn/copy/timeline.html>, accessed on 04 February 2005

<sup>7</sup> 'An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned'. For the text of the Act see Sterling, *World Copyright Law* (2003) 1250 et seq.

<sup>8</sup> Some authors, however, argue that Denmark's Ordinance of 1741 was the first Continental European legislation as it recognized a general statutory right for authors.

<sup>9</sup> Dean, *Handbook of South African Copyright Law* (1987), 1-1

However, in order to reach a balance between the contrasting interests of the copyright-holders and the public certain limitation and exceptions to the exclusive rights of the copyright holders exist.

One of the most accepted exceptions, at least under Anglo-American Copyright law, is the so-called "fair use" or "fair dealing" doctrine. As an affirmative defence to an allegation of copyright infringement<sup>10</sup> it allows copying without the copyright-holder's consent in certain, limited circumstances. The fair use / fair dealing doctrine is fundamentally based on the belief that not all copying should be banned, particularly in socially important endeavours such as criticism, news reporting, teaching, and research. Thus, the fair use / fair dealing doctrine safeguards the fundamental right to free speech and freedom of expression, which is widely recognized as one of the most fundamental principles in a civil society.

It has to be mentioned, however, that the concepts of fair use and fair dealing are not synonymous but rather analogous. The fair use doctrine could be regarded as the American version of the fair dealing concept and is, in general, much broader than the fair dealing concepts of other countries. Yet, the fundamental idea behind both concepts remains the same. Hence this paper will, in the following, use the term "fair use" for both doctrines and the specific differences will be highlighted in part C.

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<sup>10</sup> However, different views exist on whether fair use is merely a defence against a charge of infringement or rather a right that allows copying in certain circumstances.

In South Africa, the Copyright Act 98 of 1978, which has been amended by several acts since 1978, governs all matters relating to copyright.<sup>11</sup> It is based on the provisions of the Berne Convention<sup>12</sup> and expressly states in Section 41 (4) that

"no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf."

Therefore no protection of copyright exists in terms of the common law. Currently, the South African Copyright Act protects literary, musical and artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programs.<sup>13</sup> The Copyright Act defines each of these works in Section 1. As soon as the two general requirements – originality<sup>14</sup> and existence in a material form<sup>15</sup> – are met, copyright emerges automatically as the South African Copyright Act allots no formalities for its coming into being. The duration of copyright varies for the different types of work.<sup>16</sup>

The SA Copyright Act contains a fair use provision in Section 12 for literary and musical works. Section 12 provides:

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<sup>11</sup> For a brief history of South African Copyright Law see Dean, *supra* note 9, at 1-2A et seq.

<sup>12</sup> Gibson, *South African Mercantile and Company Law* (2003), 706

<sup>13</sup> Section 2(1) of the Copyright Act of 1978

<sup>14</sup> *Ibid.*

<sup>15</sup> Section 2 (2) and 44 of the Copyright Act of 1978

<sup>16</sup> Section 3 (2) of the Copyright Act of 1978

## **Section 12**

### **General exceptions from protections of literary and musical works**

Copyright shall not be infringed by any fair dealing with a literary or musical work –

for the purpose of research or private study by, or the personal or private use of, the person using the work;

for the purpose of criticism or review of that work or of another work; or for the purpose of reporting current events –

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.

[...]

In addition, Section 13 allows for further unlicensed copying, e.g. in educational institutions. Section 13 provides:

## **Section 13**

### **General exceptions from protections of artistic works**

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Subsequently, Sections 15 – 19B<sup>17</sup> extend the fair dealing provision of Section 12 widely to artistic works, cinematograph films, sound recordings, broadcast, published editions and computer programs. The only copyrighted work not covered in this context is a programme-carrying signal.<sup>18</sup>

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<sup>17</sup> See *infra*, Appendix G.1

<sup>18</sup> Gibson, *supra* note 12, at 724

However, the precise limits of fair use in South Africa remain uncertain and vague<sup>19</sup> and courts have a great deal of discretion in determining whether a certain kind of use of copyrighted material is fair or not in relation to the purpose for which it was used.<sup>20</sup>

This thesis is going to examine the scope of fair use in South Africa, especially within an academic context. It proceeds in 5 parts. Part I (B) will deal with the question of whether an international standard for fair use exists from which any clarification regarding the scope of the fair use doctrine can be deduced. In part II (C), the legal situation in other countries and regions, namely South Africa's major trading partners U.S.A., Europe (EC/Germany/UK) and Australia will be described and compared. This is done in order to analyse whether or not their approaches can either be adopted by South Africa or, at least, serve as a model. In part III (D), the impacts of digitizing and the Internet for the fair use doctrine will be examined, and part IV (E) will, in some detail, explore the rights and obligations of libraries in an increasingly digitised world. After summarizing parts II-IV, part V (F) will draw a conclusion and seek possible solutions for South Africa.

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<sup>19</sup> It has been suggested that a rule-of-thumb for personal use exists, which allows unlicensed copying of copyright material that amounts to up to 10% of the original work. However, this rule is neither generally accepted nor does it sufficiently consider the differences between different kinds of copyrighted works as well as the quality of the copied material.

<sup>20</sup> Gibson, *supra* note 12, at 725

## **B**        ***Does an international standard of fair use exist?***

### **B.1**        **Overview**

By the end of the 1800s, authorship and the buying as well as selling of copyrighted goods were predominantly domestic in nature. But when both transportation and communication improved significantly by the late 1800s, copyrighted goods started to become an important object of international trade. Hence, states entered into bilateral treaties dealing with copyright protection. However, many states signed numerous bilateral treaties<sup>21</sup> and the increase in international trade caused difficulties to police the various - and, in some instances, even conflicting - duties under these treaties.<sup>22</sup> It was therefore realized by the international community that some form of harmonization on an international level was necessary.<sup>23</sup> In the latter half of the 1800s the first steps were taken to develop a comprehensive multilateral copyright treaty.<sup>24</sup> These efforts eventually led to the adoption of the Berne Convention, which was ratified in 1886.

As a result of progress in the technological field further treaties have been adopted ever since, *inter alia*, the Universal Copyright Convention of 1952, the Rome Convention of 1961 and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994. In 1970, the World Intellectual Property Organization (WIPO) was established as an international organization dedicated to promoting the use and protection of intellectual

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<sup>21</sup> In 1886, France had signed 13, Belgium 9 and Germany and Great Britain each 5 treaties

<sup>22</sup> Okediji 'Toward an International Fair Use doctrine' 39 *Columbia Journal of Transnational Law* (2000) 95

<sup>23</sup> Sterling, *supra* note 7, at recital 1.14

<sup>24</sup> Jackson 'Harmony or discord? The pressure toward conformity in international copyright' 43 *IDEA* (2003) 620

property.<sup>25</sup> With headquarters in Geneva, Switzerland, WIPO is one of the 16 specialized agencies of the United Nations system of organizations and has 182 member states.<sup>26</sup>

Facing new challenges for copyright through digital technology and particularly the Internet, the WIPO member states, after much debate, adopted two new treaties in 1996, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WCCT) – the so-called "Internet treaties".

Yet, there is still no such thing as "international copyright" that will automatically protect a work throughout the entire world. Protection against unauthorized use in a particular country depends essentially on the national laws of that country. Nonetheless, most countries do offer copyright protection to foreign works under certain conditions and these conditions have been greatly simplified by international copyright treaties and conventions.<sup>27</sup>

In this chapter, this thesis is going to explore whether and if so, to what extent the above-mentioned treaties establish an international standard of fair use.

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<sup>25</sup> WIPO website, <http://www.wipo.int/about-wipo/en/>, accessed on 07 February 2005

<sup>26</sup> *Ibid.*

<sup>27</sup> Website of the Coalition for Networked Information, <http://www.cni.org/docs/info.policies/US.Copyright.Basics.html>, accessed on 25 August 2004

## **B.2 International Treaties**

### ***B.2.1 The Berne Convention of 1886***

The Berne Convention was concluded in 1886 and is based on two principles, the 'principle of national treatment' and 'the principle of minimum rights'.<sup>28</sup> While the former principle means that foreign nationals of member states of the convention are to be treated equally to nationals of the member state in question, the latter grants certain minimum rights to authors who are protected under the Convention. The Convention has been revised several times<sup>29</sup>, with the most recent revision known as the Paris Act of 1971. South Africa became party to the Convention on 3 October 1928.<sup>30</sup> The Convention is administered by WIPO.

The Berne Convention has contained provisions dealing with exceptions since its inception, however, by the time of the Stockholm Conference of 1967 the scope of exceptions to copyright-holders' rights had minimised considerably.<sup>31</sup> The Convention does not contain an explicit fair use provision. Rather, Article 9 (2) states broadly that each country of the Union may provide for the unauthorized reproduction of copyrighted works so long as such a reproduction does not "unreasonably prejudice the legitimate interests of the author." However, the imprecision of Article 9 (2) and the fact that it gives national tribunals far reaching discretion in determining what uses

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<sup>28</sup> Sterling, *supra* note 7, at 1.14

<sup>29</sup> Revised at Berlin on 13 November 1908; at Berne on 20 March 1914; at Rome on 02 June 1928; at Brussels on 26 June 1948; at Stockholm on 14 July 1967; at Paris on 24 July 1971

<sup>30</sup> South Africa became party to the Brussels Act to the Convention on 01 August 1951 and to Articles 22-38 of the Paris Act to the Convention on 24 March 1974

<sup>31</sup> Okediji, *supra* note 22, at 106

are permissible establish - to a certain extent - a fair use provision in international copyright law.<sup>32</sup>

Article 9 provides:

#### **Article 9**

##### ***Right of Reproduction:***

##### **1. Generally; 2. Possible exceptions; 3. Sound and visual recordings**

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

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

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 9 (2) established the so-called "three-step-test"<sup>33</sup> to strike a balance between private and public interests.<sup>34</sup> Accordingly, the reproduction of a work is permissible:

- 1) in **certain special cases**,
- 2) if it does **not conflict with the normal exploitation of the work**, and
- 3) if it does **not unreasonable prejudice the legitimate interests of the author**.

The three-step test has appeared in several treaties since then and might therefore be regarded as a general principle for exceptions to the author's or

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<sup>32</sup> *Ibid.* at 113

<sup>33</sup> Leaffer 'The uncertain future of fair use in a global information marketplace' 62 *Ohio State Law Journal* (2001) 860

<sup>34</sup> *Ibid.*

copyright-holder's rights. Yet this approach needs to be scrutinised and Section B.3 is going to deal with the three-step test in some detail.

In addition, Articles 10 and 10<sup>bis</sup> establish certain "free use" exceptions to the reproduction right<sup>35</sup>, e.g. for quotations and illustrations for teaching.

### **B.2.2                      *The TRIPS Agreement of 1995***

On 01 January 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) came into force. The Agreement was added to the General Agreement on Tariffs and Trade (GATT) at the end of the Uruguay Round of trade negotiations in 1994 after forceful lobbying by the United States accompanied by the EU, Japan and other first world states. TRIPS marked a milestone in the development of intellectual property in the 20<sup>th</sup> century.<sup>36</sup> In addition to the broad scope of the Agreement, TRIPS contains detailed rules regarding the issue of enforcement.

The Agreement's general goals are highlighted in the Preamble and include the reduction of

"distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."

Despite the recognition of the lack of certainty with regard to an international fair use doctrine during the drafting process of the TRIPS Agreement, the final

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<sup>35</sup> See *infra*, Appendix G.2

<sup>36</sup> Gervais, *The TRIPS Agreement – Drafting History and Analysis* (2003), 1.01

version of the Agreement failed to add any certainty.<sup>37</sup> Article 13 of the TRIPS Agreement is derived from Article 9 (2) of the Berne Convention and also contains the above-mentioned three-step test, which will be discussed below.<sup>38</sup>

Article 13 of the TRIPS Agreement reads as follows:

**Article 13 TRIPS  
Limitations and Exceptions**

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Hence, Article 13 applies to exceptions of any exclusive right of the author, whereas Article 9 (2) of the Berne Convention only applies to the right of reproduction. Failure to comply with any one of the three conditions – certain special cases, no conflict with the normal exploitation and no unreasonable prejudice to legitimate interests - results in the Article 13 exception being disallowed.<sup>39</sup>

However, when interpreting the scope of Article 13 of TRIPS, Articles 2 (2)<sup>40</sup> and 9 (1)<sup>41</sup> of TRIPS need to be considered to avoid tension between these two treaties. *Inter alia*, Article 9 (1) of TRIPS incorporates the three-step test of Article 9 of the Berne Convention as well as Article 20 of the Berne Convention into the TRIPS Agreement.

Article 20 of the Berne Convention reads:

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<sup>37</sup> Newby 'What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?' 51 *Stanford Law Review* (1999) 1648

<sup>38</sup> See *infra*, Section B.3

<sup>39</sup> Jackson 'Harmony or discord? The pressure toward conformity in international copyright', 43 *IDEA: The Journal of Law and Technology* (2003) 633

<sup>40</sup> See *infra*, Appendix G.3

<sup>41</sup> *Ibid.*

**Article 20 of the Berne Convention  
Special Agreements Among Countries of the Union**

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

Thus, it has been suggested to interpret Article 13 of TRIPS as an additional requirement for exceptions to exclusive rights. Accordingly, limitations which are consistent with the Berne Convention can, in addition, be examined under consideration of the three-step test of TRIPS.<sup>42</sup> Yet, this complex interaction between the Berne Convention and TRIPS does not apply for rights which were newly introduced by the TRIPS agreement as the Berne Convention does not provide any provisions in this regard and, therefore, a conflict in the meaning of Section 20 of the Berne Convention can simply not arise.

The TRIPS Agreement imposes minimum standards for intellectual property rights on all WTO members. However, in order to raise these standards, developed countries – chiefly the United States of America – increasingly negotiate bilateral and regional agreements with developing and other developed countries (so-called TRIPS plus agreements). One example for such an agreement is the Free Trade Agreement (FTA), which is currently negotiated between the US and the Southern African Customs Union (SACU<sup>43</sup>)<sup>44</sup>.

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<sup>42</sup> Senftleben, *Copyright, Limitations and the Three-Step Test* (2004), 90

<sup>43</sup> SACU comprises Botswana, Lesotho, Namibia, South Africa and Swaziland

<sup>44</sup> For more information on that matter see the official South African and American websites, <http://www.thedti.gov.za/fta/article.htm> and [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Southern\\_Africa\\_FTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Section_Index.html)

**B.2.3                      The WIPO Copyright Treaty of 1996**

In 1996, the so-called 'Internet-Treaties' – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)<sup>45</sup> – were signed in Geneva, Switzerland. The Treaties were intended to give an adequate response on the level of international copyright legislation to the challenges raised for copyright by digitizing and the Internet.<sup>46</sup> On 6 March 2002 the WCT entered into force, after being ratified by 30 contracting parties. As a "special agreement" in the meaning of Article 20 of the Berne Convention it binds parties to the Berne Convention.<sup>47</sup>

Regarding the matter of limitations and exceptions to the authors' rights, the final version of Article 10 of the WIPO Copyright Treaty merely repeats the language contained in TRIPS Article 13 and Berne Article 9(2).

**Article 10  
Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 10 of the WCT expressly confirms the approach mentioned above for the relationship between Berne and TRIPS. While Article 10 (1) establishes a three-step test requirement for limitations and exceptions newly granted

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as well as the website of the Trade Law Center of South Africa (tralac)  
<http://www.tralac.org/scripts/content.php?id=1646>, all accessed on 10 February 2005

<sup>45</sup> The WPPT will not be examined within this thesis. However, Article 16 of the WPPT resembles Article 10 of the WCT

<sup>46</sup> Ficsor, *The Law of Copyright and the Internet* (2003), vii.

<sup>47</sup> See Article 1 (1) of the WCT

under the WCT, Article 10 (2) WCT provides for the additional consideration of the three-step test for rights assigned by the Berne Convention.<sup>48 49</sup>

### **B.3 The Three-step test**

As shown above, the so-called three-step test<sup>50</sup> appears in the Berne Convention (Article 9 (2)) as well as in the TRIPS Agreement (Article 13), the WIPO Copyright Treaty (Article 10) and the WIPO Performances and Phonograms Treaty (Article 16). Moreover, it made another appearance in European legislation, namely in Article 5 (5) of the EU Copyright Directive of 2001.<sup>51</sup> Over the years, the scope of application of the doctrine has broadened significantly from a rule of referral in the Berne Convention to a mandatory rule in both TRIPS and the WIPO Copyright Treaty.<sup>52</sup>

Despite its incorporation in a number of important intellectual property treaties, no significant degree of agreement existed with regards to

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<sup>48</sup> Senftleben, *infra* note 42, at 97

<sup>49</sup> The Agreed Statement concerning Article 10 WCT stipulates:

"It is understood that the provisions of Article 10 permit Contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10 (2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." (WIPO Doc. CRNR/DC/96, 3)

<sup>50</sup> This thesis intends to outline the *status quo* of the legal discussion regarding the three-step test. For a comprehensive treatise on this issue see Senftleben, *supra* note 42

<sup>51</sup> Directive 2001/29/EC, see *infra*, Section G.6.1. The three-step test also appeared in Article 6 (3) of the Computer Program Directive (91/250/EEC) and Article 6 (3) of the Database Directive (96/9/EC)

<sup>52</sup> Heide 'The Berne Three-Step Test And The proposed Copyright Directive' 21 *European Intellectual Property Review* (1999) 105

the actual meaning of the test<sup>53</sup> since none of the Conventions defines itself what constitutes

- (1) a 'special case',
- (2) a 'normal exploitation of the work', or
- (3) 'prejudice the legitimate interest of the rightholder'.

According to Article 33 (1) of the Berne Convention, disputes regarding the interpretation and application of the Convention may be brought before the International Court of Justice. However, this possibility has never been used.<sup>54</sup>

The report of the Main Committee I of the 1967 Stockholm Diplomatic Conference offered at least some guidance on how to interpret this Article 9 (2) of the Berne Convention:<sup>55</sup>

"The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment."<sup>56</sup>

In addition to the report, three leading commentators had offered analyses of the three-step test in the context of the Berne Convention before the year 2000. First and foremost Professor Ricketson in his treatise 'The Berne

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<sup>53</sup> *Ibid.*

<sup>54</sup> Oliver 'Panel Discussion: Copyright in the WTO: The Panel Decision on the Three-Step Test' 25 *Columbia Journal of Law & the Arts* (2002) 134

<sup>55</sup> Ficsor, *supra* note 46, at C10.02

Convention: 1886-1986'; Claude Masouyé in the 'WIPO Guide to the Berne Convention'; and Desbois/Françon/Kéréver in 'Les Conventions Internationales du Droit d`Auteur et des Droits Voisins'.

In 2000, for the first time a supra-national body ruled on the interpretation and application of the three-step test in the context of Article 13 TRIPS<sup>57</sup> after the European Union had filed a complaint with the WTO Dispute Resolution Panel ("the Panel")<sup>58</sup>, claiming that Section 110 (5) (a) and (b) of the US Copyright Act<sup>59</sup> - the so-called homestyle exception and the so-called business exception - violates the TRIPS Agreement since it creates too broad an exception to the public performance right.<sup>60</sup> In this context the Panel dealt, *inter alia*, with the meaning of the three-step test contained in Article 13 of the TRIPS Agreement and extensively analyzed each of the steps. The decision provided valuable guidance to legislatures enacting legislation to comply with the three-step test and to those interpreting existing legislation.<sup>61</sup> The limited precedent value of the Panel's decision should, however, be borne in mind as the decision binds only the parties to the legal proceedings. Neither other member states nor domestic courts are bound by the decision; even a later Panel would arguably not be legally obliged to follow that decision.<sup>62</sup>

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<sup>56</sup> Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967. Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: articles 1 to 20). As reproduced in the Berne Convention Centenary, 197

<sup>57</sup> Oliver, *supra* note 54, at 124.

<sup>58</sup> For a detailed examination of the panel decision and a brief outline of the WTO dispute settlement procedure see Oliver, *supra* note 54, at 119 et seq.

<sup>59</sup> See Appendix G.5

<sup>60</sup> Jackson, *supra* note 24, at 632

<sup>61</sup> Oliver, *supra* note 54, at 170

<sup>62</sup> *Ibid.* at 133.

In the following, each of the three steps will be scrutinized under consideration of prior interpretations by the above-mentioned authorities and the WTO Panel's decision. According to the Panel, all three steps of the three-step test apply cumulatively and a failure to apply with one of the three steps results in the exception being disallowed.<sup>63</sup>

### **B.3.1 "Certain special cases"**

Before the Panel's decision, only Professor Ricketson had presented a detailed analysis of the first step.<sup>64</sup> He distinguished two elements. Firstly, the exception must be for a specific purpose and a broad exception would not be allowed; secondly, an exception must be justified by some "clear reason of public policy or some other exceptional circumstance"<sup>65</sup> (special purpose). Ricketson called the latter element a normative element and justified his claim for such an element basically on the ground that a higher degree of normative meaning is attached to the term "special" than it is to terms "particular" or "specific".<sup>66</sup>

The WTO Panel noted Ricketson's interpretation<sup>67</sup> but did not adopt his second element. The panel considered several dictionary definitions of "certain"<sup>68</sup> and "special"<sup>69</sup> and finally stated that

"the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its

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<sup>63</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.97

<sup>64</sup> Ginsburg 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' *Revue Internationale du Droit d'Auteur* (2001) 187 et seq.

<sup>65</sup> Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), 9.6.

<sup>66</sup> Ginsburg, *supra* note 64

<sup>67</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.111.

<sup>68</sup> Such as "determined, fixed, not variable; definitive, precise exact" according to the New Shorter Oxford English Dictionary, 364.

<sup>69</sup> Such as "having an individual or limited application or purpose" according to the New Shorter Oxford English Dictionary, 2971.

scope and reach. On the other hand a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgement on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition."<sup>70</sup>

In his 2003 WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, Ricketson commented on the Panel's decision and admitted:

"Furthermore, although the WTO Panel on the 'homestyle' exception used the adjectives 'exceptional' and 'distinctive' in this context [...], it nonetheless took some pains to indicate that it was not thereby equating the term 'certain special cases' with 'special purpose'. While the Panel was dealing here with a different international agreement, namely TRIPS, the language of Article 13 is the same as Article 9 (2) and a number of commentators have argued that the first step should receive the same interpretation under both instruments. Thus, Professor Ginsburg has argued cogently that the phrase "certain special cases" should not receive a normative interpretation, noting that the purpose behind any given exception will fall to be tested by the second and third steps of the test in any event, i.e. whether it conflicts with the normal exploitation of the work and whether it is unreasonably prejudicial to the legitimate interests of the author. There is also some support for this approach on the drafting history of Article 9 (2), and it is therefore submitted that the preferable view is that the phrase "certain special cases" should not be interpreted as requiring that there should also be some "special purpose" underlying it."<sup>71</sup>

Yet, some scholars annotated that the Panel's decision could be interpreted in a way that a special purpose is required but its legitimacy is for the member state to decide.<sup>72</sup>

### **B.3.2** *"Not conflict with a normal exploitation of the work"*

Before the WTP Panel decision, Ricketson commented on the second step of the three-step test and mentioned that common sense indicates that "normal

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<sup>70</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.112

<sup>71</sup> Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), 22

exploitation" simply refers to "the ways in which an author might reasonably be expected to exploit his work in the normal course of events."<sup>73</sup> In this regard the nature of the work might become an issue.<sup>74</sup> Ricketson's statement, that no conflict with the normal exploitation might exist when "there is no realistic possibility that the copyright owner would be able to enforce her rights..."<sup>75</sup> was contested by Professor Goldstein. Goldstein observed an obvious circularity within this argumentation. He argued that

"an author will normally exploit a work only in those markets where he is assured of legal rights; by definition, markets for exempted uses fall outside the range of normal exploitation. Consequently, it might be thought that to expand an exemption is to shrink the 'normal market', while to expand the definition of 'normal market' is to shrink the permitted exception."<sup>76</sup>

Neither the WIPO Guide to the Berne Convention nor the Desbois/Françon/Kéréver treatise offered substantial guidance of what constitutes a "normal" exploitation<sup>77</sup>, but a report of the Swedish government and the Bureaux for the Protection of Intellectual Property (BIRPI)<sup>78</sup> prepared for the 1967 Stockholm Revision Conference of the Berne Convention stated that "all forms of exploiting a work which have, or are likely to acquire, considerable economic or practical importance, must be reserved to authors."<sup>79</sup>

The Panel's decision brought further clarification.

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<sup>72</sup> Oliver, *supra* note 54, at 149

<sup>73</sup> Ricketson, *supra* note 65, at 483

<sup>74</sup> *Ibid.* at 9.7.

<sup>75</sup> Cited in Ginsburg, *supra* note 64

<sup>76</sup> Goldstein, *International Copyright: Principles, Law and Practice* (2001), § 5.5.

<sup>77</sup> Ginsburg, *supra* note 64

<sup>78</sup> The predecessor organisation to WIPO

<sup>79</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.179 (quoting Document S/1: Berne Convention; Proposals for Revising the Substantive Copyright Provisions (articles 1 - 20) Prepared by the Government of Sweden with the assistance of BIRPI, p. 42).

First of all, the Panel defined the term "exploitation" as "making use of" or "utilizing for one's own ends".<sup>80</sup> In the following, the Panel went on to determine what constitutes a "normal" exploitation and it stated that the meaning of the term "normal exploitation" contains two elements, one of empirical and one normative nature.<sup>81</sup> Based on Article 31 of the Vienna Convention, the Panel developed a harmonious interpretation which gave meaning and effect to both elements.<sup>82</sup>

With regard to the *empirical connotation*, the panel emphasized that in considering the "work", each right must be considered individually<sup>83</sup> and that a "possible conflict with a normal exploitation of a particular exclusive right cannot be counterbalanced or justified by the mere fact of the absence of conflict with a normal exploitation of another exclusive right, even if the exploitation of the latter right would generate more income."<sup>84</sup> Subsequently, the Panel turned to the question whether a particular use constitutes a "normal exploitation". In this respect it noted the above-mentioned<sup>85</sup> argumentation by Ricketson, to rely on "the ways in which an author might reasonably be expected to exploit his work in the normal course of events"<sup>86</sup>. The Panel went on to adopt the US' approach for the empirical connotation of "normal" to ask whether "there are areas of the market in which the copyright

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<sup>80</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.165.

<sup>81</sup> *Ibid.* at para. 6.166

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at para. 6.173

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* at para. 6.176

<sup>86</sup> Ricketson, *supra* note 65, at 483

owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exception."<sup>87</sup>

For the *normative connotation* of "normal" the Panel found "persuasive guidance" in the study group report mentioned earlier and stated that "one way of measuring the normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."<sup>88</sup>

Finally, the Panel concluded with regard to the second element of the three-step test,

"that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work..., if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains."<sup>89</sup>

In this context, both actual and potential effects should be considered.<sup>90</sup>

### ***B.3.3 "Not unreasonably prejudice the legitimate interests of the right-holder"***

With regard to the question, what kind of interests qualify as "legitimate interest" in the meaning of the three-step test's last step, some scholars stated the need to include the economic interests represented by copyright

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<sup>87</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.177-6.178.

<sup>88</sup> *Ibid.* at para. 6.180.

<sup>89</sup> *Ibid.* at para. 6.183.

<sup>90</sup> *Ibid.* at para. 6.185.

holders.<sup>91</sup> Moreover, it has been suggested that "legitimate interests" should be determined by considering the Preamble of the Berne Convention and its mentioning of the "rights of authors". Thereby, the scope of "legitimate interests" would be limited to those interests held by prior authors against later ones.<sup>92</sup>

Prior to the Panel's decision scholars already agreed that a criterion of "reasonableness" is needed within the third step since every exception will to some extent cause prejudice.<sup>93</sup> According to Ricketson, it has to be ultimately determined by each national law under which circumstances unreasonable prejudice exists. However, prejudice may not be unreasonable if the author is equitably compensated<sup>94</sup>, e.g. through a compulsory license. The records of the Stockholm Conference seem to suggest a further balancing test within the third step when it is stated in that context that there "was the considerable difficulty of finding a formula capable of safeguarding the legitimate interests of the author while having a sufficient margin of freedom to the national legislation to satisfy important social or cultural needs."<sup>95</sup>

Regarding the third condition, the WTO Panel first noted that an analysis needs to be done in several steps. Firstly, it is necessary to define the "interests" of the right holders at stake and to clarify which attributes make these interests "legitimate". Secondly, the term "prejudice" needs to be

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<sup>91</sup> Nordemann *et al.*, *International Copyright and Neighbouring Rights Law* (1990), 109

<sup>92</sup> Heide, *supra* note 52, at 106 citing Geller 'Legal Transplants in International Copyright: Some Problems of Method' 13 *Pacific Basin Law Journal* (1994) 224

<sup>93</sup> Ginsburg, *supra* note 64

<sup>94</sup> Ricketson, *supra* note 65, at 9.8

<sup>95</sup> *Records* 1967, Vol. I, 113

interpreted and what amount of it reaches a level that should be qualified as "unreasonable".<sup>96</sup>

In the following the Panel considered the dictionary meanings of "interests"<sup>97</sup> and "legitimate"<sup>98</sup> as well as "prejudice"<sup>99</sup> and lastly examined the question, which degree of prejudice should be considered as "unreasonable". The Panel held in this regard that "prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."<sup>100</sup>

Moreover, the Panel stated that it could not find any indication that "the assessment of whether the prejudice [...] is of unreasonable level"<sup>101</sup> should be limited to the right holders of the complainants' country, especially since prior WTO Panel decisions held that a complaining party has no obligation to show its legal interest as a prerequisite for requesting a Panel.<sup>102</sup>

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<sup>96</sup> *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.222

<sup>97</sup> The Panel stated (*United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.223):

"the ordinary meaning of the term "interests" may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of "interests" is not necessarily limited to actual or potential economic advantage or detriment."

<sup>98</sup> The Panel noted in this regard (*United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.224):

"The term "legitimate" has the meaning of (a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper; (b) normal, regular, conformable to a recognized standard type."

<sup>99</sup> Accordingly, the "ordinary meaning of 'prejudice' connotes damage, harm or injury." See *United States – Section 110 (5) of the US Copyright Act*, document WT/DS160/R para. 6.225

<sup>100</sup> *Ibid.* at para. 6.229

<sup>101</sup> *Ibid.* at para. 6.231

<sup>102</sup> *Ibid.*

Furthermore, the Panel cited and agreed with the above-mentioned opinion that a serious loss of profit for the copyright holder should be compensated, e.g. through a system of compulsory licensing with equitable remuneration.<sup>103</sup>

#### **B.4 Conclusion**

So far, the absence of an international standard for fair use in the major multilateral treaties dealing with copyright has been shown. However, the three-step test can – from the author's view - be regarded as a general principle for exceptions under most of the relevant treaties – namely the Berne Convention, the TRIPS Agreement, and the WCT.

### ***C Comparison with other countries***

Due to the lack of an international standard for fair use, an analysis of the legal situation in other countries and regions - namely South Africa's major trading partners U.S.A., Europe (European Union/Germany/United Kingdom) and Australia - is indicated. This is done in order to analyse whether or not their approaches can either be adopted by South Africa or, at least, serve as a model.

In principle, national laws introduced either open-ended provisions or so-called "closed lists". Some countries, however, chose the midway, with the definition of certain exceptions within specific categories on the one hand and several broader provisions for other kinds of fair uses on the other hand.

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<sup>103</sup> *Ibid.* at para. 6.229

The legislation of the United States of America will serve as an example for the usage of open-ended provisions, while the legislation of the European Union in form of the EC Copyright Directive<sup>104</sup> will be used to illustrate the "closed-list"-approach. However, the different implementations of the Directive into national laws by the Member States of the European Union necessitate a detailed examination of some of these national laws. Lastly, the Australian legislation will be used to demonstrate the indicated midway between the approach with open-ended provisions and the "closed lists"-approach.

## **C.1 United States of America**

"The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"

(The United States Constitution, Article I Section 8 Clause 8)

### ***C.1.1 Overview***

In the United States of America, Justice Story first promulgated the fair use doctrine in *Folsom v. March*<sup>105</sup> in 1841. The defendant, who had written a biography of George Washington, was sued for using excerpts of letters from the plaintiff's copyrighted and published biography of the first president. The question arose over the copyright in certain letters of George Washington and Justice Story stated in this context:

"in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

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<sup>104</sup> Directive 2001/29/EC, often referred to as the "InfoSoc Directive"

<sup>105</sup> *Folsom*, 9 Fed. Cas. at 348

[...] The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs.<sup>106</sup>

Story's fair use commentary has continued to shape the doctrine to this day.

Nowadays, the judicially created fair use exception has its statutory basis in Section 107 of the Copyright Act of 1976<sup>107</sup>. As codified, the fair-use defence is a limitation on all of the exclusive rights of the copyright holder. Under the Copyright Act four nonexclusive<sup>108</sup> factors are to be considered to determine whether a particular action qualifies as fair use. These factors were intended to give further guidance to the courts in this matter rather than to restrict courts' application of the fair use exception to a fixed, four-part test.<sup>109</sup> The House Report, which accompanied Section 107 stated:

"Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts<sup>110</sup>...

The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute,

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<sup>106</sup> *Folsom*, 9 Fed. Cas. at 348

<sup>107</sup> Certain additional specific provisions are made for fair use in various fields; see for example Section 117 of the US Copyright Act of 1976. Section 117 provides *inter alia*:

(a) Making of Additional Copy or Adaptation by Owner of Copy.—

Notwithstanding the provisions of Section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

However, this thesis will focus on Section 107 of the US Copyright Act of 1976.

<sup>108</sup> US H.R. Rep. No. 94-1476, at 66 (1976)

<sup>109</sup> Goldberg 'A Proposal for an International Licensing Body to Combat File Sharing and Digital Copyright Infringement' 8 *Boston University Journal of Science & Technology Law* (2002) 283

<sup>110</sup> US H.R. Rep. No. 94-1476, at 65 (1976)

especially during a time of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."<sup>111</sup>

Section 107 of the Copyright Act of 1976 provides as follows:

**Section 107**  
**Limitations on exclusive rights:**  
**Fair use**

Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Section 107 is thus open-ended and has the advantage of being flexible when it comes to new kinds of uses.<sup>112</sup> The use of the word "shall" in Section 107 indicates that the courts must, as a minimum, consider these four factors in their fair use analysis.<sup>113</sup>

On the other hand however, the uncertainty of fact-specific inquiries that are required in copyright infringement cases complicates a consistent and

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<sup>111</sup> *Ibid.* at 66

<sup>112</sup> Ricketson, *supra* note 71, at 68

<sup>113</sup> Newby, *supra* note 37, at 1639

predictable application of the fair use doctrine in the United States.<sup>114</sup> Courts and commentators have attempted to refine the analysis of the four factors in an effort to bring greater uniformity and predictability to the application of this doctrine of "equitable reason"<sup>115</sup>. But despite all efforts, the fair use is still a doctrine that courts apply on a case-by-case basis. The US House Report No. 94-1476, 94th Cong., 2d Sess. 52-53 (1976) for the Copyright Act of 1976 even stated that "no generally applicable definition is possible, and each case raising the question must be decided on its own facts."<sup>116</sup>

### **C.1.2                                    *The four factors in Section 107 of the US Copyright Act***

#### **C.1.2.1 "Purpose and Character of Use"**

With regard to the first factor, courts first and foremost distinguished between uses for commercial purposes and uses for non-commercial purposes. While a non-commercial use repeatedly promoted the finding of fair use, commercial uses often militated against the application of the fair use doctrine.<sup>117</sup>

Secondly, courts distinguished between transformative uses, such as commentaries and parodies, and non-transformative uses. The Supreme Court defined "transformative" work as a work which "supersedes the objects of the original [...] or [...] adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>118</sup> In general, courts favoured transformative uses within the context of fair use. However, courts acknowledged in several cases the fairness of

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<sup>114</sup> Beldiman *The Role of Copyright Limiting Doctrines in the Digital Age – Can Their Vigor be Restored?* paper in possession of author, 7

<sup>115</sup> US H.R. Rep. No. 94-1476, at 65 (1976)

<sup>116</sup> *Ibid.* See also *id.*, at 66 ("[T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute")

<sup>117</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)

many not transformative uses, especially when these uses had an educational and/or other non-commercial purpose.

Finally, courts distinguished between the public interest in access to factual or historical content of the copyrighted work itself and the protectable expression of the work. Courts have looked unfavourably upon the duplication of copyrighted modes of expression since U.S. copyright law intends to protect creative expression and not facts and ideas.<sup>119</sup>

#### **C.1.2.2 "Nature of the Copyrighted Work"**

Regarding the second factor, which focuses on the work that has been copied, courts have provided unpublished works with greater protection than published works to preserve the author's right to control the first public appearance of his expression.<sup>120</sup> Moreover, courts stated that the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.<sup>121</sup> Therefore, copying of factual works is generally more readily accepted as a fair use than is the unauthorized copying of a publication that is non-factual in nature.<sup>122</sup> However, it has to be considered that

"[even] within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case."<sup>123</sup>

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<sup>118</sup> *Campbell v Acuff-Rose Music Inc.* (114 S.Ct. 1164 at 1171 (1994)).

<sup>119</sup> Duhi 'Old Lyrics, Knock-Off Videos, And Copycat Comic Books: the Fourth fair Use Factor in U.S. Copyright Law' 54 *Syracuse Law Review* (2000) 684- 685.

<sup>120</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985)

<sup>121</sup> *Ibid.* at 563.

<sup>122</sup> Smit "'Make A Copy For The File ...": Copyright Infringement by Attorneys' 46 *Baylor Law Review* (1994) 12

<sup>123</sup> Gorman 'Fact or Fancy? The Implications for Copyright' 29 *Journal of the Copyright Society of the USA* (1982) 560-561

### C.1.2.3 "Amount and Substantiality of Portion Used"

The analysis of the third factor requires examination of the quality as well as the quantity of what was taken.<sup>124</sup> This factor has further significance for two other factors;<sup>125</sup> first, the extent of permissible copying varies with the purpose and character of the use as determined in the first factor, second, it can help to measure the likely impact on the market for the copyrighted work under factor four ("market effect").<sup>126</sup> Courts repeatedly used percentages to express the amount of the copying, which does not help any further, since no percentage can be called a bright line by now. However, previous court decisions clarified that even the copying of a small portion<sup>127</sup> might constitute a copyright infringement if this particular part is determined to be the "heart" of the work.<sup>128</sup> Additionally, courts repeatedly examined in the context of the third factor whether a substantial similarity between the original work and its copy existed.<sup>129</sup>

### C.1.2.4 "The Effect of Use Upon the Potential Market"

The fourth factor in Section 107 of the US Copyright Act is arguably<sup>130</sup> the most important element of fair use.<sup>131</sup> Its actual meaning remains highly disputed but the general rule continues to be that a use of copyrighted work that has

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<sup>124</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, *supra* note 120, 564-566

<sup>125</sup> Leval 'Toward a Fair Use Standard' 103 *Harvard Law Review* (1990) 1123

<sup>126</sup> *Ibid.*

<sup>127</sup> However, copying of a small portion, which is not essential, is arguably not even copyright infringement according to the *de minimis* doctrine, which will not be discussed in this thesis.

<sup>128</sup> Hawke, *Computer and Internet Use on Campus* (2001), 18 citing *Harper & Row Publishers Inc. v. Nation Enterprises*

<sup>129</sup> See, e.g., *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271-1273 (11th Cir. 2001)

<sup>130</sup> It has, however, been suggested by several courts that the Supreme Court may have now abandoned this view and considers no factor to be more important than another.

<sup>131</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, *supra* note 120 at 566

an adverse impact on the economic interests of the copyright holder will not constitute fair use.<sup>132</sup>

### **C.1.3** *The Interpretation of fair use by the US Supreme Court*

Apparently, the Supreme Court dealt with the question of fair use four times since 1976.

#### **C.1.3.1 Sony Corp. of America v. Universal City Studios, Inc<sup>133</sup>**

In *Sony Corp. of America v. Universal City Studios, Inc*, the holder of copyrights in television programmes (Universal City Studios, Inc) sued Sony as the creator, manufacturer and seller of Betamax video tape recorders ("VTRs") for contributory infringement of copyright. The VTR allowed people to videotape broadcasts and play them back at a later time (so-called "timeshifting"). The Supreme Court held that: (1) the manufacturer of a device that is capable of being used to violate copyright laws is liable for contributory infringement only if the device is not suitable for any substantial non-infringing use<sup>134</sup>; and (2) time-shifting copyrighted programs for private home use as a non-commercial, nonprofit activity is fair use.<sup>135</sup> Based on these findings, the Supreme Court found that the making of individual copies of complete television programmes for home use qualifies as fair use and that the production of devices to facilitate that is, therefore, legal.

#### **C.1.3.2 Harper & Row Publishers v. Nation Enterprises<sup>136</sup>**

In *Harper & Row Publishers v. Nation Enterprises*, the copyright holder of former US President Ford's unpublished memoirs (Harper & Row Publishers)

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<sup>132</sup> Hawke, *supra* note 128, at 18

<sup>133</sup> 464 U.S. 417 (1984)

<sup>134</sup> *Ibid.* at 442

<sup>135</sup> *Ibid.* at 455

<sup>136</sup> 471 U.S. 539 (1985)

negotiated a prepublication licensing agreement with Time Magazine. Shortly before the Time Article's scheduled release, The Nation Magazine obtained an unauthorized manuscript of the memoirs and published an Article, extensively quoting portions of the manuscript, including passages relating to Ford's pardon of Richard Nixon. As a result, Time Magazine cancelled the contract with Harper and Row Publishers.

The Supreme Court held that The Nation's Article was not fair use sanctioned since the use of the material was not justifiable under any of the four factors in Section 107 of the US Copyright Act. According to the Supreme Court's decision, the Nation went beyond simply reporting uncopyrightable news-information when it made a news event out of its unauthorized first publication.<sup>137</sup> The commercial nature of the publication was another factor tending to weigh against a finding of fair use.<sup>138</sup> The Supreme Court noted that the unpublished nature of a work is a key, though not necessarily the determinative factor tending to negate a defence of fair use.<sup>139</sup> Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.<sup>140</sup> The Supreme Court stated that the "right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form to publish a work."<sup>141</sup> Moreover, the Supreme Court stated, that despite the fact that the quotes in question were an insubstantial portion of

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<sup>137</sup> *Ibid.* at 561 (1985)

<sup>138</sup> *Ibid.* at 562

<sup>139</sup> *Ibid.* at 564

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

the Ford manuscript<sup>142</sup>, they nevertheless played a key role in the infringing article, since these words constituted "the heart of the book" as they dealt with Nixon's pardon.<sup>143</sup> Lastly, the usage was considered by the Supreme Court to have a prejudicial effect on the market for the memoirs.<sup>144</sup>

### C.1.3.3 *Stewart v. Abend*<sup>145</sup>

In *Stewart v. Abend*, director Alfred Hitchcock, actor Jimmy Stewart, and a company called MCA (the petitioners) entered during the first half of the 1970s into a license with ABC to broadcast and rebroadcast their film "Rear Window". That film was largely based on Cornell Woolrich's story "It Had to be Murder". Hitchcock and Stewart had obtained the motion picture rights in "It Had to Be Murder" in 1953/54. However, Woolrich had died in 1968 - two years before the original copyright term expired - and his executors had renewed the copyright after Woolrich's death and assigned the rights to Abend, although Woolrich had originally agreed to renew the copyrights in the stories at the appropriate time and to assign the same motion picture rights to the petitioners' predecessor in interest for the 28-year renewal term provided by the Copyright Act of 1909. Abend sued for infringement alleging that the re-broadcasting infringed his copyright in the story because the petitioners' right to use the story during the renewal term lapsed when Woolrich died. The petitioners claimed, *inter alia*, that the film, as a derivative, was a new work and therefore protected by the fair use doctrine.

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<sup>142</sup> "The Nation" had taken only 300 words from Ford's entire manuscript.

<sup>143</sup> 471 U.S. 539 at 565-566 (1985)

<sup>144</sup> *Ibid.* at 567-568

<sup>145</sup> 495 U.S. 207 (1990)

Regarding the fair use defence, the Supreme Court held that the re-broadcasting was unfair because of the following reasons: Firstly, "every [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the holder of the copyright."<sup>146</sup> Secondly, fair use is more likely to be found in factual works than in fictional works.<sup>147</sup> Thirdly, a substantial portion of the copyrighted work was used in the film<sup>148</sup> and fourthly, the re-broadcast "of the film impinged on the ability to market new versions of the story".<sup>149</sup>

#### **C.1.3.4 Campbell v. Acuff-Rose Music, Inc.**<sup>150</sup>

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman". They assigned their rights in it to Acuff-Rose Music, Inc (the respondent). In 1989, a member of the rap music group 2 Live Crew, L. R. Campbell, composed a song called "Pretty Woman", a parody based on Roy Orbison's song. In response to 2 Live Crew's enquiry, Acuff-Rose Music refused permission for the intended use. However, 2 Live Crew produced and released their song. All albums and compact discs identified the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose. Almost a year later, Acuff Rose sued 2 Live Crew and its record company for copyright infringement. In the meantime, nearly a quarter of a million copies of the song had been sold. During the legal proceedings, 2 Live Crew pleaded that their parody qualifies as fair use.

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<sup>146</sup> *Ibid.* at 237

<sup>147</sup> *Ibid.* at 237-238

<sup>148</sup> *Ibid.* at 238

<sup>149</sup> *Ibid.*

<sup>150</sup> 114 S.Ct. 1164 (1994).

In this case the Supreme Court first of all stated that parody, like other comment and criticism, may claim fair use.<sup>151</sup> The Supreme Court emphasized the element of 'transformative' use and ruled that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that weigh against a finding of fair use."<sup>152</sup> However, the Supreme Court stated that all factors of the fair use defence need to be considered. While examining the four factors of Section 107 of the US Copyright Act<sup>153</sup>, the Supreme Court explicitly reversed itself regarding the first factor and stated:

"the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country."

Furthermore, the Supreme Court held with regard to the third factor that it should be borne in mind that it is characteristic for a parody to go to the original's "heart" since it is the heart at which parody takes aim.<sup>154</sup>

Ultimately, the Supreme Court reversed the Sixth Circuit decision, which ruled against fair use, and remanded the case so that the trial court could weigh the uncertain harm to the copyright holder's market.

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<sup>151</sup> *Ibid.* at 1166 (1994)

<sup>152</sup> *Ibid.* at 1171

<sup>153</sup> Act of 1976

<sup>154</sup> 114 S.Ct. 1164 at 1167 (1994)

**C.1.4 Decisive decisions by lower courts**

As shown, the Supreme Court addressed the issue of fair use only four times since 1976 and was in a way reluctant to develop coherent guidelines. Therefore, the task to clarify the doctrine fell mainly upon the lower courts. In the following, the general principles from the most important decisions in this respect will be outlined.<sup>155</sup>

**C.1.4.1 Salinger v. Random House<sup>156</sup>**

A biographer used unpublished letters written by the famous author J.D. Salinger although Salinger had not authorized their reproduction. The Copyright Act<sup>157</sup> explicitly makes all of the rights protected by copyright, including the right of first publication, subject to the defence of fair use. Salinger sued to prevent publication and was successful. The court held that the unauthorized use was not a fair use. First of all, the court considered the unpublished nature of the letters written by Salinger. Furthermore the court stated:

"To deny a biographer [...] the opportunity to copy the expressive content of unpublished letters is not [...] to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported."<sup>158</sup>

**C.1.4.2 Basic Books Inc. v. Kinko's Graphics Corp.<sup>159</sup>**

In this case, the court held that the mere making of unauthorized photocopies of extracts from books for the production of so-called student "coursepacks"

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<sup>155</sup> For further decisions see Sterling, *supra* note 7, at 454 et seq as well as the Stanford University Copyright and Fair Use website:  
[http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-c.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html),  
accessed on 01 October 2004.

<sup>156</sup> 811 F.2d 90 (2d Cir. 1987)

<sup>157</sup> Act of 1976

<sup>158</sup> 811 F.2d 90 at 100 (2d Cir. 1987)

<sup>159</sup> 758 F.Supp 1522 (1991)

does not qualify as fair use, mostly since there is a commercial<sup>160</sup> and no "transformative"<sup>161</sup> use of the material. Moreover, quantitatively<sup>162</sup> and qualitatively substantial portions of the books had been copied<sup>163</sup> and the court observed an unfavourable impact on the plaintiff's book sales.<sup>164</sup> Finally, the court stated that

"[i]n this case an important additional factor is the fact that defendant has effectively created a new nationwide business allied to the publishing industry by usurping plaintiffs' copyrights and profits."<sup>165</sup>

#### **C.1.4.3 Sega Enterprises v. Accolade, Inc.**<sup>166</sup>

In the case of *Sega Enterprises v. Accolade Inc.*, the court had to deal with the process of "reverse engineering" / "decompilation"<sup>167</sup>, carried out by Accolade in order to be able to produce compatible software for Sega's game consoles. In a nutshell, the court established that decompilation qualifies as fair use when this is the only way to get access to the functional elements embodied in the program decompiled, and when there is a legitimate reason for seeking such access.<sup>168</sup> Achieving compatibility with the consoles in question was held to be one such reason. Furthermore, the court noted that copying an entire

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<sup>160</sup> *Ibid.* at 1531-1532

<sup>161</sup> *Ibid.* at 1530-1531

<sup>162</sup> The passages copied ranged from 14 to 110 pages, representing 5.2% to 25.1% of the works  
<sup>163</sup> 758 F.Supp 1522 (1991) at 1533-1534

<sup>164</sup> *Ibid.* at 1534

<sup>165</sup> *Ibid.*

<sup>166</sup> 977 F.2d 1510 (1992)

<sup>167</sup> In *Sega Enterprises v. Accolade, Inc.*, the Supreme Court explained the process of "reverse engineering" as follows (977 F.2d 1510 at 1515 FN 2 (1992)):

"Computer programs are written in specialized alphanumeric languages, or "source code". In order to operate a computer, source code must be translated into computer readable form, or "object code". Object code uses only two symbols, 0 and 1, in combinations which represent the alphanumeric characters of the source code. A program written in source code is translated into object code using a computer program called an "assembler" or "compiler", and then imprinted onto a silicon chip for commercial distribution. Devices called "disassemblers" or "decompilers" can reverse this process by "reading" the electronic signals for "0" and "1" that are produced while the program is being run, storing the resulting object code in computer memory, and translating the object code into source code."

<sup>168</sup> 977 F.2d 1510 at 1527-1528 (1992)

work does not necessarily preclude a finding of fair use<sup>169</sup> and held that permitting a wider range of games to be played on the consoles was unlikely to significantly reduce the sales of Sega.<sup>170</sup>

#### **C.1.4.4 American Geophysical Union v. Texaco Inc.**<sup>171</sup>

In *American Geophysical Union v Texaco Inc*, a researcher employed by Texaco photocopied without authorization from the copyright holder (American Geophysical Union), articles from a scientific journal for his archival use. The court held that the photocopying was not a fair use; the court found three of the four factors weighing against fair use.

The fact that the copied articles were factual weighed in favour of fair use.<sup>172</sup> However, despite the general principle that research is a favourable purpose within the context of fair usage, in this particular case, the ultimate purpose was a commercial one. The ultimate aim was to strengthen Texaco's corporate profits, since the "photocopying [...] could be regarded simply as another 'factor of production' utilized in Texaco's efforts to develop profitable products."<sup>173</sup> Moreover, exact photocopies cannot properly be regarded as being transformative.<sup>174</sup> Regarding the amount of material copied, the court stated that copying one article out of a journal is copying the entire copyrighted work, because each article is an independent work and enjoys independent copyright protection.<sup>175</sup> Finally, the court held that the fourth factor also militated against a finding of fair use. "Primarily because of lost

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<sup>169</sup> *Ibid.* at 1526

<sup>170</sup> *Ibid.* at 1523-1524

<sup>171</sup> 60 F.3d 913 (1994)

<sup>172</sup> *Ibid.* at 925

<sup>173</sup> *Ibid.* at 922

<sup>174</sup> *Ibid.* at 923-924

licensing revenue<sup>[176]</sup>, and to a minor extent because of lost subscription revenue"<sup>177</sup>, the court noted a substantial harm to the value of the infringed copyrights through the researcher's copying.<sup>178</sup>

### **C.1.5 Fair use guidelines**

#### **C.1.5.1 Overview**

Since the doctrine of fair use was embodied into statutory language in the United States in 1976, several guidelines have emerged in an attempt to clarify, explain and define the scope of the doctrine due to the little guidance on how to recognize fair use furnished by legislature and courts.<sup>179</sup> However, none of the guidelines has ever had the force of law as none of them were created by a law-making authority.

The most important fair use guidelines since 1976 are arguably the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions" (Classroom Guidelines) of 1976, the Guidelines for Educational Uses of Music (Music Guidelines) of 1976, the Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes (Off-Air Videotaping Guidelines) of 1981, the National Commission on New Technological Uses of

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<sup>175</sup> *Ibid.* at 925-926

<sup>176</sup> In this context, the court pointed out that the Copyright Clearance Center (a central clearing-house established in 1977 primarily by publishers to license photocopying) provides a practical method for paying fees and securing permissions and the court held that "it is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use, while such an unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use." (60 F.3d 913 at 930 (1994))

<sup>177</sup> 60 F.3d 913 at 931 (1994)

<sup>178</sup> *Ibid.*

<sup>179</sup> For a detailed discussion of this particular matter see Crews 'The Law of Fair Use and the Illusion of Fair-Use Guidelines' 62 *Ohio State Law Journal* (2001) 599-702

Copyrighted Works (CONTU) Guidelines<sup>180</sup> and the Conference on Fair Use (CONFU) Guidelines.

The Classroom Guidelines accompanied the 1976 Copyright Act and permit the reproduction of materials by teachers for distribution to their classes and contain both portion-limitations as well as time-limitations. They were developed with the notions of "brevity", "spontaneity", and "cumulative effect".<sup>181</sup> The Music Guidelines of 1976 addressed the copying of music for

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<sup>180</sup> The CONTU Guidelines, however, do not interpret Section 107 of the US Copyright act and are, therefore, not truly fair use guidelines.

<sup>181</sup> The Guidelines provide the following definitions for brevity, spontaneity and cumulative effect:

**Brevity**

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

**Spontaneity**

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

**Cumulative Effect**

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news Sections of other periodicals.]

instructional purposes.<sup>182</sup> They were created by music educators and music publishers to "state the minimum and not the maximum standards of educational fair use under Section 107 of HR 2223". The guidelines specify five permissible types of copying musical recordings and five prohibited types of copying. The Off-Air Videotaping Guidelines of 1981 do allow, in principle, the off-the-air recording of television broadcasts for later use or performance in classroom teaching in nonprofit educational institutions under certain conditions.<sup>183</sup> In 1979, CONTU issued Guidelines on Photocopying under Interlibrary Loan Arrangements to address the demands of computers and large-scale photocopying.<sup>184</sup> Basically, these guidelines were intended to provide guidance for copyright proprietors and librarians regarding the amount

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<sup>182</sup> Crews, *supra* note 179, at 635-636

<sup>183</sup> The conditions are as follows:

1. The guidelines were developed to apply only to off-air recording by nonprofit educational institutions.

2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a nonprofit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. "School days" are school session days -- not counting weekends, holidays, vacations, examination periods, and other scheduled interruptions -- within the forty-five (45) calendar day retention period.

4. Off-air recordings may be made only at the request of and used by individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcasted.

5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

<sup>184</sup> In particular, CONTU was confronted with Section 108 (g)(2) of the US Copyright Act of 1976, see Crews, *supra* note 179, at 622

of photocopying for use in interlibrary loan arrangements permitted under the copyright law.

#### **C.1.5.2 Conference on Fair Use (CONFU) Guidelines**

In 1993, the Information Infrastructure Task Force (IITF) was formed in the United States by the Clinton administration to fulfil the administration's goal of enhanced public access to information through the National Information Infrastructure (NII).<sup>185</sup> Within one of IITF's committees<sup>186</sup> the Working Group on Intellectual Property Rights (Working Group) was established. The Working Group's mission was to make recommendations on any appropriate changes to the U.S. intellectual property law and policy because of the development of the Internet and related new technologies. One of the issues the Working Group dealt with was fair use. The Working Group published its recommendations in a preliminary draft of its report (Green Paper<sup>187</sup>), and as a result the Conference on Fair Use (CONFU) was initiated in 1994 to "bring together copyright owner and user interests to develop guidelines for fair uses of copyrighted works by and in public libraries and school."<sup>188</sup> CONFU held its first meeting in September 1994 and issued guidelines on the topics multimedia development, the use of digital images, and the transmission of works through distance learning as part of its Final Report, issued in November 1998. These guidelines provide a "safe harbour" for fair use of copyrighted materials.

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<sup>185</sup> For detailed background information see Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, November 1998 [hereinafter: CONFU Final Report] 1 et seq.

<sup>186</sup> The IITF was organized into three committees: the Telecommunications Policy Committee, the Committee on Applications and Technology, and the Information Policy Committee; the Working Group was established within the latter committee.

<sup>187</sup> Information Infrastructure Task Force, Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights (1994)

However, none of these guidelines gained broad support. Nonetheless, a number of institutions chose to follow the CONFU guidelines that did emerge and it is therefore beneficial to briefly highlight the general principles laid down in the guidelines.

The uniform preamble for all fair use guidelines states that

"[t]he purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars and students who wish to digitize copyrighted visual images / who develop multimedia projects using portions of copyrighted works / who wish to use copyrighted works for distance education under fair use rather than by seeking authorization from the copyright owners for non-commercial educational purposes."<sup>189</sup>

**C.1.5.2.1 CONFU Fair Use Guidelines for Distance Learning<sup>190</sup>**

The guidelines address fair use in two contexts<sup>191</sup>:

- (1) live interactive distance learning classes
- (2) faculty instruction recorded without students present for later transmission.

In general, performance or display of another's work may be made in distance learning if (1) the nonprofit faculty or institution has a legal copy of the work<sup>192</sup>; (2) the work is performed or displayed one time<sup>193</sup> as part of class instruction<sup>194</sup>; (3) access is limited to students enrolled in the class over a secure system in a classroom or other similar place normally devoted to

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<sup>188</sup> Green Paper at 134

<sup>189</sup> CONFU Final Report at Appendix G, 1.1

<sup>190</sup> *Ibid.* at Appendix I

<sup>191</sup> *Ibid.* at Appendix I, 2.1

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.* at Appendix I, 5.1

instruction or any other site where the reception can be controlled by the eligible institution<sup>195</sup>; and (4) copies of the transmission are kept only for 15 consecutive days and only for viewing by students enrolled in the course.<sup>196</sup>

The guidelines are intended to address some of the shortfalls of Section 110 (1) and (2) US Copyright Act<sup>197</sup>. They do, however, not cover so-called asynchronous delivery of online course materials<sup>198</sup>, where the material is stored on a server and may be accessed by students at their discretion.<sup>199</sup>

#### ***C.1.5.2.2 CONFU Guidelines on Educational Fair Use for Digital Images***<sup>200</sup>

The CONFU Guidelines on Educational Fair Use for Digital Images stipulate under which circumstances a library or educational institution may make a digital version of an image and make it available for teaching and research.<sup>201</sup> The guidelines do not apply to images acquired in digital form or to images in the public domain.<sup>202</sup>

The general principles laid down in the guidelines are as follows:

(1) an educator may display digital images in face-to-face teaching or for classroom use, after class review, or directed study;<sup>203</sup> (2) students may use digital images in academic course assignments or in fulfilment of degree requirements, may publicly display their work incorporating digital images in courses for which they are registered, and may retain their academic work in

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<sup>194</sup> *Ibid.* at Appendix I, 3.1

<sup>195</sup> *Ibid.* at Appendix I, 4

<sup>196</sup> *Ibid.* at Appendix I, 5.2.1

<sup>197</sup> See *infra*, Appendix G.5

<sup>198</sup> CONFU Final Report at Appendix I, 2.1

<sup>199</sup> Crews, *supra* note 179, at 633

<sup>200</sup> CONFU Final Report at Appendix H

<sup>201</sup> Crews, *supra* note 179, at 634

<sup>202</sup> CONFU Final Report at Appendix H, 1.3

<sup>203</sup> *Ibid.* at Appendix H, 3.1

their personal portfolios for later personal uses;<sup>204</sup> (3) the access to, or display or distribution of, digitized images is limited to the institution's secure electronic network;<sup>205</sup> (4) the access is limited to students enrolled in the class<sup>206</sup>; (5) the duration of digital image collections is limited;<sup>207</sup> (6) a reasonable inquiry is required for the purpose of clearing rights to digitize and use digital images;<sup>208</sup> (7) it is required to credit the sources and to provide the relevant information regarding ownership of copyright;<sup>209</sup> and (8) the integrity of the original images is to be maintained by educators, scholars, and students.<sup>210</sup>

#### ***C.1.5.2.3 CONFU Guidelines of Educational Fair Use in Multimedia Materials***<sup>211</sup>

The CONFU Fair Use Guidelines for Educational Multimedia "apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects which are created by educators or students as part of a systematic learning activity by nonprofit educational institutions."<sup>212</sup>

*Inter alia*, use for face-to-face instruction, class assignments and presentations, remote instruction to students enrolled in curriculum-based courses and located at remote sites over secure, limited access technology, curriculum materials, and student portfolios is - in principle - permitted<sup>213</sup>.

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<sup>204</sup> *Ibid.* at Appendix H, 3.4

<sup>205</sup> *Ibid.* at Appendix H, 2.3.3

<sup>206</sup> *Ibid.* at Appendix H, 3.1.2

<sup>207</sup> *Ibid.* at Appendix H, 2.4

<sup>208</sup> *Ibid.* at Appendix H, 2.4.2; 5.1 and 5.2

<sup>209</sup> *Ibid.* at Appendix H, 5.3

<sup>210</sup> *Ibid.* at Appendix H, 5.7

<sup>211</sup> *Ibid.* at Appendix J

<sup>212</sup> *Ibid.* at Appendix J. 1.3

<sup>213</sup> *Ibid.* at Appendix J. 3

However, the preparation of educational multimedia projects incorporating copyrighted works and the use of such projects are subject to certain limitations regarding time, copying and distribution, and portion. These limitations are listed in Section 4 of the guidelines. According to Section 4.1 and 4.3, educators may use their project for a period of up to two years after the first instructional use with a class and only a limited number of copies may be made of an educator's educational multimedia project. The portion limitations, stated in Section 4.2, are central and read as follows:

- (1) up to 10% or 3 minutes, whichever is less, of copyrighted motion media;
- (2) up to 10% or 1000 words, whichever is less, of copyrighted text material;<sup>214</sup>
- (3) up to 10%, but no more than 30 seconds, of the music and lyrics from an individual musical work;
- (4) a photograph or illustration may be used in its entirety, but no more than 5 images from an artist or photographer or no more than 10% or 15 images, whichever is less, from a collective work;
- (5) up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table.

Moreover, educators and students

"must include on the opening screen of their multimedia project and any accompanying print material a notice that certain materials are included

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<sup>214</sup> An entire poem of less than 250 words may be used, but no more than three poems by one poet or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by different poets from a single anthology may be used.

under the fair use exception of the U.S. Copyright Law and have been prepared according to the educational multi-media fair use guidelines and are restricted from further use."<sup>215</sup>

Additionally, it is required to credit the sources and display the copyright notice and copyright ownership information if these are shown in the original source.<sup>216</sup>

#### **C.1.5.2.4 CONFU Guidelines for Electronic Reserve Systems<sup>217</sup>**

The Fair Use Guidelines for Electronic Reserve Systems were developed, but not formally adopted, by participants in the Conference on Fair Use.<sup>218</sup> Therefore, these guidelines are not considered CONFU guidelines in the narrower sense. However, the guidelines are a helpful starting point for institutions wishing to develop their own electronic reserve guidelines, and numerous educational institutions and libraries subsequently issued guidelines based on the Fair Use Guidelines for Electronic Reserve Systems.<sup>219</sup> According to the introduction of the guidelines, the "guidelines identify an understanding of fair use for the reproduction, distribution, display, and performance of materials in the context of creating and using an electronic reserve system."

The general principles of the guidelines are as follows:

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<sup>215</sup> CONFU Final Report at Appendix J. 6.3

<sup>216</sup> *Ibid.* at Appendix J. 6.2

<sup>217</sup> See the guidelines at University of Texas website, <http://www.utsystem.edu/OGC/IntellectualProperty/rsrvguid.htm>, accessed on 06 October 2004

<sup>218</sup> CONFU Final Report at 15

<sup>219</sup> See, for instance, the Paul V. Galvin Library at the Illinois Institute of Technology, <http://www.gl.iit.edu/access/copyrightreserve.htm>, accessed on 06 October 2004 and the Duke University Medical Center Library, <http://www.mclibrary.duke.edu/respub/collections/reserves/confu.html>, accessed on 06 October 2004

- (1) Electronic reserves must be limited to one article from a journal, a chapter from a book or conference proceedings, one poem from a collected work, or short excerpts from longer items;
- (2) reserves must be copies of lawfully obtained materials;
- (3) a notice of copyright, consistent with the notice described in Section 108(f)(1) of the US Copyright Act, should appear on a preliminary or introductory screen. Moreover, any copyright notice on the original work should be included on the electronic reserve portion;
- (4) access to the electronic reserves should be limited via password or other protection to students registered in the course for which the items have been placed on reserve, and to instructors and staff responsible for the course or the electronic system;
- (5) permission from copyright holder is required if the item is to be reused for the same course in subsequent semesters offered by the same instructor.

### **C.1.6** *New legislation in the United States*

#### **C.1.6.1 The Digital Millennium Copyright Act (DMCA)**

The DMCA was enacted in 1998 to implement obligations imposed on the United States by the 1996 WIPO Copyright Treaty and in response to growing concerns by copyright holders about widespread illegal copying in a networked digital world. In five titles, the DMCA covers a broad range of copyright rules and regulations relating to almost every imaginable manifestation of literary and artistic works which come into contact with the digital medium. Most importantly, the DMCA introduced anti-circumvention provisions, which were

codified in Section 1201 of the US Copyright Act.<sup>220</sup> In short, Section 1201 prohibits the circumvention of technological protection measures put in place by copyright holders to control access to their work by banning acts of circumvention<sup>221</sup> as well as banning the trafficking<sup>222</sup> of tools and technologies used for circumvention.<sup>223</sup> Thus, Section 1201 has significant impact on the applicability of the fair use exception,<sup>224</sup> since circumvention is prohibited even if the use of the work would otherwise be a fair use.<sup>225</sup> In other words, the DMCA may make illegal what previously would have been considered fair use. The first reading of Section 1201 might suggest that Section 1201 eventually protects fair use activities by stating that "[n]othing in this Section shall affect rights, remedies, limitations, or defences to copyright infringement, including fair use,..."<sup>226</sup> However, a defence to copyright infringement is not a defence to the prohibition established in Section 1201. Rather, Section 1201 itself includes a number of exceptions to the prohibition on circumvention and

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<sup>220</sup> See *infra*, Appendix G.5

<sup>221</sup> The basic provision in 17 U.S.C. 1201(a)(1)(A) reads: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."

<sup>222</sup> "Trafficking" in this context means "manufacturing, import, offering to the public, providing, or otherwise trafficking"; see Nimmer 'A Riff on Fair Use in the Digital Millennium Copyright Act' 148 *University of Pennsylvania Law Review* (2000) 684

17 U.S.C. 1201(a)(2) reads:

"No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that -

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title;

or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title."

<sup>223</sup> Section 1201 contains a third kind of violations called 'additional violations'.

<sup>224</sup> Beldiman, *supra* note 114, at 10

<sup>225</sup> Stanford University Copyright and Fair Use website, [http://fairuse.stanford.edu/stanford\\_notices/etchemendy-2003-03-copyright-reminder.html](http://fairuse.stanford.edu/stanford_notices/etchemendy-2003-03-copyright-reminder.html), accessed on 06. October 2004

circumvention devices designed to support the interests of users.<sup>227</sup> In this respect Section 1201 also protects – partly - fair use.<sup>228</sup> Section 1201 subsection (f), for example, is designed to safeguard the judicial extension of fair use to reverse engineering, which was established – as shown above<sup>229</sup> - by a court in *Sega Enterprises v. Accolade Inc.*<sup>230</sup>. Moreover, Section 1201 subsection (k)(1) allows consumers, in principle, to make analog copies of programming;<sup>231</sup> therefore this subsection ensures the continuation of the interpretation of fair use laid down by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>232</sup>. However, despite these exceptions, the DMCA is still heavily criticised<sup>233</sup> as encouraging a so-called “pay-per-use” society, as adversely impacting users’ ability to use lawfully obtained material in a way most convenient to them, as contradicting the US Copyright law on

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<sup>226</sup> Section 1201 subsection (c) of the US Copyright Act of 1976

<sup>227</sup> Section 1201 contains the following exception: subsection (d) nonprofit libraries, archives, educational institutions for limited purposes; subsection (e) law enforcement; subsection (f) reverse engineering; subsection (g) encryption research; subsection (h) protection of minors; subsection (i) protection of personal identification information; subsection (j) security testing; subsection (k) analog devices and technological measures. Additionally, Section 1201 (a)(1)(C),(D) allows an exception under 1201(a)(1)(A) for non-infringing uses by users adversely affected by this provision.

<sup>228</sup> Nimmer, *supra* note 222, at 702

<sup>229</sup> See *infra*, C.1.4.3

<sup>230</sup> 977 F.2d 1510 (1992)

<sup>231</sup> Nimmer, *Nimmer on Copyright* (1997), § 12A.06[B]

<sup>232</sup> 464 U.S. 417 (1984)

<sup>233</sup> See, for example, the Anti-DMCA website, <http://anti-dmca.org>, accessed on 04 February 2005

fair use<sup>234</sup> <sup>235</sup> and insofar as ignoring the Constitutional imperative of "Promoting Progress" as stipulated in Article I, Section 8, clause 8 of the United States.<sup>236</sup>

Moreover, Section 403 of the DMCA required a report "on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." By March 2001 the Copyright Office reported its recommendations to the US Congress.<sup>237</sup> Based on those recommendations, the Technology, Education and Copyright Harmonization (TEACH) Act was enacted on 04 October 2002.

#### **C.1.6.2 Technology, Education, Education and Copyright Harmonization (TEACH) Act**

The TEACH Act of 2002 amended, primarily, Section 110 (2)<sup>238</sup> of the US Copyright Act and gave educators at accredited nonprofit educational institutions greater flexibility to use copyrighted works in onlinecourse delivery. However, the law still imposes strict requirements for distance learning, reaching far beyond the few limits in traditional face-to-face teaching due to the increased risk of copyright violations through online distribution of materials. In addition, teachers have criticized the TEACH Act as too complicated for a day-to-day application.

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<sup>234</sup> See educause paper, The DMCA Revisited: What's Fair, <http://www.educause.edu/ir/library/pdf/EPO0410.pdf>, accessed on 07 October 2004

<sup>235</sup> The proposed 'Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act' of 2003 (US H.R. 1066) calls for specific changes in the Digital Millennium Copyright Act (DMCA) and proposes to restore the fair use doctrine in the digital environment. For further information see release of congresswoman Zoe Lofgren of 04 March 2003, [http://www.house.gov/lofgren/news/2003/pr\\_030304\\_consumerrights.html](http://www.house.gov/lofgren/news/2003/pr_030304_consumerrights.html), accessed 06.10.2004

<sup>236</sup> An in-depth examination of the outlined discussion is beyond the scope of this thesis. For further details see, e.g., Nimmer *supra* note 222, at 673

<sup>237</sup> See Statement of The Register of Copyrights before the Senate Committee on the Judiciary, <http://www.copyright.gov/docs/regstat031301.html>, accessed on 08 February 2005

<sup>238</sup> See *infra*, Appendix G.5

In a nutshell, Section 110 (2) of the US Copyright Act<sup>239</sup> permits the display and performance of works during online instruction without the consent of the copyright holder under the following conditions: (1) online instruction at an accredited nonprofit educational institution, mediated by an instructor; (2) a policy regarding copyright is instituted by the institution; (3) informational materials regarding copyright are provided by the institution; (4) a notice to students is provided by the institution that materials used in connection with the course may be subject to copyright protection; (5) the transmission of the material is intended solely for receipt by students officially enrolled in the course for which the transmission is made.

Additionally, Section 110 (2) requires institutions to use technology in a way that will reasonably limit access to copyrighted works to students currently enrolled in the class, limit access only for the time necessary to complete the class session and prevent further copying to the extent technologically feasible.<sup>240</sup> However, even after the amendment of Section 110 (2) of the US Copyright through the TEACH Act, the traditional fair use doctrine continues to be important, since the activities mentioned in Section 110 (2) of the US Copyright Act only cover few uses for electronic resources educators. It especially does not cover the digital delivery of supplemental reading materials.<sup>241</sup> When a provision like Section 110 (2) of the US Copyright Act is for some reason not sufficient in a particular case as an authority for making a copy, the traditional fair use provision may justify the use, since

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<sup>239</sup> Act of 1976

<sup>240</sup> Website of the University of Texas,  
<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>,  
accessed on 07 October 2004

uploading of material onto a network necessarily requires making a copy of the original document.

**C.1.7 Further exceptions under US Copyright law**

Fair use is not the only way in which access to copyrighted works is allowed under US copyright law. Rather, United States law contains specific exceptions to copyright, and fair use operates as a general provision designed to reach cases of worthy, unauthorized uses that do not fall within the scope of one of these exceptions.<sup>242</sup> The US Copyright Act provides for a number of other exceptions or limitations in Sections 108-122.<sup>243</sup> These exceptions and limitations pertain to:

- (1) Reproductions by libraries and archives (Section 108);
- (2) transfers of copyright material (so-called first-sale-doctrine) (Section 109);
- (3) certain (offline and/or online) performances or displays (such as teaching activities of governmental as well as educational entities) (Section 110);
- (4) certain secondary transmissions (Section 111);
- (5) ephemeral recordings (Section 112);
- (6) computer programs (Section 117);
- (7) reproductions for the blind or other people with disabilities (Section 121);

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<sup>241</sup> *Ibid.*

<sup>242</sup> Leaffer, *supra* note 33, at 863

<sup>243</sup> See *infra*, Appendix G.5

- (8) secondary transmissions by satellite carriers within local markets (Section 122).

## **C.2 Europe**

### **C.2.1 EU legislation**

In Europe, vast differences existed and still exist at a national level regarding copyright and its limitations due to different cultural traditions, or business practices.<sup>244</sup> Therefore, harmonizing legislative action at the level of the European Union was desirable. Since 1991, EC and EU Directives provide for the necessary harmonization.<sup>245</sup> EC/EU Directives do not become effective until the Member States implement them into their domestic laws.<sup>246</sup> Hence, Directives have the advantage of giving leeway to the Member States as to the exact implementation into the national laws. However, existing differences among Member States can not be levelled out entirely through Directives.

#### **C.2.1.1 The Copyright Directive of 2001**

##### **C.2.1.1.1 Overview**

On 22 May 2001, the 'Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society'<sup>247</sup> (Copyright Directive) was adopted by the European Council after lengthy negotiations. The Directive completed a discussion about harmonization in the field of copyright law between the Member States of the European Union and about

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<sup>244</sup> Hugenholtz 'Why the Copyright Directive is unimportant, and possibly invalid' 22 *European Intellectual Property Review* (2000) 499-500

<sup>245</sup> For a list of copyright-related EC Directives (until 2001) see the website of the UK Patent Office, <http://www.patent.gov.uk/copy/legislation/ecpublications.htm>, accessed on 25 October 2004

<sup>246</sup> Article 249 III of the Treaty Establishing the European Community

<sup>247</sup> Directive 2001/29/EC

necessary adjustments of copyright law to the information society, which was launched in 1995 with the European Commission's "Green Paper on Copyright and Related Rights in the Information Society"<sup>248</sup>. European lawmakers had to take into account the protection of increasing cross-border rights exploitation as well as the issue of digital exploitation.

The Copyright Directive was supposed to have been adopted into the domestic laws by 22 December 2002<sup>249</sup>, but several States have so far not enacted domestic implementing legislation.<sup>250</sup> However, while Member States are in general expected to act in accordance with EU legislation, they have substantial freedom as to how closely domestic legislation matches the provisions of a Directive.

The aim of the Copyright Directive was twofold<sup>251</sup>:

1. To bring laws within the European Union regarding copyright and related rights in accordance with the WIPO Internet Treaties; and
2. to harmonize the laws of the Member States.

In short, the Copyright Directive harmonizes a number of fundamental rights, namely the reproduction right (Article 2), the right of communication to the public and the right of availability to the public (Article 3) and the distribution right (Article 4). Furthermore, the Directive deals with the protection of

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<sup>248</sup> Com(95) 382 final, available under <http://europa.eu.int/ISPO/infosoc/legreg/com95382.doc>, accessed on 21 October 2004

<sup>249</sup> Article 13 of the Copyright Directive of 2001

<sup>250</sup> Denmark and Greece were the only countries that met the deadline.

<sup>251</sup> Hugenholtz, *supra* note 244, at 499

technological protection measures and rights management information (Articles 6 and 7<sup>252</sup>).

#### **C.2.1.1.2 Article 5 of the Copyright Directive**

It has been mentioned before that continental European countries predominantly adopted the so-called "closed list" approach with an enumerative list of exceptions. The practice of enumerating exceptions to copyright-holders' rights is primarily a civil law approach to copyright.<sup>253</sup> The actual content of these lists differs significantly from country to country although the following exceptions are more or less recognized<sup>254</sup>: quotation, copying for private use, use of a work for research or teaching purposes, news reporting, library privileges, parody, needs of the administration of justice and public policy.

Within the Copyright Directive, Article 5<sup>255</sup> deals extensively with exceptions and limitations to the rights set forth in Articles 1 to 4. Recital 44 of the Copyright Directive determines that "[w]hen applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations."

Altogether, Article 5 provides twenty-one exceptions, including exceptions for private and non-commercial use<sup>256</sup>, for libraries and archives<sup>257</sup>, for teaching and research purposes<sup>258</sup>, for people with disabilities<sup>259</sup>, and for

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<sup>252</sup> See *infra*, Appendix G.6.1

<sup>253</sup> Okediji, *supra* note 22, at 80

<sup>254</sup> Not all of these exceptions are recognized in all countries. Altogether, the European Commission identified more than 180 limitations in the EU Member States.

<sup>255</sup> See Appendix G.6.1

<sup>256</sup> Article 5.2.b, see *infra*, Appendix G.6.1

<sup>257</sup> Article 5.2.c, see *infra*, Appendix G.6.1

<sup>258</sup> Article 5.3.a, see *infra*, Appendix G.6.1

criticism and review<sup>260</sup>. Fair use is not explicitly included as an exception as such<sup>261</sup>. While the six exceptions mentioned in Articles 5.1 and 5.2 apply solely to the reproduction right, the fifteen exceptions enumerated in Article 5.3 may be applied to both the reproduction right and the right of communication to the public or the right of availability to the public. Article 5.4 allows, in general, exceptions to the distribution right where such an exception is made in national law and only "to the extent justified by the purpose of the authorized act of reproduction." Finally, Article 5.5 adopts the three-step test and thereby draws heavily from the WIPO Internet Treaties.<sup>262</sup> It applies to all exceptions under Article 5.

Article 5.1 is the only mandatory provision in Article 5 and requires Member States to provide an exception to the reproduction right for certain temporary acts which are transient or incidental and an integral and essential part of a technological process to enable a transmission in a network or a lawful use. Furthermore, these acts of reproduction must have no independent economic significance. This provision aims first and foremost at browsing<sup>263</sup> and caching.<sup>264</sup>

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<sup>259</sup> Article 5.3.b, see *infra*, Appendix G.6.1

<sup>260</sup> Article 5.3.d, see *infra*, Appendix G.6.1

<sup>261</sup> However, the introduction of an open-ended fair use provision was considered during the deliberations for the Copyright Directive, see Senftleben, *supra* note 42, at 249 (footnote 1220)

<sup>262</sup> *Ibid.* at 253

<sup>263</sup> Browsing means "[t]o look at a series of electronic documents on a computer screen by means of a computer program that permits the user to view multiple electronic documents in a flexible sequence by the process of activating hypertext "buttons" within one document, which serves as a reference to the location of related document.", website of The Webster Dictionary, <http://www.webster-dictionary.org>, accessed on 22 October 2004

<sup>264</sup> Caching means using a "form of memory in a computer which has a faster access time than most of main memory, and is usually used to store the most frequently accessed data in main memory during execution of a program.", website of The Webster Dictionary, <http://www.webster-dictionary.org>, accessed on 22 October 2004

The exceptions allowed under Articles 5.2 and 5.3 are optional. Therefore, Member States are free to adopt, maintain or ignore these exceptions in their national legislation. However, Member States may introduce or maintain no other exceptions or limitations than those mentioned in Article 5<sup>265</sup>. It has to be pointed out that Article 5.2 stipulates for some limitations a fair compensation for the right-holder.

The Copyright Directive has been criticised for different reasons. Critics argue it would damage European scientific research as well as erode users' rights on how they may make use of copyrighted materials.<sup>266</sup> Moreover, scholars have argued that the Directive does not deal with the most important questions raised in the Green Paper, such as the applicable law, administration of rights, and moral rights.<sup>267</sup> As to limitations and exceptions, scholars are doubtful whether existing differences among the Member States can be levelled out by a set of 21 mostly optional exceptions, especially when the use of exceptions and limitations is furthermore permitted "in certain other cases of minor importance where exceptions and limitations already exist under national law."<sup>268</sup> The European Commission, however, has recently published a working paper<sup>269</sup> reviewing EU legislation in the field of copyright and related rights which suggests that current EU copyright legislation is generally effective and consistent.

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<sup>265</sup> Yet, Article 5.3.o. allows for the use of exceptions and limitations in certain other cases of minor importance where exceptions and limitations already exist under national law.

<sup>266</sup> Matthew Broersma 'EU delays vote on Euro-DMCA' *ZDNet UK* (11 September 2003), <http://news.zdnet.co.uk/business/legal/0,39020651,39116281,00.htm>, accessed on 24 October 2004

<sup>267</sup> Hugenholtz, *supra* note 244, at 501

<sup>268</sup> See Article 5.3.o of the EC Copyright Directive

<sup>269</sup> Working paper SEC (2004) 995 (19/7/04)

**C.2.1.2 Computer Programs Directive of 1991 and Database Directive of 1996**

Two more pieces of European legislation have to be noted in the context of copyright and fair use: the Computer Programs Directive<sup>270</sup> of 14 May 1991 and the Database Directive<sup>271</sup> of 11 March 1996.

The Computer Programs Directive<sup>272</sup> required all European Community Member States to protect computer programs against unauthorized reproduction by copyright as literary works within the meaning of the Berne Convention. Article 1 (3) of the Directive stipulates that "[a] computer program shall be protected if it is original in the sense that it is the author's own intellectual creation". Within the Directive, Article 5 provides for exceptions to the protection.<sup>273</sup>

The Database Directive, which applies to all databases marketed in the European Union, stipulates that databases<sup>274</sup> shall be protected as such by copyright.<sup>275</sup> Furthermore, the Directive gives protection to the content of databases against unauthorised extraction and re-utilisation (of the whole or substantial parts, evaluated qualitatively or quantitatively) or both by a so-called "sui generis right"<sup>276</sup> in order to protect the creators' investment of time, money and effort. Articles 6 and 9 provide for exceptions.<sup>277</sup>

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<sup>270</sup> Directive 91/250/EEC

<sup>271</sup> Directive 96/9/EC

<sup>272</sup> For further information regarding the Directive see the Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs (COM/2000/0199 final)

<sup>273</sup> See Appendix G.6.2

<sup>274</sup> "Database" being defined by the Directive as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means" (Article 1(2) of the Directive 96/9/EC)

<sup>275</sup> Article 3 (1) of the Directive 96/9/EC

<sup>276</sup> Articles 7-11 of the Directive 96/9/EC

<sup>277</sup> See Appendix G.6.3

## C.2.2 Germany

### C.2.2.1 Introduction

Under German Copyright law, a fair use doctrine does not exist in name, but of course the exclusive rights conferred on copyright-holders are subject to certain limitations and exceptions. Hence, the German Copyright Act of 1965<sup>278</sup> contains in Sections 44a – 63a<sup>279</sup> a closed list of limitations and exceptions<sup>280</sup> to the copyright holders' exploitation rights.<sup>281</sup> Several exceptions and limitations are similar to exceptions recognized as fair use under American Copyright law.<sup>282</sup>

With a nine month delay, Germany was the fifth country in the European Union to implement the Copyright Directive of 2001<sup>283</sup>. However, the German government decided to first tackle only the mandatory obligations set up by the Directive ("first basket"). The completion of Germany's entry into the information age is therefore left to a so-called "second basket" of copyright legislation.<sup>284</sup>

The "first basket" of legislation in 2003 brought extensive and heavily disputed amendments to exceptions and limitations to protection of

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<sup>278</sup> *Gesetz über Urheberrecht und verwandte Schutzrechte (UrhG)* - BGBl I 1965, 1273

<sup>279</sup> See for computer programs also Sections 69d, 69e and for databases Section 87c of the German Copyright Act of 1965. Moreover, Section 24 ("free use") and Section 12 (2) ("communication of the content of a published work) could be mentioned in this context.

<sup>280</sup> So-called "*Schranken*". These limitations and exceptions are again subject to certain limitations ("*Schranken-Schranken*"), namely the 'Prohibition of Alteration' (Section 62 of the German Copyright Act) and the 'Acknowledgment of Source' (Section 63 of the German Copyright Act).

<sup>281</sup> According to the German Federal Court in its "*Parfümflakon*"-decision (BGHZ = GRUR 2001, 51, 52), a *mutatis mutandis* application of these exceptions is possible in exceptional cases only.

<sup>282</sup> Newby, *supra* note 37, at 1644

<sup>283</sup> Directive 2001/29/EC

<sup>284</sup> The German Federal Ministry of Justice released the first draft for the "Second Basket" on 01 October 2004. The draft is accompanied by the website [www.kopien-brauchen-](http://www.kopien-brauchen-)

copyright and related rights. Moreover, a prohibition for the circumvention of technological protection measures without the consent of the right-holder was introduced (Section 95a).

### C.2.2.2 Overview over limitations and exceptions under German Copyright law

Currently, the German Copyright Act allows for the following exceptions and limitations<sup>285</sup>:

- (a) Temporary acts of reproduction (Section 44a<sup>286</sup>);
- (b) copies made for the purpose of the administration of justice and public safety (Section 45)<sup>287</sup>;
- (c) reproductions for the benefit of persons with disabilities (Section 45a<sup>288</sup>);
- (d) reproductions for collections for religious, school or instructional use (Section 46<sup>289</sup>);
- (e) use in school broadcasts (Section 47<sup>290</sup>);

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originale.de (copies need originals) to inform users and copyright-holders about the progress on this matter.

<sup>285</sup> For an in-depth discussion of the following sections see: Schricker, *Urheberrecht* (1999), §§ 44a et seq.

<sup>286</sup> Article 44a transposes almost literally the mandatory exception for the benefit of temporary acts of reproduction provided for by Article 5.1 of the European Copyright Directive into German law. For further details see *infra* C.2.1.1.2

<sup>287</sup> Section 87c (2) of the German Copyright Act contains a similar provision for databases

<sup>288</sup> Section 45a will be discussed in detail below, *infra* C.2.2.3.1.

<sup>289</sup> Subject to the following conditions: (1) The purpose for which the collection is to be used shall be clearly stated on the title page or some other appropriate place; (2) the intention to exercise the rights afforded by paragraph 1 has been communicated by registered letter to the author or, if his permanent or temporary residence is unknown, to the holder of an exclusive exploitation right, and two weeks have elapsed since dispatch of the letter. Furthermore, an equitable remuneration shall be paid to the author and authors may prohibit reproduction and distribution if the work no longer reflects their conviction.

<sup>290</sup> Paragraph 2 contains certain conditions and provides: "The video or audio recordings may be used only for instructional purposes. They must be destroyed not later than the end of the school year following the transmission of the school broadcast, unless equitable remuneration has been paid to the author."

- (f) reproduction and distribution of public speeches (Section 48<sup>291</sup>);
- (g) reproduction, distribution and public communication of newspaper Articles, broadcast commentaries and the like "if they concern political, economic or religious issues of the day and do not contain a statement reserving rights." (Section 49<sup>292</sup>);
- (h) visual and sound reporting on events of the day (Section 50);
- (i) quotations from published works in another independent work to the extent justified by the purpose (Section 51)<sup>293</sup>;
- (j) public communication<sup>294</sup>, "if the communication serves no gainful purpose on the part of the organizer, spectators are admitted free of charge and, in the case of recitation or performance of the work, none of the performers [...] receive special remuneration. An equitable remuneration shall be paid for the communication"<sup>295</sup> (Section 52);

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<sup>291</sup> As far as speeches on issues of the day are concerned, which were made at public meetings or in broadcasting, the reproduction and distribution in newspapers, periodicals or other information journals which mainly record current events is permissible. However, collections containing predominantly speeches by the same author are not permitted under Section 48.

<sup>292</sup> Unless only short extracts from a number of commentaries or articles are reproduced, distributed or publicly communicated in the form of an overview, the author shall be paid equitable remuneration through a collecting society. In 2002, the German Federal Court (*Bundesgerichtshof*) decided that Section 49 covers, in principle, electronic press reviews (BGH I ZR 255/00)

<sup>293</sup> See *infra*, Appendix G.6.4

<sup>294</sup> Arguably, Section 52 does not cover public communication via the Internet, see Schricker, *supra* note 285, at § 52 recital 23

<sup>295</sup> The obligation to pay a remuneration does, in general, not apply in respect of events organized by the Youth Welfare Service, the Social Welfare Service, the Old Persons Welfare Service, the Prisoners Welfare Service and for school events, on condition that in

- (k) making available for educational and research purposes (Section 52a<sup>296</sup>);
- (l) reproduction for private and other personal uses (Section 53<sup>297</sup>);
- (m) recording by licensed broadcasting organisations (Section 55);
- (n) use of a database work (Section 55a);
- (o) reproduction and public communication by commercial enterprises, which sell video or audio recordings or appliances for making or communicating such recordings, or appliances for the reception of broadcasts, or which repair them (Section 56);
- (p) reproduction, distribution and publicly communication of works of secondary importance<sup>298</sup> with regard to the actual subject of the reproduction, distribution or public communication (Section 57);
- (q) use of works of fine art in illustrated catalogues in connection with (intended) public exhibitions or documentations of holdings (Section 58);
- (r) reproduction of works displayed in public places (Section 59);

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accordance with their social or educational purpose they are only accessible for a specifically limited circle of persons.

<sup>296</sup> Section 52a will be discussed in detail below, *infra* C.2.2.3.2

<sup>297</sup> Section 53 will be discussed in detail below, *infra* C.2.2.3.3

<sup>298</sup> The actual meaning of "secondary importance" is, however, disputed amongst scholars

- (s) reproduction of portraits by the principal or his successor in title (Section 60).

### **C.2.2.3 Examination of selected exceptions and limitations**

In the following, some of the above-mentioned limitations and exceptions will be scrutinised.

#### ***C.2.2.3.1 Reproductions for the benefit of persons with disabilities (Section 45a UrhG)***

Based on Article 5.3.b of the European Copyright Directive, the newly introduced Section 45a is the first provision of the German Copyright Act to be specifically designed for the needs of persons with disabilities.<sup>299</sup> Section 45a (1) permits the non-commercial reproduction of works to the extent required by the specific disability. According to paragraph 2, the right-holder is entitled to an appropriate compensation, unless the reproduction does not exceed a small number of copies. The claim for compensation is to be exercised by a collecting society.

#### ***C.2.2.3.2 Making available for educational and research purposes (Section 52a UrhG)***

Section 52a (1) permits the making available of protected published works to specific groups of persons to the extent necessary for certain teaching or research purposes, e.g. the use in on-line classes.<sup>300</sup> Article 52a (4) provides for the right-holders' compensation with an appropriate remuneration. The remuneration is to be claimed by a collecting society.

Due to lobbying by the publishing industry and film producers, the exception on the right of making available is subject to various restrictions.

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<sup>299</sup> Article 3 (3) of the German Constitution ("Grundgesetz") states that "no person shall be disfavoured on the basis of disability".

<sup>300</sup> This provision is based upon Article 5.3 (a) of the Copyright Directive, which entitles Member States to create exemptions for the benefit of educational or scientific uses.

The extent to which protected materials can be made available has been confined to "small parts of a work", "works of small size" and "single contributions from newspapers and periodicals". Moreover, the beneficiaries have been restricted to those institutions expressly mentioned. In addition, Section 52a (2) expressly exempts schoolbooks and (for a limited period of two years after their theatrical release) films. Yet, the provision is still disputed; while some would have preferred a more narrowly defined extent, others find that the current restrictions do not go far enough. Thus, the legislature decided to earmark Article 52a with an expiry date of late 2006.<sup>301</sup>

#### ***C.2.2.3.3 Reproductions for private and other personal uses (Section 53 UrhG)***

With regard to reproductions for private and other personal uses, Section 53 of the German Copyright Act<sup>302</sup> sets the conditions for what is permissible. Section 53 is highly disputed and under constant attack from publishers and copyright-holders. However, German lawmakers clarified within the "first basket" of 2003 that private copies of copyrighted material remain permitted – analogue as well as digital. The recently drafted "second basket" of copyright legislation is not going to change that.<sup>303</sup>

##### **C.2.2.3.3.1 Digital copies**

Section 53 (1) now makes clear that this provision applies in principle to digital and analogue reproductions ("reproduction on any medium"). The European Copyright Directive allows for such an equal treatment in Article

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<sup>301</sup> Section 137k of the German Copyright Act

<sup>302</sup> See *infra*, Appendix G.6.4

<sup>303</sup> According to the press release of the German Ministry of Justice of 09 September 2004: "*Urheberrecht in der Wissensgesellschaft*" (Copyright in the Information Society), 1. The Ministry justifies its decision on the grounds that prohibitions and limitations in this regard would be useless due to the lack of efficient monitoring systems.

5.2.b. However, digital private copying is likely to be more widely used and, thus, an additional restriction on private copying has been introduced in Section 53 of the German Copyright Act - reproductions are prohibited if the source was "produced obviously unlawful" to prevent downloads from so-called "peer-to-peer"/file-sharing platforms (such as the former Napster or Gnutella).<sup>304</sup>

#### **C.2.2.3.3.2 Copies to be made by another person**

Section 53 (1) still also allows private copies to be made by another person. Under this provision, on-line delivery-services of digital copies would be permissible, provided no payment is received. This condition will be met even when institutions, such as libraries, collect fees, as long as those fees do not exceed their costs. It is debateable, however, whether this provision takes into account Recital 40 of the European Copyright Directive in a sufficient manner, which states that any exception or limitation for the benefit of certain non-profit making establishments should not cover uses made in the context of on-line delivery of protected subject matter. The issue was revisited in the discussions preparing the draft of the "second basket" and the introduction of new provisions for libraries is intended. Accordingly, it shall be permitted for libraries to show their holdings in electronic reading-rooms for research and private studies, provided that no opposing contractual agreement exists. Yet, the number of copies shown in these rooms at one time may not exceed the number of offline copies possessed by the library. The right-holder is entitled

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<sup>304</sup> Currently, the wording of the provision is imprecise as it draws explicitly on the way the source was produced. Therefore, it could be argued that a legally produced copy, which is later posted on an illegal platform, does not match the provision. However, the Second Basket is likely to clarify this issue.

to an appropriate compensation, which is to be claimed by a collecting society.<sup>305</sup> Additionally, the reproduction and dissemination of individual contributions that have been published in newspapers or periodicals via mail or fax by libraries is intended to be permissible. However, the reproduction and dissemination by other electronic means is only to be permissible if the publishing-houses do not have an own electronic offering.<sup>306</sup> Again, the right-holder is entitled to an appropriate compensation.

#### **C.2.2.3.3.3 Copies for keeping in a private archive**

Further kinds of reproduction are permitted by Article 53 (2). It has to be mentioned, however, that when drafting the exception for private archives (no. 2), the legislature was thinking of cases in which an institution rather than individuals would store its inventory on microfilm in order to either save space or to keep the films in a safe place. The intent of the amendment was not to make a more intensive exploitation of the work possible. Therefore, a differentiation between analogue and digital copies can be found in paragraph (2) for the numbers 2, 3, 4, and paragraph (5), which now contains limitations to the assistance of database facilities.

#### **C.2.2.4 Technological Protection Measures under the German Copyright Act**

In Germany, technological protection measures have been protected in Section 95a<sup>307</sup> of the German Copyright Act since September 2003<sup>308</sup>. The German Copyright Act prohibits the circumvention of technological protection measures even if the user acts within the borders of the limitations to

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<sup>305</sup> Proposed Section 52b of the German Copyright Act

<sup>306</sup> Proposed Section 53a of the German Copyright Act

<sup>307</sup> See *infra*, Appendix G.6.4

copyright (e.g. making private copies or for the purpose of research). However, Section 95b of the German Copyright Act stipulates that the right holder has to help the user by providing the necessary means to enable the following permissible (privileged) uses<sup>309</sup>:

- (1) Use for the administration of justice and public safety (Section 45);
- (2) use for people with disabilities (Section 45a);
- (3) use for collections for religious, school or instructional use, with the exception of religious use, (Section 46);
- (4) use for school broadcasts (Section 47);
- (5) use for teaching and research (Section 52a);
- (6) use for ephemeral reproduction by broadcasting organizations (Section 55).

Furthermore, Section 95b encompasses the following uses of Section 53 (reproduction for private and other personal uses) of the German Copyright Act:

- (1) Private copying (Section 53 paragraph 1), but only in respect of reproductions on paper or any similar medium effected by photographic techniques or by some other process having similar effects;
- (2) personal academic use (Section 53 paragraph 2 sentence 1 no. 1);

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<sup>308</sup> This provision transforms Article 6 of the EC Copyright Directive as well as Article 11 of the WCT and Article 18 of the WCCT into German law.

<sup>309</sup> The German law, however, does not determine how this obligation can be accomplished.

- (3) inclusion of a work in a personal archive (Section 53 paragraph 2 sentence 1 no. 2), if and to the extent that reproduction for this purpose is necessary and only if the reproduction is either done by a photocopy on paper or done for non-commercial purposes;
- (4) reproduction for personal information concerning current events, in the case of a broadcast work (paragraph 2 sentence 1 no. 3) and other personal uses in the case of small parts of published works or individual contributions that have been published in newspapers or periodicals or of a work that has been out of print for at least two years (paragraph 2 sentence 1 no. 4). However, this applies in each case only in respect of reproductions on paper or any similar medium effected by photographic techniques or by some other process having similar effects, and only for analog uses. Therefore, the right-holder has no obligation to support the user if he wants to make a digital private copy of the copyrighted work; and
- (5) reproduction in part of small parts of a work, small-sized works or single contributions, published in newspapers or magazines for use in education and exams (paragraph 3).

On 18 January 2005, The German Library (Die Deutsche Bibliothek) in Frankfurt reached an agreement with the associations of book and music publishers based on Section 95b, which allows The German Library to

circumvent technological protection measures in order to fulfil its statutory mandate.<sup>310</sup>

According to Section 95b (3) of the German Copyright Act, no obligation to enforce limitations on copyright against technological protection measures exists where a work is distributed on demand online on agreed contractual terms. Moreover, Sections 95a-d do not apply to technological protection measures protecting copyrighted computer programs.<sup>311</sup>

### **C.2.3** *United Kingdom*

#### **C.2.3.1** Limitations and exceptions

##### **C.2.3.1.1** *Overview*

In the UK, copyright law is laid down in the *Copyright, Designs and Patents Act of 1988* (CDPA). Despite the recognition of a general affirmative defence of "fair dealing"<sup>312</sup>, the United Kingdom relies nowadays also primarily on enumerated statutory exceptions.<sup>313</sup> A general limitation comparable to the fair use doctrine under Section 107 of the US Copyright Act does not exist. Instead, Chapter III (Sections 28-76) of the CDPA contains numerous provisions regarding acts permitted in relation to copyright works. Moreover, Section 79 (3) – (7) contains a number of exceptions to the authors' moral rights<sup>314</sup>.

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<sup>310</sup> See joint press release of The German Library, the Capital Market Group of the German Book Trade and the German Association of the Phonographic Industry of 18 January 2005, available (in German) at [http://www.ddb.de/news/pressemitte\\_vervielfaeltigung.htm](http://www.ddb.de/news/pressemitte_vervielfaeltigung.htm), accessed on 09 February 2005

<sup>311</sup> See Section 69a (5) of the German Copyright Act

<sup>312</sup> In addition to fair dealing, a statutory exception for "insubstantial uses" exists (Section 16 of the CDPA)

<sup>313</sup> Joyce *et al.*, *Copyright Law* (2001), 953

<sup>314</sup> See *infra*, Appendix G.6.5

**C.2.3.1.2 Fair dealing****C.2.3.1.2.1 Sections 29 and 30 CDPA**

The specific exceptions defined as a fair dealing are 'research and private study' (Section 29)<sup>315</sup> and 'criticism, review and news reporting' (Section 30)<sup>316</sup>.

It needs to be highlighted that Section 29 only applies to certain kinds of work, namely literary; dramatic, musical or artistic works; or typographical arrangements, whereas Section 30 applies to all categories of works. An individual may, in general, only make one copy of an item under the fair dealing exception. Furthermore, fair dealing does not cover use of the material for teaching.<sup>317</sup>

Two significant changes were made to Sections 29 and 30, when the EC Copyright Directive was implemented into UK law with effect of 31 October 2003.<sup>318</sup> The elements of "non-commercial" and "sufficient acknowledgement" were added to Section 29 as well as the phrase "provided that the work has been made available to the public" to Section 30.

However, it remains difficult under UK Copyright law to determine whether a dealing is fair or not, since none of the UK Acts specifically define clearly the exact number of copies and the amount of the original materials allowed. In *Hubbard v. Vosper*, Lord Denning stated<sup>319</sup>:

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<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> JISC Legal Information Service website  
[http://www.jisclegal.ac.uk/ipr/fairdealing.htm?name=lis\\_fair](http://www.jisclegal.ac.uk/ipr/fairdealing.htm?name=lis_fair),  
accessed on 09 February 2005

<sup>318</sup> For an instructive overview over the changes to the UK Copyright law in this respect, see Oppenheim, *Recent Changes to Copyright Law and the implications for FE and HE*, <http://www.jisclegal.ac.uk/publications/copyrightoppenheim.htm>, accessed on 03 November 2004.

<sup>319</sup> [1972] 1 All E.R. 1023 (C.A.), 1027

"It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide."

#### C.2.3.1.2.2 The Interpretation of fair dealing by the UK courts

Due to the lack of clarity, fair dealing has been interpreted by the courts on a number of occasions. The leading cases in this regard are the afore mentioned *Hubbard v. Vosper*<sup>320</sup>, *Nora Beloff v. Pressdram Ltd.*<sup>321</sup> and *Another, British Broadcasting Corporation v. British Satellite Broadcasting Ltd.*<sup>322</sup>, *Sillitoe v McGraw-Hill Book Co (UK) Ltd*<sup>323</sup>, *Time Warner Entertainment Co Ltd v. Channel 4 Television Corporation plc*<sup>324</sup>, *Pro Sieben Media AG v. Carlton UK Television Ltd.*<sup>325</sup>, *Hyde Park Residence Ltd v. Yelland*<sup>326</sup>, and *British Oxygen Company Limited v Liquid Air Limited*<sup>327</sup>. Those cases have, *inter alia*, determined the following relevant factors for fair dealing<sup>328</sup>:

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<sup>320</sup> *Ibid.*

<sup>321</sup> [1973] F.S.R. 33

<sup>322</sup> [1992] Ch 141

<sup>323</sup> [1983] F.S.R. 545

<sup>324</sup> [1994] EMLR 1

<sup>325</sup> [1999] 1 WLR 605

<sup>326</sup> [2001] Ch 143

<sup>327</sup> [1925] 1 ChD 383

<sup>328</sup> It has to be mentioned, however, that some of the cited cases were decided under Section 6 of the Copyright Act of 1956. Section 6 (1) –(3) of the Copyright Act of 1956 provided:

#### **Section 6 Copyright Act of 1956**

##### **General exceptions from protection of literary, dramatic and musical works.**

(1) No fair dealing with a literary, dramatic or musical work for purposes of research or private study shall constitute an infringement of the copyright in the work.

(2) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review,

- (1) The extent of the quotation and its proportion to comment<sup>329</sup>;
- (2) whether the work is unpublished or published;<sup>330</sup>
- (3) whether the work has been improperly obtained<sup>331</sup>;
- (4) the economic implications of the use of the work.<sup>332</sup>

In Canada<sup>333</sup>, another commonwealth jurisdiction with a similar fair dealing provision<sup>334</sup>, the Supreme Court recently considered the following six factors<sup>335</sup> in determining whether a dealing was fair or not<sup>336</sup>:

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whether of that work or of another work, and is accompanied by a sufficient acknowledgment.

(3) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of reporting current events—

(a) in a newspaper, magazine or similar periodical, or

(b) by means of broadcasting, or in a cinematograph film, and, in a case falling within paragraph (a) of this subsection, is accompanied by a sufficient acknowledgment.

<sup>329</sup> See *supra* note 321 at 61

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.* at 63

<sup>332</sup> See *supra* note 323 at 564

<sup>333</sup> The Canadian situation on fair dealing will not be discussed in detail in this thesis.

<sup>334</sup> The Canadian Copyright Act of 1985 contains fair dealing provisions in Sections 29 – 29.2 as amended. These provisions read:

**Section 29**

**Fair dealing for the purpose of research or private study does not infringe copyright.**

**29.1** Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

**29.2** Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

<sup>335</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13. The relevant facts of the case were as follows: The appellant Law Society maintained and operated a reference and research library with one of the largest collections of legal materials in Canada. The library provided a request-based photocopy service for Law Society members, the judiciary and

- (1) The purpose of the dealing;
- (2) the nature of the dealing;
- (3) the amount of the dealing;
- (4) alternatives to the dealing;
- (5) the nature of the work in question;
- (6) the effect of the dealing on that work.

It remains to be seen if and to what extent English courts will take note of that decision in their future decisions on fair dealing.

#### **C.2.3.1.2.3 Guidelines for fair dealing**

As the law does not clearly define the amount of original material that can be copied under the fair dealing provisions, several lobbies and institutions have issued guidelines on what is considered to be fair. Accordingly, the limits for fair dealing when copying from any one publication are generally accepted to be<sup>337</sup>:

- (1) One complete chapter from a book or 5% of the total, whichever is the greater;
- (2) one article from a journal issue or set of conference proceedings;

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other authorized researchers. Under this "custom photocopy service", legal materials were reproduced by library staff and delivered in person, by mail or by facsimile transmission to requesters. The Law Society also maintained self-service photocopiers in the library for use by its patrons.

<sup>336</sup> For a detailed analysis of the decision see Tumbridge 'Canada defines originality and specifies the limits of fair dealing' *26 European Intellectual Property Review* (2004) 318-322

<sup>337</sup> "Copyright – 'Fair dealing' guidelines" paper of the Cardiff University, website of the Cardiff University, <http://feathers.cf.ac.uk/cs.html?charset=iso-8859-1&url=http://www.cardiff.ac.uk/schoolsanddivisions/divisions/insrv/help/1334.dld&qt=Fair%20dealing%20guidelines&col=cardiff&n=1&la=en>, accessed on 03 November 2004

- (3) one illustration, diagram or map not exceeding A4 size (illustrations forming an integral part of a chapter or article may be included in the above extracts);
- (4) one short story or poem (up to a maximum of 10 pages) from an anthology;
- (5) up to 10% from a pamphlet, report or standard (up to a maximum of 20 pages);
- (6) a short excerpt from a musical work, provided it is not for performance purposes.

Regarding copies for the purpose of private study or research for a non-commercial purpose, the Chartered Institute of Library and Information Professionals (CILIP<sup>338</sup>) recommends that no more than one chapter or five percent of a published work or one article from a journal or periodical is copied.<sup>339</sup>

In 1998, the Publishers' Association and the Joint Information Systems Committee (JISC) composed "Guidelines for fair dealing in the

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<sup>338</sup> Website of the Chartered Institute of Library and Information Professionals, <http://www.cilip.org.uk/>, accessed on 04 November 2004

<sup>339</sup> According to an email from CILIP dated 20 August 2004, in possession of the author.

copying of electronic publications"<sup>340</sup>, which are summarized on JISC's website<sup>341</sup> as follows:

Viewing on screen. Any incidental copying to disk involved in the viewing of part or all of an electronic publication should be considered fair dealing.

Printing onto paper. Printing onto paper of one copy of part of an electronic publication should be considered fair dealing if done by an individual or by a librarian at the request of an individual for the purpose of research or private study.

Copying onto disk of part of an electronic publication. Copying onto disk of part of an electronic publication for permanent local storage should be considered fair dealing if done by an individual where the disk is either a portable medium or a fixed medium accessible to only one user at a time, or if done by a librarian at the request of an individual where the disk is a portable medium.

Copying onto disk of all of an electronic publication. Copying onto disk of all of an electronic publication is not fair dealing and the permission of the rightsholder should be sought in all cases.

Transmission to enable printing of part of an electronic publication. Transmission by computer network of part of an electronic publication for the purpose of printing a single copy with only such interim electronic storage as is required to facilitate that printing should be considered fair dealing.

Transmission of all of an electronic publication. Transmission by computer network of all of an electronic publication is not fair dealing and the permission of the rightsholder should be sought in all cases.

Transmission for permanent storage of part of an electronic publication. Transmission of part of an electronic publication by a librarian over a computer network to an individual at their request for permanent electronic storage (but not retransmission) should be considered fair dealing.

Posting on a network. Posting of part or all of an electronic publication on a network or WWW site open to the public is not fair dealing and the permission of the rightsholder should be sought in all cases."

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<sup>340</sup> Accessible at <http://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html>, accessed on 09 February 2005. Beforehand, some guidance was provided by the Society of Authors and Publishers in 1965. Accordingly, copying for the purpose of research or private study was limited to: a) in the case of a single extract from a whole work, not more than 4.000 words or characters; b) in the case of a series of extracts from a whole work, not more than 3.000 words or characters per extract, with a total not more than 8.000 words or characters; and c) in any case, not more than 10 per cent of the work. However, the statement was withdrawn in 1984.

<sup>341</sup> [http://www.jisc.ac.uk/printer\\_friendly.cfm?name=wg\\_fairdealing\\_summary](http://www.jisc.ac.uk/printer_friendly.cfm?name=wg_fairdealing_summary), accessed on 09 February 2005

**C.2.3.1.3 Other exceptions and limitations**

Other exceptions and limitations under the UK CDPA law pertain to:

- (1) The making of temporary copies<sup>342</sup> which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable a transmission of the work in a network between third parties by an intermediary; or a lawful use of the work; and which has no independent economic significance (Section 28 A<sup>343</sup>);
- (2) use by visually impaired persons (Sections 31A – 31F<sup>344</sup>)<sup>345</sup>;
- (3) educational use (Sections 32 – 36A<sup>346</sup>);
- (4) use by libraries and archives (Sections 37 – 44<sup>347</sup>)<sup>348</sup>;
- (5) use in the context of public administration (Sections 45 – 50);
- (6) use of computer programs and databases (Sections 50A – 50D)<sup>349</sup>
- (7) use in the case of design documents (Sections 51-53) and design typefaces (Section 54);
- (8) use of works in electronic form (Section 56);
- (9) certain uses concerning literary, dramatic, musical and artistic works (Sections 57 – 65), lending of works and playing of sound

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<sup>342</sup> Does not apply for computer programs and databases

<sup>343</sup> See *infra*, Appendix G.6.5

<sup>344</sup> *Ibid.*

<sup>345</sup> These exceptions were introduced with the passing of the Copyright (Visually Impaired Persons) Act 2002

<sup>346</sup> See *infra*, Appendix G.6.5

<sup>347</sup> *Ibid.*

<sup>348</sup> Especially concerning the issue of copying by librarians

recordings (Section 66), films and sound recordings (Sections 66A - 67) and broadcasts (Sections 68 – 75)<sup>350</sup>

### **C.2.3.2 Technological Protection Measures**

The 2003 amendment brought the CDPA into line with the EC Copyright Directive regarding technological protection measures. The new regulation is spread over seven sections.<sup>351</sup> However, the UK CDPA had provided some protection for technological protection measures for some time in Section 296, yet, this protection was only be continued for computer programs, while for other works henceforth a different regime applies, providing civil remedies for the act of circumvention and both civil and criminal sanctions for making and dealing in circumvention devices and the provision of circumvention services.<sup>352</sup>

## **C.3 Australia**

### **C.3.1 Overview**

In Australia, copyright law is governed by the Copyright Act of 1968,<sup>353</sup> the Copyright Regulations 1969, and various court and tribunal decisions that have applied and interpreted the Act and the Regulations. A fair dealing must be within one of the categories set out in the Act. This categorisation resembles the UK approach with a number of specific purposes relating to fair

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<sup>349</sup> Including backup-copies decompilation and reverse-engineering; these provisions were enacted in accordance with the EC Computer Program Directive and EC Database Directive

<sup>350</sup> Including recordings for the purpose of time-shifting (Section 70)

<sup>351</sup> See Sections 296 – 296ZF of the UK CDPA, *infra*, Appendix G.6.5.

A detailed discussion of these provisions goes well beyond the scope of this thesis. For further information see the instructive article of Brazell, *Quis custodiet ipsos custodes? The protection of technological copyright protection measures*, website of Bird & Bird law firm, [http://www.twobirds.com/english/publications/articles/technological\\_copyright\\_protection\\_measures.cfm?RenderForPrint=1](http://www.twobirds.com/english/publications/articles/technological_copyright_protection_measures.cfm?RenderForPrint=1), accessed on 09 February 2005

<sup>352</sup> For detailed information about the changes being made see the Transposition Note of the UK Patent Office, [http://www.patent.gov.uk/copy/notices/2003/copy\\_direct3a.htm](http://www.patent.gov.uk/copy/notices/2003/copy_direct3a.htm), accessed on 09 February 2005

dealing and distinguishes the Australian defence from the open-ended US fair use concept. Arguably, fair dealing under Australian Copyright law applies broadly to all the exclusive rights subsisting in the particular subject matter that falls within the exception.<sup>354</sup>

### **C.3.1.1 Fair dealing, Sections 40 to 43 of the Australian Copyright Act**

With its statutory basis in Sections 40 – 43<sup>355</sup> of the Australian Copyright Act, fair dealing is currently confined to four purposes:

- (1) Research or study (Section 40<sup>356</sup>);
- (2) criticism or review (Section 41<sup>357</sup>);
- (3) reporting of news (Section 42<sup>358</sup>); and
- (4) professional advice given by a legal practitioner or patent attorney (Section 43(2)).

The guidelines set out in Section 40 (2)<sup>359</sup> are similar to the non-exclusive list of factors to be taken into account in determining fair use under Section 107 of the US Copyright Act. However, Section 40(2)(c) has no counterpart in the US legislation. It provides for consideration by a court of "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price".

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<sup>353</sup> Copyright Act 1968 Commonwealth of Australia 63/1968, as amended

<sup>354</sup> Copyright Law Review Committee report of 1998 "Simplification of the Copyright Act 1968 – Part I - Exceptions to the Exclusive Rights of Copyright Owners" paragraph 4.04 – 4.05

<sup>355</sup> See *infra*, Appendix G.7

<sup>356</sup> See also Section 103C for an "audio-visual item", which is defined in Section 100A as "a sound recording, a cinematograph film, a sound broadcast or a television broadcast"

<sup>357</sup> See also Section 103A for an "audio-visual item"

<sup>358</sup> See also Section 103B for an "audio-visual item"

<sup>359</sup> See also Section 103C (2)

Arguably, the factors mentioned in Section 40(2) are also relevant in determining the fairness of a dealing for purposes other than research or study, since both the principles in the case law and the factors described under Section 107 of the US Copyright Act are not limited to a specific purpose.

As far as the fair dealing provisions require sufficient acknowledgment, Section 10(1) of the Australian Copyright Act needs to be considered. Section 10(1) defines a sufficient acknowledgment as

"an acknowledgment identifying the work by its title or other description and, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgement of his or her name is not to be made, also identifying the author".

Regarding the fair dealing exception for the purpose of research and study (Section 40), Australian Copyright law grants users broader rights to copy than the Copyright law of the United Kingdom, since it does not refer to *private* study only. The limitation of 'private' before the word 'study' was removed from the Australian Copyright Act in 1980.<sup>360</sup>

### **C.3.1.2 The Interpretation of fair dealing by Australian courts**

When dealing with a question of fair dealing, Australian courts often refer to relevant decisions of the courts of the United Kingdom and the United States concerning fair use or fair dealing. However, three Australian cases<sup>361</sup> should be mentioned, which have brought further clarification to the matter of fair dealing in Australia.

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<sup>360</sup> See Copyright Amendment Act 1980

<sup>361</sup> Other "fair dealing" cases are: *The Commonwealth v. Walsh* (1980) 147 CLR 61; *The Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 CLR 39; *Blackie & Sons Ltd. v. Lothian Book Publishing Co. Proprietary Ltd.* (1921) 29 CLR 396

In 1975, the High Court of Australia stated in *University of New South Wales v Moorhouse*<sup>362</sup> that

"[t]he principles laid down by the Act are broadly stated, by reference to such abstract concepts as 'fair dealing' (s 40) and 'reasonable portion' (s 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case."<sup>363</sup>

In 1990, the Federal Court of Australia examined the limits of the fair dealing provisions in *De Garis and Another v Neville Jeffress Pidler Pty Limited*.<sup>364</sup> The court held that in relation to Section 40 the words "research" and "study" are intended to have their ordinary dictionary meanings<sup>365</sup>. Likewise, the court used the dictionary to define the words "criticism"<sup>366</sup> and "review"<sup>367</sup> in Section 41.

In 2002, the Federal Court of Australia concluded in *TCN Channel Nine Pty Ltd v Network Ten Pty Limited*<sup>368</sup> that the following eight principles emerged from the authorities on fair dealing:

- (1) Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;
- (2) Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing truth of purpose (sic);

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<sup>362</sup> 133 CLR 1

<sup>363</sup> *Ibid.* at 12

<sup>364</sup> 37 FCR 99

<sup>365</sup> *Ibid.* at 105-106. The court used the Macquarie dictionary. Accordingly, "research" means a "diligent and systematic enquiry or investigation into a subject in order to discover facts or principles: research in nuclear physics". "Study" is defined as "1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. the cultivation of a particular branch of learning, science, or art: The study of law. 3. a particular course of effort to acquire knowledge: to pursue special medical studies [...] 5. a thorough examination and analysis of a particular subject [...]".

<sup>366</sup> The Macquarie definition of "criticism" is: "1. the act or art of analysing and judging the quality of a literary or artistic work, etc: literary criticism. 2. the act of passing judgment as to the merits of something [...] 4. a critical comment, article or essay; a critique."

<sup>367</sup> The Macquarie defines "review" as: "1. a critical article or report, as in a periodical, on some literary work, commonly some work of recent appearance; a critique [...]"

<sup>368</sup> 118 FCR 417

- (3) Criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment. Criticism and review may be strongly expressed;
- (4) Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
- (5) An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; 'the path of criticism is a public way';
- (6) Criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;
- (7) 'News' is not restricted to current events; and
- (8) 'News' may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.<sup>369</sup>

### **C.3.1.3 Further exceptions under Australian Copyright law**

In addition to the fair dealing provisions discussed above, the Australian Copyright Act contains numerous exceptions to copyright infringement. The main exceptions will be outlined below.

#### ***C.3.1.3.1 Library and archive copying***

Part III Division 5 (Sections 48-52) of the Australian Copyright Act deals with copying of works in libraries or archives. Accordingly, but subject to certain conditions<sup>370</sup>, (non-profit) libraries and archives are allowed to copy and communicate works and parts of works - without permission of the copyright-holder and without payment - for and to researchers or students, members of Parliament and other libraries or archives. Moreover, a library or archive may reproduce and communicate original material for the purpose of its preservation, and a library or archive is allowed to copy unpublished material whose author has been dead for more than 50 years for a client's research or study or with a view to publication. Moreover, libraries may digitize hardcopy material as well as copy and electronically communicate digital material.

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<sup>369</sup> *Ibid.* at 438-9

**C.3.1.3.2 Other non-infringing actions**

Other non-infringing actions are:

- (1) Copying of an insubstantial portion<sup>371</sup>;
- (2) reproduction for purpose of judicial proceedings or professional advice (Section 43);
- (3) temporary reproductions of copyright material or copies of audio-visual items made in the course of communication (Sections 43A and 111A);
- (4) inclusion of works in collections for use by places of education (Section 44);
- (5) reading or recitation in public or the inclusion in a sound or television broadcast of an extract of reasonable length from a published literary or dramatic work (Section 45);
- (6) performance at premises (by operation of reception equipment or the use of a record) where persons reside or sleep (Section 46);
- (7) reproduction solely for purpose of broadcasting (Section 47);
- (8) communication by use of certain facilities (Section 39B)<sup>372</sup>;

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<sup>370</sup> *Inter alia*, users must provide a written declaration that the reproduction is required for the purpose of research and study only.

<sup>371</sup> For books, the Act allows one or two pages for works that are in hardcopy form and up to 200 pages in length, and no more than 1% if more than 200 pages (Section 135ZG). For all other categories of copyright material, the Act does not provide a measure for "insubstantial".

<sup>372</sup> Section 39B provides:

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.

- (9) reproduction for purposes of simulcasting (Section 47AA );
- (10) reproduction for normal use or study of computer programs (Section 47B);
- (11) back-up copy of computer programs (Section 47C);
- (12) reproducing computer programs to make interoperable products (Section 47D);
- (13) reproducing computer programs to correct errors (Section 47E);
- (14) reproducing computer programs for security testing (Section 47D).

#### **C.3.1.3.3 Statutory Licenses**

Copying may be authorised by a statutory licence and – in some cases – payment of fees to a copyright collection agency<sup>373</sup> in Australia. Statutory licences allow certain limited uses of copyright material by certain classes of users. The system of statutory licenses is exceptionally complex in Australia and pertains to a number of uses which have been described above as ordinary exceptions to copyright in other countries. Hence, an examination of these statutory licenses is worthwhile.

*Inter alia*, statutory licenses are contained in Sections 135ZGA - 135ZME pertaining to the reproduction of hardcopy works and reproduction and communication of works in electronic form for the teaching purposes of educational institutions. However, the definition of 'educational institution' set out in Sections 10(1) and 10A is extraordinarily detailed.

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<sup>373</sup> For instance, the Copyright Agency Ltd. (CAL)

Moreover, Sections 135ZN-135ZT permit certain reproductions<sup>374</sup> and communications of works by institutions assisting persons with printing disabilities or persons with intellectual disabilities.

Further statutory licenses concern recordings of musical works (Section 54-64), "ephemeral broadcast" (Section 47 (3)), use of copyright material for the services of the Crown (Section 183), broadcasting sound recordings or causing them to be heard in public (Sections 108-109), retransmission of free-to-air broadcasts (Sections 135ZZI-135ZZZE) and the making of a sound broadcast by holders of print disability radio licences (Section 47A).

#### **C.3.1.4 The Copyright Law Review Committee**

In 1983, the Australian Copyright Law Review Committee was established to suggest changes in the law of copyright to the Attorney General. Thereafter, the committee presented several reports. In the report "Simplification of the Copyright Act Part 1 - Exceptions to the Exclusive Rights of Copyright Owners" of September 1998, the Copyright Law Review Committee made a number of recommendations regarding the fair dealing exception under Australian Copyright law<sup>375</sup>. However, to date the Australian Government has not yet responded to these recommendations. When two parliamentary committees examined numerous amendments to the Copyright Act introduced by the Government for the purpose of implementing the Australia – United States

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<sup>374</sup> Such as Braille and large-print versions

<sup>375</sup> See Copyright Law Review Committee report of 1998 "Simplification of the Copyright Act 1968 – Part I - Exceptions to the Exclusive Rights of Copyright Owners" chapter 6

Free Trade Agreement (AUSFTA)<sup>376</sup>, there was some favourable comment by committee members about the flexibility of the open-ended US fair use doctrine.

#### **C.3.1.5 The Copyright Amendment (Digital Agenda) Act 2000**

The Copyright Act of 1968 was considerably amended through the Copyright Amendment (Digital Agenda) Act 2000.

The Copyright Amendment (Digital Agenda) Act intended to align Australia's copyright law with international obligations under the WCT and included a number of new copyright exceptions. *Inter alia*, the Act extended special exceptions for libraries and educational institutions into the digital environment and introduced provisions outlawing the circumvention of technological protection measures and broadcast decoder devices (accompanied by criminal penalties and civil remedies).<sup>377</sup>

The meaning of "reproduction" was altered by confirming that a digitised version of non-digitised material is a reproduction, and vice-versa (Section 21A). Furthermore, the copyright exceptions regarding computer programs (Sections 47B-47H)<sup>378</sup> were amended and the non-exhaustive definition in Section 10 (2A)<sup>379</sup> of "reasonable portion" at Section 40 (3) for works that are in electronic form was altered.

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<sup>376</sup> The Australia – US Free Trade Agreement (AUSFTA) entered into force on 01 January 2005. The issue of Intellectual Property is covered in Chapter 17 of the AUSFTA, the longest chapter in the Agreement.

<sup>377</sup> For a comprehensive overview over the changes being made see the website of Ladas & Parry LLP, <http://www.ladas.com/BULLETINS/2002/0202Bulletin/AustraliaDigitalCopyLaw.html>, accessed on 08 November 2004

<sup>378</sup> These provisions allow copying of computer programs for "normal use", studying the ideas behind a computer program, making interoperable products, correcting errors, testing security and making backup-up copies.

<sup>379</sup> For the wording of Section 10 see *infra*, Appendix G.7

In the meantime the provisions of the Copyright Amendment (Digital Agenda) Act were reviewed due to the rapid pace of technological development and the challenge for copyright law to keep up. A report ("Digital Agenda Review Report") was released in 2004<sup>380</sup> stating that "in general, the Digital Agenda Act is achieving its objectives and is working well."<sup>381</sup> However, the report contains twenty recommendations for improving the current legal situation.

#### **C.3.1.6 US Free Trade Agreement Implementation Act 2004 and the Copyright Legislation Amendment Act 2004**

In connection with the conclusion of the Australia/US Free Trade Agreement (AUSFTA), which came into force on 01 January 2005, Australia had to amend its Copyright Act. This was done through the US Free Trade Agreement Implementation Act 2004<sup>382</sup> and the Copyright Legislation Amendment Act 2004<sup>383</sup> *Inter alia*, the term for copyright protection was extended for most copyright material by 20 years, the type of electronic rights management information which can receive legal protection was extended and wider criminal provisions for copyright infringement were introduced.

#### **C.3.1.7 Technological Protection Measures**

Under current Australian copyright law, the making, importing, selling, offline and online distributing and promoting of circumvention devices and services is

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<sup>380</sup> The report is online available under <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations>, accessed on 08 November 2004.

<sup>381</sup> Digital Agenda Review Report, 1

<sup>382</sup> A full text version of the US Free Trade Agreement Implementation Act 2004 can be found under <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/frame lodgment attachments/461C078C08DOA9EECA256F8500223E97>, accessed on 09 February 2005

<sup>383</sup> A full text version of the Copyright Legislation Amendment Act 2004 can be found under <http://www.lawsearch.gov.au/html/comact/12/6910/0/CM000070.htm>, accessed on 09 February 2005

prohibited (Section 116A<sup>384</sup>). However, the making, importation and supply of the services is not prohibited for a range of permitted purposes<sup>385</sup>, such as

- (1) Reproducing computer programs to make interoperable products (Section 47D);
- (2) reproducing computer programs to correct errors (Section 47E);
- (3) reproducing computer programs for security testing (Section 47F);
- (4) copying by Parliamentary libraries for members of parliament (Section 48A);
- (5) reproducing and communicating works by libraries and archives for users (Section 49);
- (6) reproducing and communicating works by libraries or archives for other libraries or archives (Section 50);
- (7) reproducing and communicating works for preservation and other purposes (Section 51A)
- (8) use of copyright material for the services of the Crown (Section 183);
- (9) reproduction and communication by educational institutions and institutions assisting persons with a print or intellectual disability (part VB).

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<sup>384</sup> See *infra*, Appendix G.7

<sup>385</sup> See Section 116A(3)(v)

## **D        *The Impacts of the Internet and digitizing for fair use***

The Internet<sup>386</sup> and the possibility to digitize<sup>387</sup> copyright material have been characterized as the most significant technological advances in relation to copyright law since the invention of the printing press.<sup>388</sup> However, along with the invention of the printing press, the development of photocopy machines and the introduction of broadcast technology, the digital age represents only another major technological innovation copyright law has been confronted with over the years.<sup>389</sup>

While in 1996 about 45 million people used the Internet worldwide<sup>390</sup>, over 300 million people used the Internet by the year 2000<sup>391</sup>. By the end of 2004, roughly 900 million users were connected to the Internet<sup>392</sup> and in 2005 the number of Internet users will presumably top 1 billion.<sup>393</sup> Thus, the Internet represents an enormous resource with respect to information and ideas in different forms, such as text, audio, video or photographs.<sup>394</sup> As of 2003, the World Wide Web, launched only in the early 1990s, contained

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<sup>386</sup> For brief history of the Internet see Cunard/Hill/Barlas, *WIPO Study on Current Developments in the Field of Digital Rights Management* (2003), 5 et seq.

<sup>387</sup> Digitizing means "to put [analog] information into the form of a series of the numbers 0 and 1, [...] so that it can be processed by a computer", Cambridge Dictionaries Online, <http://dictionary.cambridge.org>, accessed 11 November 2004. Information is encoded by using a massive array of binary switches which can be turned on ("1" – high electronic voltage) or off ("0" – low electronic voltage).

<sup>388</sup> Davis 'Fair use on the Internet: A Fine Line Between Fair and Foul' 34 *University of San Francisco Law Review* (1999) 132

<sup>389</sup> Menell 'Symposium: IV. Can Our Current Conception of Copyright Law Survive The Internet Age?: Envisioning Copyright Law's Digital Future' 46 *New York Law School Law Review* (2002/2003) 63-64

<sup>390</sup> Forbes website, <http://www.forbes.com/asap/2002/1007/020tab.html>, accessed on 10 November 2004

<sup>391</sup> Press release of the Computer Almanac Inc. of 24 April 2001, <http://www.c-i-a.com/pr0401.htm>, accessed on 10 November 2004

<sup>392</sup> Internetworldstats, <http://www.internetworldstats.com/stats.htm>, and press release of the Computer Almanac Inc. of 03 September 2004, <http://www.c-i-a.com/pr0904.htm>, accessed on 10 November 2004

<sup>393</sup> *Ibid.*

approximately 170 terabytes (170 X 10<sup>12</sup> bytes) of data.<sup>395</sup> The functionality of the Internet<sup>396</sup> has been described by Street and Grant<sup>397</sup> as follows:

"The normal use of a World Wide Web pages is for that page to be requested by a user's Web browser for download. That information containing text and graphic files is then transmitted through Internet servers to the requesting user's computer. When that information reaches the requesting user's computer, it is stored in random access memory and also in an automatic temporary disc cache. The requesting user is then able to read and view the information."<sup>398</sup>

The following characteristics of the digital revolution were determined at an Intellectual Property and Technology conference in Cambridge, Massachusetts (U.S.A.) in 1993:<sup>399</sup>

- (1) Digital material is intangible until it is processed and projected through a microprocessor-controlled device;
- (2) digital material can be copied indefinitely with no loss of quality;
- (3) information can be combined, altered, mixed, and manipulated with relative ease;

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<sup>394</sup> Silberberg 'Preserving Educational Fair Use in the Twenty-First Century' 74 *Southern California Law Review* (2001) 643

<sup>395</sup> Lyman/Varian, *University of Berkeley Study 'How much Information? 2003' Executive Summary* (2003), <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm>, accessed on 05 February 2005

<sup>396</sup> For a more detailed description of the functionality of the Internet see Phan 'Will Fair Use Function on the Internet?' 98 *Columbia Law Review* (1998) 187-189

<sup>397</sup> Street/Grant, *Law of the Internet* (2001), § 5-5(d)

<sup>398</sup> Thus, the Internet works by copying and, therefore, it generates a number of potentially infringing copies. In *MAI Systems Corp. v Peak Computer Inc.* (991 F.2d 511 (1993)), an US court ruled that these ephemeral copies might constitute copyright infringement. Thereby, the court ignored the traditional distinction in copyright law between access and reproduction. However, other US courts have acknowledged that mere browsing will in most cases qualify as fair use (see *Religious Technology Center v. Netcom On-Line Communication Services*, 907 F. Supp. 1361, 1378 (N.D. Cal. 1995)). Moreover, the Internet causes copyright related problems as to linking, framing and liabilities of ISPs. These issues will not be discussed in this thesis.

<sup>399</sup> See David Baron 'Digital Technology and the Implications for Intellectual Property' in: *World Intellectual Property Organization, WIPO Worldwide Symposium on the Impact of Digital Technology on Copyrights and Neighboring Rights* (1993), 31

- (4) digital media has an indefinite life.

### **D.1 The impacts for copyright law in general**

Lawrence Lessig noted that copyright law is the form of intellectual property that is "the most vulnerable to the changes [brought about by] cyberspace".<sup>400</sup> The use of the Internet has the potential to violate many exclusive rights of copyright holders<sup>401</sup>, and without a doubt, copyright infringement is omnipresent on the Internet.<sup>402</sup>

In summary, the three significant changes caused by computer-technology, digitizing and the Internet regarding copyright are these<sup>403</sup>:

- (1) Digitizing has altered the way reproduction is being conducted;
- (2) computer networks have altered the way distribution is being conducted; and
- (3) the world wide web has altered the way of publication.

These changes entailed both new challenges and opportunities for copyright holders as well as users.<sup>404</sup> Firstly, the possibility to create unauthorized, perfect and costless copies with ease and the immediate and worldwide distribution through digital technology poses a threat to copyright

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<sup>400</sup> Lessig, *Code and Other Laws of Cyberspace* (2001), 124

<sup>401</sup> Silberberg, *supra* note 394, at 643

<sup>402</sup> Davis, *supra* note 388, at 130

<sup>403</sup> Similar to Samuelson/Davis, *The Digital Dilemma: A Perspective on Intellectual Property in the Information Age*, paper written for presentation at the 28<sup>th</sup> Annual Telecommunications Policy Research Conference (2000, Alexandria (Virginia) USA) (in possession of the author), 7

<sup>404</sup> Okediji 'Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace' 53 *Florida Law Review* (2001) 180

holders.<sup>405</sup> Each of those perfect copies can be used as the basis for further perfect copies.<sup>406</sup> Moreover, digitizing makes inexpensive alteration, enhancement and manipulation of copyrighted works possible<sup>407</sup>; in fact, the manipulability of digitized materials became one of the key advantages of the digital medium.<sup>408</sup> Previously, high costs for reproduction and the decreasing quality of copies were natural barriers to widespread infringement.

Secondly, however, distribution of works has become much quicker, easier and cheaper for copyright holders through the new technologies.<sup>409</sup> As long as there is a telephone or another network connection, online-information is available to an almost unlimited audience all over the world. New digital technologies enable copyright holders conveniently to license materials,<sup>410</sup> and, thus, licensing became the dominant way of Intellectual Property transaction.<sup>411</sup> Additionally, copyright holders can lock up their information through technological protection measures (TPMs),<sup>412</sup> and so-called Digital Rights Management Systems (DRMs) enable copyright holders to monitor the use and distribution of their works. Further characteristics of digital technology are the

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<sup>405</sup> Correa, *Fair Use in the Digital Era*, website of the UNESCO, [www.webworld.unesco.org/infoethics2000/documents/paper\\_correa.rtf](http://www.webworld.unesco.org/infoethics2000/documents/paper_correa.rtf), accessed 13 April 2004

<sup>406</sup> Samuelson/Davis, *supra* note 403, at 7

<sup>407</sup> Hawke, *supra* note 128, at 2

<sup>408</sup> Samuelson 'Copyright's Fair Use Doctrine and Digital Data' *37 Communications of the ACM* (1994) 24

<sup>409</sup> Antezana 'NOTE: The European Union Internet Copyright Directive as Even more than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory' *26 Boston College International & Comparative Law Review* (2003) 439

<sup>410</sup> Silberberg, *supra* note 394, at 618

<sup>411</sup> For a long time in IP history, the sale of physical copies of works was predominant. For an instructive discussion of the advantages and disadvantages of sales as compared to licensing see the report of the Committee on Intellectual Property Rights, Computer Science & Telecommunication Board, *The Digital Dilemma: Intellectual Property in the Information Age* (2000), [http://www.nap.edu/html/digital\\_dilemma](http://www.nap.edu/html/digital_dilemma), 100 *et seq.*, accessed on 05 February 2005

<sup>412</sup> Okediji, *supra* note 404, at 181

ease of combining digital works into a new product, the compactness of works in digital form, and new search and link capabilities.

The Internet and the possibility to digitize brought two main threats to copyright law, one that affects copyright holders and one that affects content users. The copyright holders fear that the sale or licensing of their products will decrease significantly, which threatens their financial investment in the development of these works.<sup>413</sup> Users, however, fear that digital technologies might lead to a total technical protection of copyrighted works with considerably reduced access to society's intellectual and cultural heritage.<sup>414</sup>

Although digital technology was introduced more than half a century ago, it only started to affect the businesses of traditional content providers, such as the print, film and music industry, when powerful computers became affordable for private users and after the World Wide Web was introduced in the early 1990s.<sup>415</sup> Subsequent innovations regarding data storage<sup>416</sup> and data compression (e.g. the introduction of the MPEG-format<sup>417</sup> and the sale of MP3 players) as well as faster networks and advanced network software (which allowed among other things for peer-to-peer communication<sup>418</sup>) accelerated this development.<sup>419</sup> These profound changes affected the previous balance

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<sup>413</sup> Gasaway 'Values Conflict in the Digital Environment: Librarians versus Copyright Holders' 24 *Columbia – VLA Journal of Law & the Arts* (2000) 159

<sup>414</sup> Samuelson/Davis, *supra* note 403, at 4

<sup>415</sup> Menell, *supra* note 389, at 66 and 98-99

<sup>416</sup> Today, the standard hard drive's capacity is with around 200 gigabytes, while the first IBM hard drive in 1956 could store 5 megabytes only.

<sup>417</sup> Invented by the Fraunhofer Institute during the late 1980s in Erlangen, Germany

<sup>418</sup> Such as Napster

<sup>419</sup> For a detailed description of a number of technological developments that have taken place see Menell, *supra* note 389, at 66 and 110-118

reached by copyright laws between the interests of the authors and copyright-holders on the one hand and the interests of the public on the other hand.<sup>420</sup> Hence, some scholars questioned whether copyright law is at all capable of dealing with the requirements of the digital age,<sup>421</sup> since new technological developments are fast-paced, whereas responding amendments of the law are generally time-consuming.<sup>422</sup> Moreover, computer and communication equipment in private households caused a significant increase of small-scale infringements by private individuals,<sup>423</sup> while - up to now- copyright laws mainly aimed to regulate businesses and organizations whose actions had large-scale public consequences.<sup>424</sup>

Thus, copyright law may stand in need of significant reconfiguration to meet the demands of the digital age at the very least. First steps in this direction have been taken and new laws have been adopted after lengthy negotiations, such as the WIPO Internet Treaties of 1996, the DMCA of 1998 in the United States<sup>425</sup>, the EC Copyright Directive of 2001 and subsequently enacted laws in the EU member states as well as the Copyright Amendment (Digital Agenda) Act 2000 in Australia. In this context, lawmakers need to overcome a number of obstacles. *Inter alia*, the international dimension of the Internet must be taken into account: the infrastructure of the Internet is international, it is not confined to any national boundaries – it simply expands

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<sup>420</sup> See Phan, *supra* note 396, at 216

<sup>421</sup> See - for the US copyright law - Litman 'Reforming Information Law in Copyright's Image' 22 *Dayton Law Review* (1997) 590

<sup>422</sup> Beldiman, *supra* note 114, at 10

<sup>423</sup> Samuelson/Davis, *supra* note 403, at 11

<sup>424</sup> *Ibid.*

<sup>425</sup> For an all-embracing overview over American legislation regarding digital copyright see Menell, *supra* note 389, at 129 *et seq.*

world-wide. However, despite some efforts regarding the harmonization of national copyright laws<sup>426</sup>, considerable differences around the world do still exist.<sup>427</sup> Additionally, several perspectives need to be considered, namely law, technology, economics, psychology and sociology, and public policy.<sup>428</sup> Finally, the enforcement of online copyright infringements faces a range of difficulties. First of all, it is not cost-effective for copyright holders to sue individual infringers, because there are millions of them, because lawsuits are expensive, and because many infringers would only be liable for minimal damages. Secondly, the international character of the Internet and its potential for anonymity cause enforcement problems. Infringers might move offshore or conceal their identity by using sophisticated encryption technologies. Moreover, it may be very difficult for domestic courts to find domestic assets to seize, and court orders to shut down or block access to an infringing site placed on a foreign web server might prove utterly impossible.

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<sup>426</sup> Such as TRIPS, the WIPO Internet Treaties and the European Copyright Directive

<sup>427</sup> For example, many parts of the world have a 50 year copyright protection term rather than the quasi-permanent copyright now found in the US. (for details on how long copyright protection currently lasts in the US see the Copyright Information Center website of the Cornell University, [http://www.copyright.cornell.edu/training/Hirtle\\_Public\\_Domain.htm](http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm)). Therefore, in July 2005 the first Elvis Presley song goes – for instance - into the European public domain, while it will remain protected under US Copyright law. It is foreseeable, that many Americans will nevertheless access European websites to get the song. American Copyright law will be sidestepped. A similar situation occurred in 2004 in Australia, when the Australian version of Project Gutenberg (<http://www.gutenberg.net.au>) put the text of the 1936 "Gone With The Wind" online at no charge. The book is still under American copyright, but had moved into the public domain in Australia. Thereafter, Project Gutenberg received a cease and desist email from the law firm representing the estate of the book's author, Margaret Mitchell, and then removed the text from its servers. However, following the conclusion of the above-mentioned AUSFTA the Australian copyright term was adapted to the US term of protection. But nonetheless the danger arises that the most restrictive national copyright laws will be the ones setting that level.

<sup>428</sup> Samuelson/Davis, *supra* note 403, at 15

The implications of digitizing and the Internet vary across the different kinds of content industries.<sup>429</sup> While the music industry has experienced a huge number of copyright infringements via the Internet, the television and film industry have been - thus far - less affected, partly due to the amount of data necessary to download videos. For some reason<sup>430</sup>, the online distribution of printed material, especially the distribution of so-called eBooks, has developed slowly so far and, therefore, the printing industry has similarly been less affected until now. Yet, newspapers, journals and magazines are widely distributed online and in this respect copyright infringement occurs on a large scale. Due to its restricted scope, the thesis focuses on the implications of digitizing and the Internet with regard to the printing industry.

## **D.2 The impacts for fair use**

### ***D.2.1 Introduction***

The fair use doctrine is an important tool to balance the interests of the right holders and the interests of the public. However, the possibility to digitize copyright material and the development of the Internet with its potential to cause significant economic, social, and cultural change<sup>431</sup> have shifted the current balance between right holders and the public as the opportunities for public access have been considerably increased. Users are not mere passive recipients of copyright material anymore, but active consumers, capable of interacting with the material to enhance the usability of it. Hence, the question

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<sup>429</sup> Menell sheds light on the particular impacts of digitizing for the different content industries, see *supra* note 389 at 119 *et seq.*

<sup>430</sup> One reason might be that the hardware available nowadays is just not convenient or "stylish" enough (compared to, e.g., the Apple iPod for music files).

<sup>431</sup> See Phan, *supra* note 396, at 216

of whether and to what extent private copying of copyrighted materials could be justified under the fair use doctrine has become much more relevant in the digital environment due to the ease with which digital copies can be made and disseminated.

Thus, in the context of digitizing and the Internet, the scope of the fair use doctrine needs to be scrutinized.<sup>432</sup> Some scholars argue that the factual changes brought by digitizing and the Internet are merely a change in issues and not a change in doctrine.<sup>433</sup> Others argue that the changes – especially with regard to Digital Right Management systems (DRMs) and Technological Protection Measures (TPMs) – jeopardize the whole concept of fair use and, therefore, they predict an increasingly troubled future for the doctrine<sup>434</sup>. Some even argue that the recent developments in digital technology might eventually eliminate fair use.<sup>435</sup> On the contrary, one could call for an expansion of the fair use doctrine due to manifold opportunities for fair uses of works made possible by digital technology, e.g. in the fields of distance education and research. Users as well as copyright holders have used the debate over fair use in the digital age to try to expand their positions.<sup>436</sup>

### ***D.2.2 DRM systems and TPM***

In the past, technological advances (such as photocopy and videotaping machines) have often posed challenges for copyright law<sup>437</sup> and required

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<sup>432</sup> *Ibid.* at 169

<sup>433</sup> Davis, *supra* note 388, at 167-168

<sup>434</sup> Leaffer, *supra* note 33, at 849

<sup>435</sup> For the educational sector see Silberberg, *supra* note 394, at 618

<sup>436</sup> Gasaway, *supra* note 413, at 161

<sup>437</sup> Samuelson/Davis, *supra* note 403, at 1

several amendments of national and international copyright laws.<sup>438</sup> Yet, significant modifications of the fair use doctrine were not necessary, since a technologically neutral interpretation of the fair use criteria led to reasonable results. However, to fully advance digital technologies, some measure of modification of the fair use doctrine is required as DRMs technologies enable copyright holders for the first time to control each use of their copyrighted material and to charge an individual fee for the use.<sup>439</sup> Of course, this poses a new challenge to the fair use doctrine. Various kinds of DRM systems<sup>440</sup> have been developed to (a) prevent unauthorized access; (b) meter access to copyright material; (c) set out terms and conditions for the use of the material and to ensure compliance with these terms and conditions; (d) register and verify user details; and (e) track consumption patterns and dissemination of the copyright material.<sup>441</sup> The United States National Institute of Standards and Technology defined DRMs as "a system of information technology components and services, along with corresponding law, policies and business models, which strive to distribute and control intellectual property and its rights."

#### **D.2.2.1 Creation of a new licensing scheme**

DRM systems create, *inter alia*, a new licensing scheme. The existence of such a scheme might create a market, which has not existed before (e.g. because no pragmatic way to pay for a license existed). Therefore, a market impact as mentioned for example in Section 107 of the US Copyright becomes much

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<sup>438</sup> See for example the US Copyright Act of 1976, which, *inter alia*, enlarged the rights of copyright holders as a result of increasing infringements caused by technological advances such as the copy machine.

<sup>439</sup> Phan, *supra* note 396, at 206.

<sup>440</sup> Sometimes also called electronic copyright management systems (ECMS)

<sup>441</sup> Longdin 'Copyright and fair use in the digital age' 6 *University of Auckland Business Review* (2004) 4

more likely and, accordingly, the scope of fair use might narrow significantly. Several scholars have argued that fair use should only be found where there is such a market failure.<sup>442</sup>

#### **D.2.2.2 Technological Protection Measures (TPM) and anti-circumvention legislation**

The measures to prevent unauthorized access do have the biggest impact on the fair use doctrine. These measures have the potential to alter the delicate balance of rights in the digital environment and to establish a new "pay-per-use" society. TPM systems allow right holders to lock up their works as a privatized alternative to the protection provided by copyright law<sup>443</sup> and without consideration of the purpose for which an individual may want to access or copy the copyright work (e.g. copying for news reporting or private study).<sup>444</sup> In other words, TPM systems do not distinguish among uses - fair use and piracy are viewed in the same light. Thus, the copyright holder can dictate how the content is used. The possibility to allow certain quantities for copying (such as 10 percent of a book) is insufficient as fair usage cannot be generally quantified. Hence, the new digital technologies force users to accept licenses which restrict their traditional rights, especially their right to fair use.<sup>445</sup>

Yet, TPMs can technically be circumvented. One of the best-known examples of a TPM system is probably the so-called Content Scrambling

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<sup>442</sup> Gordon 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' *82 Columbia Law Review* (1982) 1657

<sup>443</sup> Beldiman, *supra* note 114, at 9

<sup>444</sup> On 17 November 2004, Sony Music Entertainment (Japan) stopped using technical copy-protection mechanisms for audio CDs which it sells in Japan. Sony justified its move by saying that Japanese consumers have learned important issues about piracy and legality of music copying. Moreover, Japan's legislation would be tougher now pertaining to piracy than it was when the copy protection mechanisms were introduced.

<sup>445</sup> McGreal 'Stealing the Goose: Copyright and Learning' *International Review of Research in Open and Distance Learning* (Nov 2004), <http://www.irrodl.org/content/v5.3/mcgreal.html>, accessed on 02 December 2004.

System (CSS), used for access control and copy prevention of DVDs.<sup>446</sup> In September 1999, CSS was hacked by a teenager from Norway named Jon Johansen. He developed the decrypting program DeCSS<sup>447</sup>, which made the copying of digital content to computer hard drives in unencrypted form as well as their playback on non-compliant machines possible. Johansen created the software to enable himself to watch DVDs, which he had legally purchased, on a Linux computer.<sup>448</sup> Eventually, Johansen was cleared of all charges and the Norwegian courts said there was no evidence that what he did was aiding DVD piracy and that it was not illegal to use the software tool to watch legally obtained DVD films.

However, it has been demonstrated above that an increasing number of international treaties and national copyright laws nowadays contain a legal prohibition pertaining to the circumvention of TPMs, namely Articles 6 and 7 of the EC Copyright Directive<sup>449</sup>, Section 95a of the German Copyright Act<sup>450</sup>, Sections 296 – 296ZF of the UK CDPA<sup>451</sup>, Section 116A of the Australian Copyright Act<sup>452</sup> and Section 1201 of the US Copyright Act<sup>453</sup>. All this legislation is based upon Article 11 of the WIPO Copyright Treaty of 1996 which provides:

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<sup>446</sup> A system developed by Matsushita Electric Industrial Co. and Toshiba Corp and adopted by the major studios in 1996

<sup>447</sup> However, several sources maintain that the copy protection code itself was broken by an anonymous German hacker, see Gray "DVD Jon" to seek compensation' *CNET news.com* (28 January 2004), <http://news.com.com/2110-1025-5149084.html>, accessed on 02 December 2004.

<sup>448</sup> See Berglund 'DVD-Jon wins new legal victory' *Aftenposten* (22 December 2003) <http://www.aftenposten.no/english/local/article696330.ece>, accessed on 02 December 2004. Basically, the courts said that there was no evidence that Johansen was helping people break the law.

<sup>449</sup> See *infra*, Appendix G.6.1

<sup>450</sup> See *infra*, Appendix G.6.4

<sup>451</sup> See *infra*, Appendix G.6.5

<sup>452</sup> See *infra*, Appendix G.7

<sup>453</sup> See *infra*, Appendix G.5

"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works which are not authorised by the authors concerned or permitted by the law."

Eventually, the introduction of anti-circumvention provisions creates new and powerful means to prevent any reproduction, including fair use. In other words, the technological protection of digital works makes it complicated or even impossible to copy of material for purposes which are usually exempt under the doctrine of fair use. In the United States of America this issue was discussed at length in connection with including a legitimate fair circumvention in the DMCA. However, Congress decided not to introduce a general fair use exception to the anti-circumvention provisions due to the fact that fair use is too dependent on particular facts and circumstances.

### ***D.2.3 Application of the fair use doctrine by courts within the context of digitizing***

Most of the cases dealing with fair use in the context of digitizing and the Internet come from the U.S.A. due to the fact that a disproportionately large number of copyright holders are based there and that the use of digital technology is widely spread.

In general, courts seem to apply the fair use doctrine unchanged and in a technologically neutral way and defer to the legislature to narrow, or broaden, the fair use defence. Accordingly, the Conference on Fair Use (CONFU) Final Report stated in this respect:

"While the NII [National Information Infrastructure] and other digital technology present myriad opportunities for fair uses of works, [i]t is reasonable to expect that courts would approach claims of fair use in the context of the NII just as they do in 'traditional' environments. Commercial uses that involve no 'transformation' by users and harm actual or potential

markets will likely always be infringing, while non-profit educational transformative uses will likely often be fair. Between these two extremes, courts will have to engage in the same type of fact-intensive analysis that typifies fair use litigation and frustrates those who seek a 'bright line' clearly separating the lawful from the unlawful."<sup>454</sup>

#### **D.2.3.1 Religious Technology Center v. Lerma (US)**

In *Religious Technology Center v. Lerma*<sup>455</sup>, the defendant Arnold Lerma had obtained copies of some documents belonging to the Church of Scientology from records of litigation in California. Subsequently, he posted these documents on the Internet without the permission of the Church. In its capacity as a subsidiary of the Church of Scientology, the Religious Technology Center sued Lerma for copyright infringement and trade secret misappropriation. The defendant invoked the fair use defence.

The court refused to change the traditional four-part fair use analysis only because of the utilization of digital technologies and denied the defendant's assertion of fair use as he had posted substantial amounts of the text on the Internet.

#### **D.2.3.2 Kelly v. Arriba Soft Corporation (US)**

In *Kelly v. Arriba Soft Corporation*<sup>456</sup>, the defendant operated a visual Internet search engine website. The plaintiff is a photographer whose work was displayed in small-scale "thumbnail" format on the search engine website without his consent. A mouse-click on the "thumbnail" image would forward the user to the defendant's website and open the full size picture in a new browser window by bypassing the defendant's home page.

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<sup>454</sup> CONFU Final Report at 5

<sup>455</sup> 40 U.S.P.Q. 2d 1569

<sup>456</sup> 280 F.3d 934 (9th Cir. 2002)

Using the traditional four-part test, the court concluded that the conversion of Internet photos to "thumbnails" and the display of these "thumbnails" was permissible under the fair use exception. However, the deep-linking and display of the plaintiff's full-sized images was not considered to be fair use, since it violated the plaintiff's "public display" rights and might have a significant effect on the market as it reduced the plaintiff's opportunities to sell his photographs.<sup>457</sup>

#### **D.2.3.3 Thumbnail search engine in Germany (Germany)**

Subsequent to the *Kelly v. Arriba Soft Corp.* decision in the United States, a decision by a lower court in Germany demonstrates the differences regarding the fair use doctrine in different countries. In 2003, the Hamburg District Court found "thumbnails" provided by a search engine to infringe German copyright law<sup>458</sup>. Thus, the decision is in contradiction to the United States Court of Appeal decision in *Kelly v. Arriba Soft Corp.*, where the use of "thumbnails" was regarded as fair use. The Hamburg judges considered the *Kelly v. Arriba Soft Corp.* decision as well as the fair use doctrine in general and concluded that the whole doctrine conflicts with the German civil law approach. In particular, the Hamburg court did not take into account the purpose of the "thumbnails". Rather, the court referred to the legislature as being in charge of providing for further exceptions where necessary.

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<sup>457</sup> On 07 July 2003, the court withdrew the second part of its decision on the grounds that such a claim had not been made by the parties in their motions for summary judgment.

<sup>458</sup> LG Hamburg, decision of 05 September 2003, 308 O 449/03

## ***E Libraries in a digitized world***

In its traditional meaning, the term 'library' referred to a collection of primarily printed materials maintained for consultation by the public.<sup>459</sup> For centuries, libraries have provided a valuable opportunity for publishers and authors to disseminate their works. Publishers realized that libraries are among their best customers and that libraries do have the power to influence the reading habits of millions. At the same time, libraries served the public interest for information as well as education and, thus, librarians depend on authors and publishers as they would have nothing to offer without them. Therefore, copyright holders and librarians have – to a certain extent – a symbiotic relationship. However, the financial objectives of the copyright holders still often conflicts with the goal of librarians to provide as much information to people for as little money as possible.<sup>460</sup>

The general consequences of digitizing as well as the inauguration of the Internet for copyright holders have been described above. Despite the problem that libraries faced new difficulties to identify the right-holder for the digital exploitation of a work, since traditional and digital copyright in a work could be owned by different people, the digital age offered unprecedented opportunities for libraries as providers of information. *Inter alia*, their role has been expanded to ensure freedom of access to information, to collect as well as preserve digital knowledge<sup>461</sup> and to establish e-reserves. In addition, digitizing advanced access to traditional materials, made preservation easier

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<sup>459</sup> Ricketson, *The three—step test, deemed quantities, libraries and closed exceptions*, (2002), 99, <http://www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf>, accessed on 13 December 2004

and eventually led to an extension of library collections. Moreover, the Internet facilitated libraries to offer their services not only regionally but nationally as well as worldwide.<sup>462 463</sup>

As a result, the conflict between copyright holders and librarians has deepened in recent years. Copyright holders feared further financial losses and pressed ahead with demands for pay-per-use licenses<sup>464</sup> as well as their claim to eliminate interlibrary loans with regard to digitized material. The latter claim is founded on the fear of copyright holders that only few libraries would buy a digital work and make unlimited copies for other libraries and their users. Librarians, however, argued that these measures would cause enormous additional expenses for libraries and could eventually jeopardize the fulfilment of their mission as information providers. Libraries simply could not afford all materials and therefore they would rely on sharing. In addition, the increased use of license agreements instead of sales could cause further problems pertaining to the traditional functions of libraries, namely the libraries' functions to collect and preserve material. If a library does not pay the license fee, it loses access to all of the content, and licenses for digital materials might not include the right to preserve materials.

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<sup>460</sup> Gasaway, *supra* note 413, at 116

<sup>461</sup> *Ibid.* at 132

<sup>462</sup> *Ibid.* at 159

<sup>463</sup> For more opportunities see Mathieson 'Libraries embrace digital age' *The Guardian* (28 January 2004) <http://society.guardian.co.uk/e-public/story/0,13927,1132475,00.html>, accessed on 10 February 2005

<sup>464</sup> In order to replace the so-called 'first-sale doctrine', which permits the owner of a physical copy of a copyrighted work, to lending, resell, dispose the item, and so forth.

In a nutshell, the three following questions regarding library copying in the digital age need to be dealt with<sup>465</sup>:

- (1) Should libraries and archives be able to communicate or make copyright material available in digital format;
- (2) should libraries and archives be able to provide interloan copies by digital means; and
- (3) should libraries and archives be able to digitize material for preservation purposes?

In order to resolve some of these problems, a number of national copyright laws – but not in South Africa - have since addressed the role of libraries within the copyright system, especially pertaining to digital technologies. Consequentially, specific exceptions for libraries were introduced.<sup>466</sup> For the countries examined in this paper the provisions dealing with library exceptions have been mentioned above<sup>467</sup> and the actual wording of these provisions are reproduced in the Appendix. However, attention should be paid to the fact that the fair use doctrine might remain applicable in addition to the specific provisions for libraries. For example, Section 108 of the US Copyright Act does not apply to library reserve copying and, therefore, reserve copying remains a Section 107 fair use issue. Yet, by establishing exceptions to the copyright holders' exclusive rights, these library provisions and all services based

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<sup>465</sup> According to Sheat 'Libraries, copyright and the global digital environment' 22 *The Electronic Library* (2004) 488, citing the New Zealand Ministry of Economic Development

<sup>466</sup> In some countries such exceptions are about to be introduced (for instance in Germany)

<sup>467</sup> Section 108 of the US Copyright Act, Article 5(2)(c) of the EC Copyright Directive, Section 52a-53 of the German Copyright Act, Sections 37 – 44 of the UK Designs and Patents Act of 1988, and Sections 48-52 of the Australian Copyright Act

thereon – such as a document delivery service - need to be in line with the aforementioned three-step test contained in various international treaties.

On 14 December 2004, Google, the world's most popular Internet search service, announced an agreement with the libraries of Harvard, Stanford, the University of Michigan, and the University of Oxford as well as The New York Public Library to begin converting their holdings into digital files in order to make these files be freely searchable over the Web. The project could take at least a decade and costs about \$ 150 million. Google plans to make the full text of only those books online available which are not under copyright anymore, while copyrighted works will only be available in short extracts.<sup>468</sup>

## ***F Summary, conclusion and prospects for South Africa***

This thesis has highlighted the important role of the fair use doctrine to strike a balance between the contrasting interests of the copyright holders and the public. However, there is still significant uncertainty in determining the actual scope of the fair use doctrine. Presently, the South African regulation of fair use in Section 12 et seq. of the South African Copyright Act is ambiguous and lacks predictability. Moreover, the South African copyright law does not address a number of issues, especially regarding the educational sector, such as distance learning, conversion of works to other formats for persons with disabilities and provisions for libraries to digitize copyright material. This is

unsatisfactory. Evidently, developing countries in particular, require legal certainty regarding the doctrine as they have an extensive demand for education and (first world) knowledge. However, the obligation to pay royalties often results in retarded development and thereby hinders progression.

Despite the existence of several international treaties dealing with copyright (namely the Berne Convention of 1886, the TRIPS Agreement of 1995 and the so-called WIPO Internet Treaties of 1996), there is yet no international standard for fair use from which any clarification regarding the scope of the fair use doctrine can be deduced. However, the so-called three-step test, which appears in most of the relevant treaties, might be regarded as a general principle for exceptions (such as fair use).

The copyright laws of other countries introduced either open-ended provisions (e.g. the United States) or so-called "closed lists" (e.g. the European Community / Germany). Some countries (e.g. Australia), however, chose the midway, with the definition of certain exceptions within specific categories on the one hand and several broader provisions for other kinds of fair uses on the other hand.

It has been suggested that the American approach should be adopted in South Africa and with it, its four part test laid down in Section 107 of the US Copyright Act of 1976 as a guideline for the interpretation of the South African fair use provisions in Section 12 et seq. of the South African

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<sup>468</sup> Google has started similar ventures with major publishing houses to allow users to search the text of copyrighted books online and read excerpts. This is done in order to help them

Copyright Act of 1978.<sup>469</sup> As a matter of fact, Section 107 of the US Copyright Act offers to some extent guidance in determining whether the principles of the doctrine apply or not. However, this suggestion is rash and should be scrutinized for two reasons. Firstly, it does not sufficiently consider the enormous degree of uncertainty regarding the complete and accurate definition of the fair use doctrine in the United States.<sup>470</sup> American courts described the fair use doctrine as "the most troublesome doctrine" in American Copyright law<sup>471</sup> and scholars complain that nobody really knows what fair use is.<sup>472</sup> Some scholars deride the fair use doctrine "as among the most hopelessly vague of legal standards"<sup>473</sup> and Crews complains that "a determination of whether or not some activity may or may not be fair use is actually akin to a prediction of how a judge might decide the same question, based on limited precedent and wide variations in possible interpretations."<sup>474</sup> In sum, the statutory factors are not determinative<sup>475</sup>, and the exception is ultimately an "equitable rule of reason."<sup>476</sup> It defies a simple definition or description<sup>477</sup> and the US Committee on the Judiciary noted:

"Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."<sup>478</sup>

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decide whether to purchase the print version of a book or not.

<sup>469</sup> Dean, *supra* note 9, at 1-52

<sup>470</sup> Okediji, *supra* note 22, at 114

<sup>471</sup> *Dellar v Goldwyn, Inc.* 104 F.2d 661, 662 (2d Cir. 1939)

<sup>472</sup> Weinreb 'Fair Use' 67 *Fordham Law Review* (1999) 1291-92

<sup>473</sup> Crews, *supra* note 179, at 605

<sup>474</sup> *Ibid.* at 606

<sup>475</sup> Newby, *supra* note 37, at 1637

<sup>476</sup> *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 448 (1984) (quoting US H.R. Rep. No. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679)

<sup>477</sup> Newby, *supra* note 37, at 1637

<sup>478</sup> US H.R. Rep. No. 94-1476, at 65

Secondly, it is doubtful whether Section 107 of the US Copyright Act complies with the (above-mentioned) three-step test of several international treaties. Some scholars argue that the American fair use doctrine is inconsistent with the three-step test because of its indeterminacy and breadth<sup>479</sup> and that it does not meet the requirement of legal certainty laid down in the first step of the three-step test ("certain special cases")<sup>480</sup>. In addition, Ricketson stated that "'fairness" is an insufficiently clear criterion to meet the first part of the three-step test."<sup>481</sup> Other scholars observed a violation of the three-step test in the fair use doctrine's missing confinement to a specific purpose ("certain special cases").<sup>482</sup> None of these views is, however, undisputed. Senftleben, for example, pointed out that these views wrongfully undermine the common law tradition of determining copyright limitations through court decisions on a case-by-case basis<sup>483</sup>. Moreover, Senftleben contests the statement that the three-step test requires an exact and precise definition of copyright limitations in the sense of the civil law tradition.<sup>484</sup> He also argues that the US fair use doctrine is sufficiently confined to special cases, although the use of the words "such as" in Section 107 of the US Copyright Act might suggest otherwise. The fact that the United States was not obliged to amend Section 107 of the US Copyright Act when it adhered to the Paris Act of the Berne Convention in

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<sup>479</sup> Okediji, *supra* note 22, at 126

<sup>480</sup> Cohen Jehoram 'Einige Grundsätze zu den Ausnahmen im Urheberrecht' *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (2001) 808

<sup>481</sup> Ricketson, *supra* note 71, at 68

<sup>482</sup> Bornkamm, Der Dreistufentest als urheberrechtliche Schrankenbestimmung – Karriere eines Begriffs, *Festschrift fuer Willi Erdmann zum 65. Geburtstag* (2002) 45-46

<sup>483</sup> Senftleben, *supra* note 42, at 163

<sup>484</sup> *Ibid.*, at 163-164

1989<sup>485</sup> seems to support this perception. An in-depth analysis of the discussion is well beyond the scope of this thesis. However, the brief summary highlights the legal problems the US fair use doctrine faces. After all, it stands to reason that the United States is alone with its approach in the world intellectual property community as even other common law countries introduced enumerated statutory exceptions to a certain extent.<sup>486</sup>

It must be said, however, that a positive adoption of the "closed-list" approach is as unwise as the rash adoption of the American approach, since "closed-list" legislation often lacks flexibility, especially when it relates to new technologies.

Against this background, the midway – as chosen by Australia – seems to be the most appropriate way of how to deal with fair exceptions and limitations to the right-holders' copyrights. But a thoughtless adoption of the Australian fair use provisions is inappropriate given the disparity in development between Australia and South Africa. Rather, it is necessary for South Africa to develop its own approach towards a definition of fair use under consideration of international treaty obligations, especially the three-step test<sup>487</sup>, and national particularities.

With regard to the three-step test, some aspects need to be readjusted into a definite South African context, especially regarding the requirement that the reproduction of a copyright work is permissible only if it "does not unreasonabl[y] prejudice the legitimate interests of the owner of the

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<sup>485</sup> See The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in Sections of 17 U.S.C.)

copyright".<sup>488</sup> South Africa takes up an exceptional position as a country between third and first world with a highly unequal income distribution<sup>489</sup>. Despite its economic strength in comparison with most of the other countries on the African continent, South Africa remains a developing country in a number of areas, especially in the educational sector. As such, South Africa needs extensive exceptions to copyrights and legal certainty with regard to fair use. The UK Commission on Intellectual Property Rights states in its 2002 report "Integrating Intellectual Property Rights and Development Policy" that

"[developing countries] should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws. The implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of the continuing high level of need for improving the availability of these products, and their crucial importance for social and economic development."<sup>490</sup>

Despite the demand for adequate education and knowledge, many poor people can – if at all - only afford unauthorised copies of certain copyrighted works as these are available for considerably cheaper prices. The book market in South Africa is a good example in this regard. Book prices in South Africa, especially in the educational sector, are disproportionately high in comparison with wealthier as well as some equal or less affluent countries.<sup>491</sup> Therefore, the book market remains relatively small simply because books are

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<sup>486</sup> Leaffer, *supra* note 33, at 865

<sup>487</sup> See the detailed examination *infra*, Section B.3. Moreover, Ricketson, *supra* note 459, at 99

<sup>488</sup> Section 13 of the SA Copyright Act of 1978 adopted this requirement

<sup>489</sup> According to the World Bank's World Development Report (2004), South Africa is the second most unequal country in the world in this respect.

<sup>490</sup> UK Commission on Intellectual Property Rights, *Intellectual Property Rights and Development Policy* (2002), 104, available under [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), accessed on 03 February 2005

utterly unaffordable for the majority of the population. It has been estimated that only 1 - 2 million South African's buy books with any regularity. Consequently, a so-called "reading culture" could not yet develop in South Africa, and the illiteracy rate remains at about 15%.<sup>492</sup> Publishers were repeatedly asked to review their pricing policies and the publishing industry in South Africa brought forward various valid arguments for the high book prices, such as the small print-run and the obligatory profit sharing with the book retailers.<sup>493</sup> However, the bottom line is that financial restrictions will in the medium term bar the majority of the people in South Africa from buying books, and, therefore, it is doubtful whether multiple copying and even online-publishing of copyright material, e.g. by libraries and especially in the educational sector, would have a prejudicial effect for the offline sale of printed books.<sup>494</sup>

The role of libraries and librarians is in any case an important one to promote education and to build up the desired reading culture in South Africa. Hence, user groups and copyright holder associations agree on the necessity of substantial financial support for libraries. Yet, it seems to be equally important to enhance the legal framework in this regard. The current legal regulation - especially pertaining to the issues of fair use and online as well as

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<sup>491</sup> For example, Nelson Mandela's book *Long Walk to Freedom* is almost twice as expensive in South Africa as it is in the United States (SA price: R135; price at Amazon.com (US) on 05 February 2005: R70)

<sup>492</sup> Ages 15 and above, according to The World Banks South Africa Data Profile of 2002 – available under <http://devdata.worldbank.org/external/CPProfile.asp?SelectedCountry=ZAF&CCODE=ZAF&CNAME=South+Africa&PTYPE=CP>, accessed on 14 December 2004.

<sup>493</sup> Accordingly, roughly 40% of the book price is retained by the book stores

<sup>494</sup> The same argument would apply to the criteria of "market effect" as mentioned in the US Copyright Act of 1976 and the related requirement of Section 13 of the SA Copyright Act

offline multiple copying - is at best inadequate. Recent demands for an expansion of pay-per-use licenses and the claim to eliminate interlibrary loans regarding digitized material are counterproductive and put at risk the fulfilment of the libraries' mission as an information provider.

It must not be forgotten that the South African constitution recognizes a right to education in Section 29. The fair use doctrine is a reasonable measure to achieve sustained improvement in the educational sector, especially pertaining to those previously deprived of proper education. It safeguards education as it allows for teaching and study materials to be produced less expensively and without constant fear of lawsuits. At the same time, fair use exceptions do not only serve the public interest but also ensure fundamental human rights, such as freedom of speech, freedom of the press, freedom of expression and freedom of information as enshrined in Article 19 of the Universal Declaration of Human Rights (1948) which states:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Similar language can be found in the International Covenant on Civil and Political Rights<sup>495</sup>, the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>496</sup>, and many other human rights accords.

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<sup>495</sup> See Article 19 of the International Covenant on Civil and Political Rights

<sup>496</sup> See Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

In the digital environment, a technology neutral application of the fair use doctrine could yield a significant gain in importance for the doctrine due to the large variety of fair uses of works. The new technologies especially provide great opportunities for developing countries to access information and knowledge through, for instance, digital libraries, distance learning programmes and the ability of scientists and researchers to access online computer databases. However, DRMs and TPM accompanied by the legal protection against circumvention of these measures could just as well foil any fair use exceptions provided for by copyright law. The latter would eventually widen the large gap in knowledge and know-how that presently separates developed and developing countries. Hence, countries like South Africa must ensure that an appropriate area of application for the fair use doctrine is preserved in the digital environment and that restrictions on fair use of works imposed by legal and technical means must remain the exception. For this reason, the UK Commission on Intellectual Property Rights advised developing countries not to implement laws prohibiting the circumvention of TPM and to treat contract provisions which restrict fair use rights as void.<sup>497</sup>

Copyright holders argue that an expansion of intellectual property rights as well as a restrictive licensing scheme is crucial for their survival in the digital age and that larger intellectual property rights would inevitably result in increased innovation. However, the fear of copyright holders is to a large extent unsubstantiated, and the scare stories are evocative of their fight against photocopy machines in the 1970s as well as early Internet technology

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<sup>497</sup> UK Commission on Intellectual Property Rights, *supra* note 490, at 109

in the mid 1990s (even before widespread broadband connections and Peer-2-Peer technology existed). Nowadays, copyright holders license photocopying and generate billions of Rands of revenues worldwide. Moreover, publishing houses often offer their content online in addition to the paper copy and make more money than in pre-Internet days as paper-based revenues and those generated by licensed Internet usage accumulate.

Of course, larger intellectual property rights do not necessarily cause a larger incentive to innovate. Rather, intellectual property rights create incentives towards as well as barriers to innovation.<sup>498</sup> Databases for example are comprehensively protected in the European Union through the Database Directive of 1996<sup>499</sup>, whereas in the United States such a protection does not exist. On the contrary, the US Supreme Court ruled in *Feist Publications v. Rural Telephone Service Company*<sup>500</sup> in 1991 that unoriginal compilations of facts are not copyrightable.<sup>501</sup> However, Reynolds pointed out that after a one-time boost,

"database growth [in Europe] rates have gone back to pre-Directive levels, while the anti-competitive costs of database protection are now a permanent fixture of the European landscape. The US, by contrast, gets a nice steady growth rate in databases without paying the monopoly cost."<sup>502</sup>

Moreover, most of the databases now protected by the Directive would have presumably been created anyway.

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<sup>498</sup> Reynolds 'A natural experiment' *Financial Times* (22 November 2004), <http://news.ft.com/cms/s/4cd4941e-3cab-11d9-bb7b-00000e2511c8.html>, accessed on 02 February 2005

<sup>499</sup> See *infra*, Section C.2.1.2 and Appendix G.6.3

<sup>500</sup> 499 U.S. 340 (1991)

<sup>501</sup> *Ibid.* at 362 et seq.

<sup>502</sup> Reynolds, *supra* note 498

Finally, many profitable businesses prosper without any intellectual property rights protection. For example, the rock band *The Grateful Dead*, regularly earned more than U.S. \$50 million per year - without relying on copyright. And the successor group, *The Dead*, is continuing this tradition.<sup>503</sup> In addition, the Internet has the potential to become a unique promotional tool for lesser known artists.

Fair use remains an essential instrument to safeguard free expression and to promote future development, especially regarding education as well as scientific progress, and those who argue for broad fair use exceptions are by no means at the same time supporters of copyright infringement and theft. However, the global trend towards restrictive intellectual property provisions, especially through the conclusion of bi- or multilateral Free Trade Agreements such as the SACU-US FTA<sup>504</sup>, and the reduction of the scope of fair use have a detrimental impact on developing countries as it hampers access to essential information, educational and learning materials as well as cultural resources. These so-called TRIPS plus agreements might eventually further limit the ability of the government to make education and learning materials affordable.

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<sup>503</sup> McGreal, *supra* note 445

<sup>504</sup> See *supra* note 44

Tobias Schönwetter, University of Cape Town

*The implications of digitizing and the Internet for "fair use" in South Africa*

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Ultimately, copyright is intended to encourage the dissemination of knowledge, and fair use must be preserved to achieve this worthy goal.

## **G**      **Appendix**

### **G.1**      **Excerpts from the SA Copyright Act of 1978**

#### **Section 12 SA Copyright Act General exceptions from protections of literary and musical works**

Copyright shall not be infringed by any fair dealing with a literary or musical work –

for the purpose of research or private study by, or the personal or private use of, the person using the work;

for the purpose of criticism or review of that work or of another work; or

for the purpose of reporting current events –

in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.

[...]

#### **Section 13 SA Copyright Act General exceptions from protections of artistic works**

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

#### **Section 15 SA Copyright Act General exceptions from protections of artistic works**

[...]

(4) The provisions of Section 12 (1), (2), (4), (5), (10), (12) and (13) shall mutatis mutandis, in so far as they can be applied, apply with reference to artistic work.

#### **Section 16 SA Copyright Act General exceptions regarding protection of cinematograph films**

The provisions of Section 12 (1)(b) and (c), (2), (3), (4), (12) and (13) shall mutatis mutandis apply with reference to cinematograph films.

....

**Section 17 SA Copyright Act**  
**General exceptions regarding protection of sound recordings**

The provisions of Section 12 (1)(b) and (c), (2), (3), (4), (12) and (13) shall mutatis mutandis apply with reference to sound recordings.

**Section 18 SA Copyright Act**  
**General exceptions regarding protection of broadcasts**

The provisions of Section 12 (1) to (5) inclusive, (12) and (13) shall mutatis mutandis apply with reference to broadcasts.

**Section 19A SA Copyright Act**  
**General exceptions regarding protection of published editions**

The provisions of Section 12 (1), (2), (4), (5), (8), (12) and (13) shall mutatis mutandis apply with reference to published editions.

**Section 19B SA Copyright Act**  
**General exceptions regarding protection of computer programs**

Subject to the provisions of Section 23 (2)(d), the provisions of Section 12 (1)(b) and (c), (2), (3), (4), (5), (12) and (13) shall mutatis mutandis apply, as so far as they can be applied, with reference to computer programs.

[...]

## **G.2 Excerpts from the Berne Convention**

### **Article 9 Berne Convention**

#### **Right of Reproduction:**

#### **1. Generally; 2. Possible exceptions; 3. Sound and visual recordings**

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

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

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

**Article 10 Berne Convention****Certain Free Uses of Works:****1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author**

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper Articles and periodicals in the form of press summaries.

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

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

**Article 10<sup>bis</sup> Berne Convention****Further Possible Free Uses of Works:****1. Of certain Articles and broadcast works; 2. Of works seen or heard in connection with current events**

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of Articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

**Article 20 Berne Convention****Special Agreements Among Countries of the Union**

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

### **G.3 Excerpts from TRIPS**

#### **Article 2 TRIPS Intellectual Property Conventions**

1. [...]
2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

#### **Article 9 TRIPS Relation to the Berne Convention**

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.
2. [...]

#### **Article 13 TRIPS Limitations and Exceptions**

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

### **G.4 Excerpts from the WIPO Copyright Treaty**

#### **Article 10 WCT Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

**G.5 US: Excerpts from the US Copyright Act of 1976****Section 107 US Copyright Act  
Limitations on exclusive rights:  
Fair use**

Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

**Section 108 US Copyright Act  
Limitations on exclusive rights: Reproduction by libraries and  
archives**

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if —

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

(b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in

another library or archives of the type described by clause (2) of subsection (a), if —

(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

(c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if —

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if —

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if —

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section —

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of

reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee —

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

(2) No reproduction, distribution, display, or performance is authorized under this subsection if —

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing

with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

### **Section 109 US Copyright Act**

#### **Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord**

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on —

(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.

(b)(1)(A) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.

(B) This subsection does not apply to —

(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

(C) Nothing in this subsection affects any provision of chapter 9 of this title.

(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

(3) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, "antitrust laws" has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

(4) Any person who distributes a phonorecord or a copy of a computer program (including any tape, disk, or other medium embodying such program) in violation of paragraph (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

(e) Notwithstanding the provisions of sections 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.

**Section 110 US Copyright Act  
Limitations on exclusive rights:**

**Exemption of certain performances and displays**

Notwithstanding the provisions of Section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non profit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

[...]

(5)

(a) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

- (i) a direct charge is made to see or hear the transmission; or
- (ii) the transmission thus received is further transmitted to the public;

(b) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;

[...]

### **Section 111 US Copyright Act**

#### **Limitations on exclusive rights: Secondary transmissions**

(a) Certain Secondary Transmissions Exempted.— The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if —

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions;

(4) the secondary transmission is made by a satellite carrier for private home viewing pursuant to a statutory license under section 119; or

(5) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) Secondary Transmission of Primary Transmission to Controlled Group.— Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a performance or display of a work embodied in a primary transmission is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided*, however, That such secondary transmission is not actionable as an act of infringement if —

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

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(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) Secondary Transmissions by Cable Systems.—

[...]

(d) Statutory License for Secondary Transmissions by Cable Systems —

[...]

(e) Nonsimultaneous Secondary Transmissions by Cable Systems.—

[...]

(f) Definitions.—

[...]

### **Section 112 US Copyright Act**

#### **Limitations on exclusive rights: Ephemeral recordings**

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114 (a) or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if —

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if —

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if —

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if —

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) Statutory License. —

[...]

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(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if —

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if —

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) [...]

### **Section 117 US Copyright Act**

#### **Limitations on exclusive rights: Computer programs**

(a) Making of Additional Copy or Adaptation by Owner of Copy. — Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) Lease, Sale, or Other Transfer of Additional Copy or Adaptation. — Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) Machine Maintenance or Repair. — Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if —

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

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(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) Definitions. —  
[...]

**Section 121 US Copyright Act**

**Limitations on exclusive rights: reproduction for blind or other people with disabilities**

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

(b)(1) Copies or phonorecords to which this section applies shall —

(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

(c) For purposes of this section, the term —

(1) "authorized entity" means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

(2) "blind or other persons with disabilities" means individuals who are eligible or who may qualify in accordance with the Act entitled "An Act to provide books for the adult blind", approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487) to receive books and other publications produced in specialized formats; and

(3) "specialized formats" means braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.

**Section 122 US Copyright Act**

**Limitations on exclusive rights; secondary transmissions by satellite carriers within local markets**

(a) Secondary Transmissions of Television Broadcast Stations by Satellite Carriers. — A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station into the station's local market shall be subject to statutory licensing under this section if —

[...]

(c) No Royalty Fee Required. — A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall have no royalty obligation for such secondary transmissions.

[...]

### **Section 1201 US Copyright Act**

#### **Circumvention of copyright protection systems**

^(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES-

(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

^(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

^(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine--

^(i) the availability for use of copyrighted works;

^(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

^(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

^(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

^(v) such other factors as the Librarian considers appropriate.

^(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

^(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a

defense in any action to enforce any provision of this title other than this paragraph.

`(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

`(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

`(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

`(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

`(3) As used in this subsection--

`(A) to `circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

`(B) a technological measure `effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

`(b) ADDITIONAL VIOLATIONS-

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that--

`(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

`(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

`(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

`(2) As used in this subsection--

`(A) to `circumvent protection afforded by a technological measure' means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

`(B) a technological measure `effectively protects a right of a copyright owner under this title' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

`(c) OTHER RIGHTS, ETC., NOT AFFECTED-

(1) Nothing in this Section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

Tobias Schönwetter, University of Cape Town

*The implications of digitizing and the Internet for "fair use" in South Africa*

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`(2) Nothing in this Section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

`(3) Nothing in this Section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

`(4) Nothing in this Section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

`(d) EXEMPTION FOR NONPROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS-

(1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph--

`(A) may not be retained longer than necessary to make such good faith determination; and

`(B) may not be used for any other purpose.

`(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

`(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1)--

`(A) shall, for the first offense, be subject to the civil remedies under Section 1203; and

`(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under Section 1203, forfeit the exemption provided under paragraph (1).

`(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological measure.

`(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library or archives shall be--

`(A) open to the public; or

`(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

`(e) LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES-

[...]

`(f) REVERSE ENGINEERING-

(1) Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may

circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

`(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

`(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this Section.

`(4) For purposes of this subsection, the term `interoperability' means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

`(g) ENCRYPTION RESEARCH-

`(1) DEFINITIONS- For purposes of this subsection--

`(A) the term `encryption research' means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; and

`(B) the term `encryption technology' means the scrambling and descrambling of information using mathematical formulas or algorithms.

`(2) PERMISSIBLE ACTS OF ENCRYPTION RESEARCH- Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encryption research if--

`(A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work;

`(B) such act is necessary to conduct such encryption research;

`(C) the person made a good faith effort to obtain authorization before the circumvention; and

`(D) such act does not constitute infringement under this title or a violation of applicable law other than this Section, including Section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

`(3) FACTORS IN DETERMINING EXEMPTION- In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include--

`(A) whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner

reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this Section, including a violation of privacy or breach of security;

`(B) whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and

`(C) whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided.

`(4) USE OF TECHNOLOGICAL MEANS FOR RESEARCH ACTIVITIES- Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to--

`(A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and

`(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

`(5) REPORT TO CONGRESS- Not later than 1 year after the date of the enactment of this chapter, the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly report to the Congress on the effect this subsection has had on--

`(A) encryption research and the development of encryption technology;

`(B) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and

`(C) protection of copyright owners against the unauthorized access to their encrypted copyrighted works.

The report shall include legislative recommendations, if any.

`(h) EXCEPTIONS REGARDING MINORS-

[...]

`(i) PROTECTION OF PERSONALLY IDENTIFYING INFORMATION-

(1) CIRCUMVENTION PERMITTED- Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if--

`(A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;

`(B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

`(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

`(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

`(2) INAPPLICABILITY TO CERTAIN TECHNOLOGICAL MEASURES- This subsection does not apply to a technological measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.

`(j) SECURITY TESTING-

`(1) DEFINITION- For purposes of this subsection, the term 'security testing' means accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network.

`(2) PERMISSIBLE ACTS OF SECURITY TESTING- Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title or a violation of applicable law other than this Section, including Section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

`(3) FACTORS IN DETERMINING EXEMPTION- In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include--

`(A) whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network; and

`(B) whether the information derived from the security testing was used or maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this Section, including a violation of privacy or breach of security.

`(4) USE OF TECHNOLOGICAL MEANS FOR SECURITY TESTING- Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop, produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2), provided such technological means does not otherwise violate Section (a)(2).

`(k) CERTAIN ANALOG DEVICES AND CERTAIN TECHNOLOGICAL MEASURES-

[...]

## **G.6 European Union**

### **G.6.1 *Excerpts from the EU Copyright Directive***

#### **Article 5 EU Copyright Directive Exceptions and limitations**

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary; or

(b) a lawful use of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right-holders receive fair compensation;

(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;

(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;

(d) in respect of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right-holders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published Articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character,

in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organized by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, 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;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorized act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right-holder.

### **Article 6 EU Copyright Directive Obligations as to technological measures**

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological

measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

### **Article 7**

#### **Obligations concerning rights-management information**

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subjectmatter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

## **G.6.2**

### ***Excerpts from the EU Computer Program Directive***

#### **Article 5 EU Computer Program Directive Exceptions to the restricted acts**

1. In the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.

3. The person having a right to use a copy of a computer program shall be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

**G.6.3*****Excerpts from the EU Database Directive*****Article 6 EU Database Directive  
Exceptions to restricted acts**

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

(a) in the case of reproduction for private purposes of a non-electronic database;

(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;

(d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

**Article 9  
Exceptions to the sui generis right**

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

(a) in the case of extraction for private purposes of the contents of a non-electronic database;

(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

**G.6.4*****Germany: Excerpts from the German Copyright Act*****Section 45a German Copyright Act  
People with disabilities**

(1) The reproduction of a work for non commercial purposes for as well as the dissemination to individuals, who have no or considerably restricted access to an already available –perceptible- version of the work due to a disability shall be permissible to the extend necessary to enable an access.

(2) The author shall be paid equitable remuneration for the reproduction and distribution; this obligation does not apply for the making of single reproductions. The claim may only be asserted through a collecting society.

**Section 46 German Copyright Act  
Collections for Religious, School or Instructional Use**

(1) Reproduction and distribution shall be permissible where limited parts of works, of works of language and of musical works, individual works of fine art or individual photographs are incorporated after their publication in a collection which assembles the works of a considerable number of authors and is intended, by its nature, exclusively for religious, school or instructional use. The purpose for which the collection is to be used shall be clearly stated on the title page or some other appropriate place.

(2) Paragraph (1) shall apply to musical works incorporated in a collection intended for musical instruction only if the collection is intended for musical instruction in schools that are not schools of music.

(3) Reproduction may begin only if the intention to exercise the rights afforded by paragraph (1) has been communicated by registered letter to the author or, if his permanent or temporary residence is unknown, to the holder of an exclusive exploitation right, and two weeks have elapsed since dispatch of the letter. If the permanent or temporary address of the holder of the exclusive right is also unknown, the communication can be made by publication in the Official Bulletin (Bundesanzeiger).

(4) The author shall be paid equitable remuneration for the reproduction and distribution.

(5) An author may prohibit reproduction and distribution if the work no longer reflects his conviction and he can therefore no longer be expected to agree to the exploitation of his work and he has for that reason revoked any existing exploitation right (Article 42). The provisions of Article 136(1) and (2) shall be applicable mutatis mutandis.

**Section 50 German Copyright Act  
Reporting on Events of the Day**

For the purposes of reporting on events of the day by broadcast or through similar technical means and in newspapers, periodicals, brochures or other data media mainly devoted to current events, as well as in films, works which become perceivable in the course of the events which are being reported on may be reproduced, distributed and publicly communicated to the extent justified by the purpose of the report

**Section 51 German Copyright Act  
Quotations**

Reproduction, distribution and communication to the public shall be permitted, to the extent justified by the purpose, where

1. individual works are included after their publication in an independent scientific work to illustrate its contents;
2. passages from a work are quoted after its publication in an independent work of language;
3. individual passages from a published musical work are quoted in an independent musical work.

**Section 52a German Copyright Act  
Making available to the public for educational and research purposes**

(1) It shall be permissible to make available to the public

1. published small parts of a work, works of small size and individual contributions that have been published in newspapers or periodicals, for the purpose of demonstration during instructions at schools, universities, non commercial education institutions as well as institutions for occupational training, exclusively for the specific group of attendees at the instructions, or

2. published parts of a work, works of small size and individual contributions that have been published in newspapers or periodicals, exclusively for a specific group of individuals for their own scientific research

to the extent necessary for the particular purpose and justified for the achievement of non commercial ends.

(2) The making available of a work to the public, which is designated for teaching purposes in schools, shall be permissible only with the right holders consent. Before the expiration of the term of two years after the beginning of the regular exploitation in movie theatres situated within the application area of this Act, the making available of a film work to the public shall be permissible only with the right holders consent.

(3) In the cases of subsection (1), all reproductions necessary for the making available to the public shall be also permissible.

(4) An equitable remuneration shall be paid for the making available according to subsection 1. The claim may only be asserted through a collecting society.

**Section 53 German Copyright Act****Reproduction for Private and Other Personal Uses**

(1) It shall be permissible for a natural person to make single reproductions of a work for private use on any medium, as far as that the reproduction serves neither direct nor indirect commercial purposes, and provided that the source was not produced obviously unlawful.

A person authorized to make such reproductions may also cause such copies to be made by another person, provided no payment is received therefor, or in case of a reproduction on paper or a similar medium by means of any photo mechanic process or processes with a similar impact.

(2) It shall be permissible to make or to cause to be made single reproductions of a work

1. for personal scientific use, if and to the extent that such reproduction is necessary for the purpose,

2. to be included in personal archives, if and to the extent that reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction,

3. for personal information concerning current events, in the case of a broadcast work,

4. for other personal uses,

(a) in the case of small parts of published works or individual contributions that have been published in newspapers or periodicals,

(b) in the case of a work that has been out of print for at least two years.

Subsection (2)(1)(no.2) shall only apply, if, in addition,

1. the reproduction is carried out on paper or a similar medium by means of any photo-mechanic method or other methods with similar effects, or

2. a solely analogue utilization occurs, or

3. the archive neither serves a direct nor indirect commercial purpose.

Subsection (2)(1)(no.3) and (no. 4) shall only apply, if, in addition, one of the requirements of subsection (2)(2)(no.1) or (no.2) is met.

(3) It shall be permissible to make or to cause to be made reproductions of small parts of a work, of works of small size or of individual contributions published in newspapers or periodicals for personal use,

1. in teaching, in non-commercial institutions of education and further education or in institutions of vocational education in a quantity required for one school class or

2. for State examinations and examinations in schools, universities, non-commercial institutions of education and further education and in vocational education in the required quantity,

if and to the extent that such reproduction is necessary for this purpose.

(4) Reproduction

(a) of graphic recordings of musical works,

(b) of a book or a periodical in the case of essentially complete copies,

shall only be permissible, where not carried out by manual copying, with the consent of the copyright owner or in accordance with paragraph (2), item 2, or for personal use in the case of a work that has been out of print for at least two years.

(5) Subsections (1), (2)(no.2)-(no.4) and (3)(no.2) shall not apply for databases made of elements, which are separately accessible through electronic means. Subsections (2) (no.1) and (3) (no.1) shall apply for such

databases provided that the scientific use as well as the use for teaching does not serve a commercial purpose.

(6) Copies may neither be disseminated nor used for public communication. It shall be permissible, however, to lend out lawfully made copies of newspapers and works that are out of print or such copies in which small damaged or lost parts have been replaced with reproduced copies.

(7) The recording of public lectures, representations or performances of works on video or audio recording mediums, the realization of plans and sketches for works of fine art, and the reproduction of works of architecture shall only be permissible with the consent of the copyright owner.

### **Section 95a German Copyright Act Protection of Technological Measures**

(1) Effective technological measures for the protection of works protected by this law or of other subject-matter protected by this law may not be circumvented without authorization of the right holder, if the actor knows or has a reason to know that the circumvention takes place in order to enable access to such a work or subject matter, or to enable its use.

(2) Technological measures for the purpose of this law are technologies, devices and components, which in the normal course of their operation, are designed to prevent or restrict acts, in respect of protected works or other subject-matter protected by this law, which are not authorized by the right holder. Technological measures are effective, if the use of a protected work or other subject-matter protected by this law is controlled by the right holder through application of an access control, a protection process such as encryption, scrambling or other transformation, or a copy control mechanism, which achieves the protection objective.

(3) Prohibited are the manufacture, the import, the distribution, the sale, the rental, the advertisement for sale or rental and the possession for commercial purposes, of devices, products or components as well as the provision of services, which are

1. promoted, advertised or marketed for the purpose of circumvention of effective technical measures, or

2. have only a limited commercially significant purpose or use other than to circumvent effective technical measures, or

3. are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures.

(4) Tasks and powers of the public authorities remain unaffected by the prohibitions of paragraphs 1 and 3 for the purpose of the protection of public security or the criminal jurisdiction.

**G.6.5*****UK: Excerpts from the CDPA*****Section 28A UK CDPA  
Making of temporary copies**

Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable -

(a) a transmission of the work in a network between third parties by an intermediary; or

(b) a lawful use of the work;

and which has no independent economic significance.

**Section 29 UK CDPA  
Research and private study**

(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

(1C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes of research or private study does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if—

(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under Section 40 would not permit to be done under Section 38 or 39 (Articles or parts of published works: restriction on multiple copies of same material), or

(b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

(4) It is not fair dealing—

(a) to convert a computer program expressed in a low level language into a version expressed in a higher level language, or

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(b) incidentally in the course of so converting the program, to copy it, (these acts being permitted if done in accordance with Section 50B (decompilation)).

(4A) It is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with Section 50BA (observing, studying and testing)).

### **Section 30 UK CDPA**

#### **Criticism, review and news reporting**

(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.

(1A) For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including-

- (a) the issue of copies to the public;
- (b) making the work available by means of an electronic retrieval system;
- (c) the rental or lending of copies of the work to the public;
- (d) the performance, exhibition, playing or showing of the work in public;
- (e) the communication to the public of the work, but in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film[ or broadcast where this would be impossible for reasons of practicality or otherwise].

### **Section 31A UK CDPA**

#### **Making a single accessible copy for personal use**

(1) If a visually impaired person has lawful possession or lawful use of a copy ("the master copy") of the whole or part of—

- (a) a literary, dramatic, musical or artistic work; or
- (b) a published edition, which is not accessible to him because of the impairment, it is not an infringement of copyright in the work, or in the typographical arrangement of the published edition, for an accessible copy of the master copy to be made for his personal use.

(2) Subsection (1) does not apply—

- (a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it; or

(b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

(3) Subsection (1) does not apply in relation to the making of an accessible copy for a particular visually impaired person if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(4) An accessible copy made under this section must be accompanied by—

- (a) a statement that it is made under this section; and
- (b) a sufficient acknowledgement.

(5) If a person makes an accessible copy on behalf of a visually impaired person under this section and charges for it, the sum charged must not exceed the cost of making and supplying the copy.

(6) If a person holds an accessible copy made under subsection (1) when he is not entitled to have it made under that subsection, the copy is to be treated as an infringing copy, unless he is a person falling within subsection (7)(b).

(7) A person who holds an accessible copy made under subsection (1) may transfer it to—

- (a) a visually impaired person entitled to have the accessible copy made under subsection (1); or
- (b) a person who has lawful possession of the master copy and intends to transfer the accessible copy to a person falling within paragraph (a).

(8) The transfer by a person ("V") of an accessible copy made under subsection (1) to another person ("T") is an infringement of copyright by V unless V has reasonable grounds for believing that T is a person falling within subsection (7)(a) or (b).

(9) If an accessible copy which would be an infringing copy but for this section is subsequently dealt with—

- (a) it is to be treated as an infringing copy for the purposes of that dealing; and
- (b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

(10) In subsection (9), "dealt with" means sold or let for hire or offered or exposed for sale or hire or [communicated to the public]

### **Section 31B UK CDPA**

#### **Multiple copies for visually impaired persons**

(1) If an approved body has lawful possession of a copy ("the master copy") of the whole or part of—

- (a) a commercially published literary, dramatic, musical or artistic work;
- or
- (b) a commercially published edition,

it is not an infringement of copyright in the work, or in the typographical

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arrangement of the published edition, for the body to make, or supply, accessible copies for the personal use of visually impaired persons to whom the master copy is not accessible because of their impairment.

(2) Subsection (1) does not apply—

(a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it; or

(b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

(3) Subsection (1) does not apply in relation to the making of an accessible copy if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.

(4) Subsection (1) does not apply in relation to the supply of an accessible copy to a particular visually impaired person if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(5) An accessible copy made under this section must be accompanied by—

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(6) If an approved body charges for supplying a copy made under this section, the sum charged must not exceed the cost of making and supplying the copy.

(7) An approved body making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.

(8) If the master copy is in copy-protected electronic form, any accessible copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection (unless the copyright owner agrees otherwise).

(9) If an approved body continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.

(10) If an accessible copy which would be an infringing copy but for this section is subsequently dealt with—

(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

(11) In subsection (10), "dealt with" means sold or let for hire or offered or exposed for sale or hire or [communicated to the public].

(12) "Approved body" means an educational establishment or a body that is not conducted for profit.

(13) "Supplying" includes lending.

#### **Section 31D UK CDPA Licensing schemes**

(1) Section 31B does not apply to the making of an accessible copy in a particular form if--

- (a) a licensing scheme operated by a licensing body is in force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form;
- (b) the scheme is not unreasonably restrictive; and
- (c) the scheme and any modification made to it have been notified to the Secretary of State by the licensing body.

(2) A scheme is unreasonably restrictive if it includes a term or condition which—

- (a) purports to prevent or limit the steps that may be taken under section 31B or 31C; or
- (b) has that effect.

(3) But subsection (2) does not apply if—

- (a) the copyright work is no longer published by or with the authority of the copyright owner; and
- (b) there are reasonable grounds for preventing or restricting the making of accessible copies of the work.

(4) If section 31B or 31C is displaced by a licensing scheme, sections 119 to 122 apply in relation to the scheme as if it were one to which those sections applied as a result of section 117.

#### **Section 32 UK CDPA Things done for purposes of instruction or examination.**

(1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying-

- (a) is done by a person giving or receiving instruction,
- (b) is not done by means of a reprographic process, and
- (c) is accompanied by a sufficient acknowledgement,

and provided that the instruction is for a non-commercial purpose.

(2) Copyright in a sound recording, film or broadcast is not infringed by its being copied by making a film or film sound-track in the course of instruction, or of preparation for instruction, in the making of films or film sound-tracks, provided the copying-

- (a) is done by a person giving or receiving instruction, and
- (b) is accompanied by a sufficient acknowledgement,

and provided that the instruction is for a non-commercial purpose.

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(2A) Copyright in a literary, dramatic, musical or artistic work which has been made available to the public is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying-

- (a) is fair dealing with the work,
- (b) is done by a person giving or receiving instruction,
- (c) is not done by means of a reprographic process, and
- (d) is accompanied by a sufficient acknowledgement.

(2B) The provisions of section 30(1A) (works made available to the public) apply for the purposes of subsection (2A) as they apply for the purposes of section 30(1).

(3) Copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions, provided that the questions are accompanied by a sufficient acknowledgement.

(3A) No acknowledgement is required in connection with copying as mentioned in subsection (1), (2) or (2A), or in connection with anything done for the purposes mentioned in subsection (3), where this would be impossible for reasons of practicality or otherwise.

(4) Subsection (3) does not extend to the making of a reprographic copy of a musical work for use by an examination candidate in performing the work.

(5) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purpose of that dealing, and if that dealing infringes copyright for all subsequent purposes.

**Section 33 UK CDPA**  
**Anthologies for educational use.**

(1) The inclusion of a short passage from a published literary or dramatic work in a collection which—

- (a) is intended for use in educational establishments and is so described in its title, and in any advertisements issued by or on behalf of the publisher, and
- (b) consists mainly of material in which no copyright subsists,

does not infringe the copyright in the work if the work itself is not intended for use in such establishments and the inclusion is accompanied by a sufficient acknowledgement.

(2) Subsection (1) does not authorise the inclusion of more than two excerpts from copyright works by the same author in collections published by the same publisher over any period of five years.

(3) In relation to any given passage the reference in subsection (2) to excerpts from works by the same author—

- (a) shall be taken to include excerpts from works by him in collaboration with another, and

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(b) if the passage in question is from such a work, shall be taken to include excerpts from works by any of the authors, whether alone or in collaboration with another.

(4) References in this section to the use of a work in an educational establishment are to any use for the educational purposes of such an establishment.

**Section 34 UK CDPA**

**Performing, playing or showing work in course of activities of educational establishment.**

(1) The performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment—

(a) by a teacher or pupil in the course of the activities of the establishment, or

(b) at the establishment by any person for the purposes of instruction, is not a public performance for the purposes of infringement of copyright.

(2) The playing or showing of a sound recording, film [or broadcast] before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright.

(3) A person is not for this purpose directly connected with the activities of the educational establishment simply because he is the parent of a pupil at the establishment.

**Section 35 UK CDPA**

**Recording by educational establishments of broadcasts.**

(1) A recording of a broadcast or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without thereby infringing the copyright in the broadcast or in any work included in it, provided that it is accompanied by a sufficient acknowledgement of the broadcast and that the educational purposes are non-commercial.

(1A) Copyright is not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of subsection (1) not an infringement of copyright, is communicated to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received by any person situated outside the premises of that establishment.

(2) This section does not apply if or to the extent that there is a licensing scheme certified for the purposes of this section under section 143 providing for the grant of licences.

(3) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that

dealing infringes copyright for all subsequent purposes.

### **Section 36 UK CDPA**

#### **Reprographic copying by educational establishments of passages from published works.**

(1) Reprographic copies of passages from published literary, dramatic or musical works may, to the extent permitted by this section, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, provided that they are accompanied by a sufficient acknowledgement and the instruction is for a non-commercial purpose.

(1A) No acknowledgement is required in connection with the making of copies as mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

(1B) Reprographic copies of passages from published editions may, to the extent permitted by this section, be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the typographical arrangement of the edition.

(2) Not more than one per cent of any work may be copied by or on behalf of an establishment by virtue of this section in any quarter, that is, in any period 1st January to 31st March, 1st April to 30th June, 1st July to 30th September or 1st October to 31st December.

(3) Copying is not authorised by this section if, or to the extent that, licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.

(4) The terms of a licence granted to an educational establishment authorising the reprographic copying for the purposes of instruction of passages from published [...] works are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

(5) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with, it shall be treated as an infringing copy for the purposes of that dealing, and if that dealing infringes copyright for all subsequent purposes.

### **Section 36A UK CDPA**

#### **Lending of copies by educational establishments**

Copyright in a work is not infringed by the lending of copies of the work by an educational establishment.

### **Section 38 UK CDPA**

#### **Copying by librarians: articles in periodicals.**

(1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply a copy of an article in a periodical

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without infringing any copyright in the text, in any illustrations accompanying the text or in the typographical arrangement

(2) The prescribed conditions shall include the following—

(a) that copies are supplied only to persons satisfying the librarian that they require them for the purposes of-

- (i) research for a non-commercial purpose, or
- (ii) private study,

and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same article or with copies of more than one article contained in the same issue of a periodical; and

(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.

### **Section 39 UK CDPA**

#### **Copying by librarians: parts of published works.**

(1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply from a published edition a copy of part of a literary, dramatic or musical work (other than an article in a periodical) without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

(2) The prescribed conditions shall include the following—

(a) that copies are supplied only to persons satisfying the librarian that they require them for the purposes of-

- (i) research for a non-commercial purpose, or
- (ii) private study,

and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and

(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.

### **Section 41 UK CDPA**

#### **Copying by librarians: supply of copies to other libraries.**

(1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply to another prescribed library a copy of—

(a) an article in a periodical, or

(b) the whole or part of a published edition of a literary, dramatic or musical work,

without infringing any copyright in the text of the article or, as the case may be, in the work, in any illustrations accompanying it or in the typographical arrangement.

(2) Subsection (1)(b) does not apply if at the time the copy is made the librarian making it knows, or could by reasonable inquiry ascertain, the name and address of a person entitled to authorise the making of the copy.

#### **Section 42 UK CDPA**

##### **Copying by librarians or archivists: replacement copies of works.**

(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make a copy from any item in the permanent collection of the library or archive—

(a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it, or

(b) in order to replace in the permanent collection of another prescribed library or archive an item which has been lost, destroyed or damaged,

without infringing the copyright in any literary, dramatic or musical work, in any illustrations accompanying such a work or, in the case of a published edition, in the typographical arrangement.

(2) The prescribed conditions shall include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose.

#### **Section 43 UK CDPA**

##### **Copying by librarians or archivists: certain unpublished works.**

(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make and supply a copy of the whole or part of a literary, dramatic or musical work from a document in the library or archive without infringing any copyright in the work or any illustrations accompanying it.

(2) This section does not apply if—

(a) the work had been published before the document was deposited in the library or archive, or

(b) the copyright owner has prohibited copying of the work,

and at the time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.

(3) The prescribed conditions shall include the following—

(a) that copies are supplied only to persons satisfying the librarian or archivist that they require them for the purposes of—

(i) research for a non-commercial purpose, or

(ii) private study,

and will not use them for any other purpose;

(b) that no person is furnished with more than one copy of the same material; and

(c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.

**Section 79 UK CDPA****Exceptions to right**

(1) The right conferred by Section 77 (right to be identified as author or director) is subject to the following exceptions.

(2) The right does not apply in relation to the following descriptions of work-

- (a) a computer program;
- (b) the design of a typeface;
- (c) any computer-generated work.

(3) The right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author's or director's employer by virtue of Section 11(2) (works produced in the course of employment).

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe copyright in the work—

(a) Section 30 (fair dealing for certain purposes), so far as it relates to the reporting of current events by means of a sound recording, film or broadcast;

(b) Section 31 (incidental inclusion of work in an artistic work, sound recording, film[ or broadcast]);

(c) Section 32 (3) (examination questions);

(d) Section 45 (parliamentary and judicial proceedings);

(e) Section 46(1) or (2) (Royal Commissions and statutory inquiries);

(f) Section 51 (use of design documents and models);

(g) Section 52 (effect of exploitation of design derived from artistic work);

(h) Section 57 or 66A (acts permitted on assumptions as to expiry of copyright).

(5) The right does not apply in relation to any work made for the purpose of reporting current events.

(6) The right does not apply in relation to the publication in—

(a) a newspaper, magazine or similar periodical, or

(b) an encyclopaedia, dictionary, yearbook or other collective work of reference, of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the consent of the author for the purposes of such publication.

(7) The right does not apply in relation to—

(a) a work in which Crown copyright or Parliamentary copyright subsists, or

(b) a work in which copyright originally vested in an international organisation by virtue of Section 168, unless the author or director has previously been identified as such in or on published copies of the work.

**Section 296 UK CDPA****Circumvention of technical devices applied to computer programs**

(1) This Section applies where -

- (a) a technical device has been applied to a computer program; and

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(b) a person (A) knowing or having reason to believe that it will be used to make infringing copies -

(i) manufactures for sale or hire, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire or has in his possession for commercial purposes any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of the technical device; or

(ii) publishes information intended to enable or assist persons to remove or circumvent the technical device.

(2) The following persons have the same rights against A as a copyright owner has in respect of an infringement of copyright -

(a) a person -

(i) issuing to the public copies of, or

(ii) communicating to the public,

the computer program to which the technical device has been applied;

(b) the copyright owner or his exclusive licensee, if he is not the person specified in paragraph (a);

(c) the owner or exclusive licensee of any intellectual property right in the technical device applied to the computer program.

[...]

### **Section 296ZA UK CDPA**

#### **Circumvention of technological measures**

(1) This Section applies where -

(a) effective technological measures have been applied to a copyright work other than a computer program; and

(b) a person (B) does anything which circumvents those measures knowing, or with reasonable grounds to know, that he is pursuing that objective.

(2) This Section does not apply where a person, for the purposes of research into cryptography, does anything which circumvents effective technological measures unless in so doing, or in issuing information derived from that research, he affects prejudicially the rights of the copyright owner.

(3) The following persons have the same rights against B as a copyright owner has in respect of an infringement of copyright -

(a) a person -

(i) issuing to the public copies of, or

(ii) communicating to the public,

the work to which effective technological measures have been applied;

and

(b) the copyright owner or his exclusive licensee, if he is not the person specified in paragraph (a).

[...]

### **Section 296ZB UK CDPA**

#### **Devices and services designed to circumvent technological measures**

(1) A person commits an offence if he -

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(a) manufactures for sale or hire, or  
(b) imports otherwise than for his private and domestic use, or  
(c) in the course of a business -  
(i) sells or lets for hire, or  
(ii) offers or exposes for sale or hire, or  
(iii) advertises for sale or hire, or  
(iv) possesses, or  
(v) distributes, or  
(d) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner,  
any device, product or component which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures.

(2) A person commits an offence if he provides, promotes, advertises or markets -  
(a) in the course of a business, or  
(b) otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner,  
a service the purpose of which is to enable or facilitate the circumvention of effective technological measures.

(3) SubSections (1) and (2) do not make unlawful anything done by, or on behalf of, law enforcement agencies or any of the intelligence services -  
(a) in the interests of national security; or  
(b) for the purpose of the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution,  
and in this subsection "intelligence services" has the meaning given in Section 81 of the Regulation of Investigatory Powers Act 2000.

(4) A person guilty of an offence under subsection (1) or (2) is liable -  
(a) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum, or both;  
(b) on conviction on indictment to a fine or imprisonment for a term not exceeding two years, or both.

(5) It is a defence to any prosecution for an offence under this Section for the defendant to prove that he did not know, and had no reasonable ground for believing, that -  
(a) the device, product or component; or  
(b) the service,  
enabled or facilitated the circumvention of effective technological measures.

#### **Section 296ZD UK CDPA**

##### **Rights and remedies in respect of devices and services designed to circumvent technological measures**

(1) This Section applies where -  
(a) effective technological measures have been applied to a copyright work other than a computer program; and  
(b) a person (C) manufactures, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or has in his

possession for commercial purposes any device, product or component, or provides services which -

- (i) are promoted, advertised or marketed for the purpose of the circumvention of, or
- (ii) have only a limited commercially significant purpose or use other than to circumvent, or
- (iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, those measures.

(2) The following persons have the same rights against C as a copyright owner has in respect of an infringement of copyright -

- (a) a person -
  - (i) issuing to the public copies of, or
  - (ii) communicating to the public, the work to which effective technological measures have been applied;
- (b) the copyright owner or his exclusive licensee, if he is not the person specified in paragraph (a); and
- (c) the owner or exclusive licensee of any intellectual property right in the effective technological measures applied to the work.

[...]

#### **Section 296ZE UK CDPA**

##### **Remedy where effective technological measures prevent permitted acts**

[...]

(2) Where the application of any effective technological measure to a copyright work other than a computer program prevents a person from carrying out a permitted act in relation to that work then that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State.

[...]

#### **Section 296ZF UK CDPA**

##### **Interpretation of Sections 296ZA to 296ZE**

(1) In Sections 296ZA to 296ZE, "technological measures" are any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program.

[...]

#### **Section 296ZG UK CDPA**

##### **Electronic rights management information**

(1) This Section applies where a person (D), knowingly and without authority, removes or alters electronic rights management information which -

- (a) is associated with a copy of a copyright work, or

(b) appears in connection with the communication to the public of a copyright work, and

where D knows, or has reason to believe, that by so doing he is inducing, enabling, facilitating or concealing an infringement of copyright.

(2) This Section also applies where a person (E), knowingly and without authority, distributes, imports for distribution or communicates to the public copies of a copyright work from which electronic rights management information -

(a) associated with the copies, or

(b) appearing in connection with the communication to the public of the work,

has been removed or altered without authority and where E knows, or has reason to believe, that by so doing he is inducing, enabling, facilitating or concealing an infringement of copyright.

(3) A person issuing to the public copies of, or communicating, the work to the public, has the same rights against D and E as a copyright owner has in respect of an infringement of copyright.

(4) The copyright owner or his exclusive licensee, if he is not the person issuing to the public copies of, or communicating, the work to the public, also has the same rights against D and E as he has in respect of an infringement of copyright.

[...]

## **G.7 Australia: Excerpts from the Australian Copyright Act**

### **Section 10 Australian Copyright Act Interpretation**

[...]

(2) Without limiting the meaning of the expression "reasonable portion" in this Act, where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:

(a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or

(b) in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

(2A) Without limiting the meaning of the expression "reasonable portion" in this Act, if a person makes a reproduction of a part of:

(a) a published literary work (other than a computer program or an electronic compilation, such as a database); or

(b) a published dramatic work;

being a work that is in electronic form, the reproduction is taken to contain only a reasonable portion of the work if:

(c) the number of words copied does not exceed, in the aggregate, 10% of the number of words in the work; or

(d) if the work is divided into chapters--the number of words copied exceeds, in the aggregate, 10% of the number of words in the work, but the reproduction contains only the whole or part of a single chapter of the work.

(2B) If a published literary or dramatic work is contained in a published edition of the work and is separately available in electronic form, a reproduction of a part of the work is taken to contain only a reasonable portion of the work if it is taken to do so either under subsection 2 or 2A, whether or not it does so under both of them.

(2C) If:

(a) a person makes a reproduction of a part of a published literary or dramatic work; and

(b) the reproduction is taken to contain only a reasonable portion of the work under subsection 2 or 2A;

subsection 2 or 2A does not apply in relation to any subsequent reproduction made by the person of any other part of the same work.

[...]

### **Section 40 Australian Copyright Act**

#### **Fair dealing for purpose of research or study**

(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.

(1A) A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.

(1B) In subsection (1A) the expression "*lecture notes*" means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.

(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:

(a) the purpose and character of the dealing;

(b) the nature of the work or adaptation;

(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;

(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and

(e) in a case where part only of the work or adaptation is reproduced--the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

(3) Notwithstanding subsection (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the reproducing, for the purposes of research or study:

(a) if the work or adaptation comprises an Article in a periodical publication--of the whole or a part of that work or adaptation; or

(b) in any other case--of not more than a reasonable portion of the work or adaptation;

shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

(4) SubSection (3) does not apply to a dealing by way of reproducing the whole or a part of an Article in a periodical publication if another Article in that publication, being an Article dealing with a different subject matter, is also reproduced.

#### **Section 41 Australian Copyright Act**

##### **Fair dealing for purpose of criticism or review**

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

#### **Section 42 Australian Copyright Act**

##### **Fair dealing for purpose of reporting news**

(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:

(a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or

(b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

(2) The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this Section if the playing of the work does not form part of the news being reported.

#### **Section 43 Australian Copyright Act**

##### **Reproduction for purpose of judicial proceedings or professional advice**

(1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.

(2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by:

(a) a legal practitioner; or

(b) a person registered as a patent attorney under the Patents Act 1990; or

(c) a person registered as a trade marks attorney under the Trade Marks Act 1995.

#### **Section 44 Australian Copyright Act**

##### **Inclusion of works in collections for use by places of education**

(1) The copyright in a published literary, dramatic, musical or artistic work is not infringed by the inclusion of a short extract from the work, or, in the case of a published literary, dramatic or musical work, from an

adaptation of the work, in a collection of literary, dramatic, musical or artistic works contained in a book, sound recording or cinematograph film and intended for use by places of education if:

(a) the collection is described in an appropriate place in the book, on the label of each record embodying the recording or of its container, or in the film, as being intended for use by places of education;

(b) the work or adaptation was not published for the purpose of being used by places of education;

(c) the collection consists principally of matter in which copyright does not subsist; and

(d) a sufficient acknowledgement of the work or adaptation is made.

(2) The last preceding subsection does not apply in relation to the copyright in a work if, in addition to the extract concerned, 2 or more other extracts from, or from adaptations of, works (being works in which copyright subsists at the time when the collection is published) by the author of the first-mentioned work are contained in that collection, or are contained in that collection taken together with every similar collection, if any, of works intended for use by places of education and published by the same publisher within the period of 5 years immediately preceding the publication of the first-mentioned collection.

#### **Section 49 Australian Copyright Act**

##### **Reproducing and communicating works by libraries and archives for users**

(1) A person may furnish to the officer in charge of a library or archives:

(a) a request in writing to be supplied with a reproduction of an article, or a part of an article, contained in a periodical publication or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and

(b) a declaration signed by him or her stating:

(i) that he or she requires the reproduction for the purpose of research or study and will not use it for any other purpose; and

(ii) that he or she has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives.

(2) Subject to this section, where a request and declaration referred to in subsection (1) are furnished to the officer in charge of a library or archives, an authorized officer of the library or archives may, unless the declaration contains a statement that to his or her knowledge is untrue in a material particular, make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person who made the request.

(2A) A person may make to an authorized officer of a library or archives:

(a) a request to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and

(b) a declaration to the effect that:

(i) the person requires the reproduction for the purpose of research or study and will not use it for any other purpose;

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(ii) the person has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives; and

(iii) by reason of the remoteness of the person's location, the person cannot conveniently furnish to the officer in charge of the library or archives a request and declaration referred to in subsection (1) in relation to the reproduction soon enough to enable the reproduction to be supplied to the person before the time by which the person requires it.

(2B) A request or declaration referred to in subsection (2A) is not required to be made in writing.

(2C) Subject to this section, where:

(a) a request and declaration referred to in subsection (2A) are made by a person to an authorized officer of a library or archives; and

(b) the authorized officer makes a declaration setting out particulars of the request and declaration made by the person and stating that:

(i) the declaration made by the person, so far as it relates to the matters specified in subparagraphs (2A)(b)(i) and (ii), does not contain a statement that, to the knowledge of the authorized officer, is untrue in a material particular; and

(ii) the authorized officer is satisfied that the declaration made by the person is true so far as it relates to the matter specified in subparagraph (2A)(b)(iii);

an authorized officer of the library or archives may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person.

(3) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) or (2A) relates, subsection (2) or (2C), as the case may be, does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.

(4) Subsection (2) or (2C) does not apply in relation to a request for a reproduction of, or parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject matter.

(5) Subsection (2) or (2C) does not apply to a request for a reproduction of the whole of a work (other than an article contained in a periodical publication), or to a reproduction of a part of such a work that contains more than a reasonable portion of the work unless:

(a) the work forms part of the library or archives collection; and

(b) before the reproduction is made, an authorized officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(5A) If an article contained in a periodical publication, or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of a library or archives collection, the officer in charge of the library or archives may make it available online within the premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives:

(a) make an electronic reproduction of the article or work; or

(b) communicate the article or work.

(6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the article, or of a part of the article, in accordance with subsection (2) or (2C), as the case may be, unless the

reproduction is supplied to a person other than the person who made the request.

(7) The copyright in a published work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the work, or of a part of the work, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.

(7A) Subsections (6) and (7) do not apply to the making under subsection (2) or (2C) of an electronic reproduction of:

(a) an article, or a part of an article, contained in a periodical publication; or

(b) the whole or part of a published work, other than such an article;

in relation to a request under this section for communication to the person who made the request unless:

(c) before or when the reproduction is communicated to the person, the person is notified in accordance with the regulations:

(i) that the reproduction has been made under this section and that the article or work might be subject to copyright protection under this Act; and

(ii) about such other matters (if any) as are prescribed; and

(d) as soon as practicable after the reproduction is communicated to the person, the reproduction made under subsection (2) or (2C) and held by the library or archives is destroyed.

(7B) It is not an infringement of copyright in an article contained in a periodical publication, or of copyright in a published work, to communicate it in accordance with subsection (2), (2C) or (5A).

(8) The regulations may exclude the application of subsection (6) or (7) in such cases as are specified in the regulations.

(9) In this section:

*"library"* does not include a library that is conducted for the profit, direct or indirect, of an individual or individuals.

*"supply"* includes supply by way of a communication.

### **Section 50 Australian Copyright Act Reproducing and communicating works by libraries or archives for other libraries or archives**

(1) The officer in charge of a library may request, or cause another person to request, the officer in charge of another library to supply the officer in charge of the first-mentioned library with a reproduction of an article, or a part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library:

(a) for the purpose of including the reproduction in the collection of the first-mentioned library;

(aa) in a case where the principal purpose of the first-mentioned library is to provide library services for members of a Parliament—for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or

(b) for the purpose of supplying the reproduction to a person who has made a request for the reproduction under section 49.

(2) Subject to this section, where a request is made by or on behalf of the officer in charge of a library to the officer in charge of another library

under subsection (1), an authorized officer of the last-mentioned library may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the officer in charge of the first-mentioned library.

(3) Where, under subsection (2), an authorized officer of a library makes, or causes to be made, a reproduction of the whole or part of a work (including an article contained in a periodical publication) and supplies it to the officer in charge of another library in accordance with a request made under subsection (1):

(a) the reproduction shall, for all purposes of this Act, be deemed to have been made on behalf of an authorized officer of the other library for the purpose for which the reproduction was requested; and

(b) an action shall not be brought against the body administering that first-mentioned library, or against any officer or employee of that library, for infringement of copyright by reason of the making or supplying of that reproduction.

(4) Subject to this section, if a reproduction of the whole or a part of an article contained in a periodical publication, or of any other published work, is, by virtue of subsection (3), taken to have been made on behalf of an authorised officer of a library, the copyright in the article or other work is not infringed:

(a) by the making of the reproduction; or

(b) if the work is supplied under subsection (2) by way of a communication—by the making of the communication.

(5) The regulations may exclude the application of subsection (4) in such cases as are specified in the regulations.

(6) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) relates, subsection (4) does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.

(7) Where:

(a) a reproduction (in this subsection referred to as the *relevant reproduction*) of, or of a part of, an article, or of the whole or a part of another work, is supplied under subsection (2) to the officer in charge of a library; and

(b) a reproduction of the same article or other work, or of the same part of the article or other work, as the case may be, has previously been supplied under subsection (2) for the purpose of inclusion in the collection of the library;

subsection (4) does not apply to or in relation to the relevant reproduction unless, as soon as practicable after the request under subsection (1) relating to the relevant reproduction is made, an authorized officer of the library makes a declaration:

(c) setting out particulars of the request (including the purpose for which the relevant reproduction was requested); and

(d) stating that the reproduction referred to in paragraph (b) has been lost, destroyed or damaged, as the case requires.

(7A) If:

(a) a reproduction is made of the whole of a work (other than an article contained in a periodical publication) or of a part of such a work, being a part that contains more than a reasonable portion of the work; and

(b) the work from which the reproduction is made is in hardcopy form; and

(c) the reproduction is supplied under subsection (2) to the officer in charge of a library;

subsection (4) does not apply in relation to the reproduction unless:

(d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or

(e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:

(i) setting out particulars of the request (including the purpose for which the reproduction was requested); and

(ii) stating that, after reasonable investigation, the authorized officer is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(7B) If:

(a) a reproduction is made of the whole of a work (including an article contained in a periodical publication) or of a part of such a work, whether or not the part contains more than a reasonable portion of the work; and

(b) the work from which the reproduction is made is in electronic form; and

(c) the reproduction is supplied under subsection(2) to the officer in charge of a library;

subsection (4) does not apply in relation to the reproduction unless:

(d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or

(e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:

(i) setting out particulars of the request (including the purpose for which the reproduction was requested); and

(ii) if the reproduction is of the whole, or of more than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price; and

(iii) if the reproduction is of a reasonable portion, or less than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price; and

(iv) if the reproduction is of the whole or of a part of an article—stating that, after reasonable investigation, the authorised officer is satisfied that the article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price.

(7C) If:

(a) a reproduction is made in electronic form by or on behalf of an authorised officer of a library of the whole of a work (including an article contained in a periodical publication) or of a part of such a work; and

(b) the reproduction is supplied under subsection (2) to the officer in charge of another library;

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subsection (4) does not apply in relation to the reproduction unless, as soon as practicable after the reproduction is supplied to the other library the reproduction made for the purpose of the supply and held by the first-mentioned library is destroyed.

(8) Subsection (4) does not apply to a reproduction or communication of, or of parts of, 2 or more articles that are contained in the same periodical publication and that have been requested for the same purpose unless the articles relate to the same subject matter.

(9) In this section, a reference to a library shall be read as a reference to a library other than a library that is conducted for the profit, direct or indirect of an individual or individuals, and as including a reference to archives.

(10) In this section:

"supply" includes supply by way of a communication.

**Section 51 Australian Copyright Act  
Reproducing and communicating unpublished works in libraries  
or archives**

(1) Where, at a time more than 50 years after the end of the calendar year in which the author of a literary, dramatic, musical or artistic work died, copyright subsists in the work but:

(a) the work has not been published; and

(b) a reproduction of the work, or, in the case of a literary, dramatic or musical work, the manuscript of the work, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, open to public inspection;

the copyright in the work is not infringed:

(c) by the making or communication of a reproduction of the work by a person for the purposes of research or study or with a view to publication; or

(d) by the making or communication of a reproduction of the work by, or on behalf of, the officer in charge of the library or archives if the reproduction is supplied (whether by way of communication or otherwise) to a person who satisfies the officer in charge of the library or archives that the person requires the reproduction for the purposes of research or study, or with a view to publication, and that the person will not use it for any other purpose.

(2) If the manuscript, or a reproduction, of an unpublished thesis or other similar literary work is kept in a library of a university or other similar institution, or in an archives, the copyright in the thesis or other work is not infringed by the making or communication of a reproduction of the thesis or other work by or on behalf of the officer in charge of the library or archives if the reproduction is supplied (whether by communication or otherwise) to a person who satisfies an authorized officer of the library or archives that he or she requires the reproduction for the purposes of research or study.

**Section 116A Australian Copyright Act  
Importation, manufacture etc. of circumvention device and  
provision etc. of circumvention service**

(1) Subject to subsections (2), (3) and (4), this Section applies if:

(a) a work or other subject-matter is protected by a technological protection measure; and

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(b) a person does any of the following acts without the permission of the owner or exclusive licensee of the copyright in the work or other subject-matter:

(i) makes a circumvention device capable of circumventing, or facilitating the circumvention of, the technological protection measure;

(ii) sells, lets for hire, or by way of trade offers or exposes for sale or hire or otherwise promotes, advertises or markets, such a circumvention device;

(iii) distributes such a circumvention device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright;

(iv) exhibits such a circumvention device in public by way of trade;

(v) imports such a circumvention device into Australia for the purpose of:

(A) selling, letting for hire, or by way of trade offering or exposing for sale or hire or otherwise promoting, advertising or marketing, the device; or

(B) distributing the device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright; or

(C) exhibiting the device in public by way of trade;

(vi) makes such a circumvention device available online to an extent that will affect prejudicially the owner of the copyright;

(vii) provides, or by way of trade promotes, advertises or markets, a circumvention service capable of circumventing, or facilitating the circumvention of, the technological protection measure; and

(c) the person knew, or ought reasonably to have known, that the device or service would be used to circumvent, or facilitate the circumvention of, the technological protection measure.

(2) This Section does not apply in relation to anything lawfully done for the purposes of law enforcement or national security by or on behalf of:

(a) the Commonwealth or a State or Territory; or

(b) an authority of the Commonwealth or of a State or Territory.

(3) This Section does not apply in relation to the supply of a circumvention device or a circumvention service to a person for use for a permitted purpose if:

(a) the person is a qualified person; and

(b) the person gives the supplier before, or at the time of, the supply a declaration signed by the person:

(i) stating the name and address of the person; and

(ii) stating the basis on which the person is a qualified person; and

(iii) stating the name and address of the supplier of the circumvention device or circumvention service; and

(iv) stating that the device or service is to be used only for a permitted purpose by a qualified person; and

(v) identifying the permitted purpose by reference to one or more of Sections 47D, 47E, 47F, 48A, 49, 50, 51A and 183 and Part VB; and

(vi) stating that a work or other subject-matter in relation to which the person proposes to use the device or service for a permitted purpose is not readily available to the person in a form that is not protected by a technological protection measure.

(4) This Section does not apply in relation to the making or importing of a circumvention device:

(a) for use only for a permitted purpose relating to a work or other subject-matter that is not readily available in a form that is not protected by a technological protection measure; or

(b) for the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose.

(4A) For the purposes of paragraphs (3)(b) and (4)(a), a work or other subject-matter is taken not to be readily available if it is not available in a form that lets a person do an act relating to it that is not an infringement of copyright in it as a result of Section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.

(5) If this Section applies, the owner or exclusive licensee of the copyright may bring an action against the person.

(6) In an action under subsection (5), it must be presumed that the defendant knew, or ought reasonably to have known, that the circumvention device or service to which the action relates would be used for a purpose referred to in paragraph (1)(c) unless the defendant proves otherwise.

(7) For the purposes of this Section, a circumvention device or a circumvention service is taken to be used for a permitted purpose only if:

(a) the device or service is used for the purpose of doing an act comprised in the copyright in a work or other subject-matter; and

(b) the doing of the act is not an infringement of the copyright in the work or other subject-matter under Section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.

(8) In this Section:

"qualified person" means:

(a) a person referred to in paragraph 47D(1)(a), 47E(1)(a) or 47F(1)(a); or

(b) a person who is an authorized officer for the purposes of Section 48A, 49, 50 or 51A; or

(c) a person authorised in writing by the Commonwealth or a State for the purposes of Section 183; or

(d) a person authorised in writing by a body administering an institution (within the meaning of Part VB) to do on behalf of the body an act that is not an infringement of copyright because of that Part.

"supply" means:

(a) in relation to a circumvention device--sell the device, let it for hire, distribute it or make it available online; and

(b) in relation to a circumvention service--provide the service.

(9) The defendant bears the burden of establishing the matters referred to in subsections (3), (4) and (4A).

### **Section 135ZG Australian Copyright Act**

#### **Multiple reproduction of insubstantial parts of works that are in hardcopy form**

(1) Subject to this section, copyright in a literary or dramatic work is not infringed by the making of one or more reproductions of a page or pages of the work in an edition of the work if the reproduction is carried out on the

premises of an educational institution for the purposes of a course of education provided by it.

(2) Subsection (1) does not apply to the making of a reproduction of the whole of a work.

(3) Subsection (1) does not apply to the making of a reproduction of more than 2 of the pages of a work in an edition of the work unless:

(a) there are more than 200 pages in the edition; and

(b) the total number of pages so reproduced does not exceed 1% of the total number of pages in the edition.

(4) Where:

(a) a person makes, or causes to be made, a reproduction of a part of a work contained on a page or pages in an edition; and

(b) subsection (1) applies to the making of that reproduction;

that subsection does not apply to the making, by or on behalf of that person, of a reproduction of any other part of that work within 14 days after the day on which the previous reproduction was made.

(5) In this section, a reference to an edition of a work includes a reference to an edition of works that include that work.

### **Section 135ZH Australian Copyright Act**

#### **Copying of printed published editions by educational institutions**

The copyright in a printed published edition of a work (being a work in which copyright does not subsist) is not infringed by the making of one or more facsimile copies of the whole or a part of the edition, if the copy, or each of the copies, is made in the course of the making of a reproduction of the whole or a part of the work by, or on behalf of, a body administering an educational institution for the educational purposes of that institution or of another educational institution.

### **Section 135ZJ Australian Copyright Act**

#### **Multiple reproduction of printed periodical articles by educational institutions**

(1) Subject to this section, the copyright in an article contained in a printed periodical publication is not infringed by the making of one or more reproductions of the whole or a part of that article by, or on behalf of, a body administering an educational institution if:

(a) a remuneration notice, given by or on behalf of the body to the relevant collecting society, is in force;

(b) the reproduction is carried out solely for the educational purposes of the institution or of another educational institution; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction.

(2) This section does not apply in relation to reproductions of, or of parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject-matter.

### **Section 135ZK Australian Copyright Act**

#### **Multiple reproduction of works published in printed anthologies**

The copyright in a literary or dramatic work, being a work contained in a printed published anthology of works and comprising not more than 15 pages in that anthology, is not infringed by the making of one or more

reproductions of the whole or part of the work by, or on behalf of, a body administering an educational institution if:

(a) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(b) the reproduction is carried out solely for the educational purposes of the institution or of another educational institution; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction.

**Section 135ZL Australian Copyright Act**  
**Multiple reproduction of works that are in hardcopy form by educational institutions**

(1) Subject to this section, the copyright in a literary, dramatic, musical or artistic work (other than an article contained in a periodical publication) is not infringed by the making of one or more reproductions of the whole or a part of the work by, or on behalf of, a body administering an educational institution if:

(a) a remuneration notice, given by or on behalf of the body to the relevant collecting society, is in force;

(b) the reproduction is carried out solely for the educational purposes of the institution or of another educational institution; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction.

(2) This section does not apply in relation to reproductions of the whole, or of more than a reasonable portion, of a work that has been separately published unless the person who makes the reproductions, or causes the reproductions to be made, for, or on behalf of, the body is satisfied, after reasonable investigation, that reproductions (other than second-hand reproductions) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

**Section 135ZMB Australian Copyright Act**  
**Multiple reproduction and communication of insubstantial parts of works that are in electronic form**

(1) Subject to this section, copyright in a published literary or dramatic work is not infringed by:

(a) the making of one or more reproductions of a part of the work; or

(b) communicating a part of the work;

if the reproduction or communication is carried out on the premises of an educational institution for the purposes of a course of study provided by it.

(2) Subsection (1) does not apply to the reproduction or communication of more than 1% of the total number of words in the work.

(3) If:

(a) a person makes, or causes to be made, a reproduction of a part of a work or communicates a part of a work; and

(b) subsection (1) applies to the making of the reproduction or to the communication;

that subsection does not apply to the making by, or on behalf of, that person of a reproduction or to the communication by that person, of any other part of that work within 14 days after the day on which the previous reproduction or the first communication of the work was made.

(4) If:

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*The implications of digitizing and the Internet for "fair use" in South Africa*

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(a) a person communicates a part of a work by making the part available online; and

(b) subsection (1) applies to the communication;

that subsection does not apply to the making available online by that person of any other part of that work while the part previously made available online continues to be so available.

**Section 135ZMC Australian Copyright Act**

**Multiple reproduction and communication of periodical articles that are in electronic form by education institutions**

(1) Subject to this section, the copyright in an article contained in a periodical publication is not infringed by:

(a) the making of one or more reproductions of the whole or a part of the article; or

(b) the communication of the whole or a part of the article;

by, or on behalf of, a body administering an educational institution if:

(c) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(d) the reproduction or communication is carried out solely for the educational purposes of the institution or of another educational institution; and

(e) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction or communication.

(2) This section does not apply in relation to the reproduction or communication of, or of parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject-matter.

**Section 135ZMD Australian Copyright Act**

**Multiple reproduction and communication of works that are in electronic form by educational institutions**

(1) Subject to this section, the copyright in a literary, dramatic, musical or artistic work (other than an article contained in a periodical publication) is not infringed by:

(a) the making of one or more reproductions of the whole or a part of the work; or

(b) the communication of the whole or a part of the work;

by, or on behalf of, a body administering an educational institution if:

(c) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(d) the reproduction or communication is carried out solely for the educational purposes of the institution or of another educational institution; and

(e) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction or communication.

(2) This section does not apply in relation to the reproduction or communication of:

(a) the whole, or of more than a reasonable portion of, a literary or dramatic work; or

(b) the whole, or of more than 10% of, a musical work;

that has been separately published unless the person who makes the reproduction or communication, or causes it to be made, for, or on behalf of, the body is satisfied, after reasonable investigation, that the work is not available in electronic form within a reasonable time at an ordinary commercial price.

(3) If:

(a) a person communicates a part of a work by or on behalf of a body administering an educational institution, by making the part available online; and

(b) subsection (1) applies to the communication;

that subsection does not apply to the making available online by, or on behalf of, that body of any other part of that work while the part previously made available online continues to be so available.

**Section 135ZN Australian Copyright Act**  
**Copying published editions by institutions assisting persons with a print disability**

The copyright in a published edition of a work (being a work in which copyright does not subsist) is not infringed by the making of one or more facsimile copies of the whole or a part of the edition if the copy, or each of the copies, is made in the course of the making of a reproduction of the whole or a part of the work by, or on behalf of, a body administering an institution assisting persons with a print disability for use in the provision, whether by the institution or otherwise, of assistance to such persons.

**Section 135ZP Australian Copyright Act**  
**Multiple reproduction and communication of works by institutions assisting persons with a print disability**

(1) The copyright in a literary or dramatic work is not infringed by the making or communication by, or on behalf of, a body administering an institution assisting persons with a print disability of one or more records embodying a sound recording of the work or of a part of the work if:

(a) a remuneration notice, given by or on behalf of the body to the relevant collecting society, is in force;

(b) each record is made, or each communication is carried out solely for the purpose of use in the provision, whether by the institution or otherwise, of assistance to persons with a print disability; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each copy or communication.

(2) The copyright in a published literary or dramatic work is not infringed by the making or communication by, or on behalf of, a body administering an institution assisting persons with a print disability, of one or more Braille versions, large-print versions, photographic versions or electronic versions of the work or of a part of the work if:

(a) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(b) each version is made, or each communication is carried out, solely for the purpose of the provision, whether by the institution or otherwise of assistance to persons with a print disability; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each version or communication.

(3) Where a sound recording of a work has been published, subsection (1) does not apply to the making of any record embodying a sound recording of the work (including a record that is a copy of that first-mentioned sound recording) for, or on behalf of, a body administering an institution assisting persons with a print disability unless the person who makes that record, or causes that record to be made, is satisfied, after reasonable investigation, that no new record that embodies only a sound recording of the work can be obtained within a reasonable time at an ordinary commercial price.

(4) Where a Braille version of a work has been separately published, subsection (2) does not apply to the making of a Braille version of the work, or of a part of the work, unless the person who makes that version, or causes that version to be made, for, or on behalf of, a body administering an institution assisting persons with a print disability is satisfied, after reasonable investigation, that no new copy of a Braille version of the work, being a version that has been separately published, can be obtained within a reasonable time at an ordinary commercial price.

(5) Where a large-print version of a work has been separately published, subsection (2) does not apply to the making of a large-print version of the work, or of a part of the work, unless the person who makes the version, or causes the version to be made, for, or on behalf of, a body administering an institution assisting persons with a print disability is satisfied, after reasonable investigation, that no new copy of a large-print version of the work, being a version that has been separately published, can be obtained within a reasonable time at an ordinary commercial price.

(6) Where a photographic version of a work has been separately published, subsection (2) does not apply to the making of a photographic version of the work, or of a part of the work, unless the person who makes the version, or causes the version to be made, for, or on behalf of, a body administering an institution assisting persons with a print disability is satisfied, after reasonable investigation, that no new copy of a photographic version of the work, being a version that has been separately published, can be obtained within a reasonable time at an ordinary commercial price.

(6A) Subsection (2) does not apply to the making or communication of an electronic version of the work, or of a part of the work, unless the person who makes or communicates the version, or causes the version to be made, or communicated, for, or on behalf of, a body administering an institution assisting persons with a print disability is satisfied, after reasonable investigation, that an electronic version of the work, being a version that has been separately published, is not available within a reasonable time at an ordinary commercial price.

(7) For the purposes of this section, a record or a version shall be taken to be a new record or version if it is not second-hand.

### **Section 135ZQ Australian Copyright Act**

#### **Making of relevant reproductions and relevant communications by institutions assisting persons with a print disability**

(1) Subject to this section, the copyright in a published literary or dramatic work is not infringed by the making by, or on behalf of, a body administering an institution assisting persons with a print disability, of a relevant reproduction or a relevant communication of the work, or of a part of the work, if the reproduction or communication is made solely for use in the making by, or on behalf of that body, of a reproduction or

communication of the work, or of a part of the work, under section 135ZP for a person with a print disability.

(2) If:

(a) a relevant reproduction or a relevant communication of a work, or of a part of a work, is made by, or on behalf of, a body administering an institution assisting persons with a print disability; and

(b) the reproduction or communication is used otherwise than for use in the making by, or on behalf of that body, of a reproduction or communication of the work, or a part of the work, under section 135ZP for a person with a print disability;

subsection (1) does not apply, and is taken to never have applied, to the making of the relevant reproduction or relevant communication.

(3) Subsection (1) does not apply to the making of a relevant reproduction, being a record embodying a sound recording in analog form, of a work, or of a part of a work, unless, at the time the record was made, there was embodied on the record, immediately before the beginning of that sound recording, a sound recording of the prescribed message.

(4) Subsection (1) does not apply to the making of a relevant reproduction in hardcopy form of a work, or of a part of a work, unless the body by whom, or on whose behalf, the relevant reproduction is made marks it, or causes it to be marked, in accordance with the regulations.

(4A) Subsection (1) is to be taken never to have applied to the making of a relevant reproduction or relevant communication of a work, or of a part of a work, if, within 3 months after the relevant reproduction or relevant communication was made, the body by whom, or on whose behalf, the relevant reproduction or relevant communication was made has not given to a collecting society (if any) a notice of the making of the relevant reproduction or relevant communication.

(4B) The notice referred to in subsection (4A) must be in writing and must specify:

(a) the name of the body; and

(b) the work, or the part of the work, reproduced or communicated; and

(c) the date on which the reproduction or communication was made.

(4C) The copyright in a published literary or dramatic work is infringed by a person who does any of the acts specified in section 38 in relation to a relevant reproduction of a work, or of a part of a work, if the person knows, or ought reasonably to have known, that the reproduction was made solely for use in the making by, or on behalf of, a body administering an institution assisting persons with a print disability of a copy of the work, or of a part of the work, as the case may be, for a person with a print disability.

(5) In this section:

"relevant communication", in relation to a work or part of a work, means:

(a) the communication of a sound recording of the work, or part of the work; or

(b) the communication of an electronic version of the work.

"relevant reproduction", in relation to a work or part of a work, means:

(a) a reproduction of the work, or part of the work; or

(b) a record embodying a sound recording of the work, or part of the work; or

(c) a Braille version, a large-print version, a photographic version or an electronic version of the work, or part of the work.

**Section 135ZR Australian Copyright Act**  
**Copying of published editions by institutions assisting persons with an intellectual disability**

The copyright in a published edition of a work (being a work in which copyright does not subsist) is not infringed by the making of one or more facsimile copies of the whole or a part of the edition in the course of making one or more reproductions of the whole or a part of the work by, or on behalf of, a body administering an institution assisting persons with an intellectual disability for use in the provision, whether by the institution or otherwise, of assistance to such persons.

**Section 135ZS Australian Copyright Act**  
**Copying and communication of eligible items by institutions assisting persons with an intellectual disability**

(1) The copyright in an eligible item, or in any work or other subject-matter included in an eligible item, is not infringed by the making or communication by, or on behalf of, a body administering an institution assisting persons with an intellectual disability of a copy of the whole or a part of the eligible item if:

(a) a remuneration notice, given by or on behalf of the body to the relevant collecting society, is in force; and

(b) the copying or communication is carried out solely for the purpose of use in the provision, whether by the institution or otherwise, of assistance to persons with an intellectual disability; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to the copy or communication.

(2) Subsection (1) does not apply to the making or communication of a copy of the whole or a part of:

(a) an eligible item, being a work that has been separately published in a form that would be suitable for use in the provision of the assistance referred to in that subsection; or

(b) an eligible item that is not a work; unless the person who makes the copy or communication, or causes the copy or communication to be made, is satisfied after reasonable investigation that:

(c) in the case of an eligible item referred to in paragraph (a)--no new copy of the eligible item in a form suitable for use in the provision of that assistance can be obtained or is available electronically within a reasonable time at an ordinary commercial price; or

(d) in the case of an eligible item referred to in paragraph (b)--no new copy of the eligible item alone can be obtained or is available electronically within a reasonable time at an ordinary commercial price.

(3) For the purposes of this section, a copy shall be taken to be new if it is not second-hand.

**Section 135ZT Australian Copyright Act**  
**Making of copies etc. for use in making copies or communications for a person with an intellectual disability**

(1) Subject to this section, the copyright in an eligible item or in a television broadcast is not infringed by the making by, or on behalf of, a body administering an institution assisting persons with an intellectual disability of a copy or communication of the whole or a part of the eligible

item or broadcast, if the copy or communication is made solely for use in the making by, or on behalf of, that body of a copy or communication of the whole or the part of the eligible item or broadcast, as the case may be, for a person with an intellectual disability.

(2) Where:

(a) a copy or communication of the whole or a part of an eligible item or a television broadcast is made by, or on behalf of, a body administering an institution assisting persons with an intellectual disability; and

(b) the copy or communication is used otherwise than in the making by, or on behalf of, that body of a copy or communication of the whole or the part of the eligible item or broadcast, as the case may be, for a person with an intellectual disability;

subsection (1) does not apply, and shall be taken never to have applied, to the making of the copy or communication.

(3) Subsection (1) does not apply to the making of a record embodying a sound recording in analog form of the whole or part of an eligible item unless, at the time the record was made, there was embodied on the record, immediately before the beginning of that sound recording, a sound recording of the prescribed message.

(4) Subsection (1) does not apply to the making of a copy, in hardcopy form or analog form, of the whole or part of an eligible item or a television broadcast unless the body by whom, or on whose behalf, the copy is made, marks it, or causes it to be marked, in accordance with the regulations.